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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 FOR RESPONDENT

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QUESTION PRESENTED

Whether every response to a Freedom of Information Act request constitutes an "administrative report or investigation" under the 1986 version of the False Claims Act's public disclosure bar, regardless of the form or content of the response.

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STATEMENT OF THE CASE

1. INTRODUCTION

Congress adopted the public disclosure bar of the False Claims Act "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits."[1] This is not a parasitic lawsuit. Daniel Kirk worked at Schindler Elevator Corporation for many years. He knows firsthand that Schindler did not implement the policies and procedures required by its federal contracts. He knows that it did not gather the information necessary to submit truthful reports to the government. Mr. Kirk brought his concerns to the Department of Labor at a time when no agency was investigating the company.

To "root out" additional evidence of fraud, Mr. Kirk's wife, Linda, submitted FOIA requests to the Department of Labor. When the agency produced documents that Schindler filed to maintain its eligibility for federal contracts, Mr. Kirk knew that they were false. His inside knowledge of the company allowed him to see fraud that the government could not see.

In this action, Mr. Kirk alleges that Schindler submitted hundreds of false claims to federal agencies seeking payment for construction services when Schindler was not eligible for payment, and won new contracts when it was not eligible to bid. This illegal conduct obstructed the Government's efforts to enforce policies intended to pro-

[1] Graham County Soil and Water Conservation District v. United States ex rel. Wilson, 130 S. Ct. 1396, 1407 (2010) (hereinafter, "Graham County II").

mote the hiring and advancement of military veterans. It also deprived law-abiding contractors of a fair opportunity to compete for the Government's business.

This case arises at the intersection of the False Claims Act and the Freedom of Information Act. Congress wanted to encourage *qui tam* suits based not only on evidence unavailable to the government, but also on records gathering dust in government files. FOIA provides a mechanism for exhuming those records and making them available to the public. Working together, these laws create a powerful weapon in the war against fraud by government contractors.

Schindler asks the Court to disarm this weapon by inserting "FOIA response" into the list of sources that are subject to the public disclosure bar. This unwarranted revision would distort the statute and upset the balance designed by Congress. It would create an irrational system in which subject matter jurisdiction depends, for example, on whether an agency chooses to disclose records to the public before receiving a formal FOIA request. Most important, it would discourage citizens from using FOIA to uncover evidence of fraud.

The Second Circuit properly rejected this categorical ban on documents disclosed in response to FOIA requests. Instead, the court applied a fact-specific analysis, looking at each document produced by the Department of Labor to see if it disclosed information from one of the sources listed in the statute. This is the same approach that courts use whenever a defendant asserts that a *qui tam* complaint is based on publicly disclosed

allegations. It fits the text and the context of the statute. It preserves the balance designed by Congress and allows a genuine insider like Mr. Kirk to proceed with his action. It should be affirmed.

2. Mr. Kirk's Career at Schindler

Mr. Kirk is a Vietnam veteran who served in the Army from 1969 to 1975. In 1978, he took a job at Millar Elevator Industries, Inc. Starting as a mechanic, Mr. Kirk earned a master electrician's license. He became manager of the Repair and Maintenance Support Departments in 1990 with responsibility for supervising employees in and around New York City. He was promoted to Vice President of Millar in November 2001 and became responsible for additional personnel. *See* Joint Appendix ("JA") 49a.

Schindler bought Millar in 1989. The two companies operated separately until Schindler integrated Millar's operations into its own in 2002. Mr. Kirk then became Schindler's Regional Modernization Manager for New York City and Long Island.

Mr. Kirk's career at Schindler ended abruptly in 2003. In the spring, he heard rumors that he had been fired. Schindler then demoted him and changed his title in the company directory several weeks before he received notice of the demotion. The company apologized for this humiliation, but Mr. Kirk decided to resign in August 2003. Mr. Kirk soon found a new job in the elevator industry and has been employed ever since. JA 50a-51a.

3. Other Litigation

Because Schindler refused his request for a severance payment, Mr. Kirk filed suit in New York State court in late 2003. That action was removed to federal court and the severance claim was dismissed, but Mr. Kirk pursued other claims in state court. From late 2003 until 2006, Schindler refused to pay fines relating to city code violations; as a result, Mr. Kirk was unable to transfer his electrician's license to his new employer. The state court directed Schindler to pay those fines in 2006, and Mr. Kirk finally recovered his license. The court then dismissed his remaining claims. JA 51a-52a.

In 2004, Mr. Kirk filed a separate complaint with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), claiming that he had been improperly demoted and constructively terminated by Schindler in violation of the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"), 38 U.S.C. § 4212. In 2005, OFCCP denied the complaint, finding that there was insufficient evidence to conclude that Mr. Kirk's demotion and termination from Schindler were motivated by his status as a Vietnam-era veteran. JA 53a. OFCCP affirmed that decision in 2009, but declined to address Schindler's general compliance with the Act. JA 118a.

4. False Claims Act Procedure

"Since its enactment during the Civil War, the False Claims Act has authorized both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudu-

lent claims for payment to the United States." *Graham County II*, 130 S. Ct. at 1400. In 1986, Congress revised the Act to encourage whistle-blowers to bring *qui tam* suits. At the same time, Congress adopted the public disclosure bar to preclude *qui tam* actions based on allegations of fraud that were publicly disclosed in a limited number of sources.

The Act imposes procedural requirements on relators that are designed to provide early notice to the Attorney General about alleged fraud. 31 U.S.C. § 3730(b). These procedures allow the Attorney General to review a *qui tam* complaint and the supporting evidence before the complaint is served on the defendant, and to decide whether to take over prosecution of the action. 31 U.S.C. § 3730(c)(1). If the Attorney General determines that the case should not proceed, he can dismiss or settle the action "notwithstanding the objections of the person initiating the action." 31 U.S.C. § 3730(c)(2). Moreover, the Attorney General is authorized to transfer any *qui tam* action out of court if he determines that the dispute is better suited to non-judicial resolution: "[T]he Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty." 31 U.S.C. § 3730(c)(5).[2]

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[2] These provisions fully resolve Schindler's purported concern that, if the Second Circuit is affirmed, "relators will displace administrative and statutory enforcement mechanisms put in place by Congress, effectively seizing control of enforcement decisions. . . ." *See* Brief for Petitioner ("Pet. Br.") at 3. The court of appeals addressed this issue in its

5. THE REQUIREMENTS OF VEVRAA

Since the early 1970s, VEVRAA has required contractors (a) to adopt an affirmative action program for Vietnam-era veterans, (b) to offer its employees an invitation to identify themselves as Vietnam-era veterans separate from any other personnel form or questionnaire, and (c) to submit annual reports, known as VETS-100 reports, to the Department of Labor. 38 U.S.C. § 4212. Contractors must file a report for each "hiring location" that enters into a government contract covered by the law. 48 C.F.R. §§ 22.1310(b), 52.222-37.

In 1998, Congress enacted the Veterans Employment Opportunities Act, 31 U.S.C. § 1354, to prohibit any agency from obligating or expending funds for any fiscal year on a contract subject to VEVRAA with a contractor who failed to submit a VETS-100 report for that fiscal year. It was well established in 1998 that a knowingly false representation of compliance with a federal regulation or statute is actionable under the False Claims Act if, among other things, such compliance is a condition of payment by the government. By linking VEVRAA compliance to the government's payment decision, Congress made false representations of compliance actionable under the False Claims Act in cases where the contractor knowingly failed to comply with VEVRAA.

As the only report on contractors' hiring and firing of covered veterans, the VETS-100 report is an essential tool for enforcement of the law. The

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decision below. *See* Appendix to the Petition for Writ of Certiorari ("Pet. App.") 30a, n.9.

report is very simple. The official instructions state that the form can be completed in about 45 minutes, including the collection and review of data. *See* Supplemental Appendix ("SA") 209. The contractor merely needs to report the number of veterans it employs in certain types of jobs. To do that, the contractor must count its employees in the manner required by VEVRAA and its implementing regulations. Mr. Kirk alleges that Schindler never counted its employees. As the Second Circuit paraphrased the complaint, "the filed reports must be false because, as his personal experience demonstrated, Schindler never asked Vietnam-era veterans to self-identify." Pet. App. 10a.

6. MR. KIRK'S PERSONAL KNOWLEDGE

As a manager with responsibility for hiring, promoting and firing employees, Mr. Kirk knew firsthand that Schindler did not count its covered veterans in New York or protect its veteran employees as required by VEVRAA. JA 49a. Although Mr. Kirk is a Vietnam veteran, Schindler never offered him an opportunity to identify himself as required by VEVRAA. He personally knew many veterans employed by Schindler who should have been counted in the VETS-100 reports. JA 59a-67a.

In addition, Mr. Kirk was familiar with Schindler's national policies and practices. He attended national conferences with other modernization managers and learned about Schindler's government contracting activities. JA 50a. As a result of these trips and other activities, Mr. Kirk knew that many Schindler facilities were

bidding for contracts and working on projects for various agencies of the federal government. He was also briefed on company personnel practices. "If Schindler had adopted an affirmative action plan for military veterans, or a process for employees to identify themselves as veterans, I would have known about it." *Id*.

