No. 10-188

IN THE

Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. DANIEL KIRK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN HOSPITAL ASSOCIATION, AND PHARMACEUTICAL RESEARCH & MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* note that no counsel for a party authored the brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae,* its members, or its counsel, made such a monetary contribution. Petitioner has consented to the filing of this brief through a blanket consent letter filed with the Clerk. Respondent has consented through a consent letter filed with the Clerk.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every sector, and from every region of the country. The Chamber actively represents the interests of its members in court on issues of widespread concern to the Nation's business community. The Chamber has filed over 1,700 *amicus curiae* briefs, including many in cases before this Court involving the proper interpretation of the False Claims Act ("FCA"). *See*, *e.g.*, *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, __ U.S. __, 130 S. Ct. 1396 (2010); *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662 (2008); *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457 (2007); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000).

The American Hospital Association ("AHA") is the national advocacy organization for hospitals in this country. It represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 37,000 individual members. AHA's mission is to promote high quality health care and health services through leadership and assistance to hospitals in meeting the health care needs of their communities. AHA advocates on behalf of its members in legislative, regulatory, and judicial fora as part of its commitment to improving health care policy and health care delivery for the communities that its members serve. The AHA also has frequently participated as *amicus curiae* in cases with important consequences for its members, including cases arising under the FCA. *See*, *e.g.*,

Graham Cnty. Soil & Water Conservation Dist., 130 S. Ct. 1396; *Allison Engine Co.*, 553 U.S. 662; *Rockwell Int'l Corp.*, 549 U.S. 457; *Vermont Agency of Natural Res.*, 529 U.S. 765.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is an association whose membership comprises the country's leading research-based pharmaceutical and biotechnology companies.[2] PhRMA members are responsible for the vast majority of innovative pharmaceutical products approved for marketing in the United States, and are recognized by the federal government as partners in the delivery of life-saving medications to federal health care program beneficiaries. PhRMA members invested an estimated $45.8 billion in 2009 in discovering and developing new medicines that help patients live longer, healthier and more productive lives.[3] PhRMA closely monitors legal issues that impact the pharmaceutical industry and has regularly participated as *amicus curiae* in cases before the Court. *See*, *e.g.*, *Graham Cnty. Soil & Water Conservation Dist.*, 130 S. Ct. 1396; *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784 (2010); *Astra USA, Inc.* v. *County of Santa Clara* (No. 09-1273) (merits *amicus* brief submitted Nov. 19, 2010); *Matrixx Initiatives* v. *Siracusano* (No. 09-1156) (merits *amicus* brief submitted Aug. 27, 2010).

The Chamber, AHA, PhRMA, and their respective members have a substantial interest in this case.

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[2] *See* PhRMA Member Company List, *available at* http://www.phrma.org/member_company_list (listing approximately 40 members, affiliates, and research associates).

[3] *See* 2010 Pharmaceutical Industry Profile, *available at* http://www.phrma.org/profiles_and_reports.

The FCA authorizes private citizens who have suffered no individualized injury to bring civil actions in the name of the government "for the person and for the United States Government" alleging that false or fraudulent claims for payment were submitted to the United States or to contractors, grantees, or other recipients using federal funds to advance government programs and interests. 31 U.S.C. § 3730(b)(1); *id.* § 3729(b)(2) (definition of claim). A private citizen litigant, known as a relator, need not prove (or even allege) that a defendant had a specific intent to defraud the government, *id.* § 3729(b)(1), and yet may pursue treble damages and per-false-claim penalties of $5,500-$11,000—damages that this Court has recognized "are essentially punitive in nature." *Vermont Agency of Natural Res.*, 529 U.S. at 784; *see* 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (2009). Relators and their attorneys have a strong inducement to bring and pursue *qui tam* lawsuits for the lucrative bounties they collect when a suit results in recovery. If the United States intervenes and pursues the action, a relator keeps 15 to 25 percent of any recovery, as well as attorneys' fees and costs; if the United States declines to intervene, a relator keeps up to 30 percent of any recovery, as well as attorneys' fees and costs. 31 U.S.C. § 3730(d)(1)-(2).

