8/25/06

No. 06-282

In The
Supreme Court of the United States

CATHOLIC HEALTHCARE WEST,
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel.
PATRICIA HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether documents obtained by a *qui tam* relator pursuant to the Freedom of Information Act constitute public disclosures within the meaning of the False Claims Act's jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A).

PARTIES

Petitioners are Catholic Healthcare West, Catholic Healthcare West Arizona, and Michael Berens. Respondents are Patricia Haight and In Defense of Animals, who pursue this action on behalf of the United States of America. The United States has declined to intervene in this action. *See* 31 U.S.C. § 3730(b)(4)(B).

RULE 29.6 STATEMENT

Catholic Healthcare West is a not-for-profit entity that has no parent corporation, and no publicly held company owns ten percent or more of its stock. Catholic Healthcare West Arizona was a predecessor, prior to a merger, of Catholic Healthcare West and no longer is a separate legal entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 445 F.3d 1147 and is reproduced at App. 1-19. The order of the court of appeals denying a petition for rehearing *en banc* is unreported and is reproduced at App. 25. The decision of the district court is unreported and is reproduced at App. 20-24.

JURISDICTION

The court of appeals' judgment was entered on April 19, 2006. A timely petition for rehearing *en banc* was denied on May 30, 2006. App. 25. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

31 U.S.C. § 3730(e)(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.
>
> (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.

STATEMENT OF THE CASE

1. This case concerns the "public disclosure bar" of the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729-33. Originally enacted during the Civil War to combat fraud by those who sold supplies to the Union Army, the FCA imposes liability for false or fraudulent claims for payment to the federal government. *Id.* § 3729(a). An important feature of the Act is that it authorizes private parties, or "relators," to bring "*qui tam*" actions on behalf of the government and potentially to keep a portion of any recovery. *See id.* § 3730(a-d).

The FCA's *qui tam* provisions, as originally enacted, allowed any private party with knowledge of a fraud against the government to bring suit in the name of the government. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997) (citing Act of March 2, 1863, ch. 67 § 4, 12 Stat. 698). These provisions were used extensively in the 1930s and 1940s, "when increased government spending opened up numerous opportunities for unscrupulous government contractors to defraud the government." *Id.* This period was

marked by "parasitic lawsuits," in which "opportunistic private litigants chased after generous cash bounties" by merely copying allegations of fraud from existing indictments or congressional investigations. *Id.* at 679-80. In 1943, this Court decided *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), permitting a *qui tam* suit in which the relator copied his complaint directly from a criminal fraud indictment.

Congress reacted later that year by amending the Act to bar all *qui tam* suits "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." *Findley*, 105 F.3d at 680 (citing Act of Dec. 23, 1943, 57 Stat. 608). This amendment ultimately proved quite restrictive. Courts held that the 1943 amendments precluded *qui tam* actions even where the government was in possession of evidence or information of fraud solely because the putative relator had provided it to the government. *See, e.g., United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (discussed in *Findley*, 105 F.3d at 680).

"After ricocheting between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed," Congress in 1986 again amended the FCA's *qui tam* provisions. *Findley*, 105 F.3d at 680. In its present form, the statute deprives courts of jurisdiction over *qui tam* actions that are "based upon" a "public disclosure," unless the relator is an "original source" of the publicly disclosed information. The relevant statutory language is as follows:

> 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.

31 U.S.C. § 3730(e)(4)(A).

The D.C. Circuit has described the 1986 amendments as seeking "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." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The other courts of appeals are, generally, in agreement with this description. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). This is, however, where much of the intercircuit agreement ends. The public disclosure bar has led to extensive litigation and is the subject of many reported judicial opinions, not all of which are consistent. *See generally Findley*, 105 F.3d at 681. Despite repeated expressions of frustration by judges called upon to interpret the *qui tam* provisions, *see, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 114 F. Supp. 2d 352, 371-72 (E.D. Pa. 2000) ("questions [about the public disclosure bar] continue to plague and perplex litigants and the courts"), Congress has left the language in place for twenty years. This Petition addresses a circuit split on the important question whether documents obtained by a relator pursuant to the

Freedom of Information Act ("FOIA") constitute public disclosures within the meaning of the statute.[1]

2. Petitioner Dr. Michael Berens is a research scientist. He was, at the time relevant to this action, employed by Petitioner Catholic Healthcare West Arizona at its Barrow Neurological Institute in Phoenix, Arizona. He is attempting to find treatment options for human brain cancer. In 1997, Dr. Berens submitted a grant application to the National Institutes of Health. NIH funded his research for three years, beginning in 1998.

Respondents Patricia Haight and In Defense of Animals (collectively "Relators" herein) are self-described animal rights activists. They have vigorously and passionately protested Dr. Berens' research, which involved animal research subjects. Relators were not involved in Dr. Berens' research. Nor were they involved in any way in his preparation and submission of the 1997 grant application. Indeed, they were not even aware of his research until years after it had begun.

Haight learned about Dr. Berens' research in March 2000 from a group of students at Arizona State University. Soon thereafter, Relators engaged in a number of activities targeting Dr. Berens, including an unsuccessful attempt to persuade county officials to file animal cruelty charges against him. In June 2000, pursuant to a request under

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[1] This Court previously granted certiorari in a case presenting, *inter alia*, a question similar to the one presented here – whether the availability of a document pursuant to FOIA is sufficient to trigger the public disclosure bar – but did not need to reach that question because it concluded that the 1986 amendments to the FCA are not retroactive. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

FOIA, Haight obtained a copy of Dr. Berens' 1997 grant application. Relators sifted through the grant application and extracted statements they claim to be fraudulent. They also used FOIA to obtain additional documents about Dr. Berens' research, and they held press conferences and issued press releases in which they alleged deficiencies in the research. These activities led to the publication, in 2000 and early 2001, of news articles about defendants' research and Relators' views about that research.

3. Following these events, on March 31, 2001, Relators filed an FCA action in the district court, asserting that the grant application they had obtained through FOIA contained false statements. The United States declined to intervene, *see* 31 U.S.C. § 3730(b)(4)(B), leaving maintenance of the lawsuit to Relators.

