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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

REPLY BRIEF FOR PETITIONER

STEVEN ALAN REISS
Counsel of Record
GREGORY SILBERT
DAVID YOLKUT
ADAM BANKS
WEIL, GOTSHAL &
MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
steven.reiss@weil.com

LISA R. ESKOW
WEIL, GOTSHAL &
MANGES LLP
700 Louisiana,
Suite 1600
Houston, TX 77002
(713) 546-5000

MARC S. TABOLSKY
YETTER COLEMAN LLP
221 West 6th Street,
Suite 750
Austin, TX 78701
(512) 533-0150

Attorneys for Petitioner

234820

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement is set forth at p. ii of the Petitioner's Opening Brief and there are no amendments to that statement.

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Relator Daniel Kirk and the government contend that a qui tam relator who has no independent information about publicly disclosed fraud may nonetheless claim the FCA's enormous bounties merely for asserting legal arguments or analysis that the government did not pursue. They advance this result even though they do not dispute that the ordinary meanings of "report" and "investigation" encompass inquiries and responses made under FOIA. Adoption of the unnatural statutory interpretation they endorse would result in a flood of FOIA requests and, ultimately, parasitic lawsuits—exactly the consequence that Congress intended to avoid.

Tellingly, Kirk and the government never even apply their preferred interpretation to the FOIA responses actually at issue. They virtually ignore Kirk's allegations that, for most of the years addressed in his complaint, Schindler did not file any VETS-100 reports at all. His sole basis for making this failure-to-file claim is the Labor Department's official notification that it did not possess Schindler's reports. Plainly, the agency "investigated" whether Schindler had filed VETS-100 reports and "reported" its conclusions; Kirk and the government point to no one else who could have investigated this fact. The result is no different in the instances where the government found responsive VETS-100 reports (ones Kirk alleges to be "false"). The presence of a "report" or "investigation" does not depend on what an agency ultimately finds or concludes. These terms encompass any formal, officially sanctioned means of acquiring or disseminating information.

Ultimately, Kirk and the government seek to resurrect the same mistaken "on the trail" theory of the public-

disclosure bar that this Court rejected only last Term in *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010). This theory flies in the face of undisputed legislative history showing that Congress considered, but rejected, a version of the bar that would have allowed qui tam suits based on publicly disclosed information if the government failed to act on it. It also contorts the statute's language and contravenes its well-established purpose of rewarding only relators who come forward with valuable information.

ARGUMENT

I. THE NARROW DEFINITIONS OF "REPORT" AND "INVESTIGATION" PROPOSED BY KIRK AND THE GOVERNMENT CONFLICT WITH THE ORDINARY MEANINGS OF THOSE TERMS AND ARE NOT SUPPORTED BY THE STATUTORY CONTEXT

A. The FCA's Plain Terms Reach FOIA Responses

There is no dispute that, in interpreting the public-disclosure bar, the Court should begin with the assumption that the language employed by Congress is to be afforded its ordinary, contemporary meaning. See Pet. Br. 18-19; Resp. Br. 21. Nor is there any dispute that, when given their common, ordinary meanings, Pet. Br. 18-22, the statutory terms comfortably include a governmental agency's response to a FOIA request and its search for documents responsive to such a request.[1]

1. See *United States ex rel. Lewis v. Walker*, No. 3:06-CV-16(CDL), 2010 WL 3614144, at *6 (M.D. Ga. Sept. 8, 2010) ("The FCA itself does not narrow the definition of the word 'report'—which is 'typically defined as something that gives information.'").

However, Kirk and his *amici* urge the Court to adopt far narrower definitions, which they contend are more compatible with the statutory "context." Resp. Br. 16; Gov't Br. 18. In doing so, they ignore the directive that a statutory term should be interpreted by looking to its "first, or primary, meaning," and not a "different, somewhat special meaning of the word."[2] *Muscarello v. United States*, 524 U.S. 125, 128-30 (1998) (interpreting the term "carries" by looking to the "*first*" dictionary definition, and not the "*twenty-sixth*") (emphases in original); see also *United States ex rel. Mistick PBT v. Hous. Auth. of the City of Pittsburgh*, 186 F.3d 376, 384 n.4 (3d Cir. 1999) ("The dissent seems to have in mind a particular type of government report . . . but the ordinary understanding of the term 'report' is broader.").[3]

