No. 06-1269

In the Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE, PETITIONER

v.

BRENDA PREMO, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
IRENE M. SOLET
MICHAEL GRANSTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an audit performed by a state agency is an "administrative * * * audit" within the meaning of the "public disclosure" provision of the False Claims Act, 31 U.S.C. 3730(e)(4)(A).

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, establishes civil penalties for "[a]ny person" who "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). Suits to collect the civil penalties and statutory damages may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1).

When a *qui tam* suit is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). 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[1] 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.
>
> (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).

2. Petitioner is the former executive director of a nonprofit entity in California that receives federal and state

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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 ("So in original. Probably should be 'General.'"); *United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.), cert. denied, 529 U.S. 1018 (2000).

funds to provide services for disabled persons. She brought this *qui tam* action against individual employees of the California Department of Rehabilitation (CDR), the state agency that administers and distributes federal funds for such services pursuant to the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq*., and against certain recipients of CDR funding. This is the third *qui tam* suit in which petitioner has alleged that CDR employees conspired with others to obtain, through fraudulent certifications, federal Rehabilitation Act funds for which the CDR was not eligible. Pet. App. 2a, 11a.

a. Petitioner filed the first of those actions (*Bly-Magee I*) in 1992. The United States declined to intervene in the suit. The district court granted summary judgment for the defendants, and petitioner did not appeal. Pet. App. 2a, 14a.

b. Petitioner's second *qui tam* action, filed in 1997, covered conduct occurring from October 1988 to June 1997. *Bly-Magee* v. *Lungren*, 214 Fed. Appx. 642, 643 (9th Cir. 2006) (*Bly-Magee II*). The United States again declined to intervene. Pet. App. 2a. The district court again dismissed the suit. *Bly-Magee II*, 214 Fed. Appx. at 643.

In an unpublished opinion issued contemporaneously with the decision that is the subject of the instant certiorari petition, the court of appeals affirmed the dismissal in *Bly-Magee II*. See 214 Fed. Appx. at 643-644. With respect to the alleged submission of false claims between October 1988 and September 1992, the court held that petitioner's suit was barred by 31 U.S.C. 3730(e)(4)(A). 214 Fed. Appx. at 643. The court explained that "[t]he complaint in *Bly-Magee II* * * * was based on allegations that had been publicly disclosed in" *Bly-Magee I*, and that petitioner had failed to establish that she was an "original source" of the relevant information. *Ibid.* The court further held that peti-

tioner's remaining claims, which alleged the submission of false claims during a period (October 1992-June 1997) that was not covered by the allegations in *Bly-Magee I*, were properly dismissed because petitioner had failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). See 214 Fed. Appx. at 643-644. Petitioner has not sought further review of the court of appeals' affirmance of the dismissal in *Bly-Magee II*.

c. In October 2001, petitioner filed the instant suit (*Bly-Magee III*), which alleges that respondents submitted false claims from fiscal years 1995-1996 through 1999-2000. Pet. App. 3a. The district court dismissed the complaint pursuant to the FCA's "public disclosure" bar, 31 U.S.C. 3730(e)(4)(A). Pet. App. 16a-22a.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-9a. In disposing of petitioner's claims, the court of appeals divided them into three time periods.

a. The court of appeals first considered petitioner's allegations that respondents had submitted false claims between October 1992 and June 1997, the period covered by the complaint in *Bly-Magee II*. Pet. App. 3a-4a. The court held that this portion of petitioner's current suit was barred by 31 U.S.C. 3730(e)(4)(A) because it was based upon allegations that had been publicly disclosed in *Bly-Magee I* and petitioner had not demonstrated that she was an original source of the information. Pet. App. 3a-4a. Petitioner does not seek further review of that holding.

b. The court of appeals next considered petitioner's claims concerning conduct that allegedly occurred between June 1997 and June 30, 1999. Pet. App. 4a-9a. The court concluded that those claims were based on allegations that had been publicly disclosed in a report issued by the California State Auditor in February 2000. Pet. App. 4a-5a.

