No.

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

2. Whether the judgment must be reversed because the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, either on their face or as applied in this case, violate the Appointments and Take Care Clauses of Article II of the United States Constitution?

RULE 29.6 STATEMENT

Petitioner Rockwell International Corp. was renamed Boeing North American, Inc. Petitioner Boeing North American, Inc. has since been merged into The Boeing Company. State Street Bank and Trust Company beneficially owns 10% or more of The Boeing Company's stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL STATUTES

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY

OPINIONS BELOW

The opinion of the Tenth Circuit affirming in part and ordering limited remand (Pet. App. 1-48a) is reported at 282 F.3d 787. The opinion of the Tenth Circuit affirming after limited remand (Pet. App. 49-55a) is unreported, but is available at 92 Fed. Appx. 708. The order of the Tenth Circuit denying rehearing and rehearing *en banc* (Pet. App. 56-57a) is unreported.

JURISDICTION

The Tenth Circuit denied rehearing and rehearing *en banc* on January 4, 2006. Pet. App. 56-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 77-82a) reproduces the relevant text of 31 U.S.C. § 3730 and Article II of the United States Constitution.

STATEMENT OF THE CASE

This is a *qui tam* action brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, by James S. Stone, a former employee at the Rocky Flats nuclear weapons plant in Golden, Colorado. Rockwell International Corporation ("Rockwell")[1] operated Rocky Flats for the Department of Energy ("DOE"), and the jury found that Rockwell secured some payments from DOE in violation of the FCA. As the case comes to this Court, there is no dispute that Stone's complaint was based on information that had been previously disclosed to the public, and that the *qui tam* provisions of the FCA accordingly barred Stone's claims unless he qualified as an "original source" within the meaning of 31 U.S.C. § 3730(e)(4). The Tenth Circuit's holding that Stone was authorized to maintain the action rested on an interpretation of the original source rule that

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[1] In 1996, The Boeing Company acquired Rockwell and changed its name to Boeing North American, Inc. Thereafter the contract between Rockwell and DOE for management of Rocky Flats was amended to reflect the contractor's name change.

departs from the text of the statute and conflicts with the legal standards adopted in five other circuits.

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" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). Stone faced a serious obstacle in establishing any first-hand knowledge of the fraud at issue because his employment was terminated more than a year before the events that gave rise to the jury's finding of liability. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). But the Court of Appeals interpreted the statute to mean that a relator needs only to have some background "knowledge 'underlying or supporting' the fraud allegation." Pet. App. 20-21a.

Applying that standard, it made no difference that Stone did not even claim to have direct knowledge of the only false statements and environmental violations that he actually sought to prove at trial. As Judge Briscoe explained, the "direct and independent knowledge possessed by" the relator in this case was so tangential that it "could have been omitted entirely at trial without affecting the outcome." Pet. App. 48a. Indeed, it was. Stone did not testify, and the document he highlighted as demonstrating his "original" information was never even introduced into evidence. Stone could not have recovered under the legal standards applied in other circuits and this Court should grant review to resolve this important circuit split.

This Court should also grant review to resolve whether the *qui tam* provisions of the FCA violate Article II. Both the Appointments Clause and the Take Care Clause bar Stone from litigating on behalf of the United States.

Procedural History

Stone was employed at Rockwell as an engineer until his employment was terminated in March of 1986. Pet. App. 3a. Two years after his departure, newspapers published detailed reports concerning environmental compliance problems at Rocky Flats associated with a solidified waste

called "pondcrete." Pet. App. 60a.[2] In May of 1988, several insolid pondcrete blocks were discovered on an outdoor pad where they were stored. Tr. 601-02, 631-32, 1124-25.[3] This prompted a canvass revealing "several thousand boxes" of insolid pondcrete. Tr. 636-38, 784-86.

In June of the following year, the Federal Bureau of Investigation ("FBI") executed a search warrant at Rocky Flats, and one month later, Stone filed his *qui tam* suit. Pet. App. 4a. Stone's complaint was scattershot, covering a broad range of issues and "contain[ing] little or no specification of the statements he believed were false." CA App. at 0921; *see also* Pet. App. 4-5a. At the conclusion of the Government's investigation, Rockwell pled guilty to ten environmental violations. Pet. App. 6-7a.

When Stone filed his complaint in 1989, he provided the Government with a statement that disclosed "substantially all [of his] material evidence and information," as mandated by 31 U.S.C. § 3730(b)(2). Pet. App. 6a; CA App. 0522. The United States thereafter examined all "the evidence in [its] files," CA App. at 0916, and found no "indication that Rockwell had made misrepresentations to DOE, or concealed its conduct from DOE, or otherwise committed fraud or submitted false statements to DOE." CA App. at 0921; *see also id.* at 0920, 0913 (Government "unable to ascertain that Mr. Stone had a viable False Claims Act case"). Accordingly, the Government filed a notice in March of 1992 declining to intervene. Pet. App. 6a.

In November of 1995, based on information discovered in a separate case, CA App. 0903-04, 0923-37, the Government

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[2] Pondcrete is formed by mixing "sludge and liquids retrieved from … solar ponds" with Portland cement. Tr. 982. Glen Sjoblom, an expert with high-level experience at EPA, testified that this methodology "was generally accepted" as the proper way to handle such wastes, and was used by at least seven other DOE facilities. Tr. 4731, 4739.

[3] The trial transcript is cited herein as "Tr." The Appellant's Appendix before the Tenth Circuit is cited herein as "CA App." Appellee/Cross-Appellant James S. Stone's Supplemental Appendix before the Tenth Circuit is cited herein as "SA."

decided to intervene and, together with Stone, filed an Amended Complaint. Pet. App. 8-9a. The Amended Complaint asserted an FCA count based on the theory that Rockwell secured payments from DOE by making misstatements relating to and concealing problems with pondcrete. CA App. 0980-95.[4] Stone, but not the United States, asserted another FCA count charging concealment of plutonium contamination. Pet. App. 8-9a; CA App. 0998-1004. The district court ordered a separate trial on Stone's plutonium claim, Pet. App. 9a, which has not yet been scheduled. The pondcrete claim was tried to a jury. *Id.* Stone never testified at trial. On the verdict form, the jury was asked to determine liability under the FCA by answering questions corresponding to ten different claims for payment submitted between October 1, 1986 and December 30, 1989. *Id.* The answers established that the jury found that Rockwell violated the FCA with respect to three claims submitted between April 1987 and September 1988, but not with respect to the seven remaining claims. CA App. 1119-20.[5] The court entered judgment for both plaintiffs in the amount of $4,172,327.40. CA App. 1569.[6]

Proceedings Related To The Original Source Rule

Rockwell moved to dismiss Stone's claims under Section 3730(e)(4). CA App. 0116-35. Newspaper articles published

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[4] The Amended Complaint also charged concealment of "saltcrete" and "spray irrigation" problems. CA App. 0980-91. Counts II-V asserted various common law and contract claims. Pet. App. 8a.