In any event, Kirk and the government cannot show that FOIA responses are excluded by even the specialized meanings that they prefer. From twelve definitions of "report," they emphasize the tenth: a "usually formal account of the results of an investigation given by [an authorized] person or group." Resp. Br. 27; Gov't Br. 16 (citing *Webster's* at 1925). They embrace the very last of six definitions of "investigation": "an official probe." Pet. Br. 29, Gov't Br. 17 (citing *Webster's* at 1189). Yet even

2. Schindler, in contrast, points the Court to common, accepted meanings of the disputed terms. Compare Pet. Br. 19-20, with *Webster's Third New International Dictionary* 1189, 1925 (1971) [hereinafter, "*Webster's*"].

3. See also *N.L.R.B. v. Highland Park Mfg. Co.*, 341 U.S. 322, 324-25 (1951) ("If Congress intended [statutory terms] to have . . . other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition.").

these carefully selected meanings would encompass the official searches and notifications given by the Labor Department's Office of Investigation and Compliance in response to Mrs. Kirk's FOIA requests. However deeply they plumb the dictionary, Kirk and the government cannot overcome the fact that "a FOIA response . . . constitutes an official statement concerning the results of the agency's search of its files."[4] *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 56 (1st Cir. 2009).

It is only by insinuating into their preferred definitions an additional and wholly unwarranted requirement that an "investigation" or "report" focus on *wrongdoing* that Kirk and his *amici* cobble together an interpretation that supports their desired outcome. See, e.g., Resp. Br. 58 ("Under the [FCA], 'report' means the 'formal account of the results of an investigation' into fraud or other misconduct."); *id.* at 18 (no "investigation" because "the agency did not conduct an 'official probe' into any fraud, crime or other misconduct."); Gov't Br. 21 (no "report" or "investigation" "because the federal agency is not charged with uncovering the truth of any matter, let alone inquiring into wrongdoing"). The "wrongdoing" requirement they would import into the FCA would result in an unusual and exceedingly narrow understanding of the disputed terms, excluding not only FOIA responses

4. Responding to a FOIA request is the functional equivalent of public testimony by the government about the results of its search. Cf. *United States v. Hubbell*, 530 U.S. 27, 41-42 (2000) (responding to a subpoena *duces tecum*, when it requires the respondent's "assistance both to identify potential sources of information and to produce those sources," is "the functional equivalent" of answering "detailed" interrogatories or questions at a deposition, and is "testimonial" for purposes of the Fifth Amendment).

but many other items commonly understood to be reports or investigations.[5]

The source of the putative "wrongdoing" requirement is not the FCA's language or any dictionary definition, but the same "on the trail" theory of the public-disclosure bar that this Court previously rejected in *Graham County*, 130 S. Ct. at 1410 (public information need not reach the "desk of a DOJ lawyer"); *id.* at 1405 ("It is the fact of 'public disclosure'—not Federal Government creation or receipt—that is the touchstone of § 3730(e)(4)(A)"); Pet. Br. 39-45. Understandably, Kirk and the government now avoid the "on the trail" terminology, but they persist in arguing that the bar applies only if the government previously viewed the disclosed facts as potentially actionable misconduct. The broad terms "report" and "investigation" simply do not impose that requirement.[6]

Nothing about the statutory context suggests otherwise. The ordinary meaning of "report" does not, as Kirk argues, "swallow up" "audit" or "hearing" because—as Kirk's own brief states—the latter terms denote

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5. For example, under Kirk's cramped definition, the VETS-100 reports at issue are not, in fact, "reports," because they do not inquire into misconduct. Nor, for the same reason, are agencies' "annual reports concerning implementation of FOIA" actually "reports," so defined. Resp. Br. 47.