Compliance with health care statutes, contracting requirements, and other laws is vitally important, and *amici*'s members dedicate significant resources to internal compliance programs that complement the government's efforts to prevent misconduct. *Amici* support appropriate enforcement of the False Claims Act. At the same time, a balance must be

maintained, as contemplated by Congress, between enforcement and preventing unnecessary litigation that provides no new information to the government.

The FCA's "public disclosure bar" operates as a critical limitation on the reach of the Act's *qui tam* provisions and, in conjunction with the bar's "original source" exception, helps ensure that only genuine whistleblowers are authorized to litigate purported injuries to the United States. 31 U.S.C. § 3730(e)(4). As the Court recognized earlier this year, when Congress incorporated the public disclosure bar and original source exception into the FCA in 1986, it attempted to fashion " 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.' " *Graham Cnty. Soil & Water Conservation Dist.*, 130 S. Ct. at 1406 (citation omitted). The Second Circuit's decision upsets that balance. *Qui tam* relators who file suit on behalf of the United States based on information they have obtained from the government's response to a Freedom of Information Act ("FOIA") request are not "whistle-blowing insiders with genuinely valuable information." They are procuring from the government, and then re-presenting to the government, its *own* information—and claiming a bounty for providing that information.

Maintaining a strong public disclosure bar is of vital importance to *amici*, their members, and all of the other companies, contractors, grant recipients, health care providers, universities, and others that receive—directly or indirectly—funds from the

federal government. The convergence of the FCA's relaxed intent standard, its essentially punitive damages, and its fee-shifting provision have combined to produce an expansive cottage industry of bounty-seeking relators. As the Court previously recognized, *qui tam* relators litigate on behalf of the United States with different motivations than federal prosecutors have. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

SUMMARY OF ARGUMENT

The question presented concerns whether the government's investigation of its own files, and reporting the results of that government investigation to a FOIA requester, constitutes a "public disclosure" under the FCA so that only a relator who qualifies as an original source of the allegations can litigate on the government's behalf. For decades, the public disclosure bar has served as a fundamental constraint on relators' pursuit of an FCA cause of action and the monetary windfall that may accompany it. The bar ensures that only true whistleblowers, meaning those who come forward with information not otherwise available to the government, can pursue *qui tam* litigation. *See In re Nat. Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 961 (10th Cir. 2009) ("The public disclosure bar is * * * chiefly designed to separate the opportunistic relator from the relator who has genuine, useful information that the government lacks.").

The Second Circuit's decision substantially watered down the public disclosure bar. Rather than interpreting the bar to further the statutory goal of deputizing only true whistleblowers to pursue FCA

actions on behalf of the United States—as most circuits have done—the Second Circuit held that a relator can premise a *qui tam* suit on information publicly disclosed by the government itself in response to a FOIA request. Under that crabbed reading of the statute, someone with no first-hand knowledge of fraud who merely obtains publicly available information from the government's own records can litigate an FCA action on behalf of the United States—and assert the entitlement to tens of millions of dollars for doing so, as occurred here.

If allowed to stand, the Second Circuit's decision will invite a host of parasitic lawsuits against the wide range of entities that directly or indirectly receive funds through federal contracts, federal grants, or federal programs. Federal funding pervades every sector of our economy, ranging from construction and manufacturing to transportation, health care, and scientific research. The specter of FCA lawsuits already looms large for anyone who participates in a federal contract, grant, or program. And if it is not reversed, the Second Circuit's decision will profoundly intensify that concern. Countless (almost literally) administrative requirements would be potentially available for FOIA fishing expeditions by would-be relators seeking to find any sort of non-compliance, however minimal and however ambiguous. In many of those instances, too, federal agencies have established and carefully calibrated administrative mechanisms and remedies for non-compliance. There should be no option for private individuals who lack useful, independent whistleblowing information to use FOIA to transform matters of alleged regulatory non-compliance into FCA actions, overriding administrative agencies'

remedial discretion and subjecting defendants to litigating in the context of the FCA's draconian damages.