During the discovery phase of the proceedings, defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the district court lacked subject-matter jurisdiction under the public disclosure bar. With respect to the grant application, which contains the statements that Relators claim are false, defendants argued that the grant application met the statutory requirements for a "public disclosure" because it had been disclosed to Relators pursuant to a FOIA request. Relators responded by arguing, among other things, that disclosure of documents pursuant to FOIA is not sufficient to trigger the public disclosure bar. The district court granted the motion and dismissed for lack of subject-matter jurisdiction. App. 24.

4. The court of appeals reversed. It held that the grant application was not a public disclosure within the

meaning of the statute. The court rejected the argument that the government's response to a FOIA request occasions or constitutes an administrative "investigation" or "report." App. 11-18. The court held that the public disclosure bar is triggered only if a document obtained through FOIA is itself a "criminal, civil, or administrative hearing, . . . a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media." App. 18. The court acknowledged that, in so holding, it was creating a conflict with published decisions from other courts of appeals, which have held that FOIA inquiries and responses are administrative "investigation[s]" or "report[s]," such that information in the government's own files obtained by a putative relator pursuant to FOIA meets the statutory requirements for a public disclosure. App. 11-12 The court rejected those decisions, finding its contrary view to be compelled by the plain language and legislative history of the Act. App. 12-16. The court denied defendants' subsequent petition for rehearing *en banc*. App. 25.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's opinion in this case is in direct conflict with published decisions from the Third and Fifth Circuits. Moreover, to reach its result, the court embraced an expansive and problematic view of federal court jurisdiction under the FCA that is inconsistent with the analysis of other courts of appeals. The federal issue on which the circuits are now split as a result of the decision below is important, legal, and concerns subject-matter jurisdiction under the FCA. The split is genuine and unlikely to be resolved absent review by this Court.

I. THE CIRCUITS ARE SPLIT

In *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3d Cir. 1999), the relator-plaintiff alleged that a housing authority and others submitted false claims for payment to the United States Department of Housing and Urban Development. As in this case, the plaintiff used FOIA to obtain the documents containing the alleged false claims. *See id.* at 381. The district court dismissed the action pursuant to the public disclosure bar, and the plaintiff argued on appeal (as did the Relators here) that the "FOIA request was not one of the kinds of public disclosure that trigger the jurisdictional bar set out in 31 U.S.C. § 3730(e)(4)(A)." *Ibid.* In a thorough opinion by Justice (then-Judge) Alito, the Third Circuit rejected the relator's argument.

As in this case, the documents upon which the relator sought to base his *qui tam* action were not themselves "reports" or "investigations." *See id.* at 381. The Third Circuit concluded, however, that a FOIA request results in both an "administrative . . . report" and an "administrative . . . investigation" within the meaning of section 3730(e)(4)(A). *Id.* at 383-84. Accordingly, the court held that information obtained by a relator pursuant to FOIA necessarily constitutes a "public disclosure" within the meaning of the Act. *Ibid.* The court reached this result after applying commonly understood dictionary definitions of the terms "report" and "investigation." *Ibid.* Responding to a lengthy dissent, the court noted the relator offered no alternative definitions to challenge the commonly understood meaning of these terms. *Id.* at 384. In observations that apply equally to the Ninth Circuit's analysis in this case (*see* App. 12-13), the court said that "the dissent seem[ed] to have in mind a particular type of government

report, with 'analysis,' a 'summary,' and/or a 'conclusion' . . . but the ordinary understanding of the term 'report' is broader." *Id.* at 384 n.4 (internal page reference omitted); *see also id.* n.6 ("According to the dissent, the term "investigation" seems to be limited to a criminal investigation or a like investigation of 'wrongdoing'. . . . But in ordinary usage, the term is used more broadly.").[2]

In *United States ex el. Reagan v. East Texas Medical Center*, 384 F.3d 168 (5th Cir. 2004), the court similarly considered whether documents obtained by a relator pursuant to FOIA were public disclosures within the meaning of the FCA's jurisdictional bar. After discussing the Third Circuit's opinion in *Mistick*, the court said, "we are persuaded by the reasoning of *Mistick* and hold that the response to [relator's] FOIA request is an administrative report constituting a public disclosure under § 3730(e)(4)(A)." *Id.* at 176.

The split is, accordingly, direct and genuine. In each of the decisions on the other side of the split, the courts considered precisely the same issue that the Ninth Circuit considered here, and each reached the opposite conclusion on analogous facts. As a result, some defendants now are

[2] The Third Circuit's analysis is consistent with the prevailing understanding that the words in the public disclosure bar must be given a broad reading. One of the first issues to arise after the 1986 amendments was whether the word "hearing" in section 3730(e)(4)(A) is broad enough to encompass written court documents. Courts recognized that a failure to equate the word "hearing" with, roughly, "proceeding" would lead to an absurd result. A written indictment was, after all, the public disclosure at issue in *United States ex rel. Marcus v. Hess, supra* – the quintessential "parasitic" lawsuit that Congress has, since 1943, intended to preclude. *See Springfield Terminal Ry. Co.*, 14 F.3d at 652; *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157-58 (2d Cir. 1993).

subject to suit under the FCA, and others not, based solely on the happenstance of where they reside or can be sued. Forum shopping is inevitable. Moreover, circuit splits on matters of federal subject-matter jurisdiction are unseemly, because they mean that courts in one part of the country are hearing cases that courts in other parts of the country believe they lack the power to hear. *Cf. Miner v. Atlass*, 363 U.S. 641, 650 (1960) ("nationwide uniformity" in the "field of federal jurisdiction . . . has traditionally always been highly esteemed").

The Ninth Circuit acknowledged that it was creating a circuit split, noting its disagreement with *Mistick* and *Reagan*. App. 11-12.[3] Petitioners filed a petition for rehearing *en banc*, asking the full court to resolve the conflict, but the court declined rehearing. App. 25. Accordingly, in the absence of intervention by this Court, the intercircuit conflict created by the decision below is unlikely to resolve itself.

