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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 *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

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## INTEREST OF THE *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older.[1] Through education, advocacy and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. As the country's largest membership organization, AARP advocates for access to affordable healthcare and for controlling costs without compromising quality.

*Amicus* will explain the profound ramifications of the Petitioner's argument that *every* document disclosed in response to a Freedom of Information Act ("FOIA") request, regardless of the content or form of the document, is a *per se* trigger of the public disclosure provisions[2] of the False Claims Act ("FCA"), which would categorically prevent federal district courts from exercising

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[1] In accordance with Supreme Court Rule 37.6, *Amicus Curiae* states that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than *amicus*, their members and counsel have made a monetary contribution to the preparation or submission of this brief. Parties were timely informed with 10-days notice of the intent to file this *amicus* brief, and the written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] The version of the FCA's public disclosure bar at issue in this case has been superseded. The Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 *et seq.*) revised the public disclosure provision of the FCA. The public disclosure provision was amended such that, under section 10104(j)(2), a court cannot dismiss a *qui tam* complaint based on a public disclosure if the government opposes the dismissal.

subject matter jurisdiction over all such cases. The excessively broad construction advocated by the Petitioner would foreclose the ability to improve the quality of healthcare operations and the overall quality of care provided to patients, as well as deter noncompliance with healthcare laws by providers, based on the information that can be derived from FCA actions. It would also restrict the ability of whistleblowers to identify and prosecute fraudulent conduct on behalf of the government by blocking meritorious lawsuits initiated under the FCA's *qui tam* provisions. *Amicus* urges the Court to avoid this result by affirming the decision of the United States Court of Appeals for the Second Circuit.

## SUMMARY OF ARGUMENT

The government has long recognized that transparency is an essential part of its goal of improving the quality of healthcare in the United States. At its core, the False Claims Act, 31 U.S.C. § 3729 *et seq*., increases transparency by exposing fraudulent conduct perpetrated by healthcare providers. The information brought to light in FCA cases has resulted in improvements to healthcare operations and the overall quality of care provided to patients, deterred noncompliance with healthcare laws, and incentivized individuals with knowledge of fraudulent conduct to blow the whistle. These results can be attributed to the efforts of *qui tam* relators, which make up more than 80 percent of the cases filed under the FCA.

Petitioner contends that the public disclosure provisions of the FCA are triggered in each and every instance where a document has been disclosed

in response to a FOIA request, thus depriving federal district courts of subject matter jurisdiction in such actions. This position should be rejected for two reasons. First, the construction would eviscerate healthcare transparency laws and foreclose the opportunity to improve the quality of healthcare based on information derived from the FCA. Second, it contradicts the public disclosure provisions of the FCA, which specifically enumerate the types of documents that constitute a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Indeed, the Ninth Circuit has correctly observed that a FOIA response does not trigger the public disclosure provisions of the FCA unless the document disclosed is from one of the sources enumerated by the statute. *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147, 1153 (9th Cir. 2006). This interpretation is supported by the plain language of the FCA, the legislative history of the public disclosure provisions, and Congress's intent to "'encourage more private enforcement' of the FCA through expansion of its *qui tam* provisions" and to "correct[] restrictive interpretations of the act's . . . *qui tam* jurisdiction." *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 109 (2d Cir. 2010) (citing S. Rep. No. 99-345, at 23-24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89).[3]

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[3] *See also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684 n.4 (D.C. Cir. 1997) (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").

Accordingly, the Court should affirm the decision of the United States Court of Appeals for the Second Circuit.

## ARGUMENT

### I. ALLOWING *PER SE* EXCLUSION OF A WHISTLEBLOWER CLAIM UNDER THE FCA BASED ON THE PRESENCE OF A FOIA RESPONSE WOULD CHILL HEALTHCARE TRANSPARENCY INITIATIVES AND DIMINISH THE QUALITY OF CARE PROVIDED TO PATIENTS.

#### A. FCA Lawsuits Contribute to More Transparent Operations and Improved Quality of Care.

The FCA is the single most effective tool in the fight against fraud perpetrated against the government. In the two-year period from January 2009 to January 2011, the United States Department of Justice recovered more than $6.8 billion in actions under the statute. *See* Press Release, Department of Justice, Office of Public Affairs, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), www.justice.gov/opa/pr/2010/November/10-civ-1335.html. Whistleblowers play a key role in this success. More than 80 percent of FCA cases are filed by relators pursuant to the *qui tam* provisions of the statute. *See* Department of Justice, Civil Division, Fraud Statistics 2 (Nov. 23, 2010), www.justice.gov/civil/frauds/fcastats.pdf. Whether the government declines or seeks to intervene in a case brought by a *qui tam* relator, "the United States

is the real party in interest in any False Claims Act suit." *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 50 (4th Cir.1992).