Schindler hired approximately 400 Millar employees when the companies consolidated in 2002. Mr. Kirk was deeply involved in this integration of the two companies. He alleges that, in one striking example of non-compliance, "when Schindler integrated its operations with Millar's, the approximately 400 former Millar employees were not given an opportunity to self-identify as veterans." Pet. App. 7a.

7. THE FOIA REQUESTS AND DISCLOSURE OF THE VETS-100 REPORTS

In November 2004, at a time when the Kirks had no attorney, Linda Kirk submitted a FOIA request to the Department of Labor for copies of any VETS-100 reports filed by Schindler in 2002, 2003 or 2004. SA 99. DOL provided three redacted copies of VETS-100 reports dated September 30, 2004. SA 101-03. In a letter sent to Mrs. Kirk on February 20, 2005, DOL stated that it found no VETS-100 reports for the years 2002 or 2003. SA 100. One month later, Mr. Kirk filed his initial complaint.[3]

[3] The first two responses were handled by the Investigation and Compliance Division of DOL's Office of Veterans Employment and Training Service ("VETS"). This office is responsible for collecting VETS-100 reports from federal contractors. The name of the division does not imply that it con-

In January 2005, Mrs. Kirk submitted a second FOIA request to DOL for copies of any VETS-100 reports filed by Schindler for the years 1998 through 2001. SA 105. In September 2005, DOL responded that it had located no VETS-100 reports for the years 1998, 1999 or 2000. SA 106. The agency provided a collection of VETS-100 reports covering the 12-month period ending September 30, 2002. SA 107-34.

In April 2007, Mrs. Kirk submitted a third FOIA request to DOL for copies of any VETS-100 reports filed by Schindler for the years 2005 and 2006. SA 136-37. In May 2007, the agency sent an e-mail attaching copies of VETS-100 reports for the years ending September 30, 2005 and September 30, 2006. SA 138-206.

8. The Amended Complaint

Mr. Kirk filed an Amended Complaint in June 2007. He alleges that, beginning in 1999, Schindler failed to comply with the requirements of VEVRAA. JA 14a. As a result, many Vietnam-era veterans who were entitled to protection under VEVRAA found themselves fired or transferred by Schindler as they approached retirement age, as Schindler tried to avoid paying their pensions and other benefits. JA 48a.

The complaint alleges that Schindler knowingly failed to file the required VETS-100 reports for

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ducted an investigation in response to Mrs. Kirk's FOIA requests, as Schindler suggests. Pet. Br. 33. According to the DOL FOIA Report, VETS employed the equivalent of 1.02 full-time staff to handle 116 FOIA requests in 2009. *See* dol.gov/sol/foia/2010anrpt.htm.

any of its business units until late 2004. When Mr. Kirk brought this situation to the attention of the Department of Labor, Schindler filed false VETS-100 reports so that it would appear to be in compliance with VEVRAA and maintain its eligibility for government contracts. JA 14a-15a.

In his complaint, Mr. Kirk explains in detail why these reports are patently false. JA 34a. As the Second Circuit observed, these allegations are based on Mr. Kirk's personal knowledge: "Kirk alleges that from 1998 to the present, he was never asked to identify himself as a veteran and that when Schindler integrated its operations with Millar's, the approximately 400 former Millar employees were not given an opportunity to self-identify as veterans." Pet. App. 7a. Moreover,

> Kirk's allegation that Schindler's 2002, 2004, 2005, and 2006 VETS-100 reports were false was based on his comparison of the information contained in the reports produced pursuant to Mrs. Kirk's FOIA request with his personal knowledge of Schindler's operations. . . . He also alleged that while the 2004, 2005, and 2006 reports listed no covered veterans who are technicians or craft workers in New York, he personally knows (and named in the complaint) a number of covered veterans working for Schindler in those job categories.

Pet. App. 10a.

Since at least 1998, federal agencies have been barred from paying a contractor subject to VEVRAA who failed to submit a VETS-100 report. 31 U.S.C. § 1354. Despite that prohibition, Schindler falsely certified in its bids, contracts

and claims for payment that it was in compliance with VEVRAA. Schindler submitted bids and claims knowing that it was not eligible either to enter into contracts or to collect payments because it had not complied with the VETS-100 reporting requirement. Schindler also allowed itself to be listed as an eligible contractor by the Department of Labor, knowing that it had failed to file any VETS-100 forms or otherwise to comply with the requirements of VEVRAA. JA 37a-40a.

This action is not about inadvertently mis-counting employees or misunderstanding complex regulations, as Schindler suggests. Pet. Br. 6, 9. The complaint alleges that Schindler deliberately filed false reports. JA 15a. Because Schindler did not ask Mr. Kirk or other employees to self-identify for purposes of VEVRAA, it did not have the information needed to submit reports stating the number of veteran employees. It could only file reports by *inventing the numbers*. Rather than telling the government that it could not comply with VEVRAA's reporting requirement, Schindler attempted to cover up its violations by filing the false reports attached to the complaint.

9. PROCEEDINGS BELOW

Schindler filed a motion to dismiss the Amended Complaint on September 4, 2007. Pet. App. 11a. The district court granted that motion in an opinion and order dated March 30, 2009. The court identified two separate claims for relief: the first claim alleges that Schindler violated the False Claims Act by certifying compliance with VEVRAA when in fact it had failed to file required VETS-100 reports, and the second claim alleges

that Schindler violated the False Claims Act when it filed false VETS-100 reports. The district court held that only the first claim stated a valid claim for relief. Pet. App. 64a-66a. The court then decided that this claim was barred by section 3730(e)(4)(A) because the FOIA responses constituted "public disclosure" of the alleged fraud and Mr. Kirk's claim was based on information in those responses. Pet. App. 79a-85a. The district court never considered whether the public disclosure bar applied to the second claim based on Schindler's false VETS-100 reports.

The Second Circuit reversed. On the public disclosure issue, the court laid out the generally accepted five-part test: the bar applies only if there is (1) "public disclosure" of the information (2) in one of the sources enumerated in the statute. The disclosure must include (3) the allegations or transactions of fraud (4) on which the relator's claim is based. Even if these points are established, the complaint will not be dismissed if (5) the relator was an "original source" of the relevant information. Pet. App. 14a.[4]

Concerning the first element of the test, the court of appeals observed: "[E]very circuit to have considered this issue has determined that information produced in response to a Freedom of Information Act request becomes public once it is received by the requester." Pet. App. 15a. The

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[4] *See U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 738 (3rd Cir. 1997) (applying same five-part test). Some courts use a four-part test, combining the second and third steps, but the analysis is the same. *See, e.g., U.S. ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1203 (10th Cir. 2003).

court then moved to the second element of the test and concluded that the documents produced to Mrs. Kirk under FOIA were not "administrative reports or investigations." Pet. App. 33a.[5] The Second Circuit noted that "our sister Circuits have come to differing conclusions regarding whether materials produced by a government agency pursuant to a FOIA request are administrative reports or investigations within the meaning of the FCA's jurisdictional bar." Pet. App. 17a. After analyzing the leading decisions,[6] the court adopted a case-by-case approach: "we agree with the Ninth Circuit that whether a document obtained through a FOIA request is an enumerated source within the meaning of § 3730(e)(4)(A) depends on the nature of the document itself." Pet. App. 23a.

To reach this conclusion the court of appeals first looked at the statutory language. The words in the phrase "report, hearing, audit, or investigation" suggest "the synthesis of information in an investigatory context." Pet. App. 23a. Because very broad definitions of the words "report" and

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[5] The Second Circuit also decided that the Amended Complaint properly stated two claims for relief under the False Claims Act. Pet. App. 43a-44a. That holding is not covered by the order granting certiorari here.

[6] *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49 (1st Cir. 2009); *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1999).

"investigation" do not fit this context, the court decided to choose narrower definitions.[7]

Second, the court of appeals looked at how federal agencies respond to FOIA requests. The search for documents is sometimes "mechanistic" and sometimes substantive, but "what the agency does *not* do in such a case is synthesize the documents or their contents with the aim of itself gleaning any insight or information." Pet. App. 25a.[8] The process of making documents available to the public does not entail a governmental inquiry into alleged fraud, the type of inquiry covered by the public disclosure bar.

Third, the Second Circuit considered the legislative balance reflected in the public disclosure bar. While Congress wanted to preclude parasitic actions, it also "sought 'to prod the government into action' by allowing *qui tam* suits when 'evidence or information of fraud was buried somewhere in a government file.'" Pet. App. 27a (quoting *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684, n.4 (D.C. Cir. 1997)). Because FOIA provides a mechanism that enables citizens to exhume information buried in government files, the court of appeals

[7] The court used the term "FOIA reports" in summarizing the district court's holding that the FOIA responses are administrative reports, Pet. App. 12a, not because FOIA responses are commonly understood as reports, as Schindler suggests. Pet. Br. 14.

