No. 10-188

In the Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION, PETITIONER

v.

UNITED STATES, EX REL. DANIEL KIRK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides that "[n]o court shall have jurisdiction over [a *qui tam* action] based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," unless the relator "is an original source of the information." 31 U.S.C. 3730(e)(4)(A). In this case, respondent's *qui tam* complaint was based in part on information provided by the Department of Labor (DOL) in response to three Freedom of Information Act (FOIA) requests submitted by respondent's wife. The question presented is as follows:

Whether DOL's responses to the relevant FOIA requests, or the internal searches the agency conducted to locate responsive records, constitute "administrative * * * report[s] [or] investigation[s]" within the meaning of the FCA's "public disclosure" bar.

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INTEREST OF THE UNITED STATES

This case involves the "public disclosure" bar of the False Claims Act (FCA), 31 U.S.C. 3730(e)(4). An overly broad construction of the bar would preclude *qui tam* actions in circumstances in which relators serve the valuable function of bringing to light fraud against the federal fisc; an unduly narrow construction risks requiring the government to share its recovery when the relator has added nothing of value to the government's enforcement efforts. Because the FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and because the government receives the bulk of any award obtained through a *qui tam* action, the United States has a substantial in-

terest in the proper construction of the "public disclosure" provision.

STATEMENT

1. The FCA, 31 U.S.C. 3729 *et seq*., provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B) (West 2010).[1] The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a "*qui tam*" civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). If a *qui tam* action results in the recovery of damages or

[1] After this lawsuit was filed, Congress twice amended the FCA. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119. In general these amendments "make[] no mention of retroactivity, which would be necessary for [their] application to pending cases." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010) (*Graham County*). However, Congress made the amendments to former Section 3729(a)(2) retroactive by specifying that new Section 3729(a)(1)(B) "shall take effect as if enacted on June 7, 2008, and apply to all claims under the [FCA] * * * that are pending on or after that date." Pub. L. No. 111-21, § 4, 123 Stat. 1625. Accordingly, the old version of Section 3729(a)(1) and the current version of Section 3729(a)(1)(B) apply in this case. Pet. App. 36a-37a. In all other respects, the brief references the pre-amendment version of the FCA except where otherwise noted.

civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

If a relator brings a *qui tam* action, the complaint is filed under seal and served upon the government, and "[t]he Government may elect to intervene and proceed with the action." 31 U.S.C. 3730(b)(2). If the government initially declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). Even in cases where the government declines to intervene, the United States retains authority to dismiss a *qui tam* suit "notwithstanding the objections of the person initiating the action." 31 U.S.C. 3730(c)(2)(A); see *Swift* v. *United States*, 318 F.3d 250, 251-254 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003); see also 31 U.S.C. 3730(c)(2)(B) (government can also settle "notwithstanding the objections of the [relator] if the court determines" that the settlement "is fair, adequate, and reasonable").

As relevant here, the FCA's "public disclosure" provision states:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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.[2]

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[2] As enacted, Section 3730(e)(4)(A) refers to the "Government Accounting Office," but "[i]t is undisputed that the intended referent was

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4) (footnote omitted).

2. a. The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. 4211 *et seq.*, requires covered federal contractors and subcontractors to take affirmative action to employ and advance the employment of veterans, and to submit annual reports to the Secretary of Labor (Secretary) providing information about the number of veterans the contractor employs.[3] 38 U.S.C. 4212(a)(1) and (d). Covered contractors must "report at least annually to the Secretary" on matters such as the number of employees, by job category and hiring location, who are "qualified covered veterans." 38 U.S.C. 4212(d); see 38 U.S.C. 4212(a)(3) (defining "qualified covered veteran"). Applicable regulations require each covered contractor to file "VETS-100 [R]eports" by September 30 of each year. 41 C.F.R. 61-250.10(c). A separate report must be submitted for each hiring location employing 50 or more persons. 41 C.F.R. 61-250.11.[4] A covered veteran who believes

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the *General* Accounting Office, now renamed the Government Accountability Office." *Graham County*, 130 S. Ct. at 1402 n.6.

[3] VEVRAA applies to all federal procurement contracts for non-personal services that exceed certain monetary thresholds. 38 U.S.C. 4212(a)(1); Pet. App. 5a n.1.

[4] The cited regulations apply to covered contracts entered into before December 1, 2003. 41 C.F.R. 61-250.1(a). For all relevant pur-

that a contractor has failed to comply with any VEVRAA-mandated contractual obligation may file a complaint with the Secretary. 38 U.S.C. 4212(b).

In 1998, Congress enacted the Veterans Employment Opportunities Act, Pub. L. No. 105-339, 112 Stat. 3182. In addition to amending VEVRAA in certain respects, the Act added a new section to the Appropriations Chapter of Title 31, prohibiting federal agencies from "obligat[ing] or expend[ing] funds * * * to enter into a contract [covered by VEVRAA] with a contractor from which a [VETS-100] report was required * * * with respect to the preceding fiscal year if such contractor did not submit such report." Pub. L. No. 105-339, § 7, 112 Stat. 3188-3189 (now codified at 31 U.S.C. 1354(a)(1)).[5] The regulations implementing this provision require each contractor to certify that, "[b]y submission of its offer, the offeror represents that, if it is subject to the reporting requirements [of VEVRAA] * * * it has submitted the most recent VETS-100 Report required by that [Act]." 48 C.F.R. 52.222-38 (2009); see 48 C.F.R. 22.1302(b) (2009).

b. In July 1966, Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. 522. FOIA divides agency records into three categories: some must be published in the Federal Register, 5 U.S.C. 552(a)(1);

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poses, the same requirements apply to covered contracts entered into (or modified) after that date. See 41 C.F.R. 61-300.1(a), 61-300.10(c), and 61-300, App. A.