The value and remarkable success of the FCA is not limited to the government's financial recovery. FCA cases redress fraud by identifying and preventing substandard healthcare, while imposing continuing compliance obligations on violators to prevent recidivism. The information made available in healthcare cases, combined with other laws designed to increase the transparency of healthcare providers' operations, are a critical component of monitoring the quality of care. At the most basic level, this information educates patients making decisions about their care and those that administer it. This healthcare information should be available to whistleblowers to assist in the identification and deterrence of fraud, particularly where the fraudulent conduct affects the health and safety of patients. Adopting an overly broad interpretation of the public disclosure provisions threatens to undermine transparency laws by penalizing whistleblowers for using the FOIA statute to obtain data that ultimately can positively influence improvements in healthcare operations and the quality of care.

The government has recognized the positive impact that the FCA has on the quality of healthcare. In identifying the goal of ensuring the quality of care provided to beneficiaries of the federal health care programs as one of its top ten management and performance priorities, the Office

of Inspector General ("OIG") of the Department of Health and Human Services ("HHS") stated that:

> The False Claims Act, the Federal Government's primary civil enforcement tool for fraud, has been used successfully to address poor quality of care. These cases often involve allegations of widespread or systemic problems that result in harm to residents of nursing facilities, such as staffing shortages, failure to implement medical orders or services identified on the care plan, failure to ensure that residents are protected from harm, medication errors, and the unnecessary development of facility-acquired medical complications such as infected pressure ulcers.

U.S. Department of Health & Human Services, Office of Inspector General, 2007 Top Management and Performance Challenges Identified by the OIG, at 11, http://oig.hhs.gov/publications/challenges/files/TM_Challenges07.pdf.

Whistleblowers acting under the FCA's *qui tam* provisions can be credited with exposing fraudulent and substandard healthcare. The effect of the *qui tam* laws in aiding the government in protecting vulnerable patients, such as the elderly in nursing homes and those in an acute care setting, is illustrated by a review of recent FCA settlements. First, last year, in St. Louis, Missouri, five nursing homes operated by Cathedral Rock pled guilty to felony healthcare fraud related to the failure to

provide adequate care to Medicare residents. A press release from the United States Attorney's Office described the unconscionable conduct of the nursing homes and pointed out that FCA cases accomplish more than just recouping money for the government:

> [N]umerous residents suffered from malnutrition, dehydration, preventable pressure sores and preventable side effects from not receiving their medications. Some residents simply wandered away from the homes, sometimes with the Cathedral Rock staff not noticing that the residents were gone until many hours later. One resident was almost hit by a car after leaving a Cathedral Rock facility while using a walker. Other residents underwent amputations of feet and legs because pressure sores formed and were left untreated, and in some cases the pressure sores had become infested with maggots.
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> * * *
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> Gary M. Holst, Special Agent in Charge of the Kansas City Regional Office of Investigations for HHS, noted, "<u>These investigations and their outcomes not only protect the taxpayers from waste, fraud and abuse, but more importantly serve to protect the most vulnerable and precious in our society: the elderly</u>."

Press Release, United States Attorney's Office, Eastern District of Missouri. (Jan. 7, 2010), http://www.integriguard.org/wp-content/uploads/Cathedral-Rock-Nursing-Homes.01.07.10.pdf (emphasis added).

Second, nursing home Grant Park Care Center, located in the District of Columbia, paid $2 million in a *qui tam* case in which its failure to provide quality care to residents resulted in numerous residents suffering from dehydration, malnutrition and increased infections, and other residents being left alone for extended periods of time without cleaning or bathing. Press Release, United States Attorney's Office for the District of Columbia, The United States and the District of Columbia Reach $2 Million Settlement with Grant Park Care Center to Settle Allegations Regarding Fraudulent Billings to Medicare & Medicaid (Nov. 26, 2008), http://www.justice.gov/usao/dc/Press_Releases/2008%20Archives/November/08-323.html.