6. That "FOIA responses" are not specifically mentioned in the public-disclosure bar is of no consequence. The paradigmatic source of parasitic lawsuits that Congress intended to preclude—a criminal indictment, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)—is likewise not specifically mentioned. Nor are other specific means of disclosure—e.g., the "census," a "newspaper column"—that are also undoubtedly covered by the broader enumerated sources. So too are FOIA responses.

processes "to *obtain* information," whereas a "report" is a statement of facts that were previously determined. Resp. Br. 23 (emphasis added). If that distinction were ignored, Kirk's proposed interpretation would present a far greater redundancy problem than Schindler's. He defines a "report" as something that follows exclusively from (his definition of) an "investigation," Resp. Br. 16, leaving it unclear why Congress included "report" in the statute at all. To the extent that the broad term "investigation," given its ordinary meaning, might overlap with "hearing" or "audit," this is true of Kirk's interpretation of the term as well; Congressional hearings are certainly one means of conducting an "official probe."[7]

Also unpersuasive is the government's argument that "administrative" "report[s]" and "investigation[s]" must be "analogous to those that Congress and the GAO would issue or conduct." Gov't Br. 18. This variation of the *noscitur a sociis* argument fails for much the same reasons as the Second Circuit's analysis does. Pet. Br. 25-30. The terms "congressional," "[GAO]" and "administrative" merely denote three separate categories of governmental actors. Beyond that, no "analogy" between the enumerated sources need or should be drawn.[8] See *Graham County*, 130 S. Ct. at 1403.

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7. Cf. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 n.11 (1995) ("overlap" in definitions of terms in the Endangered Species Act "reflects the broad purpose of the Act").

8. Kirk's reliance on the *ejusdem generis* doctrine is similarly misplaced. Resp. Br. 24 n.11. He points to no common attribute among the other statutory sources—"audit," "hearing," and "news media"—that favors his interpretation. Cf. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 223-26 (2008).

Kirk purports to find support for his interpretation from other uses of "investigation" in the FCA, which are accompanied by the modifier "criminal or civil." Resp. Br. 31-33. What this actually shows, however, is that Congress knows how to limit the broad term "investigation" when it wants to do so. Indeed, it *did* limit "investigation" elsewhere in the FCA, but pointedly omitted any such limitation in the provision at issue here—despite including the terms "criminal" and "civil" elsewhere in the public-disclosure bar itself.[9] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010) (internal quotation marks and alteration omitted).

The government queries why, if Schindler's interpretation is correct, Congress did not make the bar applicable to any public disclosure "by a congressional, administrative, or GAO employee." Gov't Br. 19. That test would indeed differ from the one imposed by the existing statute, but not for the reasons suggested by the government. The actual statutory language—"report, hearing, audit, or investigation"—applies to formal, officially sanctioned processes by which Congress, the GAO, or administrative agencies acquire or disseminate information. The language suggested by the government, in contrast, would apply to disclosures that do not carry the government's official imprimatur and, even, apparently when the disclosure occurred because the government itself was complicit in the fraud (as with solicitations of bribery).

9. See 31 U.S.C. § 3730(e)(4) ("criminal, civil, or administrative hearing").

The government similarly ignores the statute's focus on formal, official processes when it claims that, under Schindler's view, "a congressional staffer's response to a press inquiry would be a congressional 'report.'" Gov't Br. 19. Such a response could trigger the bar if it appeared in the "news media"—an enumerated source that Kirk and the government persistently ignore. But a staffer's remark would not be a "congressional report" because it is not an official dissemination of information by Congress, or even a member of Congress. FOIA responses, by contrast, are official agency determinations made pursuant to express statutory authorization, which are subject to appeal. See, e.g., SA 100. These formal notifications cannot meaningfully be compared to offhand remarks by a legislative employee.[10]

B. Kirk's Proposed Definitions Conflict With the Public-Disclosure Bar's Purpose

For decades, courts have recognized that Congress enacted the public-disclosure bar in order to find "'the golden mean'" separating "whistle-blowing insiders with

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10. The government is no doubt correct that "at least *some* public disclosures by the government will not trigger" the bar. Gov't Br. 19. But there is no reason to think that information formally revealed in official inquiries or notifications is among the excluded disclosures. Cf. *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 524 (9th Cir. 1999) ("closely-held inquiry" by Medicare administrator into fraud by its own board member "lacked the institutionalized nature" necessary for an administrative investigation); *United States ex rel. Stewart v. La. Clinic*, No. Civ.A. 99-1767, 2002 WL 1066745, at *6 (E.D. La. May 28, 2002) ("informal office visit" to instruct employees on Medicaid/Medicare compliance was not administrative investigation).

genuinely valuable information" from "'opportunistic plaintiffs who have no significant information to contribute.'" *Graham County*, 130 S. Ct. at 1406 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)); see also *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009) ("[T]he public-disclosure bar implements the congressional interest in paying relators only for useful information.") (alteration, internal quotation marks and citation omitted).