[5] That statute also provides that the prohibition on contracting "shall cease to apply * * * on the date on which the contractor submits the report required by * * * section 4212(d)," 31 U.S.C. 1354(a)(2), and directs the Secretary to maintain a database of contractors that are in compliance with the VETS-100 reporting requirement, 31 U.S.C. 1354(b).

some must be "available for public inspection and copying," 5 U.S.C. 552(a)(2); and all others must be furnished upon request, 5 U.S.C. 552(a)(3). See *Federal Open Mkt. Comm. of the Fed. Reserve Sys*. v. *Merrill*, 443 U.S. 340, 352 (1979). Under 5 U.S.C. 552(a)(3), federal agencies generally must make records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption applies. 5 U.S.C. 552(a)(3); see 5 U.S.C. 552(b); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-755 (1989). In responding to a proper request under FOIA, an agency "shall make the records promptly available," and "shall make reasonable efforts to search for the records." 5 U.S.C. 552(a)(3)(A) and (C). The term "search" is defined to mean "to review * * * agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. 552(a)(3)(D).

3. Petitioner manufactures, installs, and maintains elevators in buildings and has numerous federal contracts that are subject to VEVRAA. Respondent is a Vietnam-era veteran and former employee of petitioner. In March 2005, respondent filed a *qui tam* action against his former employer under the FCA. The United States declined to intervene and, in June 2007, respondent amended his complaint and proceeded with the litigation. Pet. App. 4a-5a, 49a-50a.

a. Respondent alleged that petitioner had bid for and was awarded contracts covered by VEVRAA, and had submitted claims for payment on those contracts, even though petitioner knew that it had not filed the required VETS-100 Reports in some years and that it had filed false VETS-100 Reports in other years. See Pet. App. 10a-11a; J.A. 33a-40a. More specifically, re-

spondent alleged that petitioner had failed to file any VETS-100 Reports until 2004—only after respondent alerted the Department of Labor (DOL) to petitioner's noncompliance.[6] J.A. 14a-15a. Respondent alleged that petitioner had then deliberately filed false VETS-100 Reports for 2004-2006, and had filed untimely and false reports for 2002. J.A. 15a, 34a-37a; Pet. App. 10a. Respondent alleged that the filed reports were false because, *inter alia*, petitioner had failed to file separate reports for each hiring location employing more than 50 persons (including the location where respondent was employed); had "grossly understate[d]" the number of covered veterans in each job category (respondent alleged in particular that petitioner's VETS-100 Reports listed "zero" covered veterans in several job categories, but that respondent was aware of (and named in the complaint) covered veterans so employed); and had failed to collect the information necessary to submit accurate reports. Pet. App. 10a; J.A. 34a-37a. Respondent also alleged that petitioner had failed to file any VETS-100 Reports for 1998-2001 and 2003. J.A. 33a; Pet. App. 10a.

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[6] In April 2004, respondent filed an employment-discrimination complaint against petitioner with DOL's Office of Federal Contract Compliance Programs (OFCCP), primarily alleging that petitioner had demoted and constructively terminated him despite his status as a Vietnam-era veteran, in violation of VEVRAA. Pet. App. 4a. On February 7, 2005, the OFCCP District Office found insufficient evidence to support respondent's claim (Supp. App. 56-65), and that ruling was affirmed by the National Office in 2009 (J.A. 106a-120a). The agency's final decision focused primarily on respondent's claims of discrimination, but it also stated that petitioner had "submitted the then current VETS-100 Report to OFCCP," and that respondent's "accusation that [petitioner] filed false reports [was] not substantiated with any evidence other than [his] statement." J.A. 115a, 116a.

Respondent's allegations were based in part on information he had received from DOL in response to three FOIA requests. In November 2004, respondent's wife submitted a FOIA request for copies of all VETS-100 Reports filed by petitioner for the years 2002 through 2004. Supp. App. 99. On February 11, 2005, DOL responded with a one-page cover letter, stating that "[a] search of records produced the enclosed reports for the year 2004. Under the Privacy Act information was redacted. No records responsive to your request for the years 2002 and 2003 were found." *Id.* at 100. Copies of redacted 2004 VETS-100 Reports were enclosed. *Id.* at 101-103. In January 2005, respondent's wife submitted a second FOIA request for copies of all VETS-100 Reports filed by petitioner for the years 1998 through 2001. *Id.* at 105. On September 29, 2005, DOL responded with another one-page cover letter, stating that "[a] search of records produced the enclosed reports for the year 2001. Under the Privacy Act information was redacted. No records responsive to your request for the years [1998-2000] were found." *Id.* at 106. Again, copies of the redacted VETS-100 Reports were enclosed.[7] *Id.* at 107-134. In April 2007, respondent's wife submitted a third FOIA request for petitioner's VETS-100 Reports for 2005 and 2006. *Id.* at 136-137. On May 14, 2007, DOL responded by e-mail stating that it had "identified" the requested records and was attaching them to the e-mail. *Id.* at 138-206.