Third, Omnicare, Inc., the nation's largest nursing home pharmacy company, paid $98 million to resolve *qui tam* claims alleging kickbacks to purchase and recommend Johnson & Johnson drugs, including the anti-psychotic drug Risperdal, for use in nursing homes. Press Release, United States Attorney's Office, District of Massachusetts, Nation's Largest Nursing Home Pharmacy and Pharmaceutical Manufacturer Pay $112 Million to Settle False Claims Act Cases (Nov. 3, 2009), http://www.justice.gov/usao/ma/ Press%20Office%20-%20Press%20Release%20Files/Nov2009/OmnicarePR.html.

The impact of *qui tam* lawsuits on the quality of healthcare is even stronger where the company enters into a corporate integrity agreement ("CIA"). *See* U.S. Department of Health and Human Services, Office of Inspector General, Corporate Integrity Agreements, http://www.oig.hhs.gov/fraud/cias.asp (identifying companies that have previously executed CIA's with OIG). The OIG negotiates compliance obligations with healthcare providers and other entities as part of the civil settlement. Typically, a company agrees to adhere to a CIA in exchange for the OIG's agreement not to seek an exclusion of that healthcare provider or entity from participation in Medicare, Medicaid, and other federal healthcare programs.[4] CIAs include extensive quality improvement measures and reporting obligations.[5] For example, the Buckingham Valley Rehabilitation and Nursing Center and related companies entered into a CIA with the OIG pursuant to which the nursing home was required to implement policies and procedures

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[4] False claims submitted in violation of the False Claims Act give rise to the OIG's permissive exclusion authority under 42 U.S.C.1320a-7(b)(7).

[5] Typically, CIAs require a company to hire a compliance officer/appoint a compliance committee; develop written standards and policies; implement a comprehensive employee training program; retain an independent review organization to review claims submitted to Federal healthcare programs; establish a confidential disclosure program; restrict employment of ineligible persons; report overpayments, reportable events, and ongoing investigations/legal proceedings; and provide an implementation report and annual reports to the OIG on the status of the entity's compliance activities. *See Corporate Integrity Agreements*, http://www.oig .hhs.gov/fraud/cias.asp.

to address virtually all aspects of its business of providing care to the elderly.[6]

### B. Increased Transparency Is An Essential Part Of The Government's Goal Of Improving The Quality Of Care.

Under the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 *et seq*.) increased accountability is an essential part of the government's goals of improving the quality of care across all settings.[7] PPACA advances various

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[6]*See* Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Green Valley Pavilion et al., http://oig.hhs.gov/fraud/cia/agreements/buckingham_valley_rehabilitation_and_nursing_center_ 05012007.pdf. The nursing home was required to implement policies and procedures to address "[m]easures designed to ensure the coordinated interdisciplinary approach to providing care, including . . . resident assessment and care planning; nutrition; diabetes care; wound care; infection control; fall prevention, recovery, and assessment; abuse and neglect policies and reporting procedures; protection from harm procedures; appropriate drug therapies; appropriate mental health services; provision of basic care needs; incontinence care; resident rights and restraint use; activities of daily living (ADL) care; therapy services; quality of life, including accommodation of needs and activities; and assessment of resident competence to make treatment decisions." *Id.* at 6.

[7] PPACA also amended FCA's public disclosure bar by broadening the definition of "original source" and removing the public disclosure provision as a jurisdictional defense by prohibiting a court from dismissing a case for lack of subject matter jurisdiction where the United States opposes the dismissal. 31 U.S.C. § 3730(e)(4)(B). Although the current text

strategies to engender better care through the dissemination of information by healthcare providers. The statute includes numerous provisions that encourage or require collection, aggregation and public reporting of quality metrics, care coordination, improved delivery of services for people with chronic conditions, wellness, prevention, and health promotion, as well as acceleration of adoption of health information technology, such as electronic medical records. Significantly, the information publicly disclosed under PPACA is intended to be actionable and used to improve care and promote greater efficiency in healthcare delivery by routing out waste, fraud, and abusive practices.[8]

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of the public disclosure bar does not expressly apply retroactively to pending cases, PPACA demonstrates Congressional intent disfavoring the dismissal of *qui tam* actions. *See United States ex rel. Longhi v. Lithium Power Tech., Inc.*, 575 F.3d 458, 470 (5th Cir. 2009) (2009 amendments to the False Claims Act are "relevant as to Congress's intent when it enacted the FCA.") (citing *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990)); *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985) ("Statutes may be passed purely to make what was intended all along even more unmistakably clear.").

