No. __-____

IN THE
Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Petitioner,

v.

BRENDA PREMO, ET AL.,
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

Under the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), a court generally may not hear a *qui tam* action based on "the public disclosure of allegations or transactions . . . in a congressional, administrative, or [GAO] report, hearing, audit, or investigation." Does the phrase "administrative . . . report, hearing, audit, or investigation" encompass disclosures by *state and local* governments, as determined by three federal courts of appeals, or does it refer to disclosures only by the federal government, as held by the Third Circuit?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Brenda Premo, Catherine Campisi, Melinda Wilson, Warren Hayes, Lara Fraser, Los Angeles County Department of Mental Health, and Los Angeles County Office of Education were defendants in the district court and appellees in the court of appeals.

The named individuals, all employees of the California Department of Rehabilitation ("CDR"), are collectively referred to as the "State" respondents. The two Los Angeles agencies are referred to as the "County" respondents.

Five other CDR employees — Jim Kay, Keith Foster, Edna Larsen, Kenneth Smedberg, and Verne Albright — were named in the complaint but they retired before they could be served and thus did not appear in this action.

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Charlotte Bly-Magee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case involves an issue of recurring significance to the proper administration of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, the statute that provides a remedy for frauds against the United States Treasury. Under the FCA, an action brought by a relator on behalf of the United States is jurisdictionally barred if there is a "public disclosure" of certain information underlying the relator's claims unless the relator is found to be an original source of the information. The purpose of the bar is to prevent relators from bringing parasitic lawsuits based on information readily available to the United States government. But because of the harshness of that bar — and the consequent deleterious effect of preventing a recovery by the United States for frauds committed against the public fisc — Congress carefully limited the types of public disclosures giving rise to the bar. As relevant here, the categories of public disclosures set forth in the FCA must be "of allegations or transactions . . . in a congressional, administrative, or [GAO[1]] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A).

In holding that the word "administrative" in the foregoing provision may include a state or local report, hearing, audit, or investigation, the Ninth Circuit joined the Eighth and Eleventh Circuits in an acknowledged conflict with the Third Circuit, which approximately one month after the decision below reaffirmed its longstanding precedent that the word "administrative" refers only to such documents from the *federal* government. There is thus no reasonable prospect that this circuit conflict will be resolved without this Court's review.

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[1] The statute mistakenly refers to the General Accounting Office, now the Government Accountability Office, as the "Government Accounting Office." 31 U.S.C. § 3730(e)(4)(A). For simplicity, the abbreviation "GAO" is used here.

The question is important to the United States Treasury, because the majority interpretation of § 3730(e)(4)(A) creates a jurisdictional bar to claims where there has been a public disclosure in a document that would *not* necessarily be known to federal agents. That rule defies common sense and conflicts with the history of the FCA, which demonstrates that Congress enacted the public disclosure bar to stop parasitic suits by relators who based their suits on information already known to the federal government. Because the question presented arises commonly in FCA litigation, particularly in an era of large federal-state reimbursement programs such as Medicare and Medicaid, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 470 F.3d 914. The relevant orders of the district court (Pet. App. 10a-28a) are not reported.

JURISDICTION

The court of appeals entered its judgment on December 13, 2006. A petition for rehearing was denied on January 11, 2007. Pet. App. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "public disclosure bar" of the False Claims Act ("FCA"), 31 U.S.C. § 3730(e)(4)(A), provides:

> 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 [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Other relevant provisions of the FCA, 31 U.S.C. §§ 3729-3733, are reprinted at Pet. App. 30a-39a.

STATEMENT

A. Factual Context

This is a *qui tam* action brought under the FCA by petitioner Charlotte Bly-Magee, the former executive director of Southern California Rehabilitation Services ("SCRS"), a non-profit organization that provides services to individuals with disabilities. Petitioner complains that the California Department of Rehabilitation ("CDR") and its employees defrauded the federal government from fiscal years 1995-1996 through 1999-2000.

The Rehabilitation Act, 29 U.S.C. §§ 701-796*l*, provides federal funding to support vocational rehabilitation programs to assist disabled individuals in preparing for and obtaining employment. *See id.* § 720. CDR is the California state agency that administers the state's Vocational Rehabilitation Program and disburses federal funds for that purpose. When disbursing federal funds, CDR must comply with a series of federal statutes and regulations. CDR's employees, including the State respondents, violated those federal procurement regulations in awarding contracts to local governments and school districts.[2] The end result was that the federal government financed state programs that were not entitled to funding under the Act. The State respondents then falsely certified compliance with federal procurement and auditing regulations under the Act.

The fraudulent scheme caused the federal government to pay for services at inflated rates and to purchase duplicative services. It also substantially reduced the effectiveness of CDR and the Rehabilitation Act in helping California's disabled citizens.

Petitioner first learned of the fraud while serving as executive director of SCRS. After leaving her paid position with SCRS in 1991, petitioner continued to be actively

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[2] In the current procedural posture, the factual allegations in petitioner's complaint must be taken as true. *See* Pet. App. 15a; State Defendants'/Appellees' C.A. Br. 13-14.

involved with its Board of Directors and continued to write proposals for the organization. Petitioner's allegations of fraud in the present action stem from her ongoing investigation into CDR's practices.

In February 2000, the California State Auditor, in response to a state legislative committee's request under state law, issued an audit report describing deficiencies in CDR's administration of the Vocational Rehabilitation Program. The state audit report was transmitted to the Governor of California, the President Pro Tempore of the State Senate, and the Speaker of the California Assembly. At some point, the report was also posted on the Internet at the home page of the Bureau of State Audits.[3]

In relevant part, the state audit report contained a section entitled "The Requirement that California Work with Local Agencies has Generally Led to Higher Costs per Case," which commented that, "[t]hough not required, [CDR] has established cooperative agreements with local agencies to provide vocational rehabilitation services to clients that they mutually serve." In a written response accompanying the report, respondent Catherine Campisi, CDR's director, explained that CDR had "elected to enter cooperative arrangements with local public agencies where they furnish part or all of the required non-federal matching funds . . . enabl[ing] the department to draw down substantial federal funds that would have otherwise been unmatched." In the court of appeals, the State respondents argued that the "description of the CDR transactions with local agencies is very similar to [Bly-Magee's] description of the transactions and allegations forming the basis for her action." State Defendants'/Appellees' Br. 23.

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[3] Located at http://www.bsa.ca.gov/pdfs/reports/99111.pdf, the report can be found through the Bureau of State Audits' home page, http://www.bsa.ca.gov/reports/.

B. Statutory Context

The FCA generally prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). The FCA permits a private *qui tam* action — brought in the name of the Government by a person known as a "relator" — against a person violating that prohibition. *See id.* § 3730(b)(1).[4]

Congress first enacted the FCA in 1863 at the request of President Lincoln to combat rampant fraud in procurement during the Civil War. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"), *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878). Under the 1863 Act, relators were permitted to bring *qui tam* suits based solely on public information, with no requirement that they contribute anything to the government's knowledge of, or ability to pursue, potential fraud. *See United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 324 (1st Cir. 1994); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Opportunistic relators took advantage of the 1863 Act's permissiveness by bringing "parasitic" suits "in which the relator sued upon information copied from government files and indictments." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991).

In 1943, Congress amended the FCA in response to this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the relator was allowed to pursue a *qui tam* suit even though he brought no information of his own to the action, but merely copied the allegations from a criminal indictment. *See id.* at 545-47. In

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[4] The complaint must first be served on the United States and filed under seal for 60 days. *See* 31 U.S.C. § 3730(b)(2). