No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The False Claims Act (FCA) provides that no court has 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). The question presented is whether a state or local government report or audit qualifies as a "congressional, administrative, or Government Accounting Office report * * * [or] audit" within the meaning of the FCA.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

STATEMENT

1. The False Claims Act (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). 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). The government may intervene and take over the relator's action. 31 U.S.C. 3730(b)(2)-(4). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

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 [(GAO)] 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.[1]
>
> (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

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[1] Section 3730(e)(4)(A) as enacted refers to the "Government Accounting Office." Both the compilers of the United States Code and the courts have construed that term to refer to the *General* Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. 3730 n.2; Pet. App. 19a n.4; *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000).

> action under this section which is based on the information.

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

2. In February 1995, after a storm caused extensive flooding and erosion in western North Carolina, petitioners Graham County and Cherokee County applied for aid under the Emergency Watershed Protection Program (EWP Program), a federal disaster relief program. The Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), administers the EWP Program. Pet. App. 7a. The counties and the NRCS entered into contracts under which the counties would perform, or hire a contractor to perform, necessary clean-up and repairs, with USDA bearing 75% of the costs. *Ibid.* The Graham and Cherokee County soil and water conservation districts administered the contracts. *Ibid.*

Respondent Karen Wilson is a former secretary at petitioner Graham County Soil and Water Conservation District (Graham Conservation District). Pet. App. 9a. In the summer of 1995, respondent raised concerns with county and conservation district officials about alleged fraud by petitioners in connection with the EWP Program. *Id.* at 9a-10a. In December 1995, respondent sent a letter reporting her allegations to the NRCS, and in November 1996 she met with agents from the USDA Inspector General's office. *Ibid.*

Earlier in 1996, Graham County had begun its own investigation. Pet. App. 11a. In March 1996, Graham County asked an accounting firm to perform an audit regarding the County's administration of the EWP Program contracts (County Report). *Ibid.* The County Report identified numerous issues of concern, including the decision to hire a Graham Conservation District em-

ployee to perform EWP Program contract work and the failure to seek bids for that work. *Id.* at 9a, 11a.

In May 1996, the North Carolina Department of Environment, Health and Natural Resources issued a report (DEHNR Report) that discussed the Graham Conservation District's non-compliance with various requirements of the North Carolina Agricultural Cost Sharing Program. Pet. App. 97a. Petitioners assert that the County Report and the DEHNR Report are public records under North Carolina law, which are "readily accessible to the general public." Pet. 5 (citing N.C. Gen. Stat. §§ 132-1 to 132-10 (2007)).

3. In 2001, respondent filed suit in federal district court, alleging that petitioners had violated the FCA by making numerous false claims for payment under the EWP Program. Pet. App. 11a, 48a-52a. Respondent asserted, *inter alia*, that petitioners had failed to seek bids for EWP Program contract work and had awarded such work to a Graham Conservation District employee who had a conflict of interest. *Id.* at 12a.[2] The United States declined to intervene, and respondent proceeded with the litigation. *Id.* at 48a n.1.

The district court held that it lacked jurisdiction over respondent's FCA claims. Pet. App. 95a-105a. The court ruled that the County Report constituted a public disclosure of respondent's allegations that the Graham Conservation District had failed to solicit bids for EWP

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[2] Respondent also asserted a retaliation claim. Pet. App. 5a n.1. The court of appeals dismissed the retaliation claim as time-barred on remand from this Court's decision in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) (FCA six-year statute of limitations does not apply to retaliation claims under Section 3730(h); court of appeals should apply most closely analogous state statute of limitations).

Program contract work and had improperly hired an employee to perform such work. *Id.* at 95a-96a. The court found that respondent "ha[d] not refuted" the conclusions that the County Report had been publicly disclosed, that she had relied on the report, and that she was not an original source of the allegations. *Id.* at 96a. The court also determined that the DEHNR Report had publicly disclosed allegations of Graham County's improprieties in connection with the North Carolina Agricultural Cost Sharing Program, and that respondent was not an "original source" of such allegations. *Id.* at 97a-98a.

In the alternative, the district court granted summary judgment to petitioners on the merits of respondent's FCA claims. Pet. App. 106a-152a.