[8] Similarly the Federal Nursing Home Reform Act ("NHRA") directly ties the availability of Medicare and Medicaid payments to the provision of services where a patient or resident can "attain and maintain the highest practicable physical, mental, and psychosocial well-being." *See, e.g.,* 42 U.S.C. § 1396r(b)(4) & 42 U.S.C. § 1395i-3(b)(4). Pursuant to NHRA, a regulated facility can be denied payment for non-compliance with applicable care standards. 42 U.S.C. 1396r(h).

Among other aspects, PPACA requires nursing homes to disclose detailed information about nursing home ownership, management, leadership, and organizational structure. PPACA § 6101. Nursing homes also must have an effective compliance and ethics program to prevent and detect criminal, civil, and administrative violations. PPACA § 6102. The PPACA provisions requiring nursing home transparency will provide the elderly and their families with more information, provide additional oversight of nursing homes, and help improve the quality of care.[9]

Other PPACA provisions require HHS to publish certain information online on the "Nursing Home Compare" section of the Centers for Medicare & Medicaid Services website, including standardized staffing data, information about staffing turnover, tenure, and pay, and a summary of information regarding substantiated complaints and the number

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[9] PPACA's requirement that nursing homes disclose ownership information is of paramount importance because the complex operating structures of nursing homes contribute to substandard care. In the course of investigating substandard care in nursing homes, the OIG has encountered nursing homes with as many as 17 limited liability companies that play a role in operations of the nursing home. Testimony Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, *In the Hands of Strangers: Are Nursing Home Safeguards Working?,* Testimony of Lewis Morris, Chief Counsel to the Inspector General of the Department of Health and Human Services (May 15, 2008). The complex structures and associated lack of transparency in ownership and management have created challenges for ensuring accountability but the PPACA provisions requiring disclosure simplify law enforcement investigations and improve quality of care.

of criminal violations by the facility and its employees. PPACA § 6103. This data is important because staffing directly impacts the quality of care, and more reliable staffing data is valuable to the elderly and their families.[10]

Taken together, these PPACA provisions reflect a legislative intent to *increase* the quantity of healthcare information publicly available and thereby make providers more accountable for the care delivered. This information should be available to patients and residents to make informed decisions about their care, but also to any party, including whistleblowers acting under the FCA, seeking to expose substandard care that results in harm to patients and fraud on the government. This is in keeping with government regulations that authorize the denial of payments for services that are substandard and fail to complain with applicable standards of care. *See, e.g.*, 42 U.S.C. 1396r(h). Imposing a *per se* bar to subject matter jurisdiction is inconsistent with improving care and undermines the utility of this data in FCA healthcare cases so that there is less accountability and diminished quality.

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[10] PPACA nursing home transparency provisions will also provide consumers with a substantial amount of new information about individual facilities; provide consumer rights information; require that states maintain a website with information on all nursing homes in the state, including survey reports and complaint investigation reports; and provide dementia care and abuse prevention in nurse aide training programs. PPACA §§ 6101-6121.

## II. A DOCUMENT DISCLOSED IN RESPONSE TO A FOIA REQUEST ONLY TRIGGERS THE PUBLIC DISCLOSURE BAR IF IT FALLS INTO ONE OF THE FCA'S ENUMERATED CATEGORIES.

### A. The Nature of the Document Controls The Outcome.

Congress provided that a document disclosed in response to a FOIA request triggers the FCA's public disclosure provision only if it falls into one of the categories of documents enumerated in 31 U.S.C. § 3730(e)(4)(A). The plain language of the FCA unmistakably supports this interpretation. If Congress intended to categorically deny jurisdiction to federal courts in all cases where an administrative agency responded to a FOIA request—thereby elevating FOIA to the expressly enumerated subjects such as a Congressional report—it would have so specified.

FOIA is a mechanism for obtaining documents in the government's possession. Undoubtedly some documents released by an agency in response to a FOIA request rise to the level of an administrative "report . . . or investigation," congressional reports, or agency audits. *Id*. Others do not. *United States ex rel. Haight v. Catholic Healthcare West,* 445 F.3d 1147, 1153 (9th Cir. 2006). ("[A] response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute.").