ARGUMENT

I. STRICT APPLICATION OF THE PUBLIC DISCLOSURE BAR AND ITS ORIGINAL SOURCE EXCEPTION ENSURES THAT ONLY TRUE WHISTLEBLOWERS ARE DEPUTIZED TO LITIGATE IN THE NAME OF THE GOVERNMENT.

1. *Qui tam* lawsuits have exploded in number in the past two decades. Thirty such lawsuits were filed in 1987; nearly *six hundred* were filed in 2010. *See* United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2010* at 2, *available at* http://www.justice.gov/civil/frauds/fcastats.html. And the United States government is an active participant in comparatively very few of them. Nearly seventy-five percent of the active *qui tam* cases are cases in which the government has declined to intervene after investigating the relator's allegations of wrongdoing. *Id.* at 9. Yet relators regularly press on in these declined actions, motivated by the statute's bounty provision and unconstrained by the institutional wisdom that tempers the zeal of federal prosecutors. *Cf. Hughes Aircraft Co.*, 520 U.S. at 949 ("*Qui tam* relators are * * * less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."); Department of Justice, Office of Legal Counsel, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. O.L.C. 207, 220 (1989) ("Relators who have

no interest in the smooth execution of the government's work have a strong dollar stake in alleging fraud whether or not it exists.").

Defending declined *qui tam* lawsuits exposes defendants to immense costs and burdens, even when those cases are ultimately found to lack merit. The vast majority of declined cases fall into that category: Over the past twenty-three years, only *three percent* of the amounts recovered for the United States has come through cases that the government declined to pursue. *See* United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2010*, *supra*, at 2 (calculated by dividing the total recovery in declined *qui tam* cases by the total recovery in all *qui tam* cases). Even after a court rules that a complaint or theory of FCA liability lacks merit, the fee-shifting and bounty provisions encourage relators and their counsel to press on, through appeals in that specific case and through shopping expanded FCA liability theories to similarly situated defendants in other jurisdictions. Because of the FCA's broad venue provision, relators have access to multiple jurisdictions enabling them to file suit in a jurisdiction more likely to be receptive to their arguments. 31 U.S.C. § 3732(a).

2. The potential for lucrative awards has resulted not only in a cottage industry of relators; it has also produced a *de facto* "relator's bar" of attorneys in regular pursuit of *qui tam* plaintiffs. *See, e.g., United States ex rel. Lopez* v. *Strayer Educ., Inc.*, 698 F. Supp. 2d 633 (E.D. Va. 2010) (describing attorney's recruitment of disgruntled former employees to file *qui tam* suits). Allowing FCA actions based on information obtained from the

government through FOIA would be a gift to that bar. *Qui tam* plaintiffs' lawyers would no longer need to limit themselves to trolling for unhappy company employees to serve as whistleblowing relators; they could expand their search to include anyone willing to submit a single FOIA request.

Amici do not dispute that relators with personal knowledge of previously undisclosed information play a legitimate role in helping reveal and deter fraud perpetrated against the government. But the proliferation of vexatious or otherwise non-meritorious *qui tam* actions is also very real. It looms over every company and every organization with any connection to federal funds. And relators (and the burgeoning relators' bar) have every incentive to seek to leverage honest mistakes, alleged violations of ambiguous statutes or regulations, or conflicting agency guidance into lucrative FCA causes of action. Unless the Court reverses the Second Circuit's decision, any citizen will be able to use FOIA to scavenge through the government's files looking for material to support a *qui tam* case. Business, and commerce, will be much the worse for that.