Kirk and the government now foist onto § 3730(e)(4) a new and different purpose: to compensate relators not for new *information* but for "recogniz[ing] the previously unappreciated significance of 'raw' information released by the government." Gov't Br. 19, 28. But a relator who contributes only legal theories or analysis, as opposed to facts, is not a "whistle-blowing insider" and thus not someone whom Congress chose to reward. See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997) ("A relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed."); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("The relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction . . . .").

The notion that relators earn the FCA's extraordinary bounties merely by asserting legal arguments or

claims not pursued by the government is an axiom of the discredited "on the trail" theory, and an attempt to resurrect a proposal considered, but rejected, by Congress. Pet. Br. 39-45. It is also at odds with the FCA's undisputed purpose of precluding "parasitic" lawsuits. For if Kirk and the government are right, then any stranger to an alleged fraud can—and will—simply ask the government to determine whether any contractor has satisfied reporting requirements, and when the government reports noncompliance, claim the FCA's hefty monetary rewards.[11]

That is precisely what Kirk attempts to do, though his brief and the government's repeatedly elide this fact. They do so in part by steadfastly focusing only on Kirk's claims that Schindler filed false VETS-100 reports.[12] In fact, for six of the nine years at issue (1998–2003), Kirk claims that Schindler did not file any VETS-100 reports at all. See JA 14a-16a, 33a, 37a-42a. These failure-to-file claims are based entirely on the Labor Department's notifications that it did not possess Schindler's reports. See Pet. App. 81a ("Kirk offers no other basis for a fact-finder to conclude that Schindler failed to file VETS-100 reports."). Kirk's

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11. Some *700* qui tam "patent marking" cases have reportedly been filed since a 2009 Federal Circuit decision enhancing the available damages. Dionne Searcey, *Banks Become Targets for Patent Suits*, Wall St. J., Jan. 24, 2011, at B10. An even greater surge in FCA qui tam litigation would likely result from an affirmance here.

12. See, e.g., Gov't Br. 22 ("[I]n processing the relevant FOIA requests, DOL simply located the VETS-100 Reports that petitioner had previously submitted, determined what redactions were appropriate, and released the redacted documents to the requester.").

own complaint confirms that this is so.[13] Thus, if the agency did not "investigate" whether Schindler filed VETS-100 reports in certain years, then *no one* did, as Kirk did not do so. And the agency undoubtedly "report[ed]" the results of these investigations; Kirk learned of them no other way.

Kirk and the government give little heed to the FOIA responses concerning the failure-to-file claims—the ones predominantly at issue—except to say they are no different from other FOIA responses. Resp. Br. 18; Gov't Br. 23 n.12. In this, at least, they are correct. For once the government undertakes an official inquiry of this nature, the inquiry is an "investigation" regardless of what it ultimately turns up. It is the process of inquiring into VETS-100 reports—not whether such reports are found—that constitutes the "investigation." And any formal statement of the results of that investigation—regardless of what is stated—is a "report."

Kirk and the government would presumably agree that the Labor Department conducts an "investigation" if it inquires into a contractor's VETS-100 reports for the purpose of enforcing VEVRAA. Yet if the *same* agency makes the *same* inquiry to respond to a FOIA request, they claim there was no "investigation" because the agency was not concerned with "some kind of malfeasance." Resp. Br. 30. This reading of the public-disclosure bar cannot be squared with its long-recognized purpose of precluding suits by would-be relators who provide no valuable information.

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13. See, e.g., JA 14a ("Most important, *according to information provided to Mr. Kirk by the Department of Labor*, Schindler failed to file the required VETS-100 reports for any of its business units until late 2004.") (emphasis added).