The public disclosure provisions do not mention FOIA. A document disclosed under FOIA is

not a public disclosure unless it falls into one of the categories enumerated in the statute. When considering the issue, the Ninth Circuit correctly observed that the applicability of the jurisdictional bar depends on the nature of the document itself:

> If the document obtained via FOIA request is a public disclosure of a "criminal, civil, or administrative hearing, ... a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media," then the jurisdictional bar is applicable. If, as was the case here, the document obtained via FOIA does not *itself* qualify as an enumerated source, its disclosure in response to the FOIA request does not make it so.

*Id.* at 1156 (italics in original, underline added). The Second Circuit, in the case at hand, agreed with the Ninth Circuit's common-sense approach. The Second Circuit held that the language of the provision compelled the conclusion 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." *U.S. ex rel. Kirk*, 601 F.3d at 107.

### B. Searching For Responsive Records Is Not An Administrative "Investigation," Nor Is a FOIA Response A "Report."

Faced with the challenge of characterizing all FOIA responses into one of the three specified categories in the public disclosure provisions, the Petitioner seeks to transform the mere action of an administrative agency in responding to a FOIA request as subsumed by the enumerated categories. Petr.'s Br. 18-19 ("[A]n agency's response to a FOIA request is a 'report' and its search for documents responsive to such a request is an 'investigation.'"). Contrary to the Petitioner's assertion, responding to a FOIA request neither rises to an administrative "investigation," nor is a federal agency required to conduct an "investigation" in response to such a request. The law is clear: an agency's obligation is simply to make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Baker & Hostetler, LLP v. U.S. Dep't of Commerce,* 473 F.3d 312, 318 (D.C. Cir. 2006) (citations and internal quotation marks omitted).[11] No investigation is required.[12] As a

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[11] *See also Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), *aff'd*, No. 89-5414, 1990 WL 123924 (D.C Cir. Aug. 13, 1990) (per curiam) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters."); *Freeman v. Dep't of Justice*, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish.").

[12] Courts repeatedly have held that agencies are not required to respond to questions or requests for explanations. *Zavala v.*

matter of law, it is established that a FOIA response is not commensurate with a government "investigation" as that term is used in the FCA.

The Court also should reject the assertion that the "ordinary use" of the word "investigation" includes an agency's process of searching for documents responsive to a FOIA request. Petr.'s Br. 19-20. According to the Petitioner:

> An inquiry of this nature comes within the ordinary meaning of "investigation." Thus, not surprisingly, searches performed in response to FOIA requests are referred to in ordinary usage as "FOIA investigations." *See, e.g.*, *Madison Mech., Inc. v. Nat'l Aeronautics & Space Admin.*, No. Civ. A. 99-2854 (EGS), 2003 WL 1477014, at * 6 (D.D.C. Mar. 20, 2003); *Malinowski v. F.B.I.*, No. 86 Civ. 2239 (JFK), 1987 WL 12826, at *1 (S.D.N.Y. June 17, 1987).

Petr.'s Br. 20-21 (emphasis added). The authority cited does not represent a common or ordinary

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*Drug Enforcement Admin.*, 667 F.Supp.2d 85, 93 n.2 (D.D.C. 2009); *Anderson v. United States Dep't of Justice,* 518 F.Supp.2d 1, 10 (D.D.C.2007) ("The DEA need not 'create documents or opinions in response to an individual's request for information.'") (internal citations and quotations omitted); *Zemansky v. Envtl. Prot. Agency,* 767 F.2d 569, 573 (9th Cir. 1985) (affirming grant of summary judgment on requester's counterclaim which sought declaration of agency's obligation under FOIA to generate documents explaining its policies and actions); *Di Viaio v. Kelley,* 571 F.2d 538, 542-43 (10th Cir. 1978) (questions are not within FOIA's scope).

interpretation of the word "investigation" as the term is used in FOIA jurisprudence. An electronic search of all state and federal cases available in Westlaw reveals that in more than 9,375 cases that involve FOIA requests, the phrase "FOIA investigation" appears just *twice*—in the two unreported cases cited by the Petitioner.[13] Simply stated, a search performed in response to a FOIA request is *not* in the "ordinary use" of the terms referred to as a "FOIA investigation."

Second, conditioning the denial of subject matter jurisdiction on the degree of effort expended by agency staff is unworkable standard for a district court that has no facts before it to determine whether the agency effort was sufficiently substantial or insubstantial to be an "investigation" or a "report."