[8] The court did not say that "FOIA responses involve only a 'mechanistic production of documents,'" as Schindler states. Pet. Br. at 30. It recognized that FOIA also requires a review of agency records, Pet. App. 25a, but held that such review is not an investigation under the False Claims Act.

determined that allowing relators to use documents obtained under FOIA is consistent with the purpose of the False Claims Act.

SUMMARY OF ARGUMENT

The "statutory touchstone" of the public disclosure bar is whether "allegations of fraud have been publicly disclosed." *Graham County II*, 130 S. Ct. at 1410. Congress provided that the bar is triggered only by allegations of fraud that are publicly disclosed in an "administrative . . . report, hearing, audit, or investigation" or one of the other listed sources. This is the context of the statute.

The categorical rule advanced by Schindler—that every FOIA response is a listed source—disregards this context. The statute provides an exclusive list of sources, but the list does not include "FOIA response." That term was familiar to Congress when the public disclosure bar was amended in 1986, but Congress did not include it in the public disclosure bar. This is not surprising, because most FOIA responses have nothing to do with "allegations of fraud."

The categorical rule is also inconsistent with the meaning of the words "report" and "investigation" as they are used in the public disclosure bar. These are common words, found in a variety of contexts, with numerous dictionary definitions. Schindler asks the Court to adopt the broadest possible definitions, but the rules of statutory construction demonstrate that this approach is mistaken. These broad definitions make the other words in the same phrase ("audit" and "hearing")

superfluous. They stretch the public disclosure bar beyond its context to cover any statement of fact on any subject that could possibly be called a "report."

The dictionary provides narrower definitions for these words: "investigation" means an official probe into some sort of crime or misconduct, and "report" means an official account of such an investigation. These definitions preserve the independent significance of all four words, including "audit" and "hearing," and they fit the context provided by the adjectives "congressional, administrative, or [GAO]." They also fit the way Congress used the word "investigation" throughout the False Claims Act. Under these definitions, the government's search and response to FOIA request is not an "administrative report or investigation."

The Second Circuit did not hold, as Schindler suggests, that "FOIA responses do not trigger the public disclosure bar." Pet. Br. 13. Instead, the court of appeals held that the question requires a case-by-case determination that "depends on the nature of the document itself." Pet. App. 23a. This is the same analysis that courts regularly use in *qui tam* cases to determine whether a whistleblower's complaint is subject to the public disclosure bar. The Second Circuit's holding is a fact-specific one: in some cases documents released under FOIA may contain allegations of fraud disclosed in one of the sources listed in the public disclosure bar, but the VETS-100 reports and cover letters provided to Mrs. Kirk do not.

The language and structure of FOIA strongly supports this case-by-case analysis. FOIA

responses come in an endless variety: an agency may provide a letter with a complex analysis of statutory exemptions, or it may produce documents with no explanation, no analysis and no cover letter. The documents may include formal agency determinations or, as here, routine corporate filings. It defies common sense to say that every FOIA response is an "administrative report" regardless of its form or content. Moreover, an agency's search for responsive documents is not an "administrative investigation." Numerous courts have held that an agency is not expected to conduct an investigation in response to a FOIA request. Indeed, FOIA defines "search" as a "review," which is not a synonym for investigation.

Schindler's categorical approach fails to recognize that many records are released under FOIA without a formal request. FOIA sets up a three-tier system in sections (a)(1), (a)(2) and (a)(3), and gives wide discretion to federal agencies to choose the best method of publication. In recent years, Congress and the president have encouraged federal agencies to publish documents proactively, without waiting for a request from the public. Only section (a)(3) requires agencies, in some circumstances, to search for documents or provide a response to the requesting party. Schindler's approach would bar a *qui tam* action based on a document disclosed under section (a)(3), but permit an action based on the same document disclosed under section (a)(2). False Claims Act jurisdiction would depend on the discretion of an agency FOIA officer who may decide to disclose a document proactively under section (a)(2), or to wait for a formal request under (a)(3).

The Second Circuit's approach solves this problem. When an agency makes a record available through FOIA, it satisfies the "public disclosure" element of the five-part test. In that respect, all documents released under FOIA are the same, and it makes no difference whether the agency conducted a search under section 552(a)(3) or simply directed the requester to a public reading room under (a)(2). However, the test requires a separate step to determine whether the records made available through FOIA contain allegations disclosed in one of the enumerated sources. The *method* of publication is not relevant to that question. Instead, the court must look at the *content* of the FOIA response and each document disclosed by the agency.

Here, Schindler's VETS-100 reports are not "administrative reports" because they were not created by a government agency. The nature of these documents did not change because they were produced in response to a FOIA request. Further, the VETS-100 reports were not disclosed in an "administrative investigation" because the agency's FOIA search was not an investigation within the meaning of either FOIA or the False Claims Act. The agency did not conduct "an official probe" into any fraud, crime or other misconduct. It merely took the necessary steps to review its records and to redact information as required by the Privacy Act. For the same reasons, the cover letters prepared by DOL in this case did not disclose information from an "administrative report or investigation" within the meaning of the False Claims Act.

The Second Circuit's holding furthers the intent of Congress, demonstrated by the 1998 enactment of the Veterans Employment Opportunities Act, 31 U.S.C. § 1354, to encourage the use of the False Claims Act to enforce VEVRAA. When a contractor falsely represents to the government that it has complied with important national policies—like VEVRAA's protection for military veterans—it cheats the government by providing services that do not meet the standards established by contract. It cheats other companies in the industry who have complied with those standards; they lose the contract to unfair competition. And it cheats American citizens who are entitled to the benefits of those policies as a matter of law. Here, those citizens are military veterans whose jobs and benefits were not protected by Schindler.

The complaint alleges that Schindler intentionally deprived its employees of their legal rights. Then, to avoid losing its federal contracts, Schindler knowingly filed false VETS-100 reports and fraudulent claims for payment. Only a genuine insider like Mr. Kirk could know that these claims were false. He used the Freedom of Information Act to uncover additional evidence of fraud because "I thought this is what a good whistleblower is supposed to do" before filing suit. JA 72a. He was right. The Court should hold that the False Claims Act does not categorically bar suits based on allegations of fraud disclosed in response to FOIA requests. The Second Circuit's case-by-case approach preserves the balance struck by Congress in the public disclosure bar, and encourages whistleblowers to use FOIA to root out evidence of fraud.

ARGUMENT

I. NARROWER DEFINITIONS OF "REPORT" AND "INVESTIGATION" AVOID REDUNDANCY AND FIT THE CONTEXT OF THE FALSE CLAIMS ACT

As this Court recently explained, the public disclosure bar "deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels." *Graham County II,* 130 S. Ct. at 1401. The statute "contains three categories of jurisdiction-stripping disclosures," as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. (quoting 31 U.S.C. § 3730(e)(4)(A)). The three categories in the public disclosure bar are "exhaustive."[9] Disclosures in documents or proceedings other than the listed sources do not trigger the bar.

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[9] "Section 3730(e)(4)(A) furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply." *United States ex rel. Doe v. John Doe Corp.,* 960 F.2d 318, 323 (2nd Cir. 1992); *Dunleavy,* 123 F.3d at 744; *United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1499-1500 (11th Cir. 1991).

A. Schindler's Proposed Definitions Are Too Broad and Lack Any Context.

As in all cases involving statutory construction, "'our starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Richards v. United States*, 369 U.S. 1, 9 (1962)). When a word is not defined in the statute, the Court construes the term 'in accordance with its ordinary or natural meaning.'" *FDIC v. Meyer,* 510 U.S. 471, 476 (1994). "It is easier to state this task than to accomplish it, for . . . many words have several meanings even at a fixed point in time." *Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

The task of finding the best ordinary meaning for "report" and "investigation" is complicated because they are common words with numerous definitions. In Webster's Third New International Dictionary, for example, there are eleven definitions for "report" as a noun. There are three definitions for "investigation," and they incorporate four definitions for "investigate." Other words at issue here—audit and hearing, search and response—are also common words with multiple definitions.[10]

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[10] *See* Webster's Third New International Dictionary (2002) (referred to herein as "Webster's"). This is the same edition cited in *Ondis*, 587 F.3d at 56. The definitions in the 1981 and 1993 editions are nearly identical to the definitions in the 2002 edition cited in this brief.

When choosing among possible meanings or dictionary definitions for a word, the Court must consider the context of the statute. It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 131-32 (1993). In selecting a definition, the Court should choose the one that best fits the text. *Johnson v. United States*, 529 U.S. 694, 706-07 (2000); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson ("Graham County I"),* 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context").

Three rules provide useful guidance as the Court chooses the most appropriate definition of "report" and "investigation" here. First, when Congress uses different words in the same sentence, it does not intend those words "to mean the same thing." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199-200 (1952). Instead, a proper construction of a statute will preserve the "independent meaning" of each term. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995); *Graham County II*, 130 S. Ct. at 1403 (words in the public disclosure bar should be understood to have independent significance).

Second, "[w]e are obliged to give effect, if possible, to every word Congress used." *Reiter*, 442 U.S. at 339; *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009). "The Court will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574-75 (1995).