[5] For all periods covering spray irrigation, the jury found for Rockwell. Pet. App. 50a. Stone conceded he was not an original source as to saltcrete. *Id.* Stone's right to remain in the case, accordingly, turned on his original source status as to pondcrete. *Id.* at 50-51a. The jury found that Rockwell did not breach its contract with DOE, and the court dismissed the remaining non-FCA claims with prejudice. *Id.* at 9-10a.

[6] The district court deferred Stone's motion for attorneys' fees pending appeal. Pet. App. 9a & n.2. Reversal of the judgment would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party. *See* 31 U.S.C. § 3730(d)(1) (prevailing party "shall" receive fees and costs).

before Stone filed his complaint in 1989 had alleged false statements and concealment of a wide range of environmental violations at Rocky Flats. CA App. 0232-52. Based on this record evidence, the district court squarely held that Stone's claims were based on "incidents that were widely covered in the news media," and that Stone could only proceed if he "satisf[ied] the 'original source' requirement." Pet. App. 60a. Stone did not challenge that finding on appeal.

The original source rule requires a relator both to know of and to disclose to the Government "the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). The district court held that Stone had satisfied his burden of proof but did not make any findings regarding Stone's direct knowledge about pondcrete.[7] The district court instead relied on Stone's awareness that Rockwell's compensation was tied in part to environmental compliance and on his allegation that he was generally "instructed not to divulge environmental … problems to the DOE." Pet. App. 61a. The Tenth Circuit held that Stone had met his burden of proving that he was an original source of the claims that succeeded at trial because he knew and disclosed background information to the Government concerning pondcrete. Pet. App. 20a.

As described below, the Courts of Appeals are divided on the statutory standards for determining what a relator must know and disclose to the Government. Two circuits require knowledge of the fraudulent statement; two others require knowledge sufficient to show that the statement is false; and one evaluates whether the relator's information proximately caused the discovery of the fraud. In order to assess whether Stone could have prevailed under these

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[7] Rockwell renewed its motion after the jury verdict, and argued that Stone failed to prove that he was an original source with respect to his pondcrete allegations. Pet. App. 9a; CA App. 1153-54. The district court adhered to the prior ruling and denied Rockwell's motion with no findings specific to pondcrete. Pet. App. 14a, 64-65a, 67a.

standards, what Stone knew and disclosed to the Government, as well as the basis of Stone's claims, is summarized as follows.

1. Stone sought to prove his direct and independent knowledge through three documents: an affidavit filed with the district court, the Confidential Disclosure Statement he provided to the Government, and a one-page Engineering Order, dated 1982. Pet. App. at 17-20a. The Tenth Circuit relied on these documents to show that Stone had reviewed "a design for the process and mechanical system intended to be used for removing sludge from" the solar evaporation ponds and predicted "that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the 'pondcrete' blocks would rapidly disintegrate." CA App. 0509; Pet. App. 19a. Stone handwrote on the 1982 Engineering Order "[t]his design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." Pet. App. 18a; CA App. 0439. The Court of Appeals construed this annotation as explicitly "articulating [Stone's] belief that the proposed design for making pondcrete was flawed." Pet. App. 18a.[8] This information, in turn, was found to "support[]" Stone's allegation that Rockwell "ultimate[ly]" made false statements about pondcrete some five years after he reviewed the Order. Pet. App. 21a.

The Court of Appeals further held that the 1982 Engineering Order, entitled "Solar Evap. Pond Sludge Removal," alone sufficed to "to carry Stone's burden" of establishing that he "voluntarily provided [his direct and

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[8] Although Stone's affidavit includes general statements that "the design proposed by Rockwell management for making pondcrete" was defective, the only specific defect identified was the system for piping sludge from the solar ponds. CA App. 0298. Moreover, Stone's Confidential Disclosure Statement, which by its own terms and by statutory mandate included "substantially all material evidence and information" Stone possessed, *see* 31 U.S.C. § 3730(b)(2); Pet. App. 6a; CA App. 0522, only described a defect in the piping system. CA App. 0509-10.

independent] information to the Government," within the meaning of Section 3730(e)(4)(B). Pet. App. 52a; CA App. 0439.[9] The Order was buried in 2,300 pages Stone produced to the FBI, and the 302 reports memorializing Stone's meetings with the FBI make no mention of either pondcrete or the Engineering Order. Pet. App. 73a; CA App. 0306, 0439.

2. Although the Tenth Circuit relied on Stone's information about predicted defects in the piping as the "bas[is]" of Stone's FCA claims, Stone never actually advanced that theory as a basis for liability in the case. (And the Tenth Circuit made no finding that he did.) The Amended Complaint did not allege that known defects in the piping system caused the blocks to fail. CA App. 0980-85. Nor did Stone's Statement of Claims. That filing listed "the facts establishing [Plaintiffs'] entitlement to a judgment in their favor," and asserted that Rockwell knew pondcrete was insolid because Rockwell employees *"reduce[ed] the amount of cement added to the blocks."* CA App. at 1080, 1084 (emphasis added).[10] Although the Statement of Claims also mentioned peripheral factors such as "inadequate process controls and inadequate inspection procedures," it alleged that the reduction in cement was the "*major*

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[9] Finding on appeal that the record contained insufficient "specific and pertinent findings-of-fact" to "support a conclusion whether the required disclosure was or was not made," the Tenth Circuit remanded for the limited purpose of determining whether Stone "satisfied the pre-filing disclosure prong." Pet. App. 22-23a. On remand, the district court found that Stone had timely submitted the 1982 Engineering Order to the government, but also found that the Order was insufficient because it did not mention pondcrete. Pet. App. 72-74a. The Tenth Circuit held that its earlier statement—that the 1982 Engineering Order "was explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed"—bound the district court as law of the case. Pet. App. 51-52a.

[10] The evidence at trial demonstrated that in the winter of 1986—more than eight months after Stone left Rocky Flats—a new foreman took over pondcrete production and substantially reduced the average quantity of cement used in the mix. Tr. 980-82, 1002-03, 1041, 1108-09.

contributor to the existence of insufficiently solid pondcrete blocks"—and never mentioned the defective "piping" that Stone relied upon to establish his status as an original source. CA App. at 1080, 1084 (emphasis added).