4. The court of appeals vacated and remanded. Pet. App. 1a-46a. The court observed that a conflict among the circuits existed on the question whether the phrase "congressional, administrative, or Government Accounting Office report[s], hearing[s], audit[s], or investigation[s]" encompasses administrative reports issued by a State or county. *Id.* at 18a-21a (quoting 31 U.S.C. 3730(e)(4)(A)). Whereas the Ninth and Eleventh Circuits have concluded that the FCA "public disclosure" bar encompasses non-federal reports and audits, the Third Circuit has held that only federal reports and audits fall within the scope of Section 3730(e)(4)(A). *Id.* at 21a (citing *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918-919 (9th Cir. 2006), cert. denied, 128 S. Ct. 1119 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997)).

The court of appeals agreed with the Third Circuit that the second clause of the public disclosure provision

encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. The court noted that the terms "congressional" and GAO refer to "clearly *federal* sources." *Id.* at 23a. The court of appeals recognized that "there is nothing inherently federal about the word 'administrative.'" *Ibid.* The court concluded, however, that, for purposes of Section 3730(e)(4)(A), "[t]he placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." *Id.* at 23a-24a.

The court of appeals further found that the relevant legislative history supported its interpretation. Pet. App. 34a-35a. The court explained that when Congress amended the FCA in 1986, it enacted the current "public disclosure" bar to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 35a (internal quotations omitted). The court reasoned that the federal government probably would not learn about state or local audits or investigations, and that including such audits and investigations within the scope of the "public disclosure" bar would therefore frustrate Congress's purpose. *Id.* at 36a.

Accordingly, the court of appeals held that neither the County Report nor the DEHNR Report fell within the scope of the "public disclosure" bar. Pet. App. 37a. The court remanded to the district court to determine whether a USDA report regarding administration of the

EWP Program contracts had been publicly disclosed.[3] The court of appeals further held that the district court had erred by addressing the merits after finding that it lacked jurisdiction. The court of appeals therefore vacated the district court's decision on the merits. *Id.* at 44a-45a.

DISCUSSION

The court of appeals correctly construed the second clause of the "public disclosure" bar contained in 31 U.S.C. 3730(e)(4)(A). The court's decision, however, deepens a pre-existing circuit conflict regarding whether state and local administrative audits and reports fall within the scope of the FCA's "public disclosure" provision. This Court should grant the petition for a writ of certiorari to resolve the split among the circuits on an important legal issue affecting the federal courts' jurisdiction over FCA *qui tam* actions.

A. Section 3730(e)(4)(A) Does Not Encompass Public Disclosures Made In State Or Local Government Administrative Audits Or Reports

1. Section 3730(e)(4)(A) identifies 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). The petition for a writ of certiorari presents the question whether the reference to "ad-

[3] Petitioners concede that the USDA report cannot bar respondent's "principal claim" because it did not address whether the conservation districts were required to solicit bids for EWP Program contract work. Pet. 6 n.2.

ministrative * * * report[s]" or "audit[s]" in the second of those categories (Category 2) encompasses disclosures in state and local reports, hearings, audits, and investigations, or rather is limited to disclosures made in federal government proceedings.

As the court of appeals correctly held, Category 2 is properly construed as limited to disclosures made in a *federal* report, hearing, audit, or investigation. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("doctrine of *noscitur a sociis*" serves "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Insofar as Category 2 applies to congressional and GAO reports, its coverage is unambiguously limited to disclosures made in federal proceedings. It is therefore unlikely "that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). Indeed, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent, and these clearly federal terms bookend the not-so-clearly federal term, thus providing a very strong contextual cue about the meaning of 'administrative.'" Pet. App. 25a.

To read the term "administrative" more broadly than the words surrounding it would create an unwarranted anomaly. Such a reading, for example, would put a State's legislature on a lesser footing than a local county

administrator. Section 3730(e)(4)(A) unambiguously provides that, with respect to legislative bodies, only a report or investigation of the *federal* legislature—Congress—qualifies as a public disclosure. Because state legislative reports are excluded from the scope of Section 3730(e)(4)(A), Congress did not likely intend to mandate different treatment for reports by a state or local "administrative" body.