The court then addressed the question "whether disclosure in that report issued by a state agency, amounts to a 'public disclosure' for purposes of the False Claims Act." *Id.* at 5a.

The FCA's "public disclosure" provision encompasses public disclosures in, inter alia, a "congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation." 31 U.S.C. 3730(e)(4)(A); see p. 2 & note 1, *supra.* The court noted that other courts of appeals have reached conflicting conclusions on the question whether that language encompasses "an administrative report, audit, or investigation prepared by a state entity (as opposed to the federal government)." Pet. App. 5a. The court noted in particular (*ibid.*) that the Third Circuit has construed the relevant statutory language to be limited to disclosures by federal government sources, see *United States ex rel. Dunleavy* v. *County of Delaware*, 123 F.3d 734, 745 (1997) (*Dunleavy*), whereas the Eighth Circuit has interpreted the same phrase to include state entity disclosures, see *Hays* v. *Hoffman*, 325 F.3d 982, 988, cert. denied, 540 U.S. 877 (2003).

The court of appeals agreed with the Eighth Circuit's ruling in *Hays* and held that the relevant statutory language "includes non-federal reports, audits, and investigations." Pet. App. 6a. The court found that view to be consistent with a literal reading of the statutory language. *Ibid.* The court noted that "[t]he words 'congressional' 'administrative' and 'Government Accounting Office' are separated by commas and the conjunction 'or,'" and it inferred that "each word may be read as a separate modifier for the nouns that follow." *Ibid.*

The court of appeals also stated that its construction of the disputed language in this case was consistent with its prior decision in *A-1 Ambulance Serv., Inc.* v. *California*, 202 F.3d 1238, 1243 (9th Cir.), cert. denied, 529 U.S. 1099

(2000). Pet. App. 6a. The FCA's "public disclosure" provision additionally covers disclosures in "criminal, civil, or administrative hearing[s]," and the court in *A-1 Ambulance* had interpreted that language to cover state and local (as well as federal) administrative hearings. 202 F.3d at 1244. In the instant case, the court of appeals stated that "the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources." Pet. App. 6a. Finding that petitioner's allegations were "clearly set forth in the State Auditor's report," which covered the CDR's conduct until June 30, 1999, the court concluded that those allegations had been publicly disclosed, and that petitioner had failed to establish that she was an "original source." *Id.* at 8a-9a.

c. The court of appeals reversed the district court's dismissal order with respect to petitioner's allegations that respondents had submitted false claims between June 30, 1999, and June 30, 2000. Pet. App. 9a. The court concluded that this portion of petitioner's complaint was not barred by Section 3730(e)(4)(A) because no allegations concerning that time period had been publicly disclosed. *Ibid.* The court therefore remanded those claims to the district court for further proceedings. *Ibid.*

4. On remand, the district court dismissed the allegations concerning fiscal year 1999-2000 in petitioner's Second Amended Complaint for failure to comply with Rule 9(b). *United States ex rel. Bly-Magee* v. *Premo*, No. CV 01-08716 (C.D. Cal. May 3, 2007), slip op. 4-7. The court explained that petitioner's "allegations involving FY 1999-2000 only restate the general and conclusory allegations she makes for all fiscal years." *Id.* at 6. Granted leave to amend, petitioner then filed her Third Amended Complaint, addressing only the 1999-2000 claims, which the district

court likewise dismissed pursuant to Rule 9(b), also denying further leave to amend. *Bly-Magee*, *supra* (Aug. 1, 2007), slip op. 4-7. The district court denied reconsideration of that ruling on August 9, 2007. On August 29, 2007, petitioner filed a notice of appeal from the district court's order dismissing her Third Amended Complaint.