Put simply, the determination of whether a particular document produced in response to a FOIA request constitutes an administrative investigation or report depends not on how much effort was involved in locating the document, but rather on the nature of the document itself.[14]

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[13] Counsel for AARP conducted a Westlaw electronic search on January 20, 2011, using the database "ALLCASES." Of the 9,375 cases that involved FOIA, only 2 cases—the two cited by Petitioners—use the phrase "FOIA investigation."

[14] Similarly, throughout the process of responding to a FOIA request, *the nature of the documents* is crucial. For example, many documents may be subject to one or more of FOIA's exemptions. This Court has made it clear that the applicability of exemptions to FOIA turns on "the nature of the requested document." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772 (1989) (internal citation

### C. The "Enumerated Categories" Are Rendered Meaningless By A Categorical Rule.

Petitioner's interpretation of the public disclosure provision should be rejected because it renders the enumerated categories meaningless. Congress carefully identified the three categories of "public disclosure[s]" that can trigger the FCA's jurisdictional bar: (1) disclosures in "a criminal, civil, or administrative hearing"; (2) disclosures in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. § 3730(e)(4)(A). Each category evidences a likelihood that the government has actual knowledge or knowledge fairly implied of the fraud. Thus, Congress explicitly barred only those *qui tam* actions based on information that the government has publicly disclosed in the course of investigating, exposing,

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and quotation omitted); *FBI v. Abramson,* 456 U.S. 615, 626 (1982) ("[I]n determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure."). In some instances, a categorical approach is acceptable in determining whether certain types of records are exempt from disclosure. *Reporters Committee*, 489 U.S. at 778-79 ("rap sheets" are a type of document that categorically are "law enforcement records" exempt from disclosure under FOIA); *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 241 (1978) (finding that an entire category of documents—such as witness statements—can be found to be exempt from disclosure under FOIA). Other times, a document-by-document assessment is required. *Id.* at 229-30.

prosecuting, or otherwise pursuing the allegations of fraud.

To interpret this one-sentence provision so broadly as to also bar all *qui tam* lawsuits based on documents released in response to a FOIA request—regardless of the nature of the documents and irrespective of whether those documents fall into one of the three specified categories—would render Congress's expressly carved-out categories superfluous. Such an interpretation should be rejected. *Corley v. United States*, 129 S. Ct . 1558, 1566 (2009) (One of the "most basic interpretive canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . ."); *United States v. Fiorillo,* 186 F.3d 1136, 1153 (9th Cir.1999) ("One provision of a statute should not be interpreted in a manner that renders other sections of the same statute 'inconsistent, meaningless or superfluous.'") (internal citations omitted).

## III. A CATEGORICAL RULE WOULD UNDERMINE THE FCA'S REMEDIAL PURPOSES AND LEAD TO ABSURD RESULTS

The Second Circuit held, after carefully considering the statute and its legislative history, that the determination of whether a document obtained in response to a FOIA request is an enumerated source within the meaning of §3730(e)(4)(A) depends on the nature of the document itself. *U.S. ex rel. Kirk*, 601 F.3d at 107. The ruling makes sense because FOIA responses can include innumerable types of documents, some of

which inevitably will fall within the enumerated categories that trigger application of the public disclosure bar, and some of which will not. The plain language of the disclosure provision supports the Second Circuit's decision that only those FOIA documents that fit within the statute's carefully enumerated categories should be deemed to trigger the public disclosure provisions. This achieves the balance Congress has so determinedly worked to achieve "between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406 (2010) (quoting *United States ex rel. Springfield Terminal R. Co. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir.1994)).

Petitioner's proposed categorical rule prohibiting all *qui tam* cases based on any document provided in response to a FOIA request, regardless of the nature of the document, overturns this balance. Congress's goal of "encourag[ing] more private enforcement suits," would be undermined by a categorical rule making it more difficult for relators to discover information to expose fraud against the government. S. Rep. No. 99-345, at 23-24 (1986); *see also Cook County v. United States ex rel. Chandler,* 538 U.S. 119, 133 (2003) (explaining that the 1986 FCA amendments "enhanced the incentives for relators to bring suit"); *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 950 (1997) (1986 amendments "permitt[ed] actions by an expanded universe of plaintiffs").

Therefore, such a rule would reduce the number of *qui tam* lawsuits brought by relators.

Furthermore, such a construction of § 3730(e)(4)(A) would bar not only parasitic lawsuits, but also legitimate *qui tam* cases like Respondent's lawsuit, which likely never would have come to the federal government's attention were it not for his inside information. The remedial purposes of the FCA are not served in a setting where meritorious claims are impeded, leaving fraud against the government unchecked. "[A]n overbroad reading of the jurisdictional bar would prevent an individual with independent but partial knowledge of a possible fraud . . . from bringing a lawsuit that is neither parasitic nor frivolous." *Schindler Elevator*, 601 F.3d at 110.