II. THE GOVERNMENT'S INVESTIGATION AND REPORT IN RESPONSE TO A FOIA REQUEST CONSTITUTES A PUBLIC DISCLOSURE.

1. The FCA bars *qui tam* claims based on publicly disclosed information unless the relator is an original source. *Rockwell Int'l Corp.*, 549 U.S. at 467. The statutory bar applies where a relator's suit is based on "reports" or "investigations" that a federal administrative agency publicly discloses. *See* 31

U.S.C. § 3739(e)(4) (2009); 31 U.S.C. § 3730(e)(4) (2010).[4] Even when a public disclosure has occurred, a relator who qualifies as an original source of the FCA allegations can pursue the litigation. *See, e.g.*, *Gonzalez* v. *Planned Parenthood of Los Angeles*, 2010 WL 3190618, at *3 (9th Cir. Aug. 12, 2010). The public disclosure bar and its original source exception thus work in tandem to ensure that only true whistleblowers are deputized to pursue *qui tam* litigation, for their own gain, in the government's name.

2. The *qui tam* suit in this case was based on the government's response to several FOIA requests submitted by Kirk's wife seeking copies of reports known as "VETS-100" reports that Schindler had submitted in various years. Under FOIA, the Department of Labor was required "to search for the records" by "review[ing]" agency records to locate responsive materials. 5 U.S.C. § 552(a)(3)(C), (D). The FOIA requests here "were handled by the Chief of the Investigation and Compliance Division within the [Department of Labor's] Office of Veteran's Employment and Training, who, in his own words, conducted a 'search,' made a 'determination' and produced, on official stationary, a document setting forth the results of his inquiry." Pet. App. 82a.

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[4] The public disclosure bar was amended in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 10104(j)(2) (2010). Instead of "administrative" reports and investigations, it now refers to "federal" reports and investigations. The amendment applies prospectively. *Graham Cnty. Soil & Water Conservation Dist.*, 130 S. Ct. at 1400 n.1. Because a federal agency's action in response to a FOIA request is both "administrative" and "federal," the change in the descriptor has no bearing on the question presented.

Based "in large part" on the Department of Labor's investigation of its records and its public disclosure of materials in response to the FOIA requests, Kirk filed a *qui tam* action alleging that Schindler had violated the FCA in obtaining government contracts in years when the company either had not submitted a report or had submitted an inaccurate one. Pet. App. 2a. Kirk did not allege that Schindler failed to provide any of the goods or services for which Schindler contracted with the United States. But he nonetheless asserted, under what is known as a "false certification" theory, that every single claim Schindler submitted in connection with every one of those government contracts was "false." Kirk therefore sought treble damages on the total amount of the federal contracts—over 300 million dollars—as well as per-claim civil penalties and attorneys' fees and costs. Pet. Br. 10.

3. Kirk is not the first person to think of employing FOIA to obtain information that in turn could be the basis for an FCA claim. Relators have used FOIA to plumb the government's files for records relating to compliance with an assortment of administrative requirements that are not privately enforceable—and then have used the FCA to create private enforcement rights based on those purported instances of administrative noncompliance. *See, e.g.*, *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49, 52 (1st Cir. 2009) (relator used FOIA to obtain grant application that formed basis for claim that city made false statements to HUD in connection with city's application for federal funds); *United States ex rel. Reagan* v. *East Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-176 (5th Cir. 2004) (relator used FOIA to obtain documents

related to a hospital's cost reports and then alleged hospital violated FCA by making false statements in those reports); *United States ex rel King* v. *F.E. Moran, Inc.*, 2002 WL 2003219, at *5 (N.D. Ill. Aug. 29, 2002) (relator used FOIA to obtain information to claim that a subcontractor violated the FCA by falsely representing that it had satisfied minority business enterprise requirements of subcontract); *United States ex rel. Waris* v. *Staff Builders, Inc.*, 1999 WL 788766, at *4 (E.D. Pa. Oct. 4, 1999) (relator used cost report obtained through FOIA to allege that defendant had submitted fraudulent Medicare reimbursement claims); *United States ex rel. Lamers* v. *City of Green Bay*, 998 F. Supp. 971, 980 (E.D. Wis. 1998) (relator used FOIA to obtain grant application and certificate of compliance based on which he alleged that the City of Green Bay falsely represented to the Federal Transit Administration the nature of the city's provision of bus service to local school children), *aff'd*, 168 F.3d 1013 (7th Cir. 1999).