DISCUSSION

The court of appeals' construction of 31 U.S.C. 3730(e)(4)(A) is erroneous and conflicts with the Third Circuit's decision in *Dunleavy*. In light of more recent Third Circuit rulings, however, and the likelihood that petitioner's claims would ultimately be rejected on the merits, the better course would be for this Court to await further developments rather than granting review now. The petition for a writ of certiorari therefore should be denied.

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

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 [General] Accounting Office report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. 3730(e)(4)(A). The certiorari petition presents the question whether 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. More specifically, the issue is whether the February 2000 audit performed by the California State Auditor was an "administrative * * * audit" within the meaning of Section 3730(e)(4)(A).

Contrary to the court of appeals' ruling, 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"). Of course, insofar as Category 2 applies to "congressional" and "[General] Accounting Office" reports, etc., 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." *Dunleavy*, 123 F.3d at 745.

That interpretation is confirmed by reading paragraph (A) of Section 3730(e)(4) in pari materia with paragraph (B), which defines "original source" for purposes of the public disclosure bar. That definition requires that, in order for the relator to qualify for the "original source" exception to the "public disclosure" bar, the relator must have voluntarily provided the information to "the Government" before filing a *qui tam* action. The most sensible reading of the jurisdictional bar in paragraph (A) is that it covers only public disclosures by the same government as "the Government" referenced in the "original source" exception. And the single, capital G, "Government" referenced in paragraph (B)'s "original source" exception is the *federal* government, as the numerous other references to "the Government" elsewhere in 31 U.S.C. 3730 make clear.

Construing Category 2 (and Category 1, for that matter, see pp. 14-15, *infra*) as limited to federal proceedings is also supported by the purposes and history of the 1986 amendments to the FCA, which added the current "public disclosure" bar. 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) (*Marcus*). 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) (*Springfield*) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress has repeatedly 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*, 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 the proceeds. 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 this Court's decision in *Marcus*, 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).[2] In that context, the unmodified reference to "the Government" unambiguously was limited to the government that could bring the action, *i.e.*, the federal government. Based on its analysis of FCA enforcement practices under that version of the statute, Congress subsequently concluded that the bar to suits based on information already in the federal government's possession had precluded an unduly broad range of potential *qui tam* actions. See *Springfield*, 14 F.3d at 650 ("Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis.").

In 1986, as one aspect of comprehensive amendments to the FCA, Congress replaced the government-knowledge bar with Section 3730(e)(4). The result was to lift the bar to *qui tam* suits based solely on the fact that the relevant information was already in the federal government's possession, but to maintain the bar to the sort of opportunistic or parasitic suit involved in *Marcus* by prohibiting *qui tam* suits where the federal government itself (or the news media) not only possessed the information but had publicly disclosed it in the course of exposing, investigating, prosecuting, or otherwise pursuing the allegations of fraud. Congress did, however, include an exception to the bar for situations in which the relator was the "original source" of the information that was later publicly disclosed by the federal government, thereby affording protection for the true informer even in the context of such public disclosures.

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[2] 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).

The legislative history of the 1986 amendments confirms that the bar applies only where the public disclosure was by the federal government itself. In the first place, the amendments were directed at modifying the government-knowledge bar, which, through its unmodified reference to "the Government," was clearly directed only to the federal government and its knowledge.

The text of the original bills in both Houses provides further support. The bill reported by the House Judiciary Committee provided that the court was to dismiss any *qui tam* action if it found that the action was "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," or "based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986) (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added). The bill contained an exception, however, for situations in which the government took over the action within 60 days, or 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. *Id.* at 42-43 (proposed 31 U.S.C. 3730(b)(5)(B)). In this version, all the bill's references to the government clearly meant the *federal* government. The bill passed by the House of Representatives contained that provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).

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 Govern-

ment Accounting Office report or hearing, or from the news media." S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill was not expressly limited to disclosures by the federal government (in addition to the news media), there is no indication that it was meant to be fundamentally different from the House bill in this respect.