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[3] The Ninth Circuit also appears to have concluded that its decision was in conflict with the Sixth Circuit's opinion in *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 723-24 (6th Cir. 1999). *See* App. 12. While the Sixth Circuit in *Burns* held that disclosure through FOIA is disclosure to the "public," 186 F.3d at 723-24, it treated as a separate question (which it did not resolve) whether such a disclosure occurs in connection with an administrative "report" or "investigation," *id.* at 725. It is, accordingly, probably not accurate to view *Burns* as in direct conflict with the Ninth Circuit's decision below. In any event, most of the discussion in *Burns* is *dicta* and appears to be little more than a survey of the law. The court ultimately remanded the case, because it was unclear whether the allegations in the *qui tam* complaint were based upon the FOIA information. *Id.* at 726.

II. THE NINTH CIRCUIT ADOPTED A KNOWLEDGE STANDARD THAT IS INCONSISTENT WITH DECISIONS FROM OTHER COURTS OF APPEALS

The Ninth Circuit found its interpretation of the FCA's jurisdictional bar buttressed by its conclusion that the statute's language manifests Congress's intent to preclude *qui tam* actions only where "the government already could be expected to be on notice of the fraud." App. 15. The court determined that the government does not have a sufficient "degree of familiarity and cognizance" with respect to information in documents disclosed pursuant to FOIA to trigger the public disclosure bar, because it "need not assimilate the information contained in the . . . documents." App. 16. In other words, the court determined that in deciding questions about the meaning of the words in section 3730(e)(4)(A), courts should be guided by whether the government was aware of, or had "assimilated," the information at issue.

A FOIA document is, of course, known to the government, because it comes from the government's own files. Indeed, the document at issue here – a grant application – necessarily must have been both read and considered by the government, because the grant ultimately was awarded. Moreover, documents disclosed pursuant to FOIA are not merely tucked away in file cabinets somewhere, but have expressly been called to the government's attention by the requesting party before their disclosure. Thus, in ruling that the government does not have sufficient "familiarity and cognizance" with respect to FOIA documents, the Ninth Circuit has set an exceptionally high standard for the level of awareness of a document

that the government must possess to trigger the public disclosure bar.

As an initial matter, the Ninth Circuit's suggestion that Congress intended application of the public disclosure bar to turn on the government's "familiarity and cognizance" with respect to a particular document is suspect and inconsistent with the structure of the FCA itself. The public disclosure bar expressly applies to disclosures "from the news media," 31 U.S.C. § 3730(e)(4)(A), of which the government may or may not actually be aware. If Congress had intended to adopt the knowledge standard read into the statute by the Ninth Circuit, it is unlikely also to have precluded *qui tam* FCA actions based on information that has merely appeared somewhere in the news.[4]

In addition to being most probably erroneous, the Ninth Circuit's focus on whether or not the government knows about a particular document is inconsistent with decisions of other courts of appeals. Those courts, in attempting to interpret the meaning of words such as "hearing" or "report" in section 3730(e)(4)(B), have noted that the relevant issue is not whether the government is actually aware of particular information, but whether the information is in the public domain. For example, the Seventh Circuit has expressly rejected the argument that

[4] The court appears to have recognized this problem with its analysis, but its answer was terse: "While information in the news media does not necessarily originate from the government, it is so public that the government can be presumed to be on notice of it." App. 15 n.4. There is no reason to expect Congress thought the government would have a greater degree of "familiarity and cognizance" with respect to matters that have merely appeared somewhere in a news article than the government has with respect to its own documents in its own files that have been called to its attention in a FOIA request.

a government lawyer must be actually aware of publicly disclosed information in an administrative report, holding as follows: "That a particular attorney of [an] agency may not know of [the] information is of no moment; what concerns this analysis is whether the critical information was in the public domain. . . . [A]n allegation or transaction can be publicly disclosed under the FCA even where a representative of the Government is unaware of any public disclosures." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 496 (7th Cir. 2003) (internal quotation to lower court opinion omitted). Similarly, the Third Circuit has suggested that the relevant inquiry under the statute is whether the information at issue was "equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991).[5]

Applying similar reasoning, "every court of appeals to have addressed the question" has concluded that information disclosed in civil litigation and on file with a court constitutes a "public disclosure" within the meaning of the FCA. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (collecting cases). Thus,

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[6] In support of its knowledge standard, the Ninth Circuit relied on *United States ex rel. Springfield Terminal Ry. Co., supra*. *See* App. 15-16. While the D.C. Circuit in that case discussed extensively the quantum of information that must be available to the government to trigger the public disclosure bar, it primarily focused on whether the information was in the public domain, not on whether the government had actually assimilated the information. *See* 14 F.3d at 654 ("Congress . . . navigated between . . . two extremes . . . to create a standard under which *qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction. . . .").

the fact that information filed in civil litigation between private parties can be found in a clerk's office file is sufficient, in every circuit that has considered the matter, to preclude a *qui tam* action under the public disclosure bar. *E.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993) (statute was designed to preclude suits based on information "gleaned in litigation" and "on file in [a] clerk's office") (internal citation and quotation omitted); *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1996) ("[a]ny information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)") (internal citation and quotation omitted).[6]

The Ninth Circuit's decision here cannot harmoniously coexist with these cases. Surely the government cannot be expected to be more aware of what happens in all private civil litigation throughout the country than it is aware of the contents of federal grant applications or other documents within its own files called to its attention in a FOIA request. Accordingly, not only does the Ninth Circuit's decision present a direct circuit split on the important issue whether FOIA disclosures constitute "public disclosures," its focus on whether the government was

[6] Indeed, even the Ninth Circuit appears previously to have concluded that documents filed in private civil litigation constitute public disclosures. *E.g., United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011, 1015-16 (9th Cir. 2001) (suggesting that a complaint filed in civil litigation could constitute a public disclosure within the meaning of the Act, but not ruling on the issue because the allegations in the civil complaint were not sufficiently similar to those in the FCA complaint).

aware of, or had assimilated, a particular document also will inevitably create or exacerbate further divisions among the circuits.

III. THE FEDERAL ISSUE PRESENTED IS IMPORTANT

By their own admission, Relators were not insiders with respect to Dr. Berens' research. Indeed, they did not even know about his grant application until two and one-half years after it was submitted to NIH. Relators are animal rights activists who, after using other methods to attempt to derail Dr. Berens' research, obtained his grant application through FOIA and then consulted other public information to attempt to claim that certain statements in the grant application are misleading.

The Ninth Circuit understood that, in allowing Relators' claims to go forward, it was adopting an expansive view of *qui tam* jurisdiction. Indeed, the court described that result as a "happy effect" of its decision: "Permitting claims based on otherwise private information obtained via a FOIA request to go forward also has the happy effect of encouraging private citizens with suspicions of fraud to take the most expeditious route toward uncovering information related to that fraud and hastening recovery for the government." App. 16-17 n.5.

The Ninth Circuit's extension of *qui tam* jurisdiction to cases where relators merely suspect fraud and are able to "uncover[]" it after using FOIA to look through the government's own files is inconsistent with the careful balance struck by Congress in the 1986 amendments.

Indeed, the Ninth Circuit's analysis harkens back to the since-rejected era of *United States ex rel. Marcus v. Hess*, *supra*, when a *qui tam* action could be based upon the government's own information, which is what happens when a relator must rely on FOIA in order to bring an FCA action.

The FCA already is an often-used statute, with hundreds of new *qui tam* actions filed each year. *See* 2 John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H at H-2 (3d ed. 2005) ("Boese Treatise") (showing approximately 300 to 500 new *qui tam* actions filed each year in the past decade). The decision below is likely to occasion a significant increase in these numbers in the Western states, and also can be expected to increase the number of FOIA requests made by putative relators to bring FCA actions and chase *qui tam* bounties.[7] While the Ninth Circuit described its expansion of *qui tam* jurisdiction as a "happy effect," the reality is that most *qui tam* actions are meritless. In resolved *qui tam* cases filed after the 1986 amendments in which the government has declined to intervene, the relators have obtained a settlement or judgment only about six percent of the time.[8] The

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[7] FOIA already imposes a considerable burden on federal agencies. *See* Department of Justice Pub., *Summary of Annual FOIA Reports for Fiscal Year 2003* (www.usdoj.gov/oip/foiapost/2004foiapost22.htm) (showing that, for Fiscal Year 2003, the federal government received 3,266,394 FOIA requests, devoted the equivalent of 5,007.61 employee work-years to handling FOIA requests, and spent more than $323 million on FOIA activities).

[8] Department of Justice statistics as of September 30, 2005 indicate that out of the 2,893 *qui tam* actions that have been filed since the 1986 amendments and in which the government declined to intervene, 2,716 have been dismissed and only 177 (or about six percent) have been resolved by settlement or judgment. *See* Boese Treatise, Appendix H at H-6.

nature of FOIA ensures that almost anyone can do what Relators did here – obtain grant applications or other government documents relating to those with whom they have political (or philosophical or commercial) disagreements and then bring disruptive lawsuits.

The Third Circuit recognized the very point in the *Mistick* case:

> Just as civil discovery is public, it must be the case that information obtained pursuant to a[] FOIA request has been made public through the administrative process and cannot form the basis of a qui tam action. If that were not the case then, like court records, public agency records would be flooded with citizens requesting information in order to bring qui tam suits. Congress did not intend the qui tam provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.

Mistick, 186 F.3d at 385 (quoting *United States ex rel. Herbert v. Nat'l Academy of Sciences*, 1992 WL 247587, at *6 (D.D.C. Sept. 15, 1992).) The Ninth Circuit's disagreement with its sister circuits is, in sum, a significant decision that, we respectfully submit, warrants the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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445 F.3d 1147

UNITED STATES of America,
Plaintiff,

and

Patricia Haight, ex rel. and in
Defense of Animals, Plaintiff-Appellant,

v.

CATHOLIC HEALTHCARE WEST;
Catholic Healthcare West Arizona;
Michael Berens, Defendants-Appellees.

No. 03-16937.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 13, 2005.

Filed April 19, 2006.

Jeremy L. Friedman, Law Office of Jeremy L. Friedman, Oakland, CA, for the appellants.

Lawrence A. Kasten, Lewis and Roca LLP, Phoenix, AZ, for the appellees.

Appeal from the United States District Court for the District of Arizona; Frederick J. Martone, District Judge, Presiding. D.C. No. CV-01-02253-FJM.

Before: B. FLETCHER, JOHN R. GIBSON,* and BERZON, Circuit Judges.

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* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

B. FLETCHER, Circuit Judge:

Dr. Patricia Haight and the organization In Defense of Animals (collectively "Relators") appeal the dismissal of their complaint for lack of subject matter jurisdiction under the False Claims Act's "public disclosure" jurisdictional bar, 31 U.S.C. § 3730(e)(4). We reverse.

I.

Relators brought this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, against Catholic Healthcare West and Dr. Michael Berens (collectively "Defendants"). The Relators allege that Berens submitted a fraudulent grant application to the National Institutes of Health ("NIH"). Based on this application, he was awarded over $700,000 in grant money.

Defendant Berens is a research scientist at Barrow Neurological Institute, a division of Catholic Healthcare West. Berens is the primary researcher on a project that uses beagle dogs to research glioma, a form of malignant brain tumor. The study is designed to develop a large animal model for studying glioma and then extrapolate any knowledge gained to treat glioma in humans. Berens attempted to develop the model by injecting glioma tumor cells into the flanks of gestating beagle puppies. This procedure had to be done during gestation to prevent the immune systems of the puppies from rejecting the gliomal cells and was designed to cause tumors to develop after the puppies were born, which could then be transplanted into their brains. Initially, Berens' research was privately funded. Later he sought public funding. Berens' first grant application to the NIH was rejected, but his

second application was approved, resulting in an award of over $700,000 in grant money.

Relator Haight is an experimental psychologist and the Southwest Regional Director of In Defense of Animals. Haight performed extensive research on Berens' study and uncovered the fraud alleged in the complaint. Haight began investigating Berens' research at the request of a student and community members who were protesting animal research conducted at Barrow and Arizona State University ("ASU"). She first identified the funding source for Berens' study – the National Institute of Neurological Disorders and Strokes, an institute within the larger NIH – and requested documents relating to the study pursuant to the Freedom of Information Act ("FOIA"). She was subsequently informed that she could obtain the documents from her FOIA request directly from Barrow, where Berens' study was being performed, so she walked down personally to obtain them. The documents she obtained because of her FOIA request included the 1997 grant application and continuation forms, and a paper and paper abstract by Berens.