Relators' use of FOIA in FCA actions thus far has been constrained by the holding of a majority of the circuit courts that obtaining documents through FOIA triggers the public disclosure bar. The first circuit to address the issue was the Third Circuit, which held that "the disclosure of information in response to a FOIA request is a 'public disclosure' " based on FOIA's directive that " '[e]ach agency shall make available *to the public*' certain specified categories of information" and FOIA's " 'central purpose' " of "ensur[ing] that government activities are 'opened to the sharp eye of *public* scrutiny.' " *United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*, 186 F.3d 376, 383 (3d Cir.

1999) (quoting 5 U.S.C. § 552(a) and *United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989)) (emphasis in *Mistick*). The Third Circuit also focused on this Court's conclusion in *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) that the disclosure of information pursuant to FOIA constitutes a "public disclosure" within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1). 186 F.3d at 383. In that case, the Court held:

> [A]s a matter of common usage the term "public" is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of [the Consumer Product Safety Act].

GTE Sylvania, 447 U.S. at 108-109.[5] As the Third Circuit explained, there is "no sound basis for construing the term 'public disclosure' any more narrowly [in the FCA] than the Supreme Court did in *GTE Sylvania*." 186 F.3d at 383.

The First, Fifth, Sixth, and Tenth Circuits have offered a similar analysis. *See United States ex rel. Reagan*, 384 F.3d at 176 (response to a FOIA request is a "report" because it is "official government action" that " 'provides information and notification

[5] Citing *GTE Sylvania*, the District Court explained that "[f]inding that the DOL's response to the Kirks' requests publicly disclosed the information in question, therefore, is consistent not only with this Circuit's FCA precedent, but also with both the statutory language and the Supreme Court's understanding of the purpose behind the FOIA." Pet. App. 77a.

regarding the results of the agency's search for the requested documents' ") (citation omitted); *United States ex rel. Branhan* v. *Mercy Health Sys. of S.W. Ohio*, 188 F.3d 510, 1999 WL 618018 (6th Cir. Aug. 5, 1999) (information is "publicly disclosed" under the FCA if it is "available to anyone who request[s] it"); *see also United States ex rel. Ondis*, 587 F.3d at 55-56; *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir. 2004).

The Court should follow the logic and analysis of those courts. The conclusion they reached—that FOIA disclosures are public disclosures—is consistent with the general recognition that the public disclosure bar is designed to preclude *qui tam* suits "based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator," like *qui tam* suits based on information obtained through a FOIA request. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, PA* v. *Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991); *see also United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) ("The 1986 amendments [to the FCA] attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud."). Permitting relators to capitalize on public information available through FOIA conflicts with the core purpose of the statute by sanctioning *qui tam* suits based on public information.[6]

[6] Moreover, the public disclosure bar operates as a jurisdictional limitation for the hundreds of pending cases in

4. The Second Circuit erred in limiting the term "report" in the public disclosure bar to only a "compilation or analysis of information with the aim of synthesizing that information in order *to serve some end of the government*" and the term "investigation" as including only "sustained inquir[ies] *directed toward a government end*." Pet. App. 24a (emphases added). Nothing in the plain language of the statute or the policy underlying the public disclosure bar supports the "government end" interpretation of the terms "report" or "investigation." The statute does not include a qualification that the report be directed toward some "government end," whatever that is taken to mean. *See Graham Cnty. Soil & Water Conservation Dist.*, 130 S. Ct. at 1405, 1410 (rejecting proposed interpretation of the public disclosure bar that was not supported by the statute's plain language, and explaining that the "public disclosure" is the "touchstone" of the bar).[7]

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which the pre-2010 FCA applies. It is well established that jurisdictional statutes are construed narrowly to permit jurisdiction over only those disputes that Congress intended to proceed in federal court. *See*, *e.g.*, *Cheng Fan Kwok* v. *Immigration & Naturalization Serv.*, 392 U.S. 206, 212 (1968); *International Union of Operating Eng'rs, Local 150, AFL-CIO* v. *Ward*, 563 F.3d 276, 284 (7th Cir. 2009); *New Rock Asset Partners, LP* v. *Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1510 (3d Cir. 1996). Narrowly construing the jurisdiction available under the public disclosure bar counsels in favor of reading the terms "report" and "investigation" to encompass public disclosures that occur in response to FOIA requests.