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's *qui tam* provisions, Senator Grassley, 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 subsection (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 of course is consistent with the express terms of the public disclosure bar in the bill passed by the House.

This interpretation is confirmed by this Court's explanation of the 1986 amendments as expanding the range of *qui tam* actions that may now be brought. See *Cook County* v.

United States ex rel. Chandler, 538 U.S. 119, 133 (2003) (Congress sought in 1986 to make the FCA more effective by, inter alia, "allow[ing] private parties to sue even based on information already in the Government's possession" and by "enhanc[ing] the incentives for relators to bring suit."); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (amendments "permitt[ed] actions by an expanded universe of plaintiffs"); S. Rep. No. 345, *supra*, at 4 (stating that the 1986 FCA amendments were "aimed at correcting restrictive interpretations of," inter alia, the statute's "*qui tam* jurisdiction"). Under the court of appeals' interpretation of Section 3730(e)(4)(A), however, the effect of the 1986 amendments is significantly to *expand* not the "universe of plaintiffs," but the reach of the jurisdictional bar, to preclude *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. The court of appeals' approach would extend the jurisdictional bar to suits that could have proceeded even under the pre-1986 government-knowledge bar—*viz.*, suits in which state, but not federal, authorities knew of the fraud. But there is no question that Congress's concern with the government-knowledge bar was that it excluded too many—not too few—*qui tam* actions.

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 also better serves the "twin goals" (*Springfield*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, precluding *qui tam* actions when the government is already publicly looking into the relevant allegations and can prosecute its own suit, while promoting suits alleging possible fraud that the federal government is not publicly pursuing or may even be

unaware of. 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, and the theoretical availability of such state and local materials in no way suggests that the federal government is already looking into the matter. Barring suits by *qui tam* 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 parasitic suits by would-be relators who add nothing to the government's store of pertinent information.

2. In *A-1 Ambulance*, the Ninth Circuit held that Category 1 of Section 3730(e)(4)(A), which encompasses public disclosures in a "criminal, civil, or administrative hearing," covers state and local administrative hearings. See 202 F.3d at 1244. In the instant case, the court of appeals relied on that prior holding in construing Category 2 to cover state administrative audits and reports. The court explained that "the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources." Pet. App. 6a.

In the view of the United States, however, the Ninth Circuit in *A-1 Ambulance* erred in construing Category 1 to encompass state administrative hearings. Rather, consistent with the text, history, and purposes of Section 3730(e)(4) as a whole, the phrase "criminal, civil, or administrative hearing" is properly construed as limited to hearings involving the federal government. If Category 1 is

read in that manner, the purported inconsistency perceived by the court of appeals disappears.[3]

Moreover, as explained above (see p. 8, *supra*), the adjectives "congressional" and "[General] Accounting Office" in Category 2 of Section 3730(e)(4)(A) strongly suggest that the word "administrative" in that same phrase refers to *federal* administrative reports. If (as the court of appeals believed) it would be anomalous to treat one category as encompassing non-federal sources and the other category as excluding them, there is no evident reason to *expand* the coverage of Category 2 simply because Category 1, read in isolation, might appear to cover non-federal hearings. Rather, just as the word "administrative" *within* Category 2 should be construed in light of the accompanying adjectives "congressional" and "[General] Accounting Office," construing Category 1 in light of Category 2's federal focus (not to mention the federal focus of the section as a whole as reinforced by the statutory evolution and legislative history) is consistent with the interpretive canon that a statutory "phrase 'gathers meaning from the words around it.'" *Jones*, 527 U.S. at 389 (quoting *Jarecki*, 367 U.S. at 307).

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[3] The courts of appeals that have addressed the question have all held or assumed that Category 1 encompasses hearings conducted by state and local governments. See, *e.g.*, *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326, 330, 333 (3d Cir. 2005); *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1341, 1350 (4th Cir.), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Reagan* v. *East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *United States ex rel. Gilligan* v. *Medtronic, Inc.*, 403 F.3d 386, 390 (6th Cir. 2005), cert. denied, 546 U.S. 1094 (2006); *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999).