Haight then requested documents from ASU, where the project had formerly been housed, including animal care records and minutes from the Institutional Animal Care and Use Committee ("IACUC") meetings, where animal research projects are vetted. In response to this request, Haight received protocols submitted to ASU by Berens starting in 1990, animal care records, IACUC minutes, and correspondence between Berens and IACUC concerning Berens' withdrawal of the project from ASU in 1997.

Becoming concerned about the efficacy of the project, Haight arranged to tour the ASU facility where the dogs had been housed and the Veterans Administration hospital to which the dogs were transferred when Berens' project ceased to have the support of ASU. She also interviewed numerous individuals who provided information about Berens' research, including Edward Castaneda, Chairman of the IACUC at ASU; Ted Brandon, Director of ASU's Animal Care Program; Neal DeNardo, ASU Veterinarian; Ronald Barr, Assistant Vice Provost for Research at ASU and IACUC member; Tol Chesko, IACUC member; Joan McGregor, ASU faculty member; and graduate student Clare Rhodes. In conjunction with her tour of the VA facility, Haight interviewed Jedd Nelson, Director of Animal Care. Haight contacted Geoffrey Pilkington, Professor of Experimental Neuro-oncology at King's College of London, who was listed as a consultant to Berens' project on the NIH application. Haight also met with Joan Rankin Shapiro, Vice President for Research at Barrow Neurological Institute.

In the course of these discussions and tours, Haight learned what she believes to be the truth about Berens' research. First, she learned from DeNardo and Brandon that Berens' research has produced little, if any, scientific results. Many of the pups died, were aborted, or were born with congenital defects, and those that were born healthy did not develop the expected subcutaneous tumors. This assessment of the project was supported by Shapiro, who told Haight that throughout the ten years that the project had been ongoing, only three pups had developed tumors, and one of those tumors was so small that it could not be seen until after the pup was killed. Second, she learned that Berens' competency to perform the complicated

surgery on the prenatal pups was questionable and that the researchers could not identify gross anatomical landmarks when attempting to inject the pups' flanks with gliomal cells. Shapiro stated that because the uterus of the beagle is murky, it became necessary to "inject everything we think we can see" when attempting to implant the cells in the pups' flanks. Third, she learned that while Berens had officially withdrawn his project from ASU, he had done so under pressure from the university's IACUC to terminate the project because of its failure to produce meaningful results after ten years of attempts. Fourth, she learned that none of the dogs temporarily housed at the VA Hospital after the project was terminated at ASU had developed subcutaneous tumors. Fifth, she discovered from Dr. Pilkington that he was surprised to have been listed as a consultant for the project and that he had not, as stated in the grant application, agreed to provide any dogs for the project.

The Relators challenge an array of allegedly fraudulent or misleading statements. The Relators' allegations are as follows:

1. Relators challenge the indications of success stated in the grant application, specifically that:

a. "successful allotolerant pups had been achieved in four separate litters";

b. "4 out of 5 pups in one litter developed tumors";

c. "one in four litters yielded at least one pup with a subcutaneous tumor";

d. "there were subcutaneous tumors in up to 80% of the pups."

2. Relators challenge the assertions in the grant application that the researchers have "achieved the technical and surgical skills necessary for realizing the desired outcome," that they can identify gross anatomical landmarks, and that the cells were embedded in the desired locations.

3. Relators challenge the projections in the grant application as to the number of tumors the researchers would create.

4. Relators challenge the statement in the grant application that "neonatal pups cannot be induced to accept allogenic cells," thus necessitating the approach taken by Berens.

5. Relators challenge the assertions in the grant application as to Pilkington's involvement as a consultant and provider of control dogs (i.e. dogs with naturally occurring brain tumors).

With respect to each allegation, the false or misleading statement was contained in the grant application obtained via Haight's FOIA request.

Before Relators filed their complaint, several news articles were published on the Berens' controversial animal experiments. *See, e.g.,* Scott Bewick, *Researcher's Beagle Testing Unnecessary, Protesters Say,* ASU STATE PRESS, Sept. 28, 2000, *available in part at* http://studentmedia.vpsa.asu.edu/webarchives/; James Hibberd, *Screwing the Pooch,* PHOENIX NEW TIMES, Jan. 4, 2001, at 14-24, *available at* http://phoenixnewtimes.com/Issues/2001-01-04/news/feature.html. In addition, In Defense of Animals issued several press and news releases relating to the Berens study. Relators argue that what they allege to be the truth about Berens' study was discovered through Haight's independent investigation.

Haight and In Defense of Animals filed their complaint on behalf of the United States under the *qui tam* provisions of the FCA in the Northern District of California. The United States declined to intervene in the action. Based on Defendants' motion, the suit was transferred to Arizona.

After transfer, the Relators filed an amended complaint, and the Defendants filed a motion to dismiss for failure to state a claim. After the motion to dismiss was denied, the Defendants filed an Answer, and the parties initiated discovery. Then the Defendants filed a second motion to dismiss, now based on lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). After argument the district court granted the Defendants' motion, holding that a response to a FOIA request is a public disclosure via an enumerated source and that accordingly Relators' suit was barred under 31 U.S.C. § 3730(e)(4). The district court also awarded costs to the Defendants. The Relators appeal both the district court's order granting the motion to dismiss and the order awarding costs.

We review de novo the district court's dismissal for lack of subject matter jurisdiction. *United States ex rel. Hochman v. Nackman,* 145 F.3d 1069, 1072 (9th Cir. 1998).

II.

The False Claims Act imposes liability on those who defraud the government. 31 U.S.C. § 3729. It encourages the uncovering of such fraud by permitting private persons to bring *qui tam* actions on behalf of the government. *Id.* § 3730(b); *see also United States ex rel. Campbell v. Redding Med. Ctr.,* 421 F.3d 817, 823 (9th Cir.2005) ("'[T]he Committee's overall intent in amending the qui tam

section of the False Claims Act is to encourage more private enforcement suits.'" (quoting Sen. Rep. No. 99-345, at 23-24 (1986))). Such *qui tam* relators then share in any recovery obtained on the government's behalf. 31 U.S.C. § 3730(d). At the same time, the FCA discourages opportunistic *qui tam* relators by depriving the courts of subject matter jurisdiction in actions where the fraud allegations were publicly disclosed via a source listed in the provision, unless the relator was the original source of the allegations. The jurisdictional bar provision reads:

> 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 [General] 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.

Id. § 3730(e)(4)(A).

Whether an action is barred under this provision is a two-step inquiry. First, it must be determined whether the allegations were publicly disclosed via a source enumerated in § 3730(e)(4)(A). If so, then it must be determined whether the relator was the original source of those allegations. *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir.1992) ("Where there has been no 'public disclosure' within the meaning of section 3730(e)(4)(A), there is no need for a *qui tam* plaintiff to show that he is the 'original source' of the information."). "Original source" is defined in § 3730(e)(4)(B) as "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." 31 U.S.C. § 3730(e)(4)(B). Because we conclude that the allegations underlying the complaint were not publicly disclosed within the meaning of § 3730(e)(4)(A), we need not proceed to the second step.

A.

Determining whether the allegations underlying a fraud claim have been publicly disclosed under § 3730(e)(4)(A) itself requires two inquiries. First, to constitute a public disclosure, the fraud must have been disclosed in one or more[1] of the sources specified under the statute:

> 1) a criminal, civil, or administrative hearing;
>
> 2) a congressional, administrative, or [General] Accounting Office report, hearing, audit or investigation; or
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> 3) the news media.

Id. § 3730(e)(4)(A). If there has been such a disclosure, the content of that disclosure must consist of the "allegations or transactions" giving rise to Relators' claim. *A-1*

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[1] Contrary to Appellants' assertion, we assume that the elements of the fraud allegation need not have been made public in a single document. *See, e.g., United States ex rel. Found. Aiding the Elderly v. Horizon West Inc.*, 265 F.3d 1011 (9th Cir.2001), *amended by*, 275 F.3d 1189 (9th Cir.2001), *reprinted as amended*, 2001 U.S.App. LEXIS 27363, *7-11 (pin cites and subsequent citations are to the reprinted opinion) (analyzing several documents to determine whether the allegations and transactions were publicly disclosed); *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238 (9th Cir.2000) (finding a complaint barred by the jurisdictional provision based on the disclosures in several administrative hearings and the documents filed in conjunction with those hearings).

Ambulance Serv., 202 F.3d at 1243. "The substance of the disclosure . . . need not contain an explicit 'allegation' of fraud, so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain." *Foundation Aiding the Elderly,* 265 F.3d at 1014.

> If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Id. at 1015 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 654 (D.C.Cir.1994)). In a fraud case, X and Y stand for "a misrepresented state of facts and a true state of facts." *Id.* at 1015 (internal quotation marks and citation omitted). Thus, for the suit to be barred, Defendants must show that its essential elements, both the alleged truth and the allegedly fraudulent statements, were publicly disclosed via an enumerated source.

The district court determined that the allegations underlying the fraud claim were publicly disclosed because the alleged fraud occurred in a grant application obtained by Relators pursuant to a FOIA request, and Relators' claims were disclosed in press releases and various news articles. We conclude that the district court was incorrect in holding that the response to the FOIA request was a public disclosure via an enumerated source within the meaning of § 3730(e)(4)(A). Because the misrepresented state of facts, "X," was not publicly disclosed via an enumerated source, we need not reach the questions of whether the true state of facts, "Y," was publicly disclosed

via an enumerated source or whether Relators were the "original source" of that true state of facts.

B.

Whether a response to a FOIA request is a public disclosure in a form prescribed by the jurisdictional provision is an open question in the Ninth Circuit.[2] Appellees contend that we should hold that all documents obtained via FOIA request are public disclosures for the purposes of the jurisdictional statute. In support, they cite *United States ex rel. Mistick PBT v. Housing Authority,* 186 F.3d 376, 383 (3d Cir.1999), in which the Third Circuit concluded that a response to a FOIA request is a publicly disclosed "administrative report" or "administrative investigation" so as to invoke the jurisdictional bar. *See also United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l*

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[2] This court addressed a related question in *United States ex rel. Schumer v. Hughes Aircraft Co.,* 63 F.3d 1512, 1520 (9th Cir.1995), *vacated on other grounds,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), which the district court cited in support of its decision. *Schumer's* holding is not on point, however. *Schumer* holds only that material in a government file that is potentially accessible to the public through a FOIA request is not publicly disclosed. *Id.* at 1519-20. Only in dicta does the court discuss information that is disclosed through FOIA, saying: "In the FOIA context, information cannot be deemed disclosed until a member of the public requests the information *and receives it* from the government. Only then is the information *actually,* rather than *theoretically* or *potentially,* available to the public." *Id.* at 1520. Furthermore, *Schumer* was vacated by the Supreme Court on grounds unrelated to the public disclosure analysis. *See Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 952, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). It is thus only persuasive authority and is not binding precedent. *Orhorhaghe v. INS,* 38 F.3d 488, 493 n. 4 (9th Cir.1994). The *Schumer* opinion does not supply the answer as to whether information received through a FOIA request is publicly disclosed.

Healthcare Sys., 384 F.3d 168, 176 (5th Cir.2004); *United States ex rel. Burns v. A.D. Roe Co.,* 186 F.3d 717, 723-24 (6th Cir.1999). We disagree: 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. Since the document obtained via FOIA request here was not from one of the sources enumerated in the statute, the FOIA response does not trigger the jurisdictional bar.

In interpreting the jurisdictional bar, we "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *United States ex rel. Lujan v. Hughes Aircraft Co.,* 243 F.3d 1181, 1187 (9th Cir.2001) (quoting *United States v. Hockings,* 129 F.3d 1069, 1071 (9th Cir.1997)). If the statutory text is ambiguous, we look to the legislative history. *Id.*

Interpreting "report" or "investigation" as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly. FOIA requires only that federal agencies search their records for those that are responsive to the request. 5 U.S.C. § 552(a)(3)(D) (" '[S]earch' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."). In essence, a FOIA request is a "mechanism for duplicating records that are in the possession of the federal government and that are not otherwise excludable from members of the public." *Mistick,* 186 F.3d at 393 (Becker, C.J., dissenting). In contrast, reports and investigations generally involve independent work product. "Report" denotes a document that includes an analysis of findings; "investigation" implies independent governmental

leg-work. Moreover, the FCA's jurisdictional bar groups "report" and "investigation" with a series of other enumerated sources that each involve extensive governmental work product and involvement.[3] Because responding to a FOIA request requires little more than duplication, labeling any response to a FOIA request a "report" or "investigation" would ignore the way in which each of the enumerated sources involves governmental work product.