Nor did Stone introduce any evidence of defects in the piping system at trial. Instead, the evidence centered on Rockwell's decision to reduce the amount of cement—conduct that was specifically discussed in newspaper articles upon which, *inter alia*, the district court relied in finding that Stone's action was based upon allegations that had been publicly disclosed.[11] The evidence established that sludge and cement were not mixed in the piping system Stone critiqued, but rather in a "pug mill" that was not installed until 1985—three years after Stone made his prediction. Tr. 983-85; CA App. 1661. Not only did plaintiffs tell the jury that reductions in the amount of cement used caused the solidification problem, Tr. 5079, 5128, 5135, 5144, 5161, they affirmatively told the jury that the pondcrete system itself was *not* the cause. In closing, the Government told the jury that the first foreman to manufacture pondcrete at Rocky Flats "was able to get concrete hard pondcrete blocks using the same methods" that later foremen "used with the exception of *one thing, and that is the reduction of cement*." Tr. 5177. And Stone did not even contest Rockwell's assertion on appeal that Stone "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

3. As these facts make clear, the district court did not find that Stone had direct and independent knowledge of any false statements actually made by Rockwell. Nor did the Tenth Circuit purport to find any evidence in the record

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[11] Newspaper articles detailed not only the spill in 1988, but also the conclusion that "the ratio of concrete to waste was apparently altered," from "about 3.5 pounds of cement to 1 gallon of the sludge" to "closer to 1.8 pounds of cement to 1 gallon of sludge," thereby causing the spill. CA App. 889-38, 889-39, 889-40, 1342-45.

that Stone knew of the actual false statements—instead, the Tenth Circuit held as a matter of law that a relator need not know of "the actual act of fraud." Pet. App. 21a. And the record contained ample evidence that Stone did *not* know of any actual fraudulent statements. Plaintiffs told the jury that "the three years that are important to this case" were 1987-89—years when Stone never set foot inside Rocky Flats. Tr. 209; CA App. 0290-310; Pet. App. 3a. All of the environmental violations and concomitant false claims alleged by plaintiffs took place long after Stone's employment with Rocky Flats ended. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Although Stone asserted that Rockwell supervisors ordered him not to "discuss[] any environmental problems at Rocky Flats with the DOE," Pet. App. 19-20a, this statement was allegedly made in 1981—*six years* before the alleged concealments at issue in this case—at an isolated meeting with three individuals who appear to have had nothing to do with pondcrete (none of them was even mentioned at trial). Moreover, Stone admitted that he did not know of any documents containing false statements, nor of any persons who had concealed environmental issues or made false statements. CA App. 0225-26, 0230-31. When asked in his deposition for instances in which Rockwell misstated or concealed its compliance with environmental requirements, Stone described a single incident involving a cooling tower, and "[could not] remember any" others. CA App. 0230.

4. The district court also did not find that Stone had direct and independent knowledge that pondcrete blocks stored at Rocky Flats were actually insolid. Stone could not have known whether the pondcrete blocks stored at Rocky Flats between April 1987 and September 1988 were solid because he had left Rocky Flats before those blocks were manufactured. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Nor could he have known that Rockwell would use an inadequate ratio of concrete—the alleged cause of the insolid pondcrete—because that did not occur until there was a personnel change months after Stone's

departure. *Id.*; Tr. 1002-03, 1108-09. The Court of Appeals held that Stone satisfied the original source rule based on his prediction "that a defective pondcrete manufacturing process *would be* employed." Pet. App. 21a (emphasis added). And the Court of Appeals deemed "immaterial" the fact that Stone never even tried to prove at trial that his prediction was the actual cause of "solidity defects in the pondcrete blocks." *Id.*

5. The district court also made no finding that Stone proximately caused the Government's discovery of the alleged false claims. Nor did the Tenth Circuit. Although the Court of Appeals stated that Agent Lipsky used "information he had learned from Stone," Pet. App. 4a, to secure a search warrant, there was no evidence or finding that the information was central to the Government's discovery of the pondcrete problems. Agent Lipsky's 302 reports show that Stone focused on incineration charges, which Lipsky repeated in his affidavit. CA App. 145, 458, 461-62, 469, 778-87. The Government later determined that the incineration charges were meritless. CA App. 788, 803-04. And Lipsky relied far more heavily on information drawn from other informants, public records, and the Government's own independent investigations. *See* Lipsky Aff. ¶¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine (Nov. 10, 1997). Moreover, the record demonstrates that the Government did not, at the time, view Stone as a whistleblower. In a statement after the FBI raid, the United States Attorney who led the investigation said that the Rocky Flats case was unusual because "at no time … did any knowledgeable 'insider' come forward." CA App. 0832. "Almost always," he explained, "someone eventually 'cracks' and steps forward to provide an 'insider's' cooperation. That simply did not happen here." *Id.* Instead, the Government discovered the facts through its own efforts, "stringing together thousands of documents to create inferences of criminality." *Id.* The day after the raid, newspapers reported that an unnamed DOJ source said "[n]o 'whistle blower' was involved" and "the investigation

didn't result from any 'single … source.'" CA App. 0234. The DOJ attorney who led the plea bargain negotiations later told Congress that "candidly … in the criminal investigation we found the information that [Stone] supplied to have very limited usefulness." Additional Record on Remand filed April 24, 2002, Tab 3(A), at 367.[12] In discovery, Stone identified 48 individuals with relevant knowledge, CA App. 1232-80, not one of whom testified at trial. Of the 55 witnesses who did testify, none even mentioned Stone's name.

Proceedings On Appeal

1. The Tenth Circuit affirmed, holding "that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete." Pet. App. 22a. The Tenth Circuit analyzed Section 3730(e)(4) as merely requiring relators to know facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint." Pet. App. 21a. The Tenth Circuit expressly held that a relator need not have direct and independent knowledge of "the actual submission of inaccurate claims." Pet. App. 21a. Moreover, the Tenth Circuit did not require that a relator have direct and independent knowledge of facts sufficient to prove that claims submitted by a defendant were inaccurate. Instead, the Tenth Circuit found that Stone qualified as an original source based merely on his prediction that Rockwell "*would be* using a defective process for manufacturing pondcrete," irrespective of whether the problem Stone

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[12] Although the Government advised the district court that it would "not challenge Mr. Stone's status pursuant to 31 U.S.C. § 3730(e)(4)," SA 26, it had previously advised the district court that Stone's statement of "all material evidence and information" in his possession was insufficient to demonstrate a viable FCA claim. CA App. 0903-04, 0913, 0916, 0920-21, 0923-37. In support of its motion to intervene, the Government advised the district court that discovery elicited by the Government in a separate action, principally testimony from other Rocky Flats employees "obtained [by the government] for the first time subsequent to March 1992," was what revealed an FCA claim. CA App. at 0926-32, 0936.

predicted "actually caused the production of malformed blocks." Pet. App. 21-22a (emphasis added).