B. Although A Circuit Conflict Exists On The Question Presented, Review Is Not Warranted In This Case

1. Like the Ninth Circuit in this case, the Eighth and Eleventh Circuits have construed Category 2 in Section 3730(e)(4)(A) to encompass disclosures made in non-federal reports and audits. See *Hays*, 325 F.3d at 989; *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (concluding, without meaningful discussion, that a disclosure in a state audit was encompassed by Category 2). The Third Circuit, by contrast, has held that, in Category 2, the term "'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Dunleavy*, 123 F.3d at 745. The court in *Dunleavy* found it "hard to believe 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." *Ibid.* The Third Circuit also explained that state audits and reports often will not come to the attention of federal authorities, *ibid.*, and that "a broad reading of 'administrative reports' would be fundamentally inconsistent with the purpose and tenor of the 1986 [FCA] amendments," *ibid.*

Respondents appear to acknowledge (Br. in Opp. 4-6) that the Ninth Circuit's decision in this case cannot be reconciled with the Third Circuit's analysis in *Dunleavy*. Respondents contend (*id.* at 6-9), however, that subsequent Third Circuit decisions have lessened the force of *Dunleavy*. That overstates matters. Although the Third Circuit in more recent cases has distinguished *Dunleavy* on various grounds, none of those decisions suggests disapproval of the *Dunleavy* court's construction of Category 2.

In *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376, 384 (3d Cir. 1999) (Alito, J.), cert.

denied, 529 U.S. 1018 (2000), the court of appeals held that a federal agency's disclosure of records in response to a Freedom of Information Act (FOIA) request was a "public disclosure" covered by Category 2. The court noted that "[t]his holding is entirely consistent with our holding in *Dunleavy* that a report prepared at the behest of a county was not itself an 'administrative report' because it did not 'originate with the federal government.'" *Id.* at 384 n.5 (quoting *Dunleavy*, 123 F.3d at 745). In *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326 (3d Cir. 2005) (*Paranich*), the court more recently held, based on its prior decisions in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) (*Stinson*), and *Mistick*, that Section 3730(e)(4)(A) encompassed two state-court complaints and a report obtained from the federal government pursuant to FOIA. See *Paranich*, 396 F.3d at 329-330, 333. The court in *Paranich* expressed no disapproval of any aspect of *Dunleavy*'s reasoning, and it was not presented with the specific question whether Category 2 of Section 3730(e)(4)(A) encompasses audits or reports prepared by a state agency.[4]

Most recently, in *United States ex rel. Atkinson* v. *Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007) (*Atkinson*), the court took *Dunleavy* as its starting point in

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[4] The court in *Paranich* did conclude, however, contrary to the view of the United States, that Category 1 of Section 3730(e)(4)(A) encompasses disclosures made in state-court litigation. Given the view of both the United States and the Ninth Circuit that it would be anomalous for Category 1 and Category 2 to have a different reach with respect to non-federal entities, there is some tension between *Paranich* and *Dunleavy*. The *Paranich* decision did not introduce that tension, however. Even before *Dunleavy* was decided, the Third Circuit in *Stinson* had held that Category 1 encompasses state-court disclosures. See *Stinson*, 944 F.2d at 1151, 1157-1160 & n.9; *Dunleavy*, 123 F.3d at 744-746 (distinguishing *Stinson*).

considering whether public documents that do not qualify as "public disclosure[s]" under Section 3730(e)(4)(A) can nevertheless prevent a relator from establishing his status as an "original source" within the meaning of Section 3730(e)(4)(B). The court in *Atkinson* held that a relator whose claim was entirely based on information obtained from his examination of state records that were not "obscure" lacked sufficiently direct and independent knowledge to qualify as an original source. See *id.* at 522-523. As in *Paranich*, the court distinguished rather than disapproved *Dunleavy*, explaining that "[s]imply because a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A), *Dunleavy*, 123 F.3d at 744-45, does not mean that the public nature of the state records is irrelevant under the direct and independent knowledge language of § 3730(e)(4)(B)." *Id.* at 520 n.21.