Third, when a statute uses words with potentially very broad meanings, the Court has a "duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention." *Reiche v. Smythe*, 80 U.S. 162, 164 (1871); *Commissioner v. Brown,* 380 U.S. 563, 571 (1965) (courts may adopt restricted meanings for statutory words in some circumstances); *Neal v. Clark*, 95 U.S. 704, 709 (1877) (choosing narrow definition of "fraud" suggested by adjoining words). A narrow definition can solve the problem posed by the first two rules by preserving the independent meaning of each word and ensuring that all of them are effective. *United States v. Williams,* 553 U.S. 285, 294 (2008) (using *noscitur a sociis* to select narrow definitions for words based on their context).

Following *Mistick, Reagan* and *Ondis*, Schindler endorses a very broad definition of "report" as "something that gives information" or a "notification." Pet. Br. 19. This definition is based on two of the eleven definitions in Webster's dictionary: "2(a) Something that gives information: a usually detailed account or statement. 2(b) Notification." *See* Webster's at 1925. The problem with this broad definition of report is that it swallows up the other words in the phrase "report, hearing, audit, or investigation," making them redundant and superfluous. Each of these four words denotes "something that gives information." Indeed, the very purpose of holding a hearing, or conducting an audit or an investigation, is to obtain information, by interviewing witnesses, examining documents or studying financial records. Therefore, if

"report" is so broadly defined, all hearings, audits and investigations are reports.[11]

Schindler also chooses the broadest definition of "investigation" as a "detailed examination" or "the making of a search." Pet. Br. 20. This definition is based in part on a definition in Webster's: "(1) the action or process of investigating: detailed examination: study, research." *See* Webster's at 1189.[12] This broad definition makes the words "hearing" and "audit" superfluous because both are also defined as types of examination. The first definition of "audit" in Webster's is "a formal or official examination and verification of books of account." *Id.,* at 143. A hearing is generally understood as a proceeding for the examination of witnesses, and

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[11] Moreover, construing "report" as a general term encompassing all notifications or statements of fact contravenes the doctrine *ejusdem generis*: general words in a series are construed to embrace only objects similar to the specific words. "If the general words are given their full and natural meaning, they would include the objects designated by the specific words, making the latter superfluous." 2A N. Singer, Sutherland Statutes and Statutory Construction § 47:17 (7th ed. 2007). *See United States v. Stever*, 222 U.S. 167, 174 (1911) (construing general term "schemes" in light of words describing specific lottery-related schemes); *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 91-92 (1989) (choosing narrow definition suggested by specific terms listed in statutory phrase).

[12] However, the phrase "the making of a search" is not found in Webster's. The phrase comes from the Compact Edition of the Oxford English Dictionary. *See Mistick*, 186 F.3d at 384. As explained in Point II below, the definition of "search" that fits the context of FOIA—where search is defined as a "review"—is not a synonym of investigation. *See* Black's Law Dictionary (5th ed. 1979) at 740 (defining "investigate" as "to search into").

Webster's defines "hearing" as (among many other things) "a preliminary examination in criminal procedure." *Id.,* at 1044.

If the words "report" and "investigation" have the meanings attributed to them by Schindler, then Congress could have dropped the words "audit" and "hearing" from the public disclosure bar. The resulting phrase would still cover every *examination* to gather information and every *statement* or *notification* now covered by the statutory phrase "congressional, administrative, or [GAO] report, hearing, audit, or investigation." This is so because the broadest definition of "report" includes "audit," "hearing" and "investigation" as subsets or specific types of report, and the broadest definition of "investigation" includes "audit" and "hearing" as subsets or specific types of investigation.[13]

This problem is the same one confronted by the Court in construing another common word with broad meaning—communication:

> If "communication" included every written communication, it would render "notice, circular, advertisement, [and] letter" redundant, since each of these are forms of written communication as well. Congress with ease could have drafted § 2(10) to read: "The term

[13] Schindler does not justify its choice of definitions or even acknowledge that the same dictionary cited in *Mistick* and *Ondis* offers numerous alternatives. *See* P. Rubin, *War of the Words: How Courts Can Use Dictionaries Consistent with Textualist Principles*, 60 Duke L.J. 167, 194-5 (2010) (proper use of dictionaries requires acknowledgement of alternative definitions and argument to show why one definition is superior to others).

> 'prospectus' means any communication, written or by radio or television, that offers a security for sale or confirms the sale of a security." Congress did not write the statute that way, however, and we decline to say it included the words "notice, circular, advertisement, [and] letter" for no purpose.

Gustafson, 513 U.S. at 574-75. Similarly, in *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), the Court considered the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" in section 1962(c) of the RICO statute. The Court rejected petitioner's broad definitions of "conduct" and "participate" because, in each case, the word "would be superfluous" unless given a narrower definition. "It seems that Congress chose a middle ground, consistent with a common understanding of the word. . . ." *Id*.

In sum, Schindler's construction of "report" and "investigation" in the public disclosure bar fails for three related reasons. It takes the words chosen by Congress (report, hearing, audit and investigation) and makes them mean the same thing. It disregards the narrower definitions available for the same words (in the same dictionary) that preserve their distinct meanings—what the Court in *Reves* called the "middle ground" definition. And it is "at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignif-

icant." *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (internal quotation marks omitted).[14]

B. To Fit the Context of the False Claims Act, the Court Should Choose Narrower Definitions.

Webster's provides narrower definitions of "report" and "investigation" that allow the four words in the phrase "report, hearing, audit or investigation" to retain their independent significance. Moreover, the word "investigation" is used repeatedly in the False Claims Act in a way that further clarifies its meaning.

1. The Appropriate Definition of Report

Among the eleven definitions of "report" in Webster's is the following: "4(b). A usually formal account of the results of an investigation given by a person or group authorized or delegated to make the investigation." *See* Webster's at 1925. This definition fits the context of the public disclosure bar far better than Schindler's generic definition of "report" ("something that gives information" or a "notification") for at least two reasons. First, it

[14] Schindler suggests the public disclosure bar must be "strictly construed," as if the rules of statutory construction were different when subject matter jurisdiction is at stake. Pet. Br. 18 (mistakenly citing the dissenting opinion in *Holmes*, 318 F.3d at 1216). This Court has not adopted that view in any case construing this statute. *See* A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, at 23 (Princeton Univ. Press, 1997) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means").

defines the word "report" by referring to another word in the public disclosure bar—"investigation"—while preserving the independent meaning of each word, so "report" in Webster's definition 4(b) has the same context as "report" in the public disclosure bar. Second, unlike Schindler's vague definition, Webster's definition 4(b) fits the adjectives "congressional, administrative, or [GAO]" in the public disclosure bar. It recognizes the familiar process used by Congress and government agencies: (i) a person or group is authorized or delegated to make an investigation, (ii) the authorized people conduct the investigation, and (iii) when they have finished, they issue "a formal account of the results" of the investigation.

This definition protects the independent significance of the four terms (report, hearing, audit and investigation) by clarifying that "report" means an account that *follows* steps taken by governmental entities to uncover facts. An "audit," for example, is defined as "a formal or official examination and verification of books of account (*as for reporting* on the financial condition of a business at a given date)." *See* Webster's at 143 (emphasis added). The report is the oral or written statement that follows the audit and provides its results. (The first example provided for Webster's definition 4(b) of "report" is "an audit report." *Id.* at 1925.) Similarly, Webster's defines "hearing" as a proceeding commonly used by governmental entities to uncover facts: "2(c). A session (as of a congressional committee) in which witnesses are heard and testimony is taken." *Id.* at 1044. The committee then generates a report stating the results of the hearing.

Thus, the context-specific definition of "report" comports with the way the word is used by people who are familiar with governmental audits, hearings and investigations. *Cf. Greenwich Collieries*, 512 U.S. at 275-76 ("We . . . presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment"). When a statute uses a word that is ambiguous or "elastic," the Court construes the word "in its context and in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). A definition that fits the specific context of a statute is clearly preferable to a generic definition lacking any context at all.

2. The Appropriate Definition of Investigation

Webster's also provides a definition of "investigation" that fits the context of the public disclosure bar. That definition is an "official probe." *See* Webster's at 1189. Further, the dictionary defines "investigation" as "the action or process of investigating," and then defines the transitive verb "investigate" as "to subject to an official probe." *Id.* The three examples of this definition demonstrate its governmental context: (i) "investigate a crime," (ii) "investigate marine casualties," and (iii) "the FBI investigates every applicant for federal employment." *Id.* This is the context of the word in the public disclosure bar, as demonstrated by the adjectives "congressional, administrative, or [GAO]." Schindler's proposed definition of investigation as a "detailed examination" or "the making of a search" lacks any governmental context. Pet. Br. 20.

Because this definition of "investigation" is based on a transitive verb, it has an object. Something or someone is investigated. By emphasizing that an investigation has a *target*, this definition allows "investigation" to fit squarely with "audit" and "hearing" without trampling on either of them. While an audit examines financial records and a hearing examines witnesses, an investigation is an official probe *into* some kind of malfeasance. Again, Schindler's generic definition misses this common aspect of governmental investigations.