Judge Briscoe concurred in part and dissented in part. Pet. App. 44a. Characterizing the majority's rule as requiring only "background knowledge," *id.*, she noted that "there is *no evidence* that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, *Stone was terminated from his employment with Rockwell well before either event occurred.*" *Id.* at 46a (emphasis added). And Stone's predictions were insufficient, in Judge Briscoe's view, because "it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the … FCA claims. Rather, [those] claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began." *Id.* at 47a & n.2. As evidence of Stone's ignorance, Judge Briscoe pointed out that "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome." *Id.* at 48a. Because Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims, she concluded, he could not qualify as an original source. *Id.* at 47a.

2. With respect to Article II,[13] the Tenth Circuit reasoned that the Appointments Clause imposes only "procedural requirements" governing the appointment of officers, and that because Stone did not draw "a government salary" he was not an "officer." *Id.* at 24-26a. With respect to the Take Care Clause, the Tenth Circuit held that the Executive retains sufficient control to avoid constitutional infirmity where, as here, the Government was permitted to

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[13] Rockwell raised its Article II arguments in its Answer, CA App. 1460, and again in a motion to dismiss after the jury's verdict. CA App. 1459-71. In its motion, Rockwell sought dismissal of all of Stone's claims. CA App. 1460, 1471. The district court denied that motion in its entirety. Pet. App. 67a.

intervene. *Id.* at 26-29a.

3. Rockwell twice petitioned for rehearing *en banc*. In response to Rockwell's first petition, the panel granted rehearing and remanded for further fact finding. Pet. App. 49a. Rockwell's second petition was denied by an evenly divided vote, with Chief Judge Tacha, Judge Kelly, Judge Briscoe, Judge O'Brien, and Judge McConnell voting for *en banc*. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision deepens an existing circuit split regarding the proper interpretation of the original source rule, conflicts with this Court's reading of similar statutory language, and effectively eviscerates the jurisdictional bar of Section 3730(e)(4). The statute expressly requires a relator to be the original source of the factual information on which the FCA allegations are "based." As this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993), when construing the same term in the Foreign Sovereign Immunities Act, the "basis" of an action refers to "the 'gravamen' of the complaint," meaning "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 356-57. And there can be no doubt that the "gravamen" of an FCA claim consists of allegations that the defendant knowingly made statements or claims that did not reflect the true state of affairs. *See, e.g.*, John T. Boese, 1 Civil False Claims and *Qui Tam* Actions § 2.03[B] (3d ed. 2006). An FCA claim accordingly could not possibly be "based" on the relator's information, within the ordinary meaning of that term, unless the relator had "direct and independent knowledge" of the false claims made by the defendant. In the Tenth Circuit, however, a relator need only know background information "underlying or supporting" the fraud allegation, and the relator's "information" can even be wrong and irrelevant. Pet. App. 21a. That view cannot be reconciled with *Nelson*, where this Court squarely rejected the view that a claim could be "based" on acts that only had some causal "connection with, or relation to" the elements of the

claim. 507 U.S. at 357-58. And it conflicts with the standards adopted by five other circuits. This Court should grant review to resolve a deep and well-developed circuit split, and to prevent an expansion of the *qui tam* provisions that is unsupported by the text of the FCA.

Independently, this Court should grant review to decide whether the *qui tam* provisions violate Article II of the Constitution. This Court reserved that question in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and it is time to resolve it. By vesting the authority to initiate and maintain litigation on behalf of the United States with a self-appointed relator, the FCA violates the Appointments Clause as construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). And by vesting such discretion in a relator whom the Executive cannot dismiss, the FCA violates the Take Care clause as construed by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988).

I. THE TENTH CIRCUIT'S JUDGMENT DEEPENS AN EXISTING CIRCUIT SPLIT AND EFFECTIVELY EVISCERATES § 3730(e)(4)

A. The Tenth Circuit's Interpretation Of The Governing Standard Conflicts With The Interpretations Adopted By The Third, Eighth, Ninth, Eleventh, And D.C. Circuits

The lower courts are in deep disarray on the question of how to define the nature and quantum of "knowledge" a *qui tam* relator must possess in order to qualify as an "original source" of the "information" that forms the "bas[is]" for the claims at issue. The Third and Eleventh Circuits require relators to know of an actual false statement to the Government. The Ninth Circuit requires relators to know of a false statement or at least to have been a proximate cause of the Government's discovery of a false statement. And the Eighth and D.C. Circuits require relators to know the actual facts that made a statement false. Stone would not have qualified as an original source in any of these circuits. But the Tenth Circuit only requires a relator to know

background information "underlying or supporting" his supposition that a defendant might have engaged in fraud, even if the relator pursues a different theory at trial.

1. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.), the Third Circuit held that an "original source" is one who knows of the alleged fraud. Mistick was a construction company that remediated lead-based paint pursuant to specifications issued by the Pittsburgh Housing Authority. *Id.* at 379. The Housing Authority's specification required use of a product called "Glid-Wall," manufactured by Glidden, to cover the lead paint. *Id.* Glidden, however, "had begun recommending against the use of [Glid-Wall] for this purpose some time earlier." *Id.* Mistick's *qui tam* action charged the Housing Authority with concealing this information from HUD, in order to procure additional remediation funds from HUD when Glid-Wall failed. *Id.* at 381-82.