[7] In any event, even under the Second Circuit's "government end" standard, FOIA investigations should qualify. FOIA was, after all, passed to ensure more transparent access to the government's inner workings—which certainly constitutes a government end.

This Court should not adopt a reading of the public disclosure bar that is at odds with the plain meaning of the statutory terms and the policy behind the bar. Here, for example, Kirk did not dispute that the government "conducted a search and prepared a letter detailing that search and its results, a work process that produced a substantive government work product." Pet. App. 83a-84a. This sort of search and the ensuing substantive government work product, provided without restriction to a member of the public, is a publicly disclosed "investigation" and "report." As the District Court correctly recognized, the mere fact that "the investigation and the resulting report may not have been lengthy does not obscure the fact that an administrative body conducted an investigation and produced a report disclosing to members of the public the critical elements of Kirk's claims." Pet. App. 84a.

In rejecting the District Court's interpretation, the Second Circuit relied on an interpretation urged by the United States—that the public disclosure bar should be triggered only if the disclosure "demonstrat[es] that the government is either actively investigating the alleged fraud or there is sufficient public awareness of the allegations to pressure the government to start an investigation." Pet. App. 30a (quoting Brief for *Amicus Curiae* United States of America). This Court rejected a nearly identical argument made by the relator and the United States in *Graham County* and it should do so again here. In that case, the Court had to resolve whether state and local "reports" were "reports" under the public disclosure bar. The relator and the United States argued that state and local reports should not count as public disclosures

because they might not come to the attention of federal prosecutors.

The Court rejected that limitation. It emphasized that the focus of the statutory standard is whether a public disclosure *occurred*, not "whether [the reports] have landed on the desk of a DOJ lawyer." *Graham Cnty. Soil & Water Conservation Dist.*, 130 S. Ct. at 1410. That same focus on the fact of a public disclosure should apply here. It is the public nature of the information provided by the government—and equally available to anyone who asks to see it—that implicates the public disclosure bar, not what the government is doing, intends to do, or has done with that information. If a public disclosure has occurred, only an individual who qualifies as an original source can pursue a *qui tam* suit.

III. THE GATEKEEPING FUNCTION SERVED BY THE PUBLIC DISCLOSURE BAR IS PARTICULARLY IMPORTANT IN LIGHT OF "FALSE CERTIFICATION" THEORIES OF FCA LIABILITY BEING ADVANCED BY RELATORS.

1. The lure of basing a *qui tam* action on information publicly disclosed through FOIA is especially concerning to the *amici* and their members for two related reasons. The first is the rise in *qui tam* suits pursuing so-called "false certification" theories like the one Kirk presented.

"False certification" theories of FCA liability have, thus far, come in two forms—"express" false certification and "implied" false certification. Under these theories, relators do not assert that a claim is "false" because it contains a misstatement or

misrepresentation as to whether the government actually received the exact goods or service in the exact amount or form for which it paid. Instead, these theories seek to render "false" claims that are factually correct on the basis that the submission of the claim somehow erroneously certifies the submitter's compliance with a legal requirement found elsewhere that the relator asserts is relevant to the government's payment of a claim. *See, e.g., Mikes* v. *Straus*, 274 F.3d 687, 699 (2d Cir. 2001); *see also United States* v. *Science Applications Int'l Corp.* __ F.3d. __, 2010 WL 4909467, at *8-*9 (D.C. Cir. Dec. 3, 2010) (holding that the implied certification theory permits FCA liability to be imposed even when the legal requirement on which the FCA action is based was not a precondition for payment).

According to the relators who pursue these theories, a "false certification" even can be "implied" from the mere act of submitting a claim, if the submitter neglected to comply with some other regulatory requirement tethered in some (however distant) way to the claim for payment. *See, e.g., Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) ("Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim"); *see also* Pet. App. 39a-41a, 62a-68a (discussing false certification theories).