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[7] Each VETS-100 Report generally spans two calendar years, as the applicable regulations require that VETS-100 Reports be filed no later than September 30 of each year. See p. 4 & note 4, *supra*. The enclosed reports were actually for the year ending September 30, 2002. Supp. App. 107-134. This brief refers to the relevant VETS-100 Reports based on the year the report was filed.

b. In September 2007, petitioner moved to dismiss respondent's complaint on several grounds, including the FCA's "public disclosure" bar. As relevant here, the district court characterized respondent's complaint as setting forth two different ways in which petitioner had violated the FCA: (i) by the alleged filing of knowingly false VETS-100 Reports for certain years, and (ii) by the alleged knowing failure to file any reports for other years. Pet. App. 64a. On the false-report allegations, the district court held that respondent had failed to state a claim under the FCA because (in the court's view) petitioner was not required to certify as a condition of payment that its annual VETS-100 Reports were accurate. *Id.* at 66a-67a. For the failure-to-file allegations, the court concluded that respondent had stated a valid claim under the FCA. *Id.* at 65a-66a. The court held, however, that it lacked jurisdiction to consider that claim because respondent's allegations were based upon information contained in DOL's responses to respondent's FOIA requests and respondent was not an original source of that information. *Id.* at 70a-87a. The court concluded, *inter alia*, that DOL's responses to the FOIA requests were "public" disclosures, *id.* at 75a-79a, and that, because DOL in responding to each FOIA request had "conducted a search and prepared a letter detailing that search and its results," the letters and searches qualified as "administrative" "report[s]" and "investigation[s]" within the meaning of Section 3730(e)(4)(A), *id.* at 81a-84a.

4. The court of appeals reversed. Pet. App. 1a-48a. The court explained that, in order for the "public disclosure" bar to apply, there must be a "'public disclosure' of the information on which the allegation of fraud rests, and this 'public disclosure' must occur through one of

the sources enumerated in the statute." *Id.* at 14a. On the first question, the court of appeals agreed with "every circuit to have considered this issue" that information produced in response to a FOIA request meets the "public disclosure" requirement because it "becomes public once it is received by the requester." *Id.* at 15a-16a (citing cases).

On the second question, the court of appeals acknowledged that other 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 examining the approaches taken by other courts of appeals, *id.* at 17a-23a, the court concluded that "whether a document obtained through a FOIA request is an enumerated source within the meaning of [Section] 3730(e)(4)(A) depends on the nature of the document itself," *id.* at 23a.

The court of appeals explained that, read in context, the term "report" in Section 3730(e)(4)(A) "connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a 'hearing' or 'audit.'" Pet. App. 24a. The term "investigation," the court observed, likewise "implies a more focused and sustained inquiry directed toward a government end." *Ibid.* The court explained that FOIA, in contrast, "is simply a mechanism for granting the public access to information in the possession of an agency." *Id.* at 26a. The court acknowledged that "an agency responding to a FOIA request conducts a review of its records and compiles all responsive documents before providing them to the requester," but it emphasized that the agency "does *not* * * * syn-

thesize the documents or their contents with the aim of itself gleaning any insight or information, as, in contrast, it necessarily would in conducting a 'hearing' or 'audit.'" *Id.* at 25a-26a.

While recognizing the limitations of the relevant drafting history, Pet. App. 26a-27a (citing *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1407-1410 (2010)), the court of appeals found it "clear that the 1986 [FCA] amendments * * * were a reaction against the previous version of the statute which had barred any *qui tam* action that was based on information in the possession of the government," *id.* at 27a. The court also emphasized that the "facts of this case belie the assertion that individuals who are not original sources and who obtain information through FOIA requests will generally * * * be opportunistic litigators." *Id.* at 29a. The court explained that respondent "became suspicious based on his own experience as a Vietnam veteran employed by [petitioner], that [petitioner] was not in compliance with VEVRAA," and that respondent's receipt of the relevant documents through FOIA requests simply enabled him "to put the pieces of his lawsuit together." *Id.* at 30a. The court concluded that the VETS-100 Reports disclosed in this case "are not enumerated sources" and that "the FCA's jurisdictional bar does not apply." *Id.* at 33a.[8]

[8] The court of appeals further held that respondent had stated a claim under the FCA both with respect to petitioner's alleged failure to file VETS-100 Reports in certain years, and with respect to petitioner's alleged filing of false reports in other years. Pet. App. 34a-47a. Petitioner did not seek review of that aspect of the court's decision.

SUMMARY OF ARGUMENT

1. Although the release of federal records in response to a FOIA request constitutes a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A), the FCA does not bar all *qui tam* suits based upon publicly disclosed information, or even all *qui tam* suits based upon information that has been released into the public domain by government officials. As the court of appeals correctly held, the determination whether a particular FOIA release effects the public disclosure of an "administrative * * * report [or] investigation" depends on the nature of the agency records that are disclosed.

Under that approach, the VETS-100 Reports that respondent obtained through FOIA are not "administrative" "reports." This Court has recognized that the term "administrative" in Section 3730(e)(4)(A) "is most naturally read to describe the activities of governmental agencies," *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1402 (2010), and the VETS-100 Reports were prepared by a private entity (petitioner) rather than by any governmental unit. The VETS-100 Reports also do not suggest the existence of any government "investigation" (let alone any government "audit" or "hearing"). The documents that respondent obtained through FOIA therefore fall outside the coverage of Section 3730(e)(4)(A). Petitioner cannot avoid that conclusion by characterizing DOL's FOIA response itself as an "administrative" "report," or by treating the agency's search for responsive records as an "administrative" "investigation."

2. a. Read in context, the terms "report" and "investigation" cannot bear the expansive reading petitioner advocates. The term "report" is best understood

to refer to a formal account of a government inquiry or analysis, such as a hearing, audit, or investigation. The term "investigation," in turn, is naturally read to refer to an official probe designed to uncover the truth of a matter, usually some form of wrongdoing.

Congress could easily have drafted Section 3730(e)(4)(A) to cover *all* public disclosures emanating from specified governmental sources, but Congress instead limited the provision's coverage to certain governmental "report[s]," "hearing[s]," "audit[s]," and "investigation[s]." Taken together, those terms reflect Congress's focus on situations in which the government is conducting, or has completed, some focused inquiry or analysis concerning the relevant facts. Acceptance of petitioner's theory—under which Section 3730(e)(4)(A) would cover federal agency disclosures of documents (like those at issue here) that were prepared by private entities and do not reflect any federal inquiry or analysis—would effectively redraw the balance struck by Congress.

b. A FOIA search is not an "investigation," and a FOIA response is not a "report," within the meaning of Section 3730(e)(4)(A). In discharging its obligations under FOIA, a federal agency reviews documents to determine whether they are responsive to a request, and to ascertain whether a statutory exemption applies—not to draw a conclusion about any primary conduct that the documents may describe. In addition, an agency can make records available under FOIA in a variety of ways, some of which would not involve an "investigation" or result in a "report" under any plausible definition of those terms. There is no reason to think that Congress intended Section 3730(e)(4)(A)'s application to turn on the method of public disclosure.