Mistick was an insider for much of the relevant conduct. Mistick was the "general contractor for all of" the work at issue and company representatives attended a meeting with the Housing Authority when Glidden disclosed that Glid-Wall was unsuitable for this purpose. *Id.* at 379. Mistick also undertook its own independent investigation. *Id.* at 381. Nevertheless, the Third Circuit found that Mistick did not qualify as an original source because it did not know "that the Authority had made the alleged misrepresentations to HUD." *Id.* at 388. The Third Circuit held that, to be an "original source," a relator must have "'direct and independent knowledge' of the most critical element of its claims, *viz.*," the misrepresentation itself. *Id.* Construing a prior decision that held "'it is not necessary for a relator to have all the relevant information in order to qualify,'" the court concluded that "a relator cannot be said to have 'direct and independent knowledge of the information upon which [its fraud] allegations are based,' 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent

statements." *Id.* at 389 (quoting *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991)).[14]

The Eleventh Circuit has adopted a similar interpretation. In *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 564-65 (11th Cir. 1994), the *qui tam* relator charged that an insurance company systematically charged Medicare for claims that Medicare had no obligation to pay. The relator held a policy with Blue Cross, had himself been subject to the challenged practice, and knew that his own medical bills had been forwarded to Medicare for payment in violation of the law. *Id.* at 564-65. The Eleventh Circuit held Cooper to be an original source because his "information is potentially specific, direct evidence of fraudulent activity." *Id.* at 568 n.12. The Eleventh Circuit distinguished Cooper from a relator who possessed mere "background information which enables him to understand the significance of a more general public disclosure." *Id.* (citing *Stinson*, 944 F.2d at 1160).

The Tenth Circuit's decision irreconcilably conflicts with *Mistick* and *Cooper*. The Tenth Circuit rejected as "flawed" Rockwell's argument that "a relator must have direct and independent knowledge of the *actual* fraudulent submission

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[14] Stone argued below that he would qualify as an original source in the Third Circuit under *Stinson*. *See, e.g.*, Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 45 (Mar. 17, 2000). *Mistick* demonstrates Stone's error. Moreover, *Stinson* made clear that a "relator must possess *substantive information about the particular fraud* rather than *merely background information* which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." 944 F.2d at 1160 (emphasis added). And district courts within the Third Circuit have applied *Mistick* and *Stinson* to disqualify relators who "have direct and independent knowledge of *some* of the elements of" their claim but not "the most critical elements." *See, e.g. United States ex rel. Waris v. Staff Builders, Inc.*, No. CIV. A. 96-1969, 1999 WL 788766 at *1-2, *8 (E.D. Pa. Oct. 4, 1999) (relator not original source, even though he saw false invoices and inferred they would be submitted for reimbursement by Medicare, because "the mere existence of a false invoice is insufficient to make out a claim of fraud").

to the government." Pet. App. 20a. While *Mistick* required a relator to know of "the allegedly fraudulent statements," 186 F.3d at 389, and *Cooper* requires "specific, direct evidence of fraudulent activity," 19 F.3d at 568 n.12, the Tenth Circuit held that a "relator need not … have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge 'underlying or supporting' the fraud allegation is sufficient." Pet. App. 21a. And Stone could not have prevailed under *Mistick* or *Cooper*. As Judge Briscoe observed in dissent, "Stone lacked direct and independent knowledge of *any of the essential elements* of the" FCA claim. Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part). Stone at most had the "background information" that *Cooper* found inadequate.[15] "[T]here is no evidence" that Stone knew that Rockwell concealed pondcrete problems from DOE or claimed payment for environmental compliance it had not achieved. *Id.* at 46a. Indeed, *Stone left Rocky Flats before any such misrepresentations occurred*. *Id.* As Judge Briscoe noted, "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome of the" FCA claims, *id.* at 48a, and in fact Stone did not testify at trial nor was his 1982 Engineering Order introduced into evidence. Moreover, because Section

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[15] Stone argued below that his general knowledge of the DOE award fee process, coupled with a single incident in 1981 in which his Rockwell superiors told him not to discuss environmental problems with DOE, allowed him to infer that Rockwell submitted false claims to DOE in 1987-88. *See* Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 41-43, 47 (Mar. 17, 2000). The Tenth Circuit did not adopt this theory, and held that Stone did not need to know of "the actual submission of inaccurate claims by Rockwell to DOE." Pet. App. 21a. Stone's inference would not satisfy *Mistick* in any event. The relator in *Mistick* attended the meeting where Glidden told the government contractor that the specified product would fail, and Mistick knew that HUD was reimbursing lead paint remediation work. 186 F.3d at 379. The fact that the relator in *Mistick* could draw an inference that the product defects had not been disclosed to HUD was insufficient. And Stone's own knowledge fell far short of Mistick's.

3730(e)(4)(B) requires a relator both to know of *and to disclose* "the information on which the allegations are based," the Tenth Circuit diverged from the Third and Eleventh Circuits when it held that disclosure of Stone's 1982 Engineering Order sufficed to "carry Stone's burden" on voluntary disclosure. Pet. App. 52a. The Engineering Order nowhere identified or even predicted any fraudulent statements.

Stone's inability to direct the Government's attention to his pondcrete information further demonstrates his lack of sufficient knowledge. If Stone had understood the pondcrete issue at the time, he would have been able to explain it to Agent Lipsky, yet Agent Lipsky's 302s make no mention of pondcrete. Pet. App. 73a. Stone also would have been able to explain the significance of the engineering order—yet no evidence suggests he did so. *Id.* Stone, of course, bore the burden of proof to establish that he was an "original source." Pet. App. 12a.

2. The Ninth Circuit also requires a relator to have "firsthand knowledge of the alleged fraud." *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1998). The Ninth Circuit does not permit a relator to qualify merely based on "speculation or conjecture" that a defendant might have committed fraud. *Id.* at 526. Stone's prediction that the pondcrete design he reviewed would fail is precisely the sort of "speculation or conjecture" that does not suffice in the Ninth Circuit. *See* Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part) (citing *Aflatooni* to demonstrate that "although Stone predicted that problems would occur with the production of pondcrete, and perhaps may have speculated that Rockwell would conceal any such problems from the government," he did not qualify as an original source). Stone conceded that he lacked direct and independent knowledge of fraudulent statements. CA App. 0225-26, 0230-31.

The Ninth Circuit recognizes a limited exception where a relator "trigger[s]" a Government investigation that uncovers the fraud. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1162

(9th Cir. 2001). A relator's status as an original source under this exception is governed by proximate cause concepts: "(1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations." *Id.* at 1163. In *Seal 1*, the Ninth Circuit disqualified a relator who triggered a government investigation because "others provided substantial assistance to the government along the way" and the Government itself "played a significant role in uncovering the allegations." *Id.* at 1163.

The very same analysis would have disqualified Stone. First, the Tenth Circuit did not apply the *Seal 1* factors and the district court did not—indeed, could not—make the findings necessary for Stone to prevail under *Seal 1*. Stone never proved that he triggered the investigation that uncovered the pondcrete problems—quite to the contrary, contemporaneous newspaper coverage showed that Rockwell reported its pondcrete spill, triggering a state and federal investigation. CA App. 889-38, 889-39, 889-40, 1342-45. Moreover, other private entities (Rockwell itself, local newspapers, and other unnamed informants) provided substantial assistance to the Government. And the Government played a significant role as well. *See* Additional Record on Remand at tab 3(A), filed April 24, 2002; CA App. 0832; Lipsky Aff. ¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine, Nov. 10, 1997. On such facts, *Seal 1* also would have barred Stone's claim had this case been litigated in the Ninth Circuit.