The Court recently reaffirmed that when interpreting the FCA's disclosure provisions, "the statutory touchstone" is not whether any information whatsoever has been disclosed, but rather "whether the allegations of fraud have been 'publicly disclosed' . . . ." *Graham County*, 130 S. Ct. at 1410 (internal citations omitted) (emphasis added). The Court of Appeals for the D.C. Circuit addressed this issue at length in *Springfield Terminal*. There, the Court found that both the plain language[15] and the purpose and policy of the FCA's public disclosure provision mandate the conclusion that "Congress sought to prohibit *qui tam*

[15] The plain language of the public disclosure provision makes it clear that it applies to the public disclosure of "allegations or transactions" in one of the enumerated fora. 31 U.S.C. §3730(e)(4)(A).

actions <u>only</u> when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain."[16] *Springfield Terminal*, 14 F.3d at 654 (emphasis in original). "Many potentially valuable *qui tam* suits would be aborted prematurely by a reading of the jurisdictional provision that barred suits when the only publicly disclosed information was itself innocuous." *Id.* The claims alleged by Respondent are precisely the kind that the *Springfield Terminal* court was concerned would be prematurely barred by an overly-broad application of the FCA's public disclosure provisions.

Finally, Petitioner and *Amici* sensationalize the Second Circuit's common sense rule and express concern that, absent a categorical denial of subject matter jurisdiction, "vexatious" *qui tam* lawsuits will be filed. Petr.'s Br. 45 ("The Second Circuit's Interpretation of the Public-Disclosure Bar Will Have Far-Reaching and Damaging Consequences.");

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[16] The Second Circuit, in the decision below, also observed that the FCA "indicates that the public disclosure (via an enumerated source) must be of the material elements of the 'allegations or transactions' on which the claim is based." *U.S. ex rel. Kirk*, 601 F.3d at 103 (citing 31 U.S.C. § 3730 (e)(4)(A);*United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 736 (7th Cir. 2007) (stating that "[a] 'public disclosure' exists under §3730(e)(4)(A) when the critical elements exposing the transaction as fraudulent are placed in the public domain" (internal quotation marks omitted)), *overruled on other grounds by Glaser v. Wound Care Consultants,* 570 F.3d 907 (7th Cir. 2009); and *United States ex rel. Grynberg v. Praxair, Inc.,* 389 F.3d 1038, 1049-51 (10th Cir. 2004) (finding that "allegations or transactions" have been disclosed when "[a]ll of the material elements of the fraudulent transaction were already in the public domain")).

*Amici Curiae* of the Chamber of Commerce *et al.* Br. 10 ("[T]he proliferation of vexatious or otherwise non-meritorious *qui tam* actions is . . . very real. . . . Unless the Court reverses the Second Circuit's decision, any citizen will be able to use FOIA to scavenge through the government's files looking for material to support a qui tam case."). Their objections rest on mischaracterizations of the court's ruling. The court did *not* hold "that FOIA responses do not trigger the public-disclosure bar . . . ." Petr.'s Br. 46. Nor did the Second Circuit "discard the requirement that relators have firsthand knowledge of misconduct" or find that a *qui tam* case can be based on "FOIA responses alone." *Id.* Instead, the court employed an approach that focused on the nature of the document itself, and not the mere fact that anything has been disclosed under FOIA, as the determinant whether it falls into one of the enumerated categories that triggers the statute. *U.S. ex rel. Kirk*, 601 F.3d at 111. It placed this determination in the sound discretion of federal district court judges who are properly the gatekeeper for whether a FOIA response works a denial of jurisdiction. The judiciary also is empowered to remedy any claims that lack merit or are filed for vexatious reasons under the Federal Rules of Civil Procedure.

It can be no solution to indiscriminately toss out of court every *qui tam* lawsuit in the presence of a FOIA response regardless of the nature and content of the document. Doing so will only dispose of meritorious claims of fraud against the government in contravention of the letter and spirit of the FCA. *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (when absurd results follow

from giving broad meaning to words, it is "unreasonable to believe that the legislator intended" that result); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

## CONCLUSION

For the foregoing reasons, AARP respectfully submits that the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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