Kirk himself has no such information, despite his vigorous protests to the contrary. He does not even purport to have independent information about the failure-to-file claims.[14] See Resp. Br. 7-8, 10. As for the allegedly false reports, they first were filed, according to Kirk, in "late 2004," but his "career at Schindler ended abruptly in 2003." Resp. Br. 3, 10. Thus, his contention that Schindler "never offered him an opportunity to identify himself" as a veteran is irrelevant; he was not even at the company during the relevant time period. Resp. Br. 7. Moreover, the Labor Department's decision rejecting Kirk's administrative appeal directly quotes Schindler's 2004 affirmative action policy, which expressly states that veterans "are invited voluntarily to self-identify." JA 117a-18a. In any event, the false-report claims are themselves based on a false premise: that the VETS-100 reports state the *actual* number of Schindler's veteran employees. In truth, they reflect—and were required to reflect—only employees who voluntarily *self-identified* as veterans.[15] See Pet. Br. 7. Accordingly, Kirk's allegation

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14. The government suggests that Kirk had personal knowledge of Schindler's "federal contracts subject to VETS-100 reporting requirements." Gov't Br. 23 n.12. However, the basis on which Kirk alleged that Schindler had federal contracts was printed data from publicly accessible government websites that he attached to his complaint. SA 5-54.

15. Accordingly, Schindler argued below that a contractor cannot "certif[y] the accuracy" of VETS-100 reports. Pet. App. 43a. It did not argue, as the government claims, that "submission of a knowingly false VETS-100 Report is not actionable under the FCA." Gov't Br. 31 n.14. The portion of the Second Circuit's decision cited by the government concerns Schindler's argument that the FCA's materiality requirement—a completely separate element from knowledge or falsity—was not satisfied because the data contained in VETS-100 reports has no effect on the government's funding decisions. Pet. App. 43a-47a.

that he "personally knows . . . a number of covered veterans working for Schindler" who were not counted in the reports is irrelevant. Resp. Br. 10 (quoting Pet. App. 7a). Kirk does not allege that any of these "covered veterans" self-identified as such, so there is no reason to think that they should have been counted.

Whether Kirk possessed material, non-public information is relevant to whether Schindler could satisfy the "allegations or transactions" prong of the public-disclosure bar, a wholly distinct requirement.[16] But Kirk and the government want to terminate the public-disclosure bar analysis before it reaches that prong. Accordingly, it is not Schindler who asks the Court to adopt a "categorical" result, as Kirk and his *amici* repeatedly and incorrectly assert;[17] for even if FOIA responses are held to be "reports" and "investigations," a qui tam defendant must still meet the jurisdictional bar's other requirements. It is, rather, Kirk and his *amici* who seek a "categorical" ruling because they would preclude the bar from applying, whether the relator has contributed new information or not. That result is completely incompatible with the FCA's well-established purposes.

C. The FOIA Statute Further Confirms That FOIA Responses Are "Reports" and "Investigations"

Schindler's opening brief demonstrates that FOIA responses involve processes that are far more "focused and sustained" than the "mechanistic production of

16. See Pet. App. 14a-15a ("'[A]llegations or transactions' have been disclosed when all of the material elements of the fraudulent transaction were already in the public domain.").

17. See, e.g., Resp. Br. 51; Gov't Br. 32; AARP Br. 21; Public Citizen Br. 13-14; TAFEF Br. 4.

documents" imagined by the Second Circuit. Pet. App. 24a. Accordingly, FOIA responses are "reports" and "investigations" even as narrowly defined by the court below. Pet. Br. 30-34.

Kirk and the government nonetheless argue that Schindler's statutory interpretation would yield "irrational results" because § 3730(e)(4)(A)'s applicability supposedly would depend on which of three methods of FOIA disclosure an agency used. Resp. Br. 50-53; Gov't Br. 23-26. This argument fails for multiple reasons.

As a practical matter, the issue of the public-disclosure bar's applicability to those other methods of FOIA disclosure will infrequently arise. The first method—publication in the Federal Register under 5 U.S.C. § 552(a)(1)—applies primarily to agency organization, procedures, and rules. 5 U.S.C. § 552(a)(1)(A)-(E). Rarely will these or any materials suitable for publication in the Federal Register disclose allegations of fraud. The second method—making records available in a public reading room or electronically under 5 U.S.C. § 552(a)(2)—applies to: agency adjudications (which would fall within the bar even under Kirk's theory); agency interpretations or manuals not published in the Federal Register (which are unlikely to contain allegations of fraud); and certain records that were "*previously released* in response to a FOIA request" (as to which the *original* release under 5 U.S.C. § 552(a)(3) would already have triggered the public-disclosure bar). Gov't Br. 23 (emphasis added); 5 U.S.C. § 552(a)(2)(A)-(E).