In *Graham County II*, the Court recognized that the public disclosure bar is focused on the disclosure of *fraud*, and held that the terms in the statute should be construed in that context: "When used to modify the nouns 'report, hearing, audit, or investigation,' in the context of a statutory provision about 'the public disclosure' of fraud on the United States, the term is most naturally read to describe the activities of governmental agencies." 130 S. Ct. at 1402.[15] The statute

[15] This holding refutes Schindler's contention that the four nouns in this phrase lack any "shared core of meaning." Pet. Br. 28. Each is part of the government's ongoing effort to fight fraud. Schindler also defends its context-free definitions by arguing that Congress included the phrase "news media" in the public disclosure bar, and that phrase lacks any governmental context. Pet. Br. 27. *Graham County II* considered "news media" in holding that the statute is not limited to federal information, but nothing in that decision implies that only the broadest definitions are appropriate for other words in the statute. On the contrary, Schindler's argument begs the question why the False Claims Act uses the phrase "news media" rather than the broader term "media." Clearly Congress intended to limit the statute to those sources where allegations of fraud are most often found.

refers to the disclosure of "allegations and transactions"—not merely information—because these are the elements of an investigation into fraud. This context demonstrates that "investigation" in the public disclosure bar is most reasonably understood as "an official probe into fraudulent conduct."[16]

3. The False Claims Act's Use of "Investigation"

This definition also fits the specific meaning of "investigation" as it is used in other parts of the False Claims Act. The Act requires the Attorney General to investigate violations of section 3729. 31 U.S.C. § 3730(a). The statute refers to "the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.*, § 3730(c)(4). It then describes this investigation as a "criminal or civil investigation." *Id.* Clearly, the False Claims Act does not use the word "investigation" to mean a "detailed examination" or "search," as Schindler suggests. The Department of Justice does not examine or search

[16] Schindler repeatedly suggests that the False Claims Act is concerned with disclosure of "information" rather than "allegations and transactions" related to fraud. Pet. Br. 1, 2, 12, 14. On the contrary, even relevant information does not trigger the public disclosure bar unless it reveals the fraud. "[T]he public disclosure bar is not triggered by *evidence*, but by *allegations*." J. Boese, *Civil False Claims and Qui Tam Actions*, at 4-65 (3rd ed., 2010) (original emphasis). At one point, Schindler concedes that "report" and "investigation" must be construed in light of the "public disclosure of allegations or transactions," Pet. Br. 29, but that advice is ignored in its discussion of the proper definitions for those words. *Id.* 18-22.

allegations of criminal or civil misconduct. It conducts a targeted probe into such allegations to determine whether someone has broken the law.

The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson*, 513 U.S. at 570 (internal quotation marks omitted).[17] There is a "presumption that a given term is used to mean the same thing throughout a statute." *Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). Moreover, a provision that may seem ambiguous in isolation is often clarified by the remainder of the statute because the same term is used elsewhere in a context that makes its meaning clear. *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371 (1988). "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233-34 (1993).

The Court used the same reasoning in *Graham County I* when it adopted a narrow construction of the phrase "action under section 3730" in the False Claims Act. 545 U.S. at 418. In section 3730, "Congress sometimes used the term to refer only

[17] In *Gustafson*, the Court rejected a reading of the Securities Act that "would require us to hold that the word 'prospectus' in § 12 refers to a broader set of communications than the same term in § 10." 513 U.S. at 572. Statutes "should not be read as a series of unrelated and isolated provisions." *Id.* at 570; *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (selecting definition of "standard" consistent with its use in other parts of Clean Air Act).

to a subset of § 3730 actions. It is reasonable to read the same language in § 3731(b)(1) to be likewise limited." *Id.* Similarly, in *Graham County II,* the Court stated: "If the Court of Appeals was correct that the term 'administrative' encompasses state and local sources in Category 1, it becomes even harder to see why the term would not do the same in Category 2." 130 S. Ct. at 1402. *See also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 472 (2007) (holding that "information" has the same meaning in two section of the public disclosure bar).

When Congress used "investigation" to refer to the Attorney General's "criminal or civil investigation," it was using the ordinary meaning provided by Webster's as "an official probe." Moreover, when it required the Attorney General to conduct an investigation "of a criminal or civil matter arising out of the same facts," Congress made clear that an investigation has a target. This is the meaning of "investigation" that best fits the entire False Claims Act, and there is no reason to believe that the same word has a different meaning in the public disclosure bar. On the contrary, if Congress had intended to give "investigation" a different meaning in section 3730(e) than it has in section 3730(c), "that is when one would have expected Congress to have been explicit." *Gustafson*, 513 U.S. at 573.

C. The Second Circuit's Definitions of Report and Investigation Are Consistent with the Purpose of the Public Disclosure Bar.

"Arguments of policy are relevant when . . . there are ambiguities in the legislative language that must be resolved." *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 64 (1953). A statute is considered "ambiguous because its text, literally read, admits of two plausible interpretations." *Graham County I,* 545 U.S. at 419, n.2. Because the definitions proposed in Point I(B) above are ordinary, natural definitions for "report" and "investigation" that fit the context of the public disclosure bar, the Court does not need to examine the statute's purpose. However, if these definitions are not sufficient to resolve the ambiguity, then it is appropriate to consider legislative intent.

Both the Second Circuit and the Ninth Circuit correctly concluded that congressional intent supports narrow definitions of "report" and "investigation." The courts used *noscitur a sociis* to construe the phrase "congressional, administrative, or [GAO] report, hearing, audit, or investigation."[18] For example, the Ninth Circuit stated:

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[18] This Court did not hold in *Graham County II* that *noscitur a sociis* is "an unreliable guide to the public disclosure bar's meaning," as Schindler contends. Pet. Br. at 15, 27. The Court merely found that the canon was not helpful in construing the phrase "congressional, administrative, or [GAO]." 130 S. Ct. at 1403. The Second Circuit carefully followed *Graham County II* in applying the canon to the longer phrase "report, hearing, audit or investigation." Pet. App. 24a, n.6.

> [R]eports and investigations generally involve independent work product. "Report" denotes a document that includes an analysis of findings; "investigation" implies independent governmental leg-work. Moreover, the FCA's jurisdictional bar groups "report" and "investigation" with a series of other enumerated sources that each involve extensive governmental work product and involvement.

Haight, 445 F.3d at 1153. The Court then turned to the history of the 1986 amendments to the False Claims Act and concluded: "the jurisdictional bar provisions 'must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *Id.* (quoting *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)). The Ninth Circuit concluded that these goals were best served by choosing narrower definitions of "report" and "investigation" applicable to circumstances where the government is engaged in extensive "leg-work" and analysis of its findings.

In its decision below, the Second Circuit relied on *Williams,* 553 U.S. at 294, to select narrow definitions that fit the statutory context:

> All of the other terms in the list of enumerated sources connote the synthesis of information in an investigatory context. "[C]riminal, civil, [and] administrative hearings," for instance, all entail a government inquiry into a given subject, here into an alleged case of fraud. Similarly, government "hearing[s and] audit[s]" are processes by

> which information is compiled with the concerted aim of deepening a government entity's knowledge of a given subject or, often, determining whether a party is in compliance with applicable law.

Pet. App. 23a.[19] The Second Circuit then examined the legislative history for the 1986 amendments and concluded that Congress intended to encourage more suits by private whistleblowers. In particular, the legislators sought "'to prod the government into action' by allowing *qui tam* suits when 'evidence or information of fraud was buried somewhere in a government file.'" Pet. App. 27a (quoting *Findley,* 105 F.3d at 684, n.4).

Schindler argues that Congress decided in 1986 to prohibit "actions by relators who have no independent knowledge of the wrongdoing." Pet. Br. 34.[20] This is a plain misreading of the statute. Schindler's discussion of "drafting history" disre-

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[19] Schindler misconstrues the Second Circuit's holding when it argues that the application of the public disclosure bar should not depend on whether an agency conducted a "sustained inquiry" in responding to a FOIA request. Pet. Br. 21-22. The court of appeals held that a FOIA search is not the type of inquiry that constitutes an "administrative investigation," so the jurisdictional issue turns on the nature of the documents provided under FOIA, not on the extent of the agency's search.

[20] The cases cited by Schindler emphasize the need for "firsthand knowledge of fraud" because the courts had to decide whether the relators were original sources with "direct and independent knowledge." Pet. Br. at 35 (citing *United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358 (9th Cir. 1996); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991)). That question is not presented here.

gards the fact that the public disclosure bar applies only to actions that are based on allegations disclosed in a few specific sources. *Id.* 15, 34-39. The statute does not limit the "class of persons" who can bring suit. *Id.* 37.[21] It permits actions by people with "direct and independent knowledge" of the fraud *and anyone else* who discovers fraud that is not disclosed in one of the enumerated sources. 31 U.S.C. § 3730(e)(4). The statute could have been written so that only an "original source" could file suit, but that is not what Congress chose to do.