3. The statutory history and purposes of the "public disclosure" bar reinforce the conclusions that a FOIA response is not an "administrative" "report," and that an agency's search for responsive documents is not an "administrative" "investigation." Petitioner's approach would subvert Congress's effort to strike an appropriate balance between preventing "parasitic" *qui tam* suits and encouraging relators who make meaningful contributions to the government's anti-fraud efforts. And petitioner is simply wrong in arguing that Congress sought to limit the *qui tam* mechanism to relators who possess "firsthand knowledge" of fraud. Rather, Congress required "direct and independent" knowledge, 31 U.S.C. 3730(e)(4)(B), only in the limited subset of cases involving a prior public disclosure through one of the sources enumerated in Section 3730(e)(4)(A).

4. Petitioner's policy arguments misunderstand important aspects of the FCA, ignore others, and have little to do with the question presented. Petitioner seeks in essence to use the "public disclosure" bar to counteract the practical effects of what petitioner perceives to be unduly broad theories of substantive FCA liability. Section 3730(e)(4)(A) is neither intended nor well suited for that purpose.

ARGUMENT

A FEDERAL AGENCY'S RESPONSE TO A FOIA REQUEST IS NOT ITSELF AN "ADMINISTRATIVE" "REPORT" OR "INVESTIGATION" WITHIN THE MEANING OF THE FCA'S "PUBLIC DISCLOSURE" BAR

The FCA does not categorically bar all *qui tam* actions that are based upon publicly disclosed information, or even all *qui tam* suits based upon information that was publicly disclosed by government officials. Instead,

Congress confined the "public disclosure" bar to "allegations or transactions" that have been publicly disclosed in (1) "a criminal, civil, or administrative hearing," (2) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation," or (3) "the news media." 31 U.S.C. 3730(e)(4)(A); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1401-1402 (2010) (*Graham County*).

Whether a disclosure is sufficiently "public," and whether the relevant "allegations or transactions" are disclosed through one of the enumerated means, are two distinct inquiries. A "public disclosure" occurs whenever relevant information is provided to even a single "stranger to the fraud" outside the government, so long as the outsider is not precluded from further disseminating the information. See, *e.g.*, *United States ex rel. Fine* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1544-1545 (10th Cir. 1996); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322-323 (2d Cir. 1992); see also *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108-109 (1980) ("as a matter of common usage," the term "public disclosure" under the Consumer Product Safety Act (CPSA), 15 U.S.C. 2051 *et seq.*, includes disclosure to FOIA requester). Allegations or transactions of fraud can enter the public domain in any number of ways: they can be broadcast in a news report, disclosed in a criminal complaint, posted on a company's website, filed in a public library, or exposed by a corporate insider. As both parties to this case recognize, disclosure under FOIA is one such method of public disclosure. Resp. Br. 18; Pet. App. 15a-16a.

Section 3730(e)(4)(A), however, applies only to the "public disclosure of allegations or transactions in certain specified sources." *Graham County*, 130 S. Ct. at

1400. The VETS-100 Reports that respondent obtained under FOIA were not themselves "administrative" "report[s]" within the meaning of that provision. As used in Section 3730(e)(4)(A), the term "administrative" "is most naturally read to describe the activities of governmental agencies." *Id.* at 1402. The VETS-100 Reports were prepared by a private entity (petitioner) rather than by any government actor, and they did not reveal the existence of any "administrative" "investigation." As the court of appeals correctly held, petitioner cannot evade that limit on the FCA's "public disclosure" bar by characterizing DOL's search for responsive records as an "investigation," or by describing the agency's FOIA response as a "report."

A. The Plain Language Of Section 3730(e)(4)(A) Does Not Encompass FOIA Responses

1. Contrary to petitioner's contentions (Br. 17-22), the words "report" and "investigation" do not have a single "ordinary meaning" that encompasses the FOIA responses at issue here.

a. The term "report" can refer to "something that gives information: a [usually] detailed account or statement," a "notification." See *Webster's Third New Int'l Dictionary of the English Language* 1925 (1971) (*Webster's Third*) (cited at Pet. Br. 19); *United States ex rel. Mistick PBT* v. *Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000). But the term is also commonly defined as "a [usually] formal account of the results of an investigation given by a person or group authorized or delegated to make the investigation," *Webster's Third* 1925; "[a]n account or relation, [especially] of some matter specially investigated," *Webster's New Int'l Dictionary of the*

English Language 2113 (2d ed. 1958) (*Webster's New Int'l*); and "[a]n account brought by one person to another, [especially] of some matter specially investigated," "[a] formal statement of the results of an investigation," 8 *The Oxford English Dictionary* 650 (2d ed. 1989).