That interpretation is consistent with the exclusively federal focus of the FCA more generally, which provides a remedy only for false claims against "the United States Government." 31 U.S.C. 3729(a)(1). Suit may be brought by the United States Attorney General or, in certain circumstances, by *qui tam* relators who sue "for the United States Government" and collect a portion of the federal government's recovery, 31 U.S.C. 3730(b)(1) and (d). To the extent that state or local governmental entities may become parties to actions under Section 3730, they do so in the same capacity as private individuals can—as defendants or as *qui tam* relators. See, *e.g.*, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 134 (2003) (local governments are subject to suit as "person[s]" under 31 U.S.C. 3729); cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-787 (2000) (State not subject to suit by *qui tam* relator); *id.* at 787 n.18 (noting, without resolving, the question whether "States can be 'persons' for purposes of *commencing* an FCA *qui tam* action under § 3730(b)"). The exclusively federal focus of the statute's governmental references is also seen in the use, throughout Sections 3729 and 3730 (including in Subparagraph (B) of Section 3730(e)(4)), of the term "the Government," singular and with a capital "G," to refer exclusively to the *federal* government. See, *e.g.*, 31

U.S.C. 3729(a)(2)-(7); 31 U.S.C. 3730(b)(1)-(3), (e)(2)(A), (3) and (4)(B). Given the exclusively federal character of all these other governmental references, including the references to Congress and the GAO in the same clause at issue here, the reference to governmental "administrative * * * report[s]" "or audit[s]" in Section 3730(e)(4)(A) should not be read to sweep in reports or audits by state or local governmental entities.

2. The purposes and history of the "public disclosure" bar also support construing Category 2 (and Category 1, for that matter, see pp. 17-18, *infra*) as limited to federal proceedings. The "public disclosure" bar is intended to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." Pet. App. 35a (internal quotations omitted). Consistent with those goals, the bar should apply only to documents that demonstrate that the federal government is already on the trail of the alleged fraud. Documents prepared by state and local governments do not give rise to any such inference.

a. 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 *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943). 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.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress twice has 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 Ry.*, 14 F.3d at 649. Early in the FCA's history, "the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud," *Seal 1* v. *Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001), cert. denied, 535 U.S. 1017 (2002), yet could receive one-half of any judgment. In *Marcus*, for example, 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. See 317 U.S. at 545-548.

In 1943, shortly after the *Marcus* decision, Congress amended the FCA to divest the 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).[4] In that context, the reference to "the Government" unambiguously was limited to the federal government, which could choose to bring the suit itself based on the information in its possession. In the 1980s, Congress concluded that the absolute bar against *qui tam* suits based on information already in the federal government's possession precluded an unduly broad range of potentially valuable suits. See *Springfield Terminal Ry.*, 14 F.3d at 650-651.

[4] 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).

In 1986, as part of a broader reform of the FCA, Congress replaced the government-knowledge bar with the present Section 3730(e). The applicability of the current provision turns on whether the federal government is already acting, or likely to act, on the alleged fraud, such as where the government has publicly disclosed the relevant information in the course of exposing, investigating, prosecuting, or otherwise pursuing the allegations of fraud. At the same time, Congress carved out an exception to the bar for situations in which the relator was the "original source" of the information about the fraud.

The legislative history of the 1986 amendment confirms that the governmental proceedings referred to in the "public disclosure" bar are exclusively federal. Although the amendments were directed at narrowing the then-existing bar, which encompassed all knowledge possessed by the federal government, Congress did not intend to alter the bar's exclusive focus on whether the *federal* government is able to pursue the fraud unaided by a *qui tam* relator.

The uniquely federal focus of the amendment is evidenced by the text of the original House and Senate bills. The bill reported by the House Judiciary Committee would have barred *qui tam* actions that are (1) "based on specific evidence or specific information *which the Government* disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding," (2) "based on specific information disclosed during the course of a congressional investigation," or (3) "based on specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986) (H.R. Rep. 660) (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added). The term "adminis-

trative * * * proceedings" here could have meant only federal administrative proceedings given the provision's reference to "information which *the Government* disclosed" in such proceedings. *Id.* at 42 (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added)). The bill passed by the House of Representatives contained this provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).[5]

The bill reported by the Senate Judiciary Committee contained a parallel, though differently worded, provision. It provided that a person could not bring a *qui tam* action "within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media." S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986) (S. Rep. 345) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill broadened the House bar by making it applicable regardless of who had made the disclosure during the governmental proceeding, the focus on federal proceedings remained, as evidenced by the reference to congressional or GAO reports.