"Because Congress was concerned about pervasive fraud in all Government programs, it allowed private parties to sue even based on information already in the Government's possession." *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (internal quotations omitted). The public disclosure bar creates a narrow *exception* to this rule by prohibiting suits based on allegations of fraud that were publicly disclosed in one of the enumerated sources. *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 946 (1997). But this exception must not be per-

[21] Several *amici* state this misguided position explicitly when they argue that the public disclosure bar should be construed to cover FOIA responses "so that only a relator who qualifies as an original source of the allegations can litigate on the government's behalf." *See* Brief *Amici Curiae* of the Chamber of Commerce of the United States of America, *et al.,* at 6. In any event, Schindler's argument has no bearing on this case because Mr. Kirk has personal knowledge of the company's misconduct. Ignoring the undisputed facts in Mr. Kirk's affidavit, JA 47a-72a, Schindler carefully contends that he lacks knowledge only of the company's "reporting practices." Pet. Br. 2, 8.

mitted to swallow the rule: a stranger to the fraud may bring a *qui tam* suit based on allegations known to the government, except in the specific circumstances described in the statute.[22]

The Second and Ninth Circuits' case-by-case approach is consistent with congressional intent. It permits suits based on most information known to the government while prohibiting only those suits based on allegations disclosed "in a congressional, administrative, or [GAO] report, hearing, audit, or investigation" and the other listed sources. Moreover, the analysis built on *noscitur a sociis* and congressional intent leads to the same result as a plain-language analysis based on Webster's dictionary and the text of the statute. Both approaches support a narrow construction of "report" and "investigation" in the public disclosure bar. The Second Circuit held that the phrase "administrative investigation" is best understood to refer to a "government inquiry into a given subject," especially "an alleged case of fraud." Pet. App. 23a. This is what Webster's calls an "official probe," the definition that best fits the meaning of "investigation" in other parts of the False Claims Act. The Second Circuit held that "administrative report" refers to the "information compiled" in such an inquiry or probe. *Id*. This is what Web-

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[22] Schindler is concerned that relators' use of FOIA "opens the floodgates to opportunistic suits." Pet. Br. at 23. It is true that Congress has expanded the scope of FOIA in recent years, and the president has encouraged proactive disclosure. *See* Point II(A) below. These changes could result in more *qui tam* suits against contractors who file fraudulent reports, but that does not mean that this Court should construe the False Claims Act to counteract the pro-disclosure policies of the other two branches.

ster's calls the "formal account of the results of an investigation."

The Court should reject the overly broad definitions of "report" and "investigation" proposed by Schindler, and adopt instead the ordinary meanings that fit the context of the public disclosure bar.

II. The Language and Structure of FOIA Demonstrate that an Agency's Search and Response are not Reports or Investigations

As noted above, this case arises at the intersection of two statutes, the False Claims Act and the Freedom of Information Act. In particular, the issue before the Court concerns the application of the False Claims Act to two administrative processes created by FOIA: the search for records and the response to the requesting party. The language and structure of FOIA strongly support the conclusion that these processes are not "administrative reports or investigations."

"The Freedom of Information Act was enacted to facilitate public access to Government documents." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991) (purpose of the Act requires a "strong presumption in favor of disclosure"). FOIA also facilitates access to records prepared and filed by private parties, including federal contractors like Schindler. Even in that context, "the basic objective of the Act is disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 (1979).[23] The Court

[23] *Chrysler* also concerned a contractor's reports of compliance with affirmative action laws regulated by the

should be wary of any construction of the public disclosure bar that discourages citizens from using FOIA to uncover information about federal contractors, or disfavors the use of such information as evidence in *qui tam* suits.

A. FOIA Records are Routinely Disclosed with No Search or Response.

FOIA begins with a simple directive: "Each agency shall make available to the public information as follows." 5 U.S.C. § 552(a). The statute requires each agency to adopt a three-tiered system to carry out this directive.[24] The first tier, under section (a)(1), requires agencies to publish many types of documents in the Federal Register. The second tier, under section (a)(2), requires agencies to make many other documents "available for public inspection and copying" in a reading room open to the public or, since 1996, on a website or "other electronic means." This section requires publication of documents previously disclosed under FOIA that the agency

Department of Labor. 441 U.S. at 286. As here, the contractor protested that making such reports public under FOIA would damage national business interests and DOL's compliance efforts, in part because individuals could use the reports to sue contractors. *Chrysler v. Brown*, Brief of Petitioner, 1978 WL 206755 at *25-27. Schindler's argument fails to note that Congress decided to make fraudulent non-compliance with VEVRAA actionable under the False Claims Act, 31 U.S.C. § 1354, and that such non-compliance is unfair competition that harms law-abiding contractors.

[24] E. Fraser, *Reducing Fraud against the Government: Using FOIA Disclosures in Qui Tam Litigation*, 75 U. Chic. L. Rev. 497, 510 (2008). *See Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979) (describing three methods of publication).

expects to be requested again. 5 U.S.C. § 552(a)(2)(D). Finally, the statute provides a third tier for documents that are *not* disclosed under (a)(1) or (a)(2). Each agency is required to make such documents "promptly available" upon request, 5 U.S.C. § 552(a)(3)(A), unless they fall into one of the exemptions listed in section 552(b). Section 552(a)(3) is the only part of FOIA that requires a "request for records." The government discloses countless documents pursuant to sections 552(a)(1) and (a)(2) without any request.[25]

Further, the statute requires the agency to conduct a "search" only if it receives a proper request and determines that the responsive documents have not been "made available" by publication in the Federal Register or a reading room or by posting on the Internet. 5 U.S.C. §§ 552(a)(3)(A), (C). If the requestor seeks records that are already available to the public, or if the request itself is deficient, the agency may make records available to the requester, but it is not required to conduct a search. Thus, a FOIA response that describes the search and provides copies of records directly to a requesting party—like the letters sent by the Department of Labor to Mrs. Kirk—is not a nec-

[25] U.S. Dept. of Labor, Freedom of Information Act Guide, Sec. II (many records are available in reading rooms and electronically; "you will not need to make a FOIA request to obtain these documents"). *See* M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 Cardozo Pub. L. Pol'y & Ethics J. 577, 587-88 (2009) (noting that Congress has moved FOIA away from the "request-driven" model to one based on agencies anticipating public interest and making records available online without a request).

essary step in a FOIA disclosure. It happens only in specific circumstances defined by the statute.

This overview of FOIA demonstrates two points that are essential to the proper application of the False Claims Act's public disclosure bar. First, FOIA is a vehicle for making documents available to the public. Publication pursuant to 552(a)(1), (2) or (3) satisfies the first part of the test: the document that was "buried somewhere in a government file" becomes public upon release under FOIA. *See* Pet. App. 27a; *Ondis*, 587 F.3d at 55 ("[A] response to a FOIA request is an act of public disclosure because the response disseminates (and, thus, discloses) information to members of the public (and, thus, outside the government's bailiwick)").

Second, FOIA disclosure does not entail a "search" or "response" by the agency, except in the specific circumstances described in section (a)(3).[26] Schindler misses this point when it contends that "[t]o respond to a FOIA request, an agency must search its records for responsive documents and then analyze those documents to determine whether any of FOIA's nine exemptions to disclosure apply." Pet. Br. 13, 31-32. Similarly, the Third Circuit stated: "When an agency receives a FOIA request, it is obligated to conduct a search

[26] If records are not confidential or exempt, the agency is free to release them even if the request is not technically proper. Such disclosure beyond the strict requirements of FOIA is encouraged. *See* Presidential Memorandum on FOIA, 74 Fed. Reg. 4683 (Jan. 29, 2009) (directing agencies to make information public without waiting for specific requests). In that event, there is no "search" or "response" as those terms are used in the statute.

that is reasonably calculated to uncover all relevant documents." *Mistick,* 186 F.3d at 384. This is not always true. An agency is required only to make records available. It may use any of the three formal modes of publication, or informal methods. Therefore, it is incorrect to say that all documents produced under FOIA are the result of an "investigation or report" in any sense of those words. Even if the Court were to adopt Schindler's broad definitions, there would still be no basis to hold that *every* document produced under FOIA is subject to the public disclosure bar.

That FOIA works in unpredictable ways is best illustrated by the facts in *Haight*. The relator conducted her own investigation into the defendants' alleged research fraud against NIH. She tried to use FOIA to obtain a copy of the NIH grant application, but NIH answered her FOIA request by informing the relator that she could go to a private hospital and obtain a copy of the grant application there. As the Ninth Circuit said:

> The specific facts of this case illustrate how ill-fitting the labels of "report" or "investigation" can be for responses to FOIA requests. Haight ultimately obtained the documents that she had requested by FOIA . . . by walking to Barrow and obtaining them herself. In this instance, the FOIA response consisted only of alerting Haight to the location of the documents relating to Dr. Berens' research. Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication.

Haight, 445 F.3d at 1155.

In short, not every FOIA request triggers a search and response. The sheer variety of mechanisms to publish records under FOIA undermines Schindler's categorical treatment of such records under the public disclosure bar.