Although the term "investigation" can refer to a "detailed examination," *Webster's Third* 1189 (cited at Pet. Br. 20), it is also defined to mean a "searching inquiry" and "an official probe," *ibid.* See *American Heritage Dictionary of the English Language* 920 (4th ed. 2006) ("[a] detailed inquiry or systematic examination"); 13 *The Oxford English Dictionary* 47 ("systematic examination," "careful and minute research"); *Webster's New Int'l* 1306 ("process of inquiring into or tracking down; thorough inquiry; research"). "Investigation" is a synonym for "inquiry," along with "inquest," "inquisition," "probe," and "research"—"nouns [that] denote a quest for knowledge, data, or truth." *Webster's Third* 1167. "Research" involves "careful, prolonged study, [especially] to uncover new knowledge." *Ibid.* And a "probe" "may apply to any deep, painstaking inquiry to discover something wrong or improper." *Ibid.*[9]

b. As this Court recently confirmed in the context of the "public disclosure" bar, "[s]tatutory language has meaning only in context." *Graham County*, 130 S. Ct. at 1404; see *Jones* v. *United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase 'gathers meaning from the words

[9] Other provisions of the FCA use the term "investigation" in this more targeted sense. See, *e.g.*, 31 U.S.C. 3729(a)(C) (referencing "the existence of an investigation into [an FCA] violation"); 31 U.S.C. 3730(c)(4) (referencing "the Government's investigation or prosecution of a criminal or civil matter").

around it.'") (citation omitted). The terms "report" and "investigation" are illuminated by the adjectives—"congressional, administrative, or [GAO]"—that modify those nouns. As this Court recognized in *Graham County*, that statutory context indicates that the word "administrative" in the "public disclosure" bar is limited to the "activities of governmental agencies." 130 S. Ct. at 1402; see p. 16, *supra*. That context also suggests that Section 3730(e)(4)(A)'s reference to "administrative" "report[s]" and "investigation[s]" is confined to agency reports and investigations analogous to those that Congress and the GAO would issue or conduct.

The terms "congressional report" and "congressional investigation" denote a far more specific meaning than "something that gives information" (Pet. Br. 19) or "a detailed examination" (*id.* at 20). Cf. *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history, we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."); *Watkins* v. *United States*, 354 U.S. 178, 188, 198 (1957) (finding the "Bill of Rights" applicable to "congressional investigations"). The same is true with respect to the GAO. Cf. GAO, *About GAO Reports*, http://www.gao.gov/about/products/about-gao-reports.html (last visited Jan. 24, 2011) (explaining that one of "GAO's primary products is reports, often called 'blue books'"); GAO, *Our Products*, http://www.gao.gov/about/products (describing the process for releasing "GAO reports" to the public); 31 U.S.C. 712(4) ("The Comptroller General shall * * * make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures"). Under petitioner's expansive definitions of "re-

port" and "investigation," however, a congressional staffer's response to a press inquiry would be a congressional "report," and her search for information with which to respond would be an "investigation."

c. If Congress had intended Section 3730(e)(4)(A) to encompass all public disclosures effected by specified governmental units, the provision could have been drafted in far simpler fashion: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [by a congressional, administrative, or GAO employee] or from the news media." Instead, Congress limited Section 3730(e)(4)(A)'s coverage to public disclosures in certain governmental "report[s], hearing[s], audit[s], or investigation[s]." Taken together, those terms reflect a focus on situations in which the government is conducting, or has completed, some focused inquiry or analysis concerning the relevant facts.

Congress may have viewed the existence of an ongoing or concluded governmental inquiry or analysis as an indication that *qui tam* suits are unnecessary because the government is capable of pursuing any potentially meritorious fraud claims. Or Congress may have viewed relators who seek to exploit prior government inquiry or analysis as more "parasitic," and therefore less worthy of reward, than relators who recognize the previously unappreciated significance of "raw" information released by the government into the public domain. In any event, the clear import of the language Congress chose is that at least *some* public disclosures by the government will not trigger Section 3730(e)(4)(A)'s jurisdictional bar. The VETS-100 Reports at issue here, which were prepared by a private entity and reflect no govern-

mental inquiry or analysis, fall squarely within that category.

2. Viewed in the proper statutory context, a federal agency's response to a FOIA request is not itself an "administrative" "report," and the agency's antecedent search for responsive records is not an "administrative" "investigation."

a. FOIA had been in effect for 20 years when Section 3730(e)(4)(A) was amended in 1986, and the 1986 FCA amendments themselves reflect Congress's awareness of the obligations that FOIA imposes.[10] In 1986 (as now), however, an agency's search for records was not referred to as a "FOIA investigation," nor was an agency's response to a FOIA request called a "FOIA report." Although petitioner finds it significant that the court of appeals referred to "FOIA reports" in summarizing the district court's holding (Br. 20 (citing Pet. App. 12a)), none of this Court's opinions discussing FOIA has used the term "FOIA report" or any variant thereof. Some documents requested or released under FOIA are naturally described as "reports," but the act of release has not been so characterized. See, *e.g.*, *United States Dep't of State* v. *Ray*, 502 U.S. 164, 168, 173, 177, 179 (1991) (referring to FOIA request seeking "reports" of immigration interviews, but referring to the

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[10] At the same time Congress amended the "public disclosure" bar to include the terms "administrative" "report" and "investigation," it also added an exemption from disclosure under FOIA for certain information furnished by a person who had committed an FCA violation. See Act of Oct. 27, 1986, Pub. L. No. 99-562, § 2(d), 100 Stat. 3154; cf. *CPSC*, 447 U.S. at 109 ("That Congress was aware of the relationship between [Section 6 of the CPSA] and the FOIA when it enacted the CPSA is exhibited by the fact that Congress * * * specifically incorporated" the FOIA exemptions in that provision.).

agency's response as a "production" of documents); *CPSC*, 447 U.S. at 106, 107 (discussing a FOIA request for accident "reports," but referring to the agency's response as a "release" of documents).