3. The D.C. and Eighth Circuits do not require relators to know of the fraudulent statements—instead, they only require knowledge of facts sufficient to show that statements made to the Government were false. In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 647 (D.C. Cir. 1994), the D.C. Circuit held that

an "original source" is one who has direct and independent knowledge of an essential element of the fraud. Quinn was an arbitrator, appointed by the National Mediation Board to resolve a labor dispute involving Springfield. Upon reviewing Quinn's time vouchers, Springfield realized that "Quinn had no arbitral function to perform on several of the days for which he sought pay." *Id.* Springfield brought a *qui tam* action, charging Quinn with false billing claims. *Id.* The D.C. Circuit interpreted the statutory language to require "direct and independent knowledge of" one of the "essential element[s] of the underlying fraud transaction." *Id.* at 657. Applying that standard, the Court held that Springfield was an original source because it "had direct and independent knowledge of *essential* information" sufficient to establish the core element of falsity. *Id.*

The Eighth Circuit adopted the same interpretation of the statute in *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002). Anesthetists brought a *qui tam* claim, charging that anesthesiologists were improperly billing Medicare for work performed by anesthetists. *Id.* at 1050. The Eighth Circuit held that a relator must have "direct knowledge of the true state of the facts." The anesthetists qualified, because they had themselves performed the work for which the anesthesiologists billed, and had had directly observed "anesthesiologist[s] filling out forms used for billing." *Id.*

The standard adopted in this case irreconcilably conflicts with *Springfield* and *Nurse Anesthetists*. The Tenth Circuit did not even purport to find that Stone had direct knowledge of essential information sufficient to establish the element of falsity, as required in the D.C. and Eighth Circuits. That is precisely why Judge Briscoe dissented. *See* Pet. App. 47a (Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims). As the Tenth Circuit's analysis makes plain, Stone's knowledge was hardly "essential" to the proof of his claims—the standard used to assess the sufficiency of knowledge in *Springfield*. 14 F.3d at 647. Indeed, the

majority did not quarrel with Judge Briscoe's observation that Stone's information "could have been omitted entirely at trial without affecting the outcome of the" FCA "claims." Pet. App. 48a. And the Tenth Circuit squarely held that Stone's speculation about design flaws in the pondcrete system was sufficient, regardless of whether those alleged flaws "actually caused the production of malformed pondcrete blocks." Pet. App. 22a. The Tenth Circuit's holding that Stone's production of his 1982 Engineering Order met his burden of voluntary disclosure, Pet. App. 52a, also conflicts with the law of the D.C. and Eighth Circuits. If a relator must *know* an "essential element of the underlying fraud transaction," *Springfield*, 14 F.3d at 657, then he also must adequately *disclose* an essential element. Stone did neither.

4. Instead of any of these approaches, the Tenth Circuit adopted a rule divorced from the statutory text that disserves the intended function of the original source rule. Congress sought to incentivize "whistle-blowing insiders with genuinely valuable information," *Springfield*, 14 F.3d at 649, *i.e.*, the "private individuals who are aware of fraud being perpetrated against the Government." H.R. Rep. No. 99-660, at 23 (1986). But the Tenth Circuit now permits relators to qualify without actually knowing of any fraud, or even having any *accurate* knowledge about the defendant's underlying conduct, Pet. App. 20-22a, and without disclosing information evidencing actual fraud or the true state of affairs at the time the statements were made. Pet. App. 52-53a. The statutory requirement that a relator must "have direct and independent knowledge of the information" that forms the "bas[is]" for the fraud claim cannot reasonably be read to allow relators to drain millions of dollars from the federal treasury based only on speculation about the future. In addition, the relator here was allowed to establish liability by relying on the facts that were publicly disclosed—the change in the cement/sludge ratio—even though Stone never even claimed to have direct and independent knowledge of those facts. Congress surely did

not intend to permit relators to rely on one set of facts to establish their status as an original source and then turn around and rely on different facts derived from public sources to prove their claim. Yet the Tenth Circuit's loose legal standard permitted that very type of bait and switch in this case.

Not only does the Tenth Circuit's rule allow relators to siphon away the Government's recovery, it also eviscerates Section 3730(e)(4)'s function as a bulwark against abusive *qui tam* lawsuits. *Qui tam* lawsuits are regularly brought by disgruntled ex-employees. Boese, 1 Civil False Claims and *Qui Tam* Actions § 4.01[B][2]. And "[m]ore and more *qui tam* cases are being brought by a defendant's competitor [or] employees of the defendant's competitors." *Id.* at § 4.01[B][3]. The potential for abuse in each situation is obvious. Properly construed, Section 3730(e)(4) would serve as a bar to abusive *qui tam* suits, by requiring relators to actually know about fraud. The Tenth Circuit's rule merely requires speculative beliefs "underlying or supporting" the view that fraud may have occurred. The Tenth Circuit's decision thus gives vindictive ex-employees or unscrupulous business competitors license to use the FCA, and a lawsuit in the name of the United States, merely "to gain a competitive advantage over the defendant." *Id.*

B. There Is No Reason To Defer Review

The issues presented here have been analyzed in the Courts of Appeals for over a decade, and clear conflicting positions have been staked out by the Third, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. This Court can thus interpret the original source rule with the benefit of considerable analysis from the courts below, a developed record, and with an awareness of the wide range of fact patterns to which the FCA and the original source rule can be applied. And the issues raised in this case strike at the very core of the original source rule. This Court recently denied a petition that focused solely on the meaning of the words "direct" and "independent" in Section 3730(e)(4)(B). *See, e.g.*, *Comstock Res., Inc. v. Kennard*, 125 S. Ct. 2957

(2005). This case goes further, including the antecedent question of "*what* the relator must know firsthand." Brief for the United States as Amicus Curiae at 12-13, *Comstock Res., Inc. v. Kennard*, 543 U.S. 923 (2004) (No. 04-165) (emphasis in original). Analysis of the words "direct" and "independent" alone will be of limited significance because most if not all relators will have firsthand knowledge of *something* related to their claims.