Thus, there is a circuit conflict on the specific question presented here. But the Third Circuit—the only court of appeals to limit Category 2 to federal government entities—has itself disagreed with one aspect of the government's position, namely that both Category 1 and Category 2 are limited to disclosures by the federal government. See p. 16 & note 4, *supra* (citing *Stinson* and *Paranich*). In these circumstances, and because the resolution of the "public disclosure" issue appears unlikely to affect the ultimate outcome of this case, see pp. 18-20, *infra*, the better course appears to be to await further development of the issue in the lower courts.

2. On remand from the court of appeals' decision in the instant case, the district court dismissed petitioner's claims concerning fiscal year 1999-2000, explaining that petitioner's allegations did not satisfy Federal Rule of Civil Procedure 9(b) because they "only restate the general and

conclusory allegations [petitioner] makes for all fiscal years." *United States ex rel. Bly-Magee* v. *Premo*, No. CV 01-08716 (C.D. Cal. May 3, 2007), slip op. 6, ; see p. 9, *supra*. That characterization of petitioner's complaint strongly suggests that the district court regarded petitioner's claims concerning the earlier time period (the claims that are presently before this Court) as likewise inadequately particularized. And particularly in light of the Ninth Circuit's decision in *Bly-Magee II*, which held that petitioner's claims as to the October 1992-June 1997 period did not satisfy Rule 9(b) (see 214 Fed. Appx. at 643-644; pp. 3-4, *supra*), there is a substantial likelihood that petitioner's claims for June 1997-June 30, 1999 will ultimately be held to be no different from the claims for the periods that preceded and followed them, and be dismissed as insufficiently particularized even if this Court holds that they are not barred by Section 3730(e)(4).[5]

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[5] Petitioner's claims for the period from June 1997 to June 30, 1999 might also be subject to dismissal on the ground that they were based on information that had been publicly disclosed in *Bly-Magee I* and/or *Bly-Magee II*. The Ninth Circuit concluded, without analysis, that the complaint in *Bly-Magee II* barred only claims arising in the period covered by the allegations in that complaint. See Pet. App. 4a. Accordingly, it held that petitioner could pursue her claims for the period 1999-2000, even though allegations concerning the same basic fraudulent scheme had been publicly disclosed in two prior complaints. Other courts of appeals, by contrast, have found the bar in Section 3730(e)(4) to be applicable even when relators alleged that false claims had been submitted outside the time frames covered by the relevant public disclosures. See, *e.g.*, *United States ex rel. Boothe* v. *Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1173-1174 (10th Cir. 2007) (bar triggered by public disclosure in prior *qui tam* suits of same fraudulent scheme but for different years); *United States ex rel. Settlemire* v. *District of Columbia*, 198 F.3d 913, 918-919 (D.C. Cir. 1999) (disclosure in congressional hearings regarding the manner in which District of Columbia was spending federal funds triggered "public disclosure" bar,

The court of appeals has not addressed the question whether petitioner's allegations concerning the June 1997-June 30, 1999 time period satisfy Rule 9(b)'s particularity requirement. Rather, the Ninth Circuit affirmed the dismissal of those claims solely on the ground that they were barred by Section 3730(e)(4). It is therefore theoretically possible that petitioner will prevail on the merits if this Court grants certiorari and holds that the suit can go forward. Nevertheless, the likelihood that petitioner's claims would ultimately be rejected on other grounds even if the "public disclosure" issue were resolved in her favor reinforces the conclusion that resolution of the question by this Court should await further consideration by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
IRENE M. SOLET
MICHAEL GRANSTON
Attorneys

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even though hearings occurred prior to some misspending alleged in relator's complaint).