After the Senate bill was reported, the Senate adopted a substitute version of the bill. See 132 Cong. Rec. at 20,530. That provision contained a "public disclosure" bar that was identical for present purposes to 31 U.S.C. 3730(e)(4) as finally enacted. See 132 Cong. Rec. at 20,531 (proposed 31 U.S.C. 3730(e)(5)). In describing the substitute bill's *qui tam* provisions, Senator Grass-

[5] The House bill contained an exception for situations in which "the Government" was aware of the information for at least six months before the relator filed suit but did not initiate a civil action within that period. H.R. Rep. 660, at 42-43 (proposed 31 U.S.C. 3730(b)(5)(B)).

ley, the principal sponsor, explained that "the term 'Government' in the definition of original source"—*i.e.*, in that definition's requirement that the relator must have voluntarily informed "the Government" of the allegations prior to suit—"is meant to include any Government source of disclosures cited in[S]ubsection (5)(A) [Subsection (4)(A) as enacted]; that is Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." *Id.* at 20,536. This explanation makes clear that Paragraphs (A) and (B) in Section 3730(e)(4) are to be read together and that the public disclosure bar in Paragraph (A) is triggered only by a disclosure made by a component of the *federal* "Government" referred to in Paragraph (B). That interpretation is, as discussed above, see pp. 12-13, *supra*, also consistent with the federal focus of the bill passed by the House, which was expressly limited to "information which the Government disclosed" in one of the enumerated governmental fora. H.R. Rep. 660, at 42 (proposed 31 U.S.C. 3730(b)(5)(A)).

b. Construing the "public disclosure" bar as limited to disclosures in federal proceedings furthers Congress's purpose "to encourage more private enforcement suits," S. Rep. 345, at 23; see *Chandler*, 538 U.S. at 133 (explaining that the 1986 FCA amendments "enhanced the incentives for relators to bring suit"), whereas petitioner's interpretation would undermine that purpose. By replacing the prior government-knowledge bar with current Section 3730(e)(4), Congress narrowed the scope of the bar by "allow[ing] private parties to sue even based on information already in the Government's possession." *Ibid.*; see *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"). Interpreting Section 3730(e)(4)(A) to encompass state and local reports, however, would significantly *expand* the jurisdictional bar, precluding *qui tam* suits based on information that has never been in the federal government's possession and that is unlikely to come to its attention, even though such suits would have gone forward under the pre-1986 version of the statute. "Because the federal government is unlikely to learn about state and local investigations," construing the public disclosure bar to encompass state and local reports would "discourage private actions that the federal government is *not* capable of pursuing on its own, thus frustrating rather than furthering the goals of the FCA." Pet. App. 36a.

Against this background, Category 2 in Section 3730(e)(4)(A) is properly construed, consistent with the most natural reading of its text, as limited to federal reports, hearings, audits, and investigations. That interpretation better serves the "twin goals" (*Springfield Terminal Ry.*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, promoting *qui tam* actions alleging possible fraud that the federal government is not publicly pursuing or may even be unaware of, while precluding relator suits when the government is already on the way toward prosecuting its own suit. While federal fraud inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports and investigations never come to the attention of federal authorities (see Pet. App. 35a-36a), and the theoretical availability of such materials in no way suggests that the federal government is already looking into the matter. Barring suits by relators based on disclosures from such state and local sources would therefore frustrate Congress's

effort to strike an appropriate balance between encouraging private citizens to expose fraud unknown to or unaddressed by the federal government and preventing suits by would-be relators who add nothing to the government's own enforcement efforts.

Construing Section 3730(e)(4)(A) as encompassing state and local government reports is particularly problematic where, as here, the county is both the source of the purported disclosure and a defendant in the *qui tam* suit. If the County Report were to qualify as a public disclosure, Graham County would effectively have shielded itself from a *qui tam* suit through a report not readily available to the federal government. As the Third Circuit has noted, "[i]f state and local government reports were treated as administrative reports under the Act, the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring." *Dunleavy*, 123 F.3d at 745. This case, in other words, demonstrates how petitioners' proposed interpretation would frustrate Congress's intent to encourage *qui tam* actions in circumstances where the federal government is unlikely to learn of the alleged fraud.