As for the rare circumstances that do implicate the public disclosure bar's applicability to materials in the Federal Register or in actual or virtual government

"reading rooms," Kirk and the government wrongly presume that the bar would not be triggered. Gov't Br. 23-24; Resp. Br. 51. They cite nothing to support this presumption and there is existing case law to the contrary. See, e.g., *United States ex rel. Jamison v. McKesson Corp.*, No. 2:08CV214-SA-DAS, 2010 WL 1276712, at *3, *6-*7 (N.D. Miss. Mar. 25, 2010) (holding that republication of Inspector General Fraud Alert report in Federal Register five years later "to identify 'national trends in health care fraud'" was itself an "administrative report"); *United States v. Sodexho, Inc.*, No. 03-6003, 2009 WL 579380, at *13 n.6 (E.D. Pa. Mar. 6, 2009) ("[T]he fact that the theory initially appears . . . as a direct quote from the Federal Register illustrates that Relator plucked it directly from the public domain and is thus barred by Section 3730(e)(4) from asserting it."); *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, --- F.Supp. 2d ----, Nos. 06 Civ. 7115 (SAS), 06 Civ. 11440 (SAS), 2010 WL 2670829, at *7 (S.D.N.Y. July 2, 2010) (applying the Second Circuit's *Kirk* decision to conclude that data made available on a government website was an "administrative report," as it was readily searchable by the public and did "not present raw, unanalyzed data" but "synthesized" and "organized" tax benefit histories); *United States ex rel. Jones v. Collegiate Funding Servs., Inc.*, No. 3:07CV290-HEH, 2011 WL 129842, at *7 (E.D. Va. Jan. 12, 2011) (concluding that "SEC filings . . . which the government disclosed to the public on its website, constituted 'administrative reports'").[18]

18. Nor is the public-disclosure bar's scope cabined by Congress's contemporaneous creation of a FOIA exemption for certain information disclosed by FCA offenders who cooperate with fraud investigations. See Gov't Br. 20 n.10. This amendment reflects Congress's desire to encourage those with firsthand knowledge of fraud to come forward, see, e.g., S. Rep. No. 99-345, at 4 (1986)—a goal the FOIA exemption advances.

Underlying Kirk's and the government's FOIA argument is their puzzling assertion that Congress did not "intend[] Section 3730(e)(4)(A)'s application to turn on the method of public disclosure." Gov't Br. 13; Resp. Br. 18 ("The *method* of publication is not relevant . . . ."). In fact, the enumerated sources in § 3730(e)(4) ensure that the method of disclosure *will* be relevant. But those enumerated sources are not, as Kirk and the government claim, intended to isolate information that the government has previously viewed as potentially concerning malfeasance. Rather, they are intended to encompass the formal, officially sanctioned processes by which the government acquires or disseminates information. For once such information enters the public domain, there is no longer any reason to incentivize relators to come forward with it.[19]

II. THE DRAFTING HISTORY OF THE FALSE CLAIMS ACT CONFIRMS THAT FOIA RESPONSES TRIGGER THE PUBLIC-DISCLOSURE BAR

According to Kirk, when Congress enacted the public-disclosure bar in 1986, it wanted to permit suits by "stranger[s] to the fraud" whose claims are admittedly based on public information, if disclosed outside of

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19. Accordingly, the government misses the mark when it claims that, "even under petitioner's approach, there is no bright line [rule]." Gov't Br. 25. Given their ordinary meanings, the statutory terms encompass formal governmental inquiries or notifications. This interpretation draws a far brighter line than that urged by the government, which turns, among other things, on how "focused" was the government's "inquiry or analysis." Gov't Br. 19.