Finally, further percolation promises only to increase confusion in the lower courts. Section 3730(e)(4) has given rise to at least two other circuit splits. The circuits are divided on the question of whether the phrase "the information on which the allegations are based" in Section 3730(e)(4)(B) refers to the allegations in the relator's complaint,[16] or the allegations in the public disclosure.[17] If this Court were to hold the latter, Stone would not qualify as an original source. *See* Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); CA App. 0889-38 to 40, 0892, 1343-45. The circuits are also split on the voluntary disclosure prong of Section 3730(e)(4)(B), with some holding that a relator must have been a source of information to the entity that made the public disclosure,[18] others holding that the relator must have provided his information to the

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16 *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Mistick*, 186 F.3d at 388-89; *United States v. Bank of Farmington*, 166 F.3d 853, 864-65 (7th Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir. 1993); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999).

17 *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (acknowledging circuit split); *United States ex rel. McKenzie v. BellSouth Telecoms.*, 123 F.3d 935, 943 (6th Cir. 1997); *Nurse Anesthetists*, 276 F.3d at 1048; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997).

18 *Dick*, 912 F.2d at 16 (2d Cir. 1990); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

Government prior to the public disclosure,[19] and still others holding that the relator need only disclose his information to the Government prior to filing his complaint.[20] In the process of resolving the question presented in this case, this Court would invariably provide guidance that would help clarify this confused body of law.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTION RESERVED IN *STEVENS*—WHETHER THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT VIOLATE ARTICLE II

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), this Court reserved "the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take care' Clause of § 3." This case presents that question, which this Court should grant review to resolve.

A. The *Qui Tam* Provisions Of The False Claims Act Violate The Appointments Clause

Section 3730(b) authorizes *qui tam* relators to bring civil actions "for the United States Government." 31 U.S.C. § 3730(b). But in *Buckley v. Valeo*, 424 U.S. 1, 140 (1976), this Court unequivocally held that the Appointments Clause of the Constitution prohibits the vesting of "primary responsibility for conducting civil litigation … for vindicating public rights" in persons not appointed in the manner prescribed by that Clause. The *qui tam* provisions of the FCA do precisely what *Buckley* forbids. Section 3730 provides that if the Government intervenes, "it shall have the primary responsibility for prosecuting the action." 31 U.S.C. § 3730 (c)(1). But, in every case, the statute vests in the relator "the right to conduct the action" unless and until the Government intervenes. 31 U.S.C. § 3730 (c)(3).

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19 *McKenzie*, 123 F.3d at 942 (6th Cir. 1997); *Findley*, 105 F.3d at 690.

20 *Bank of Farmington*, 166 F.3d at 865; *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1352 (4th Cir. 1994).

Assistant Attorney General William P. Barr determined in 1996 that these provisions "plainly violate the Appointments Clause." 42 Op. Off. Legal Counsel 207, 221 (1989) ("Barr Op."), *superseded by* 20 Op. Off. Legal Counsel 124 (1996) (Dellinger, W.). The Tenth Circuit disagreed, taking refuge in empty formalism by arguing that because relators do not collect a Government paycheck or receive the other benefits of office, they are not officers. Pet. App. 24-26a. That analysis directly contravenes *Buckley*, and strips the Appointments Clause of its structural significance.

In this case, Stone exercised primary responsibility for conducting civil litigation on behalf of the United States. He arrogated to himself the authority to file on behalf of the United States, without the advice and consent required by the Appointments Clause. Initiating *qui tam* suits can prematurely disclose criminal investigations, complicate plea agreements, cut off informal dispute resolution, and otherwise complicate the Executive's litigation strategy. *See* Barr Op. at 217. And here, the Government did not intervene for six years, leaving Stone with primary responsibility for the litigation for over half a decade. Pet. App. 6-8a. Even after intervening, the Executive expressly elected not to support Stone's plutonium claim—but Stone was permitted to pursue it nonetheless. *Id.* at 8-9a.[21] Moreover, even on their joint claims, Stone effectively led the litigation—deposing and examining almost half of the witnesses and driving the pre- and post-trial motions practice. Stone thus exercised the function of an officer of the United States.

The Tenth Circuit ignored these trenchant facts, reasoning that the Appointments Clause merely sets forth "procedural requirements" that "only apply to the appointment of officers." Pet. App. 25a. In so doing, the

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[21] Rockwell's Article II motion covered all of Stone's claim. CA App. 1460, 1471. The motion was denied *in toto*. Pet. App. 67a.

Tenth Circuit misinterpreted the governing law.[22] The Appointments Clause has a substantive role to play in "prevent[ing] congressional encroachment upon the Executive and Judicial Branches" and in "ensur[ing] public accountability." *Edmond v. United States*, 520 U.S. 651, 659-60 (1997). It "is more than a matter of 'etiquette or protocol'" but rather "is among the significant structural safeguards of the constitutional scheme." *Id.* at 659 (quoting *Buckley*, 424 U.S. at 125). The rationale for the Appointments Clause is not simply to make sure that federal salaries and benefits are not paid to the wrong parties—it is to protect the separation of powers and to ensure Government accountability by regulating who may exercise significant governmental authority. *See Buckley*, 424 U.S. at 126; *Edmond*, 520 U.S. at 659-62. The *qui tam* statute "allows Congress to circumvent" the check of an accountable Executive "and have its laws enforced directly by its own private bounty hunters." Barr Op. at 211.

Having recognized the obvious—that *qui tam* relators do not draw a federal paycheck—the Tenth Circuit was thus obliged to determine whether a relator was constitutionally permitted to prosecute FCA claims on behalf of the United States. Had it carried the analysis to its completion as required under *Buckley* and *Edmond*, the Tenth Circuit would have been compelled to hold that the FCA's *qui tam* provisions violate the Appointment Clause. Not only does the Tenth Circuit's decision directly conflict with *Buckley*, it invites end-runs around the Appointments Clause by the simple expedient of withholding federal paychecks and benefits from those to whom Congress purports to delegate

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[22] The Tenth Circuit's reliance on *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), stood *Buckley* on its head. *Germaine* and *Auffmordt* held that a person's status may be discerned by examining such factors as "tenure, duration, emolument, and duties." 99 U.S. at 511-12. But *Buckley* instructs that *it is precisely because relators are not officers* that they may not exercise "significant authority" to litigate on behalf of the United States. *Buckley*, 424 U.S. at 126, 140.

executive power. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 768 (5th Cir. 2001) (*en banc*) (Smith, J., dissenting). Other circuits have made the same error.[23] This Court should grant review to resolve the conflict with *Buckley* and *Edmond*, and to restore the integrity of the Appointments Clause.