Contrary to petitioner's suggestion (Br. 20-21), searches performed in response to FOIA requests are not commonly referred to as "FOIA investigations." This Court has never used that terminology, and the two unpublished district court cases petitioner cites (each of which uses the term "FOIA investigation" once) are outliers. A search for "FOIA investigation" in all federal cases available on Westlaw reveals no other decision using that phrase, strongly suggesting that this is far from "ordinary usage" (*id.* at 20).[11] Indeed, although FOIA itself repeatedly uses the terms "investigation" and "report," it never uses those terms to refer to the agency's search for responsive documents or its response to a FOIA request. See, *e.g.*, 5 U.S.C. 552(b)(7) (referring to "criminal" and "law enforcement investigations"); 5 U.S.C. 552(a)(4)(F)(i) (Supp. II 2008) (referring to an "investigation" by "Special Counsel"); 5 U.S.C. 552(e)(1) (requiring submission of a "report" to the Attorney General compiling statistics regarding "determinations" made and requests "processed" under FOIA); 5 U.S.C. 552(a)(4)(F)(ii) (Supp. II 2008) (referring to an annual "report" to be submitted to Congress).

b. A FOIA response is not a "report," and a FOIA search is not an "investigation," because the federal agency is not charged with uncovering the truth of any matter, let alone inquiring into wrongdoing. That is true even when (unlike in this case) the agency engages in an

[11] By the same token, the Westlaw search used to reach that conclusion would not naturally be described as an "investigation."

exhaustive search for responsive documents, including an examination of statutory exemptions and the redaction of information, and then duplicates thousands of records and provides a lengthy cover letter explaining why certain documents (or portions thereof) are exempt. See Pet. Br. 30-33. The touchstone is not how hard the government must work to respond to the request, but the nature of the government's efforts.

FOIA requires federal agencies to search their records "for the purpose of locating those records which are responsive to a request." 5 U.S.C. 552(a)(3)(D). It does not require the government to create new records, see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975), to answer questions posed by the requester, see *Zemansky* v. *United States EPA*, 767 F.2d 569, 573-574 (9th Cir. 1985), or to analyze information, DOL, *The Freedom of Information Act Guide*, http://www.dol.gov/dol/foia/guide6.htm (last visited Jan. 24, 2011). All that is required is a "reasonable search" for responsive records. *Grand Cent. P'ship, Inc.* v. *Cuomo*, 166 F.3d 473, 488-489 (2d Cir. 1999). And a "search" within the meaning of FOIA is a "review" of records "for the purpose of locating those records which are responsive to a request." 5 U.S.C. 552(a)(3)(D).

An agency's "review" of records in response to a FOIA request is fundamentally different from an "investigation." In this case, for example, in 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. DOL did not purport to investigate, or to express a view concerning, any aspect of petitioner's *actual* operations (*e.g.*, how many veterans petitioner in fact employed, or

whether petitioner was in compliance with its VEVRAA obligations). DOL's review of records for the sole purpose of responding to a document request cannot reasonably be characterized as an "investigation" within the meaning of Section 3730(e)(4)(A).[12]

c. A federal agency has discretion to respond to a FOIA request in various ways. Some legally permissible means of making agency records available to the public would not involve an "investigation," or result in a "report," even under petitioner's expansive definition of those terms. Upon receiving a qualifying request for records, an agency must make those records "promptly available to any person" unless a statutory exemption applies. 5 U.S.C. 522(a)(3)(A) and (b). Even without such a request, certain categories of documents must be published in the Federal Register, 5 U.S.C. 552(a)(1), and others must be "available for public inspection and copying" in a reading room open to the public or, for certain documents, through "electronic means," 5 U.S.C. 552(a)(2). If an agency determines that a record previously released in response to a FOIA request is "likely to become the subject of subsequent requests," for example, it must make that record available in a reading room or electronically. See 5 U.S.C. 552(a)(2)(D); cf. DOL, *Freedom of Information Act*

[12] This is true even in the unusual circumstance where the FOIA response itself, when coupled with other information, suggests that fraud has occurred. For example, DOL's responses indicating that petitioner had not filed VETS-100 Reports for certain years, coupled with respondent's knowledge that petitioner had federal contracts subject to the VETS-100 reporting requirement during the relevant years, suggested that petitioner was ineligible for those contracts and ineligible for payment under them. But the degree to which a particular FOIA response happens to disclose "allegations or transactions" of fraud cannot transform the character of the federal agency's actions.

(FOIA), http://www.dol.gov/dol/foia/main.htm (last visited Jan. 24, 2011) (encouraging individuals to search DOL's website before making a FOIA request because DOL has already "made hundreds of thousands of pages of information immediately available to [the public] through [its] Web site"). In those circumstances, the process by which the government makes records available to the public clearly involves no "investigation" or "report."

Even when the pertinent records are not available in a reading room or electronically, the agency might respond informally to a FOIA request. In *United States ex rel. Haight* v. *Catholic Healthcare West*, 445 F.3d 1147, 1149 (9th Cir.), cert. denied, 549 U.S. 1077 (2006) (*Haight*), for example, the relator submitted a FOIA request seeking a copy of a grant application submitted to the National Institutes of Health (NIH). NIH responded by informing the relator that she could obtain a copy of the grant application from a private hospital; the relator walked to the hospital and obtained a copy of the application herself. *Ibid.* As the court of appeals in *Haight* observed, "[t]he specific facts of this case illustrate how ill-fitting the labels of 'report' or 'investigation' can be for responses to FOIA requests." *Id.* at 1155.