"narrow[ly] defin[ed]" enumerated sources. Resp. Br. 34, 37, 38. Thus, Kirk and his *amici* maintain that Congress meant to *allow* broad categories of "lawsuits by those who learn of the fraud through public channels." *Graham County*, 130 S. Ct. at 1408 n.16 (internal quotation marks omitted). As previously shown, the FCA's drafting history belies this contention, Pet. Br. 34-45, as do numerous judicial decisions recognizing Congress' goal of "stifling parasitic lawsuits." *Graham County*, 130 S. Ct. at 1407.

Kirk and the government view strangers to a fraud as proper relators because, according to them, Congress made independent knowledge of fraud relevant only to the original-source exception to the public-disclosure bar, not to the bar itself. Gov't Br. 14, 29; Resp. Br. 37. But this Court and others have long recognized that Congress sought to reward relators only for "significant *independent* information." *Springfield Terminal*, 14 F.3d at 653 (emphasis added); see also *Graham County*, 130 S. Ct. at 1406. Conversely, Congress did not intend to reward relators for "information that would have been equally available to strangers to the fraud transaction had they chosen to look for it . . . ." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) (internal quotation marks omitted). Yet it is precisely on the basis of such information that Kirk seeks an outsized recovery.

In denying that Congress was concerned with independent knowledge of fraud, Kirk and the government completely ignore that Congress explicitly considered authorizing recoveries by relators who had only "indirect" knowledge—recoveries that the Senate Report recognized would be "inappropriate windfalls"—and decided *not* to do so. Pet. Br. 42-45. Moreover, the reason that Congress

contemplated permitting those "inappropriate" suits—a reason it ultimately did not find persuasive—is the same reason that Kirk and the government argue that the bar should be narrowly construed: to encourage relators to bring suit when the government has not. See, e.g., Gov't Br. 28 ("[A] relator's primary contribution [may be] recognizing the previously unappreciated significance of information already in the government's possession."). The drafting history shows that Congress rejected this rationale for qui tam recoveries, and courts have properly rejected it as well. See *Stinson*, 944 F.2d at 1160; *Findley*, 105 F.3d at 688.

Accordingly, Congress did not, as Kirk argues, establish a general rule allowing qui tam suits based on public information and then carve out a "narrow *exception*" with the public-disclosure bar. Resp. Br. 37 (emphasis in original). Rather, Congress intended, as the 1986 amendment's principal sponsor explained, that "jurisdiction for qui tam actions based on information that has been publicly disclosed *will be limited* to those people who were 'original sources' of the information." 132 Cong. Rec. S11238-04, 1986 WL 783415, at 20 (emphasis added).

Kirk and the government find support for their interpretation from the fact that Congress did not "simply creat[e] an original-source exception while retaining the government-knowledge bar." Gov't Br. 29; see also Resp. Br. 37 & n.21. But there are good reasons to allow suits based on non-public information that is known to the government. For one thing, the government itself might be complicit in the fraud. For another, the government cannot be held accountable for its decision whether, or how, to act upon fraud of which it is aware unless such fraud is exposed to the public. When facts underlying such fraud

are hidden, the government's enforcement priorities and exercises of prosecutorial discretion are shielded from scrutiny. Once the information is publicly revealed, the government is accountable for its decisions, so there is good reason to encourage relators to disclose such fraud even though the government is aware of it. After public disclosure, the only "whistle-blowers" are the original sources, and there is no reason to reward anyone else for bringing suit.

III. THE RESULT URGED BY KIRK AND THE GOVERNMENT IS CONTRARY TO THE PUBLIC INTEREST

Schindler's opening brief demonstrated that embracing Kirk's position would harm the public interest by raising the government's costs of doing business without providing a commensurate public benefit. Pet. Br. 45-49. Notably, the government does not dispute the key elements of this demonstration. It does not deny that bounty-seeking relators will bring multitudes of qui tam actions "based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc"—noncompliance of which the relator has no personal knowledge. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946, 949 (1997). Nor does it deny that, when this occurs, the "relator's interests and the Government's do not . . . coincide." *Id.* at 949 n.5.

Instead, the government points to "screening mechanisms" within the FCA that will supposedly ameliorate the problem that a cramped interpretation of the public-disclosure bar creates. None of these "safety valves" has so far disposed of this case, which has been pending for nearly six years, and there is no reason to

think they will be more effective in the deluge of cases that will follow if this suit proceeds.