The legislative history of the jurisdictional provisions of the False Claims Act lends support to the interpretation that a response to a FOIA request is not, standing alone, an administrative report or investigation. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 649-51 (D.C.Cir.1994) (providing a more detailed history); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.,* 944 F.2d 1149, 1152-54 (3d Cir.1991) (same). The original version of the False Claims act, enacted in 1863, permitted *qui tam* suits to be filed regardless of how the relator came by the information that underlay the fraud claim, even if the government was already aware of that information. In 1943, the Supreme Court interpreted this broad statutory language to permit *qui tam* suits even when the allegations in the complaint were copied by the relator directly from criminal indictments in public court files, clearly

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[3] The enumerated sources are "criminal, civil, or administrative hearing[s], . . . congressional, administrative, or Government [General] Accounting Office report[s], hearing[s], audit[s], or investigation[s], or . . . the news media." 31 U.S.C. § 3730(e)(4)(A). With the exception of the news media, each of these enumerated sources is a form of work product originating with the government. The contents of those sources is expected to be well-known to the government. Likewise, the reports of the news media can be presumed to be known by the government.

within the government's cognizance. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 546-548, 63 S.Ct. 379, 87 L.Ed. 443 (1943). Congress responded quickly to this interpretation of the statute by swinging far in the other direction. The 1943 amendments to the FCA prohibited *qui tam* suits "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982) (superceded), even when that information was obtained by the relator through substantial independent effort and provided to the government in anticipation of the suit. *See, e.g., United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir.1984) (barring jurisdiction over a *qui tam* suit filed by the state of Wisconsin alleging Medicaid fraud the state had uncovered and reported to the federal government as required by law).

In 1986, Congress passed further amendments, acknowledging that less restrictive jurisdictional provisions were required to fight the ever-growing problem of fraud. The current language, then, was designed to create a scheme in which "the *qui tam* suit provision[s] operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases, which precluded suit even by the original sources." *Stinson,* 944 F.2d at 1154 (citation omitted); *see also United States ex rel. Devlin v. California,* 84 F.3d 358, 362 (9th Cir.1996) (explaining that the 1986 amendments to the FCA represent "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" (internal quotation marks and citation omitted)). The current provisions seek to

balance the primary fraud-detection function of the FCA while "ensur[ing] that no qui tam relator could profit from information that had become part of the public domain." *Mistick,* 186 F.3d at 391 (Becker, C.J., dissenting). Thus, the jurisdictional bar provisions "must be analyzed in the context of these 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." *Springfield Terminal,* 14 F.3d at 651.

Interpreting the jurisdictional provision to bar *qui tam* suits where the allegations are based on otherwise private information obtained via a FOIA request would be out of step with Congress's intentions in amending the jurisdictional provision of the FCA. In order to prevent opportunistic *qui tam* relators from profiting from information that was already part of the public domain, Congress sought to bar suits in which the government could already be expected to be on notice of the fraud. It determined that the government could be expected to be aware of information derived from the enumerated sources, because the information *originated* from the government or involved governmental work product.[4] By limiting the enumerated sources to that narrow list, however, Congress also sought to capitalize on the independent efforts of prospective *qui tam* relators who call information to the attention of the government. As stated by the D.C. Circuit:

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[4] The sole exception to this generalization about the enumerated sources is the news media. The same principle applies in this instance, however. While information in the news media does not necessarily originate from the government, it is so public that the government can be presumed to be on notice of it.

> [T]he entire *qui tam* regime is premised on the idea that the government's knowledge of misrepresented claims against the federal fisc (without knowledge that they are misrepresented) does not in itself translate into effective enforcement of the laws against fraud.

Springfield Terminal, 14 F.3d at 656. While the government can be expected to be on notice of fraud when the allegations are contained in a public disclosure such as an administrative or congressional hearing, when responding to a FOIA request, the government need not assimilate the information contained in the requested documents. The duplication of FOIA-requested documents does not require the degree of familiarity and cognizance that the drafting of a report or the conducting of an investigation would. Accordingly, prohibiting *qui tam* relators from basing their allegations on any information obtained in a FOIA response would damage the fraud-detection purpose of the FCA while failing to serve its twin goal of preventing opportunism.[5]

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[5] Moreover, holding that a FOIA response is necessarily a "report" or "investigation" would deter individuals who suspect fraud from investigating it. FOIA requests are one of the simplest vehicles by which interested citizens can uncover possible fraud against the government. If information obtained pursuant to FOIA requests could never form the basis of a *qui tam* action, prospective relators would have to invest substantially more energy into uncovering the suspected fraud through other means. Moreover, the government is not harmed by permitting claims based on information obtained pursuant to FOIA request from going forward; it still has an opportunity to intervene and take over the suit. *See* 31 U.S.C. § 3730(b)(2). Permitting claims based on otherwise private information obtained via a FOIA request to go forward also has the happy effect of encouraging private citizens with suspicions of fraud to take the most expeditious route toward uncover-

(Continued on following page)

The specific facts of this case illustrate how ill-fitting the labels of "report" or "investigation" can be for responses to FOIA requests. Haight ultimately obtained the documents 4398 that she had requested by FOIA – saliently Dr. Berens' successful grant application containing the alleged misrepresentations – by walking to Barrow and obtaining them herself. In this instance, the FOIA response consisted only of alerting Haight to the location of the documents relating to Dr. Berens' research. Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication. Responding to Haight's FOIA request did not position the government to detect or respond to the alleged fraud.

Haight, on the other hand, put in substantial time and effort into uncovering the allegations the Relators make in their complaint. In addition to filing a FOIA request, Haight requested documents, including animal care records and minutes from IACUC meetings, from Arizona State University; she toured the two facilities where dogs associated with Berens' research were housed; she contacted and interviewed at least nine people who had knowledge about the Berens' project; she also corresponded with a scientist overseas who was listed as a consultant to Berens' research. Moreover, she combed the documents that she received through her FOIA inquiry and from ASU in an attempt to learn about Berens' research. Ultimately, she uncovered what Relators allege to be serious misrepresentations about the project that resulted in an award of over $700,000 in federal funds. Relators did not behave opportunistically. To the contrary,

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ing information related to that fraud and hastening recovery for the government.