There is no reason to think that Congress intended the applicability of the FCA's jurisdictional bar to vary depending on the precise method of disclosure employed by a federal agency. Petitioner's proposed broad definitions of "report" and "investigation," however, would produce that untoward result. Under petitioner's approach, if DOL provides copies of VETS-100 Reports to a FOIA requester under 5 U.S.C. 552(a)(3), the agency has conducted an "administrative" "investigation" and

issued an "administrative" "report," and a suit based upon the VETS-100 Reports would be barred unless the relator qualifies as an "original source." But if DOL makes all VETS-100 Reports available electronically (or in a reading room), there would be no "investigation" or "report" that could trigger the "public disclosure" bar even under the broadest reading of Section 3730(e)(4)(A). The precise means by which an agency chooses to make certain records available to the public should not determine whether specific disclosures are encompassed by Section 3730(e)(4)(A).

d. Petitioner urges a bright-line rule to save the courts from "fact-dependent inquiries." Br. 21. But, even under petitioner's approach, there is no bright line—not every mechanism through which an agency discharges its obligations under FOIA can be characterized as a "report" or an "investigation," however broadly those terms are defined. In any event, courts regularly engage in "fact-dependent inquiries" when government documents are publicly disclosed through mechanisms other than FOIA. The court of appeals correctly focused on whether the released records at issue in this case (*i.e.*, petitioner's VETS-100 Reports) fall within the sources enumerated in Section 3730(e)(4)(A), rather than on the precise method by which the information entered the public domain. See Pet. App. 23a, 32a-33a; accord *Haight*, 445 F.3d at 1153 ("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."). That would be the proper approach if the agency had released the VETS-100 Reports unilaterally rather than in response to a FOIA request, and there is no reason for a different analysis here. Cf. *Thompson* v. *North Am. Stainless,*

LP, No. 09-291, 2011 WL 197638, at *4 (Jan. 24, 2011) ("[A] preference for clear rules cannot justify departing from statutory text.").

B. The History And Purposes Of The "Public Disclosure" Bar Reinforce The Conclusion That A FOIA Response Is Not Itself An "Administrative" "Report" Or "Investigation"

1. Since its original enactment during the Civil War, the FCA has authorized *qui tam* relators to sue for the United States and for themselves, and to obtain a share of the government's recovery if the suit is successful. See *Graham County*, 130 S. Ct. at 1400. Such private actions supplement government enforcement efforts, and thereby deter fraud, by harnessing "the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (*Springfield Terminal*) (citation omitted).

Prior to the recent amendments (see note 1, *supra*) Congress had twice amended the FCA's *qui tam* provisions in an effort to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal*, 14 F.3d at 649. In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943) (*Marcus*), this Court held that the FCA in its then-current form authorized a *qui tam* suit brought by a relator who had derived his allegations of fraud from a prior federal indictment. In 1943, shortly after the *Marcus* decision, Congress amended the FCA to divest the federal courts of jurisdiction over *qui tam* suits that were "based on evidence

or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982). Although the Senate version of the 1943 amendments contained an exception to the jurisdictional bar for suits brought by relators who were the "original source" of the government's information, that provision was dropped from the enacted version without explanation. S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986) (*Senate Report*). Thus, from 1943 to 1986, *qui tam* suits based on information in the government's possession were precluded even when the government had received the information from the relator himself. See, *e.g.*, *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100, 1104-1107 (7th Cir. 1984) (*Dean*) (finding no jurisdiction to adjudicate the State of Wisconsin's *qui tam* suit alleging Medicaid fraud that the State had uncovered and reported to the federal government as required by law).

In the 1980s, Congress concluded that the absolute bar against *qui tam* suits based on information already in the federal government's possession had precluded an unduly broad range of potentially valuable suits. See *Springfield Terminal*, 14 F.3d at 650-651. In 1986, as part of a broader reform of the FCA, Congress replaced the so-called "government-knowledge bar" with Section 3730(e)(4). "Because Congress was concerned about pervasive fraud in 'all [g]overnment programs,' it allowed private parties to sue even based on information already in the [g]overnment's possession." *Cook County, Ill.* v. *United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting *Senate Report* 2). Congress relaxed the prior jurisdictional bar both by limiting it to cases in which the pertinent information had been publicly disclosed through one of several enumerated means, and by creating an exception for "original

source[s]" even in circumstances where the "public disclosure" bar would otherwise apply.

2. This Court stated in *Graham County* that "the drafting history of the public disclosure bar raises more questions than it answers." 130 S. Ct. at 1407. At a minimum, however, two points clearly emerge from that history.

First, Congress sought to strike a balance between preventing "parasitic" *qui tam* suits and encouraging suits that provide the government with valuable information about fraud against the federal fisc. *Graham County*, 130 S. Ct. at 1406-1407. On the one hand, Congress sought to "stifl[e]" the "quintessential 'parasitic'" lawsuit, like the one that was allowed to proceed in *Marcus*, where the relator has contributed nothing to the discovery of fraud but has simply exploited the prior investigative efforts of federal officers. See *ibid.* On the other hand, Congress recognized that relators can often provide valuable assistance to the government's anti-fraud efforts, even when a relator's primary contribution lies in recognizing the previously unappreciated significance of information already in the government's possession.

The enumerated categories of governmental disclosures that can trigger the jurisdictional bar reflect Congress's focus on situations in which some process of government inquiry or analysis has been completed or is underway. See pp. 19-20, *supra*. If all FOIA responses and searches were treated as administrative "report[s]" or "investigation[s]," Section 3730(e)(4)(A) would preclude *qui tam* suits based on disclosures of "raw" information that is contained in government files but has not been subjected to government inquiry or analysis. That approach "would damage the fraud-detection purpose of

the FCA while failing to serve its twin goal of preventing opportunism." *Haight*, 445 F.3d at 1155.

Second, Congress did not prohibit all *qui tam* suits by individuals who lack "direct and independent" knowledge of fraud. Petitioner's repeated insistence (see, *e.g.*, Br. 2-3, 14, 34-35, 49) that only relators with "firsthand knowledge" can file *qui tam* actions mistakes the original-source *exception* for a jurisdictional requirement. Congress certainly could have required all relators to have "direct and independent" (or "firsthand") knowledge of the fraud. It could also have mitigated the concern raised by cases like *Dean* by simply creating an original-source exception while retaining the government-knowledge bar. But Congress pursued a different course, requiring "direct and independent" knowledge, 31 U.S.C. 3730(e)(4)(B), only in the limited subset of cases involving a prior public disclosure through one of the sources enumerated in Section 3730(e)(4)(A). Accordingly, unless the allegations or transactions on which the suit is based have been publicly disclosed through one of the means listed in the statute, anyone with information about fraud—firsthand or otherwise—may pursue a *qui tam* suit.