3. Petitioners urge (Pet. 24-25) that the court of appeals' interpretation of Category 2 as limited to federal reports and investigations creates anomalies because the other categories of "public disclosure" that implicate the bar do not require federal involvement. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—has been construed as encompassing state and local proceedings, see Pet. App. 26a (citing cases), and Category 3—"the news media," 31 U.S.C. 3730(e)(4)(A)—is wholly non-governmental. Petitioners are mistaken with respect to the scope of Category 1,

and they misunderstand the reason for Congress's inclusion of Category 3.

a. The court of appeals noted (Pet. App. 28a) a seeming tension between its recognition that Category 2 should be limited to *federal* sources of disclosures in light of the "inherently federal language chosen by Congress" in Category 2, *id.* at 30a-31a, and earlier circuit precedent holding that Category 1 "encompass[es] state as well as federal hearings," *id.* at 26a. In the view of the United States, the source of any tension is the court of appeals' erroneous construction of Category 1 to encompass state judicial and administrative hearings.

As explained above, see p. 8, *supra*, the adjectives "congressional" and "[General] Accounting Office" in Category 2 strongly suggest that the word "administrative" in that same phrase refers to *federal* administrative reports. If (as petitioners argue) it would be anomalous to treat one category as encompassing non-federal sources and the other category as excluding them, the solution would not be to *expand* the coverage of Category 2, which contains the more explicit textual evidence of Congress's intent, but to read Category 1, which might appear in isolation to cover non-federal hearings, as limited instead to federal proceedings. Just as the word "administrative" *within* Category 2 should be construed in light of the accompanying adjectives "congressional" and "[General] Accounting Office," the scope of Category 1 should be determined in light of Category 2's federal focus as well as the federal focus of the Section as a whole. See *Jones*, 527 U.S. at 389 (statutory

"phrase 'gathers meaning from the words around it'") (quoting *Jarecki*, 367 U.S. at 307).[6]

b. Petitioners also suggest that it would have been inconsistent for Congress to include "the news media," 31 U.S.C. 3730(e)(4)(A), among the sources of disqualifying public disclosures, while excluding "a formal audit conducted by an elected state official that is widely disseminated." Pet. 25. As noted above, the 1986 amendments to the public disclosure bar were intended to permit a broader class of *qui tam* suits, while barring those where the federal government was on the trail of the fraud (except where the suit was brought by an "original source"). Although a media disclosure does not demonstrate that the federal government knew of the alleged fraud *before* the disclosure, it is the type of disclosure—because of its widely dispersed nature—that almost certainly will come to the federal government's attention when it concerns fraud on the federal fisc. Indeed, media exposés are often part of an effort to urge the government into action.

By contrast, a "public disclosure" of a governmental fraud investigation occurs whenever that investigation is disclosed 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,

[6] The court of appeals stated that its construction avoided what it believed would otherwise be a redundancy in the statute's reference to administrative hearings in both Categories 1 and 2. There is, however, no redundancy. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—refers to adjudicative proceedings, whereas Category 2—"congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]," *ibid.*—refers to legislative or oversight proceedings, such as an administrative rule-making proceeding or an investigation carried out by an agency's inspector general.

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). If the investigation so disclosed is being conducted by the federal government, then application of the "public disclosure" bar serves Congress's purposes. If, however, the investigation in question was conducted by the local or state governmental entity that is itself potentially liable under the FCA, as is true of the County Report in this case, its disclosure to a single member of the public provides no assurance that the federal government is likely to become aware of the fraud. Under these circumstances, application of the public disclosure bar would frustrate, rather than further, Congress's purpose.[7]