B. The Term "FOIA Response" Is Not Listed in the Public Disclosure Bar

In some cases, of course, an agency receives a FOIA request and conducts a search for responsive documents. When the search is complete, the agency prepares a "response" that explains the results of the search and conveys any responsive documents. *See, e.g.,* 29 C.F.R. § 70.21 (prescribing form and content of DOL response to FOIA request). In many cases, it is the agency's response—or lack of response—that determines whether the district courts may hear a FOIA case. *See* 5 U.S.C. § 552(a)(6)(E)(iii) (agency's failure to provide timely response to FOIA request is subject to judicial review); *id*. § 552(a)(6)(E)(iv) ("A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request"). Accordingly, FOIA litigation often depends on whether an agency's activities constitute a "response."

Because of its special role in the administrative process and judicial review, "FOIA response" is a term of art. It constitutes a step in the administrative process that follows a request for records. That is how the term is used in the statute and the regulations of many federal agencies. By the time Congress amended the False Claims Act in

1986, the phrase "FOIA response" had a specific meaning that was familiar to people in the field, including judges. *See, e.g., Shurberg Broad. of Hartford, Inc. v. F.C.C.*, 617 F. Supp. 825, 831 (D.D.C. 1985) (discussing necessity for "quick response to plaintiff's FOIA request" and "administrative review of the initial FOIA response").

The special meaning of a key term in FOIA must be considered in construing the False Claims Act. The principles of statutory construction can be applied "to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Bilski v. Kappos*, 130 S. Ct. 3218, 3229 (2010) (opinion of Kennedy, J.); *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 131-32 (1943). Similar language in different statutes should be construed in the same manner, particularly where Congress was aware of cases construing the language of the earlier act. *Perrin v. U.S.*, 444 U.S. 37, 43 (1979) (earlier statutes extended the meaning of "bribery" beyond common-law definition); *Reiche*, 80 U.S. at 164. This rule of construction is particularly important where a term like "FOIA response" was created by an earlier statute and had been authoritatively construed by the courts when Congress amended the False Claims Act.

Congress knew the unique terminology of FOIA in 1986 when it adopted the public disclosure bar. It knew that FOIA offered one of the most common ways for citizens to obtain information from the government—information that might be used in *qui tam* suits. So Congress could have included a specific reference to FOIA in the list of enumerated sources in the public disclosure bar, by

adding "FOIA response" to the phrase "administrative . . . report, hearing, audit, or investigation." But Congress did not include that term.

Two courts have held that this fact resolves the question presented here. "[B]ecause the 1986 Amendments to section 3730(e)(4)(A) did not textually include FOIA information among the list of disclosures considered public, FOIA information is not encompassed by the public disclosure bar." *United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp.2d 939, 951-52 (N.D. Ill. 2004). "FOIA information, however, is not among the items listed in § 3730(e)(4)(A) as 'public disclosures' and therefore does not operate as a jurisdictional bar." *United States ex rel. Bondy v. Consumer Health Found.*, 28 F. App'x. 178, 184, n.2 (4th Cir. 2001) (unpublished decision). Under the doctrine *expressio unius est exclusio alterius*, a statute that contains an exclusive list of related items is properly construed to exclude items that are not listed. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978). Here, the list of enumerated sources is exclusive. "FOIA response" is not listed, so the public disclosure bar does not apply.

C. A FOIA Response Is Not a "Report" and a FOIA Search is Not an "Investigation"

The text of FOIA also demonstrates that "response" does not mean "report." The dictionary defines "response" as "an act or action of responding (as by an answer)." Webster's at 1935. None of the subsidiary definitions refers to a report or to the act of providing information or notice. Thus,

even under Schindler's generic definition of "report," a FOIA response is not a report.[27] Notably, Congress used the two words in FOIA to refer to different kinds of documents created for different purposes. "Response" refers to the last step in the process of handling a request for documents under section 552(a)(3), while the word "report" refers to the annual reports concerning implementation of FOIA. *See* 5 U.S.C. § 552(e)(i) ("each agency shall submit to the Attorney General of the United States a report"); *id.* § 552(a)(4)(F)(ii) (requiring "report" to Congress on the number of FOIA actions in the preceding year).

Eliminating the distinction between "report" and "response" would create the anomalous situation where a response is not a report under FOIA, but is a report under the False Claims Act. "Of course, a word need not mean the same thing in different statutes, but the meaning attributed in one Act is far from irrelevant to the interpretation of another." *United States v. Embassy Rest., Inc.*, 359 U.S. 29, 38 (1959). Certainly, such a confusing result should be avoided.

The word "search" has a specific definition in FOIA. When an agency receives a request for records and the other conditions of section 552(a)(3)(A) are satisfied, the agency "shall make reasonable efforts to search for the records in electronic form or format." 5 U.S.C. § 552(a)(3)(C).

[27] FOIA also requires "notification" to the requesting party, but that notice merely indicates whether the agency will comply with the request. 5 U.S.C. § 552(a)(6)(A). The "response" that actually transmits the documents is normally a separate step after the search is complete.

"For purposes of this paragraph, the term 'search' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." *Id*. § 552(a)(3)(D).

FOIA defines "search" as a "review." Webster's definitions of "investigate" and "investigation" do not include "review." *See* Webster's at 1189. On the other hand, of the dictionary's twelve definitions of "search," the one that describes a review is this:

> (1) To look into or over carefully or thoroughly in an effort to find something, as
>
> . . . (d) to peruse thoroughly and usually with a specific objective: subject to a careful check (search the records of the case) . . . esp. to examine a public record or register for information about (searching titles in the courthouse).

Id. at 2048. By contrast, the definition of "search" that refers to an investigation has an entirely different context:

> (1) To look into or over carefully or thoroughly in an effort to find something, as
>
> . . . (c) to look through or explore thoroughly, esp. by checking on possible places of concealment or investigating circumstances possibly leading to something being overlooked (searching the apartment building for the suspect).

Id. The type of "search" that involves a *review* is applicable to a perusal of public records, while the type of search that involves an *investigation* is

applicable to police checking a building for a suspect. Obviously, the first definition better fits the context of FOIA. By defining the statutory search as a review, FOIA leaves no doubt that the search for records is not an investigation.

This conclusion is supported by a series of decisions holding that agencies are *not* expected to conduct an investigation in response to a FOIA request.

> [I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. The rationale for this rule is that *FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters*. Therefore, agencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems.

Assassination Archives & Research Ctr., Inc. v. C.I.A., 720 F. Supp. 217, 219 (D.D.C. 1989), *aff'd,* 1990 WL 123924 (D.C. Cir. 1990) (emphasis added). "FOIA entitles citizens to the disclosure of documents, but does not oblige the government to answer their questions or establish a research service." *Bailey v. Callahan*, 2010 WL 924251 (E.D. Va. Mar. 11, 2010). "Indeed, an agency is not 'obliged to look beyond the four corners of the request for leads to the location of responsive documents.'" *Amnesty Int'l USA v. C.I.A.*, 2008 WL 2519908 (S.D.N.Y. June 19, 2008) (quoting *Kowalczyk v. U.S. Dep't of Justice,* 73 F.3d 386, 389 (D.C. Cir. 1996) (dismissing action to enforce

FOIA request that required agency to conduct investigation)).[28]

In short, a search for responsive documents under FOIA is a "review" of agency records, not an "investigation." This reading of the Act is consistent with the dictionary definitions of the words at issue and with numerous decisions holding that FOIA does not require an agency to conduct an investigation. Schindler's contrary view is based on a misreading of FOIA.

D. Schindler's Categorical Rule Leads to Irrational Results.

Under sections (a)(1) and (a)(2) of FOIA, the government discloses many documents without a search or response. Schindler does not contend that these documents are categorically covered by the sources listed in the public disclosure bar. Instead, when a *qui tam* complaint uses information obtained from, for example, an agency memorandum posted online pursuant to (a)(2), the court will evaluate that document to determine if it contains allegations disclosed in an administrative investigation or another source listed in the statute.

However, Schindler proposes special treatment for documents disclosed under section (a)(3)—those documents that have not been made avail-

[28] Schindler cites unpublished cases referring to a "FOIA investigation." Pet. Br. 21. The term appears to be an imprecise reference to a typical search for documents. It is possible that the agency conducted some sort of investigation in those cases, but that does not mean that *every* FOIA search is an investigation within the meaning of the False Claims Act, as Schindler contends.

able before the government receives a request for disclosure. Schindler wants *all* of these documents to be covered by the public disclosure bar, because (in some cases) the government conducts a search and prepares a response when it complies with the request. Under this scheme, a private contractor's report, like Schindler's VETS-100s, will be transformed into an administrative report because an agency happened to make it available under (a)(3).