C. Petitioner's Policy Arguments Do Not Support Its Reading Of Section 3730(e)(4)(A)

Petitioner suggests (Br. 45-49) that a broad reading of Section 3730(e)(4)(A) is needed to prevent unscrupulous relators from obtaining exorbitant recoveries in suits alleging mere technical noncompliance with complicated regulatory requirements. That argument misunderstands important aspects of the FCA, ignores others, and has little to do with how information concerning alleged fraud enters the public domain.

1. The FCA is a fraud statute that imposes liability only on persons who "knowingly" engage in the prohibited conduct. 31 U.S.C. 3729(a) and (b). While the statutory definition of "knowingly" includes acting in "deliberate ignorance" or "reckless disregard of the truth or falsity of the information," 31 U.S.C. 3729(b)(2)-(3), "[n]egligence and innocent mistake are insufficient to meet the intent requirement under the FCA." *United States ex rel. Burlbaw* v. *Orenduff*, 548 F.3d 931, 949 (10th Cir. 2008) (citations omitted).

2. Petitioner (Br. 46-49) and its amici (*e.g.*, Chamber of Commerce, et al., Am. Br. 12-13, 18-25) suggest that their expansive reading of Section 3730(e)(4)(A) is an appropriate means of protecting government contractors from unwarranted *qui tam* suits premised on allegations of technical noncompliance with complex statutory and regulatory schemes. Not all instances of noncompliance with applicable requirements, however, give rise to liability under the FCA. Rather, liability arises only when compliance with a statutory, regulatory, or contractual requirement is material to payment, the defendant knows it has not complied with the requirement, and nevertheless submits, or causes someone else to submit, a claim for payment to which it is not entitled. See, *e.g.*, *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1269-1270 (D.C. Cir. 2010); *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1169 (10th Cir. 2010) ("[F]alse certification—regardless of whether it is implied or express—is actionable under the FCA only if it leads the government to make a payment which, absent the falsity, it

may not have made.").[13] Noncompliance with requirements that are *not* tied to payment, and noncompliance due to confusion over regulatory requirements, do not give rise to FCA liability.

In any event, the manner in which a relator has acquired the information on which his suit is based has no meaningful bearing on the determination whether particular false claims give rise to FCA liability. A variety of screening mechanisms exist to address meritless *qui tam* suits. The general pleading requirements under Rule 8(a)(2) and Rule 11 of the Federal Rules of Civil Procedure, and the heightened specificity required for fraud under Rule 9(b), apply to FCA claims. See, *e.g.*, *United States ex rel. Rost* v. *Pfizer, Inc.*, 507 F.3d 720, 731-733 (1st Cir. 2007) (dismissing claims under Rule 9(b)). The FCA also authorizes awards of attorney's fees to prevailing defendants in *qui tam* suits that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. 3730(d)(4). With respect to false-certification cases in particular, if compliance with particular requirements is not a condition of payment, or if the defendant acted without the requisite scienter, the defendant can prevail on the merits without relying on Section 3730(e)(4)(A).[14]

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[13] That other statutory or administrative remedial schemes may exist even in these more limited circumstances does not foreclose a plaintiff (whether it be a relator or the United States) from pursuing a claim under the FCA. See, *e.g.*, *United States* v. *Sforza*, 326 F.3d 107, 111-115 (2d Cir. 2003); *United States ex rel. Sutton* v. *Double Day Office Servs., Inc.*, 121 F.3d 531, 533-535 (9th Cir. 1997).

[14] Petitioner argued below that the submission of a knowingly false VETS-100 Report is not actionable under the FCA, but the court of appeals rejected that contention, see Pet. App. 43a-47a, and petitioner did not seek review of that ruling in this Court.

3. By contrast, if a relator uses documents obtained through FOIA to draft a *qui tam* complaint that survives a motion to dismiss on the merits, there is no basis for assuming that the complaint represents a misuse of the *qui tam* mechanism. To be sure, if the underlying documents fall within the categories enumerated in Section 3730(e)(4)(A) (*e.g.*, if the documents constitute "administrative * * * report[s]" within the meaning of that provision), the "public disclosure" bar applies. But if a relator uses FOIA to obtain documents falling outside those categories, and those documents establish an actual FCA violation, allowing a *qui tam* suit to go forward generally furthers rather than subverts the purposes of the FCA.[15]

The jurisdictional rule that petitioner advocates, moreover, could not be limited to suits alleging false certifications of compliance with "technical" requirements. Rather, a rule categorically precluding *qui tam* actions that are based upon information acquired through FOIA would equally apply to *qui tam* suits alleging that a contractor "overcharged the government for substandard goods or services," or "requested payment for goods or services not actually provided." Pet. Br. 10 n.5 (citation omitted). That predictable consequence of adopting petitioner's approach underscores the unsuitability of Section 3730(e)(4)(A) as a tool for

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[15] Whether or not the United States has intervened in a *qui tam* action, it retains authority to seek dismissal of the suit. See p. 3, *supra*. That authority provides a safety valve if the allegations in a particular *qui tam* complaint are legally sufficient to survive a motion to dismiss, but federal officials conclude that continued prosecution of the suit by the relator would have adverse policy consequences (*e.g.*, by disrupting the operations of an important contractor or its relations with the government).

weeding out meritless or counterproductive *qui tam* suits.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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