One screening mechanism relied on by the government is that it could "seek dismissal" of a qui tam suit that "disrupt[ed] the operations of an important contractor." Gov't Br. 32 n.15. Of course, simply because the government "seeks" dismissal of an action does not ensure that it would occur.[20] But even if such dismissal motions were invariably granted, this is cold comfort to the potentially vast numbers of contractors who the government may decide are not sufficiently "important" to merit this extraordinary and resource-intensive step. Moreover, the government ignores that dismissal would take place, if at all, long after the costs of excessive qui tam litigation had been incurred. Unless the government took the unlikely step of guaranteeing *ex ante* that it would eliminate a contractor's qui tam litigation risk, that risk would be present when the contract was made and would be passed along in the form of higher costs.[21]

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20. A court may deny a dismissal sought by the government if the relator can demonstrate after a hearing "that dismissal is fraudulent, arbitrary and capricious, or illegal." *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (quotation marks and citation omitted). Similarly, the government cannot settle a qui tam action over the relator's objection unless a court first determines "after a hearing, that the proposed settlement is fair, adequate, and reasonable." 31 U.S.C. § 3730(c)(2)(B).

21. Similar difficulties beset Kirk's suggestion that the government could "transfer any *qui tam* action out of court" and pursue administrative penalties. Resp. Br. 5 & n.2 (citing 31 U.S.C. § 3730(c)(5)). Unless the government represents that it will transfer all future qui tam cases like this one to administrative

Another screening mechanism asserted by the government is that the FCA permits awards of attorneys' fees to prevailing defendants for "clearly frivolous" or "clearly vexatious" qui tam suits. Gov't Br. 31. But even in the cases where those exacting standards could be met, the relief is unlikely to come without substantial litigation and individual relators are unlikely to have the resources to pay the attendant attorneys' fees.

The government also suggests that some qui tam defendants may be able to "prevail on the merits," or show noncompliance with heightened pleading requirements.[22] Gov't Br. 31. But the entire point of a jurisdictional bar is that it is distinct from—and prior to—adjudication on the merits and other non-jurisdictional defenses. That some qui tam defendants may have meritorious defenses *other* than the jurisdictional bar (as Schindler believes it does) is no ground to deprive the bar of the preclusive effect that Congress intended.

The government's resort to "screening mechanisms" is particularly misplaced because, under the recent amendment to the public-disclosure bar, the government has the unfettered option to prevent the bar from applying in any particular case. See Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119, 901 (2010) ("The court shall dismiss an action or claim

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proceedings—which might strain administrative resources beyond the breaking point—potential contractors will likely decline to bid or monetize the risk.

22. Schindler argued below that Kirk had not pled fraud with particularity as required by Rule 9(b), but neither court reached the issue. See Pet. App. 46a-47a n.20.

under this section, *unless opposed by the Government* . . . .") (emphasis added).

The amended statute does not apply in this case. See Pet. Br. 11 n.6. But the government may opt to let future qui tam cases that it deems beneficial go forward even if based on public information, while allowing the bar to preclude cases contrary to the public interest, like this one. There is, accordingly, little weight to the government's concern that § 3730(e)(4), once given its ordinary meaning, could prevent suits "alleging that a contractor 'overcharged the government for substandard goods or services . . . or goods and services not actually provided.'" Gov't Br. 32 (quoting Pet. Br. 10 n.5). The government could allow such suits to proceed or, alternatively, intervene in them. In any event, if less than all of the material elements of the fraud alleged in such cases were in the public domain, the bar's "allegations or transactions" prong would not be satisfied and the bar could not be invoked. If the elements all were in the public domain, the relator would not deserve any reward.

CONCLUSION

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

Respectfully submitted,

Lisa R. Eskow
Weil, Gotshal &
Manges LLP
700 Louisiana,
Suite 1600
Houston, TX 77002
(713) 546-5000

Marc S. Tabolsky
Yetter Coleman LLP
221 West 6th Street,
Suite 750
Austin, TX 78701
(512) 533-0150

Steven Alan Reiss
Counsel of Record
Gregory Silbert
David Yolkut
Adam Banks
Weil, Gotshal &
Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
steven.reiss@weil.com

Attorneys for Petitioner

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