Schindler's categorical approach leads to a number of irrational results. First, it means that a random decision by agency employees to disclose records under (a)(1) and (a)(2) before they receive a request for specific documents under (a)(3) will determine whether the court can hear a *qui tam* case. If someone had submitted a FOIA request in 2004 for another company's VETS-100 reports, the Department of Labor could well have determined to make Schindler's reports available under (a)(2), anticipating that someone would ask for them. If Mr. Kirk had then found the VETS-100 reports on a Department of Labor website, he would not have made a request and the agency would not have conducted a search or prepared a response. In that case, the VETS-100 reports would be 'publicly disclosed,' but, according to Schindler's reasoning, they would not be administrative reports or investigations. "It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 134-35 (1995).

Second, Schindler's categorical ban on FOIA documents would apply even when the agency did not conduct a search or prepare a response to a

request under (a)(3). For example, if a request is not technically compliant with the statute, the agency is free to provide readily accessible documents without conducting a full search. If an agency does not have the documents, but its FOIA officer knows where they are, the agency can issue a "response" that simply tells the requester where to find them. *See Haight*, 445 F.3d at 1155. This informal handling of FOIA requests is not uncommon; agencies are encouraged to disclose records even when they are not required to undertake a search. It makes no sense to hold that a document disclosed under FOIA is an "administrative report or investigation" when the agency did not conduct a search or provide a formal response.

Third, Schindler's approach would mean that two relators could obtain copies of the same publicly disclosed document, and only the relator who got the document through FOIA would find his case barred. If Schindler chose to publish its own VETS-100 reports (or sent them to veterans groups in an effort to generate goodwill) and an employee determined that they were fraudulent, the employee could use them to bring a *qui tam* suit. But Schindler contends that Mr. Kirk cannot use the same documents because he obtained them through FOIA. This result would discourage the use of FOIA by legitimate whistleblowers and undermine the purpose of the statute.

These anomalies are caused by Schindler's confusion between the first and second steps of the public disclosure analysis.[29] Publication through

[29] "The [public disclosure bar] requires that courts make a categorical determination: does the document at issue fit into one of the enumerated categories? This cate-

any one of the methods described in sections (a)(1), (2) or (3) of FOIA satisfies the first step of the analysis by making a document publicly available. But publication does not change the nature of the document or the information that it contains. A document may contain allegations of fraud disclosed "in a congressional, administrative, or [GAO] report, hearing, audit, or investigation" whether or not it was published under FOIA. When the two steps of the analysis are addressed separately—as the Second Circuit held—a document triggers the public disclosure bar if it contains allegations from one of the enumerated sources, regardless of *how* it was publicly disclosed.[30] False Claims Act jurisdiction does not depend on random choices among the three tiers of FOIA publication, and FOIA is not specially disfavored as a method to obtain information about fraudulent conduct.

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gorical determination must be made at the document level. Making a categorical determination at a more abstract level such as the disclosure method is tempting, but it folds the enumerated sources prong into the disclosure prong. The two prongs require independent determinations." *See* Fraser, *Reducing Fraud*, 75 U. Chic. L. Rev. at 514.

[30] The Tenth Circuit properly applied this analysis when it held that an agency letter released under FOIA was an administrative report that disclosed fraudulent transactions. The court focused on the content of the letter, not the agency's handling of the FOIA request, to decide whether the letter was an enumerated source of allegations of fraud. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir. 2004).

III. The Letters and VETS-100 Reports Produced to Mrs. Kirk Are Not Administrative Reports or Investigations.

After the Second Circuit adopted context-appropriate definitions of "report" and "investigation," it turned to the next step in the well-established analysis. Looking at the letters and VETS-100 reports produced to Mrs. Kirk by DOL, the court concluded that the information in these documents was not disclosed in any of the sources listed in the public disclosure bar. This finding should be affirmed.

A. The VETS-100 Reports Are Not "Administrative"

Although the term "administrative" has a variety of meanings, "[w]hen used to modify the nouns 'report, hearing, audit, or investigation,' in the context of a statutory provision about "the public disclosure" of fraud on the United States, the term is most naturally read to describe the activities of governmental agencies." *Graham County II*, 130 S. Ct. at 1402. Thus, an administrative report must be created by a government agency, not by a private contractor like Schindler. The VETS-100 reports are clearly not administrative reports.

Schindler suggests that everything sent by DOL with its FOIA response to Mrs. Kirk is administrative—even if the enclosed document is a private contractor's report. *See* Pet. Br. 33; *Mistick*, 186 F.3d at 384 (HUD's response to FOIA request was an "administrative report" and "the documents that HUD provided were publicly disclosed 'in' that 'report'"). However, the public disclosure bar

does not refer to allegations "enclosed with" or "attached to" one of the enumerated sources. It refers to allegations disclosed "in" one of the enumerated sources. Here, the only documents obtained by Mrs. Kirk that can fairly be said to be "administrative" are the DOL cover letters to Mrs. Kirk, but the information provided by Schindler in the VETS-100 reports is not contained "in" those letters. DOL enclosed the VETS-100 reports with the first two FOIA responses (SA 100, 106) and attached the reports to an email containing the third FOIA response (SA 138). The letters do not refer to the contents of the VETS-100 reports at all.

If the Court adopted Schindler's theory, documents provided under FOIA without a cover letter or similar document created by the agency would be treated differently than the VETS-100 reports here. As explained in Point II above, FOIA does not always require a written "response." An agency may make its records available in a variety of ways, such as posting them online, mailing them without a cover letter or allowing the requester to inspect them. 29 C.F.R. § 70.21(a)(2).[31] If they were produced with no cover letter, the VETS-100 reports (and the information contained in them) would not be disclosed in an administrative report. The better approach is the one adopted by the Second Circuit: each document should be examined separately to determine if its contents trigger the public disclosure bar.

[31] In addition, agencies often provide documents separately from their determination letter, waiting for the requester to pay a processing fee before the documents are released. *See, e.g,* 6 C.F.R. § 5.6.

Schindler also argues that the Department of Labor's search for the VETS-100 reports involved several complex steps that qualify as an investigation. Pet. Br. 33. These procedures, however, do not change the character of the document disclosed. A contractor's report does not become "administrative" because it is part of a FOIA response or located in a FOIA search.[32] The agency merely "reviews" a record under FOIA; it does not adopt or endorse its contents. Documents disclosed under FOIA do not "bear[ ] the government's imprimatur." Pet. Br. 14.

The survival of a *qui tam* complaint should not depend on whether an agency conducts a complex evaluation of its records under FOIA or simply copies and mails the requested documents. When the government releases a record under FOIA, that record is publicly disclosed under the False Claims Act. It makes no difference how the agency handled the FOIA request, because the "nature of the document" is unchanged. Here, the VETS-100 reports are private, non-governmental documents, so the Second Circuit properly concluded that they are not administrative. Pet. App. 33a. The information in the VETS-100 reports comes from Schindler, not from an administrative report or investigation.

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[32] Under Schindler's theory, contractors could reduce the likelihood of a *qui tam* suit by requesting their own documents under FOIA, transforming them into administrative reports. *See* Fraser, *Reducing Fraud*, 75 U. Chic. L. Rev. at 520.

B. The Department of Labor Did Not Conduct an Investigation or Prepare a Report under FOIA or the False Claims Act.

The information contained in DOL's letters to Mrs. Kirk was not disclosed in an "administrative investigation." As explained in Point I above, a FOIA search is not an investigation under the False Claims Act. The dictionary definition of "investigation" that best fits the context of the public disclosure bar is an "official probe" with a target, or what the Second Circuit called a "government inquiry into a given subject," especially allegations of fraud and compliance with the law. Pet. App. 23a. Moreover, as explained in Point II, the word "search" is defined in FOIA as a "review," which is not a synonym for "investigation." Agencies are *not* expected to conduct investigations in response to FOIA requests.

The Department of Labor's letters show that the agency conducted a review of its records in 2005, first to locate them and then to identify material subject to the Privacy Act. *See* SA-100, 106. The letters do not indicate that DOL conducted a probe into any fraud or other type of misconduct by Schindler. Indeed, when the agency could not find many of Schindler's VETS-100 reports, it did not even try to determine whether those reports had been submitted by Schindler and then misplaced by the agency, or never submitted at all. The agency did not ask *why* the reports were missing. It was conducting a review of records, not an investigation.

Similarly, the DOL letters are merely responses to Mrs. Kirk's requests for records. They are not

reports. Congress used the word "report" in FOIA to refer to an entirely different type of document. *See* Point II(C), *supra*. Under the False Claims Act, "report" means the "formal account of the results of an investigation" into fraud or other misconduct. Specifically, an "administrative report" refers to the information compiled in an investigation (or audit or hearing) into the kind of fraudulent conduct described in the False Claims Act.

Although it is possible that a FOIA response could refer to a fraud investigation and even disclose investigative findings, the DOL letters here do not provide that kind of information. DOL simply told Mrs. Kirk that it had reviewed its files and released certain documents, and that other documents could not be found. Thus, the DOL letters are not administrative reports under the False Claims Act, and they do not contain information disclosed in an administrative investigation. The Second Circuit correctly held that the public disclosure bar does not apply to the documents provided to Mrs. Kirk in response to her FOIA requests.

CONCLUSION

The Court should affirm the Second Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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