Haight performed precisely the sort of investigative work that the *qui tam* provisions of the FCA encourage in order to promote detection of fraud against the government.

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

In the present case, the allegations and transactions in the complaint were based on information found solely in the grant application Haight obtained in response to the FOIA request. Because the grant application was not publicly disclosed via an enumerated source, Relators' suit is not barred by § 3730(e)(4)(A).

C.

Because we hold that the misrepresented state of facts, "X," was not publicly disclosed via an enumerated source, we need not, and do not, reach the questions of whether the true state of facts, "Y," was publicly disclosed via an enumerated source, or whether Relators were the "original source" of that true state of facts.

III.

We **REVERSE** and **REMAND.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, ex rel. Patricia Haight and In Defense of Animals, Plaintiff, vs. Catholic Healthcare West, et al., Defendants.	No. CV-01-2253-PHX-FJM **ORDER** (Filed Sep. 3, 2003)

The court has before it Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 78), Plaintiff's response, and Defendants' reply. Plaintiff brings this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. Plaintiff alleges that Defendants knowingly made false and misleading statements in their grant application, and thus, fraudulently received research funding from the federal government. Defendants move to dismiss under the FCA's "public disclosure" jurisdictional bar.

The FCA expressly limits a court's jurisdiction over *qui tam* claims that are

> 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 [the "relator"] is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The bar furthers the FCA's purpose because, when the information underlying the relator's complaint has already been publicly disclosed, the government receives no additional benefit from the relator's filing a *qui tam* suit. The FCA's public disclosure bar involves a two part test. A court must first determine if there has been a public disclosure of the allegations or transactions upon which the FCA action is based. If yes, a court must then determine whether the relator is an original source within the meaning of the FCA. The relator bears the burden of establishing by a preponderance of the evidence that the jurisdictional bar does not apply and the court has subject matter jurisdiction.

To constitute a "public disclosure" within the meaning of the FCA the disclosure must have been through a method specified in the statute. Here, Defendants argue that the public disclosure bar applies because Plaintiff's allegations are based upon information obtained pursuant to a Freedom of Information Act ("FOIA") request and news media articles. The FCA specifically lists administrative reports and news media reports as sources of pub[l]ic disclosures. Information released in response to a FOIA request constitutes an administrative report and is, therefore, a public disclosure within the meaning of the FCA. *United States, ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995); *see also United States, ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999). Allegations reported in the news media are also publicly disclosed for purposes of the FCA.

An FCA claim is based upon a public disclosure if it is substantially similar to or supported by the allegations or transactions described in the public disclosure. *United*

States, ex rel. Biddle v. Bd. of Tr. of Stanford Univ., 161 F.3d 533, 536-37 (9th Cir. 1998). Plaintiff alleges that Defendants defrauded the government because they overstated their success rate in their grant application. The allegations of fraud are, at least in part, based on information contained in the grant application, which Plaintiff obtained pursuant to a FOIA request. Furthermore, the news articles describe the Defendants' research and alleged failure rate and are substantially similar to Plaintiff's allegations. Both the FOIA requests and the news media articles predate Plaintiff's FCA claims. These claims, therefore, are "based upon" publicly disclosed information within the meaning of the FCA.

Plaintiff argues that her FCA claims are not based upon public disclosures because she was the source of the news articles, and the publication of the allegations or transactions in the news stories cannot therefore serve to bar this suit. The Ninth Circuit has squarely rejected this theory. *United States, ex rel. Aflatooni v. Kitsap Physicians Svcs.*, 163 F.3d 561, 521-22 (9th Cir. 1998). Plaintiff also argues that the disclosures do not trigger the jurisdictional bar because no single disclosure contained all of the allegations of fraud. The issue, however, is whether the critical elements of the fraudulent transaction are in the public domain, not whether they are neatly collected in a single publicly disclosed document. Here, the allegedly misrepresented facts were publicly disclosed in the grant application through the FOIA process and the allegedly true facts were disclosed in the news media. Therefore, all of the material elements of Plaintiff's FCA claim were in the public domain.

Having determined that Plaintiff's FCA claim is based upon publicly disclosed allegations, the final question is

whether the court nonetheless has subject matter jurisdiction because Plaintiff was an original source of the disclosures. The FCA defines an original source as "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 [a *qui tam*] action." 31 U.S.C. § 3730(e)(4)(B) . In order to qualify as an original source, the relator must have both direct and independent knowledge of the information upon which her allegations are based. A relator's information is independently obtained when it is acquired prior to the public disclosure of the allegations. A relator has direct knowledge if it is discovered firsthand. In other words, a relator has direct knowledge only if she saw the fraud with her own eyes or obtained her knowledge of it through her own labor unmediated by anything else. *United States, ex rel. Delvin v. State of Calif.*, 84 F.3d 358, 361 (9th Cir. 1996).

Here, Plaintiff's knowledge is not independent because it is based, at least in part, on information contained in the grant application. Furthermore, Plaintiff obtained her knowledge of the alleged research failure second hand. She had no involvement with Defendants' research, nor did she witness any of the research procedures or laboratory results. Plaintiff's allegations are based solely on information gathered from third parties. Plaintiff has failed to provide persuasive authority in support of her argument that her investigative efforts and discussions with project participants render her an original source within the meaning of the FCA.

Plaintiff's FCA claims are based upon information that has been publicly disclosed as defined by the FCA.

Furthermore, Plaintiff has failed to establish that she is an original source of the publicly disclosed information.

Accordingly,

IT IS ORDERED GRANTING Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 78).

DATED this 29 day of August, 2003.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and PATRICIA HAIGHT, ex rel and in Defense of Animals, Plaintiff-Appellant, v. CATHOLIC HEALTHCARE WEST; et al., Defendants-Appellees.	No. 03-16937 D.C. No. CV-01-02253-FJM District of Arizona, Phoenix ORDER (Filed May 30, 2006)

Before: B. FLETCHER, GIBSON,* and BERZON, Circuit Judges.

Judge Berzon votes to deny the petition for rehearing en banc and Judges B. Fletcher and Gibson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.