B. The *Qui Tam* Provisions Of The False Claims Act Violate The Take Care Clause

Morrison v. Olson, 487 U.S. 654 (1988), instructs that the President must retain substantial control over any person charged with executive functions. Like the Appointments Clause, the Take Care Clause serves the values of separation of powers and public accountability and prohibits Congress from insulating any aspect of executive authority from the President's control. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The touchstone inquiry is whether the Executive Branch retains "sufficient control over [the person] to ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696. The *qui tam* provisions of the FCA violate these principles, creating "self-appointed 'ad hoc deputies' who are largely beyond the supervision of the United States and for whose actions the United States is not accountable." *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 869 (8th Cir. 1998) (Panner, J., dissenting). The Tenth Circuit, however, held that because the Executive was permitted to intervene (six years into the litigation), the Take Care Clause was satisfied. Pet. App. 26-27a.[24] In this respect, the Tenth Circuit's judgment conflicts with *Morrison*.

A *qui tam* relator exercises significant executive authority by initiating and maintaining litigation on behalf

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[23] *Riley*, 252 F.3d at 757–58; *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 n.21 (9th Cir. 1993).

[24] Three other circuits have also concluded that the *qui tam* provisions of the FCA comport with the Take Care Clause. *Riley*, 252 F.3d 749; *Taxpayers Against Fraud*, 41 F.3d 1032; *Kelly*, 9 F.3d 743.

of the United States. Initiating suit on behalf of the United States is entirely under the relator's control: the Executive has no say in choosing the relator, in drafting the complaint, in selecting the venue, or in deciding the appropriate time to file. *See* 31 U.S.C. § 3730(b)(1), (2). Such timing and tactical decisions, however, are core questions of prosecutorial discretion. *See* Barr. Op. at 217-18 (giving examples of cases in which Executive was concretely injured by premature initiation of suit by *qui tam* relators); *see also Stinson*, 944 F.2d at 1164 (Scirica, J. dissenting). Under the FCA, a *qui tam* relator can act where the Executive has chosen not to, with no duty to "follow Department of Justice ("DOJ") policies" and "no fiduciary or other duties to" the United States. *Riley*, 252 F.3d at 761–62 (Smith, J. dissenting).

If, as happened here for six years, the Government does not intervene, then the relator retains unbridled discretion to make every litigation decision in his best interests without regard to the public interest. *See* 31 U.S.C. § 3730(c)(3); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("[*Q*]*ui tam* relators are … motivated primarily by monetary reward rather than the public good … [and] are thus less likely … to forego an action arguably based on mere technical noncompliance … that involved no real harm to the public fisc."); Barr Op. at 220 (*qui tam* suits interfere with government contracting decisions); *id.* at 219 (relator incentivized to trade concessions on *qui tam* claims for concessions on his personal claims, "since he receives only a fraction of any payment" made pursuant to *qui tam* claims).

Even where the Executive intervenes, the relator remains a party with autonomy to act contrary to the Executive's litigation strategy. *See* 31 U.S.C. § 3730(c)(1); *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 25–26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290–91 (*qui tam* plaintiffs intended to act "as a check that the Government does not neglect evidence, cause undue delay, or drop a false claims case without legitimate reason."). As the Barr Opinion noted, relators often exercise this power "in ways

adverse to the government's interest." Barr. Opp. at 218. Here, Stone continued to press a claim the Executive disapproved. Pet. App. 8-9a. While the Executive may petition for restrictions on the relator, he cannot oust the relator altogether without dismissing the entire action. 31 U.S.C. § 3730(c)(1-2(A)); Barr Op. at 219. And the Executive may not prevent the relator from objecting to the settlement or dismissal of the complaint. *See* 31 U.S.C. § 3730(c)(2); Barr Op. at 219. These restrictions are far from trivial—in several reported cases, a relator's objections to a proposed settlement created enormous obstacles for the Executive to carry out its objectives. *See, e.g.*, *United States ex rel. Coughlin v. IBM*, 992 F. Supp. 137, 142 (N.D.N.Y. 1998); *United States ex rel. Burr v. Blue Cross & Blue Shield of Fla., Inc.*, 882 F. Supp. 166, 169 (M.D. Fla. 1995). And in at least one instance, the Court rejected the Government's proposed settlement based upon the objections of the relator. *See Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988); Barr Op. at 219.

None of the features that saved the Ethics in Government Act are present here. The independent counsel provisions authorized the Government to remove counsel for "good cause," *see Morrison*, 487 U.S. at 696, whereas the FCA does not permit the Executive to remove a relator without dismissing the entire action. The decision whether to appoint an independent counsel was committed to the Attorney General's "unreviewable discretion," *see id.*, whereas a relator appoints himself without any obligation even to consult the Executive first. An independent counsel's jurisdiction was "defined with reference to the facts submitted by the Attorney General," *id.*, whereas the relator may assert any allegations he chooses and pursue any course in the litigation that he best sees fit. Finally, an independent counsel was required to abide by DOJ policies, *see id.*, whereas a relator is not.

These intrusions upon Executive authority are no accident. Congress candidly viewed *qui tam* actions as "a critically needed supplement—and prod—to Government

prosecution," where the Executive had "not done an acceptable job of prosecuting defense contractor fraud." 132 Cong. Rec. at H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman); *see also* S. Rep. No. 345 at 25–26. The Tenth Circuit's disposition of this issue conflicts with *Morrison*, and this Court should grant review to resolve the constitutional issues it left open in *Stevens*.[25]

CONCLUSION

The petition for certiorari should be granted.

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[25] The historical evidence considered by the *Stevens* majority as relevant to the Article III issue does not control the analysis here. Article III's reference to "cases" and "controversies" is understood to refer to actions "of the sort *traditionally amenable to, and resolved by the judicial process*," making history more relevant to the standing issue. *Id.* at 766 (emphasis added). The prosecutorial authority of the Executive branch is not similarly tied to a historical referent. Moreover, the "early *qui tam* statutes required a citizen to have suffered some private injury before he could sue on behalf of the government—unlike the FCA, which allows suit based solely on injury to the government." *Riley*, 252 F.3d at 773 & n.35 (Smith, J. dissenting) (collecting statutes). That distinction is more central to the Article II analysis than it was to standing, because bringing "suit based solely on injury to the government" is a defining characteristic of the Executive branch. *Buckley*, 424 U.S. at 140. In any event, as this Court has repeatedly held, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983); Barr Op. at 233-38 (history does not validate the *qui tam* provisions of the FCA).

Respectfully submitted,

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