Basing a theory of FCA liability on legal technicalities, rather than on falsely seeking payment for goods or services not provided, is a boon

to a relator; it relieves the relator from needing to prove, or indeed even to allege, any actual falsity in the claim for payment submitted in connection with providing the goods or services. And the number of potential legal technicalities for relators to exploit through the combination of FOIA and a false certification theory is enormous. Government contractors, for example, are required to submit certifications related to everything from how they dispose of hazardous materials to their affirmative action plans, and they frequently enter into contracts requiring compliance with other statutory and regulatory provisions. *E.g.*, 40 U.S.C. § 3142 (companies contracting with the government for construction projects must pay their workers according to a wage schedule set by the Department of Labor); 29 U.S.C. § 793 (companies doing business with the government must take "affirmative action" to employ disabled individuals).[8] Providers participating in federal health care programs complete enrollment applications that generally require them to state that they understand that they

[8] The relators' bar is actively soliciting this sort of FCA action. *See, e.g.*, WhistleblowerLaws.com, "Federal Government Contractor Fraud" (suggesting that the FCA "is an enforcement device for contract terms requiring compliance with other federal statutory schemes," such as "environmental protection laws, equal employment opportunity, small business procurements, federal wage laws, and competitive bidding laws * * * despite the absence 'private right to sue,' because Government contracts contain many clauses beyond the technical requirements or descriptions of the products or services being procured" and emphasizing that the FCA is being used by relators to enforce "the Buy American Act, Trade Agreements Act, Anti-Kickback Act, Walsh-Healy and Service Contract Acts, and the Davis-Bacon Act"), *available at* http://whistleblowerlaws.com/index.php?option=com_content&task=view&id=66.

must comply with federal statutes and regulations. *E.g.*, CMS Form 855A Sec. 15(A)(3) ("I agree to abide by the Medicare laws, regulations and program instructions that apply to this provider."). The lower courts already have been struggling to figure out whether to recognize, and how to make sense of, allegations of FCA liability premised on these sorts of "certifications." *See, e.g.*, *United States ex rel. Chabot* v. *MLU Servs., Inc.*, 2010 WL 1539975, at *6 (M.D. Fla. Apr. 18, 2010) (relator alleged that defendant violated FCA by falsely impliedly certifying its eligibility for FEMA installation contract when it submitted a bid and claims for payment but lacked a Florida license; court had to analyze whether being licensed in Florida was a condition of submitting a bid and the extent to which compliance with state licensing laws was a condition of payment under the FEMA contract). Adding suits where the allegations of a false certification stem from the government's FOIA response will exacerbate those problems manyfold.

A second, related concern is that many of the statutes and regulations on which relators base "false certification" FCA cases already have in place carefully calibrated administrative remedies, not subject to private enforcement, to address allegations of non-compliance. Relators have increasingly tried to transform all sorts of alleged regulatory non-compliance into *qui tam* actions with the accompanying potential for a lucrative financial award. Allowing FCA suits to proceed where the government or an administrative agency has designed specific administrative remedies appropriate to redress specific kinds of regulatory non-compliance improperly permits *qui tam*

plaintiffs to rewrite the mechanisms for dealing with noncompliance and to override the discretion vested in executive agencies. *See*, *e.g.*, *United States ex rel. Hendow* v. *Univ. of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on alleged non-compliance with a condition of participation in student loan program even though Department of Education treated alleged noncompliance of condition as an administrative enforcement matter, not fraud).

2. Both concerns are presented by the claims that Kirk used FOIA to assert. Kirk did not allege, based on some unique and independent inside information, that Schindler had filed claims for servicing the federal government's escalators and elevators that the company in fact had failed to service. Instead, Kirk alleged that Schindler's claims were "false" because: [1] the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA") states that an agency may not enter certain contracts unless the contractor has submitted a VETS-100 report; [2] a regulation states that an offeror subject to VEVRAA's reporting requirements represents by submitting an offer that "it has submitted its most recent VETS-100 report required" by VEVRAA; and [3] Kirk was a federal contractor. 31 U.S.C. § 1354(a)(1); 48 C.F.R. § 52.222-38; Pet. App. 41a, 58a-59a. Based on the government's report in response to Kirk's FOIA request, Kirk alleged that all of Schindler's claims for payment under contracts to service elevators and escalators were legally "false," because Schindler had not submitted accurate VETS-100 reports in certain years, and thus, the VETS-100 reporting requirement was subject to private enforcement for

treble damages (based on the entire value of all the contracts) under the FCA.