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[7] Respondent contended in the court of appeals that neither the County Report nor DEHNR Report had been "publicly" disclosed because they were provided only to governmental officials. See Pet. App. 17a. The court of appeals did not decide whether the dissemination of the reports had actually been limited in that manner because it held the "public disclosure" bar inapplicable to state and local reports. Petitioners contend (Pet. 5) that whether the documents were actually disclosed beyond the government is legally irrelevant because a "public disclosure" occurs whenever information is placed in government files that are subject to applicable open-records laws. The United States disagrees with petitioners' legal assertion. In the view of the United States, even when information is contained in federal records that are subject to potential release under the Freedom of Information Act, 5 U.S.C. 552, the FCA's "public disclosure" bar is not triggered unless and until an *actual* release of that information outside the government occurs. Thus, if respondent were clearly correct that the reports were not disclosed beyond government officials, that fact would constitute an independent basis for affirming the court of appeals' conclusion that the "public disclosure" bar does not preclude respondent's action and might

B. Review Is Warranted Because The Petition Presents An Important Question On Which The Circuits Are In Conflict

Although the court of appeals' holding is correct, it deepens a pre-existing conflict among the circuits that warrants this Court's resolution. Consistent with the decision below, the Third Circuit has held that Category 2 is limited to disclosures in federal sources. *Dunleavy*, 123 F.3d at 745. In contrast, the Ninth and Eleventh Circuits have construed Category 2 to encompass disclosures made in non-federal reports and audits. *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918-919 (9th Cir. 2006), cert. denied, 128 S. Ct. 1119 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). The Eighth Circuit has also ruled that state reports and audits can fall within the scope of the "public disclosure" provision "if they are prepared * * * by or at the behest of a state agency that administers the federal grant program under 'significant Federal regula-

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therefore make this case a poor vehicle for the Court to resolve the question presented.

The record below contains evidence, however, that would support a conclusion that the allegations in the County Report and DEHNR Report were in fact disclosed to members of the public beyond governmental officials. See 10/17/06 Dep. of Karen Wilson, Ex. GC1 (minutes of May 21, 1996, public Graham Conservation District meeting at which relator discussed allegations in County Report that she had obtained); *ibid.* (minutes of same, reflecting oral request by relator's husband and others of DEHNR Report); N.C. Gen. Stat. § 132-6(a) and (b) (2007) (permitting disclosure of public records pursuant to oral request). Thus, the Court could consider the question presented on the factual assumption that the reports were disclosed to the "public" and, if the Court were to conclude that state and local reports *are* within the scope of Category 2, it could remand for the court of appeals to resolve in the first instance whether those reports were, in fact, disclosed publicly.

tion and involvement.'" *Hays* v. *Hoffman*, 325 F.3d 982, 989 (quoting S. Rep. 345, at 22), cert. denied, 540 U.S. 877 (2003).[8]

This case provides an appropriate opportunity for the Court to resolve that persistent and growing conflict among the circuits.[9]

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[8] In addition, the Fifth Circuit has indicated in *dicta*, without analysis, that Category 2 could encompass materials received in response to a state-law public-records request. *United States ex rel. Fried* v. *West Indep. Sch. Dist.*, 527 F.3d 439, 442 (2008).

[9] As the Fourth Circuit acknowledged, see Pet. App. 40a-41a, its standard for determining whether a relator's claims are "based upon" a public disclosure differs from that of the majority of circuits. The Fourth and Seventh Circuits have ruled that a *qui tam* action is "based upon" a public disclosure "*only* if the *qui tam* plaintiff's allegations were actually *derived from* the public disclosure itself." *Ibid.* In contrast, eight courts of appeals have held, consistent with the position of the United States, "that a *qui tam* action is 'based upon' a public disclosure when the supporting allegations are the same as those that have been publicly disclosed . . . regardless of where the relator obtained his information." *United States ex rel. Fowler* v. *Caremark RX, L.L.C.*, 496 F.3d 730, 737 (7th Cir. 2007) (internal quotation marks omitted) (describing, while rejecting, majority rule and collecting cases), cert. denied, 128 S. Ct. 1246 (2008).

The Court need not resolve the disagreement among the circuits on that question in order to decide this case. Although the court of appeals did not regard the district court as having made an explicit factual finding that respondent's complaint was "based upon" the County Report under the Fourth Circuit's more restrictive standard, Pet. App. 41a, the district court did note evidence that respondent had access to the report, and it stated that respondent "has relied on this document," *id.* at 96a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2009