Kirk also used FOIA to try to supplant the administrative remedy Congress enacted for VEVRAA—triggering the second concern described above. VEVRAA contains a specific administrative mechanism for alleging a contractor's noncompliance. *See* 38 U.S.C § 4212(b) (veteran who "believes any [federal] contractor * * * has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor"). Kirk actually availed himself of that administrative remedy, in fact. After Kirk filed an administrative complaint on April 15, 2004, "the DOL's Office of Federal Contract Compliance Programs conducted an investigation" and found "no evidence of non-compliance" by Schindler. Pet. App. 69a.

Kirk was not satisfied with the administrative remedy Congress provided for alleging non-compliance with VEVRAA's reporting requirement. He sought through his *qui* tam action to use FOIA, and the FCA, to circumvent that administrative remedy, override the Department of Labor's investigation, and privately enforce (and privately benefit from) allegations of regulatory noncompliance. This Court should decline to tolerate that end-run around the government's remedial prerogatives.

3. The FCA was never meant to be "a general 'enforcement device' for federal statutes, regulations, and contracts." *United States ex rel. Steury* v. *Cardinal Health, Inc.*, __ F.3d __, 2010 WL 4276073,

at *4 (5th Cir. Nov. 1, 2010). Nor was it meant to allow *qui tam* relators to "shoehorn" what are, in essence, breaches of contract or garden variety administrative matters subject to administrative oversight "into a claim that is cognizable under the False Claims Act." *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008).

There is no question that implied and express "false certification" theories have become the theories *du jour* of the relator's bar. Encouraging *qui tam* actions predicated on FOIA disclosures, in combination with the proliferation of false certification cases that seek to supplement or, in many cases, circumvent administrative discretion will foster abuse of the *qui tam* mechanism. The FCA's objective is to enlist those with knowledge of fraud to help the government ferret it out, not to arm citizens with a heavy statutory weapon to challenge every alleged instance of regulatory noncompliance, however minimal. Where a relator has no knowledge of wrongdoing or fraud, but instead bases a FCA action on publicly available FOIA materials, the relator is simply not the true whistleblower that the FCA is intended to foster and encourage. *See, e.g.*, *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime."); *United States ex rel. McKenzie* v. *BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (a "true whistleblower" alerts the government to an alleged fraud "before such information is in the public domain").

Upholding the Second Circuit's decision would be harmful to millions of federal contractors, grantees, and program participants. It would encourage citizens with no knowledge of or connection to an industry—not to mention the relators' bar—to rummage through the government's own files and use the threat of the FCA's punitive damages to privately enforce any sort of minor violation that can be alleged, regardless of administrative remedies. By permitting Kirk's *qui tam* suit to proceed after his administrative complaint had been filed, investigated, and resolved against him, Kirk sidestepped the appropriate administrative mechanisms and second-guessed the agency's determination. As the Office of Legal Counsel explained over twenty years ago, the contracting agency should decide whether a deviation constitutes a breach and whether a breach amounts to fraud—taking care "to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party" and considering whether "the contractor's performance otherwise has been adequate or even excellent." Office of Legal Counsel, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. O.L.C. at 220.

Relators have no such tempering influences; their strategy is recovery-or-bust. They only reap the financial reward (and attorneys' fees) if they can obtain a judgment or settlement based on allegations of technical noncompliance. There is no basis in law, FCA policy, or logic for using FOIA materials from the government to pursue a FCA action and displace the normal agency compliance and enforcement mechanisms.

CONCLUSION

For the foregoing reasons, and those in Schindler Elevator's brief, the Court should reverse the Second Circuit's judgment.

Respectfully submitted,

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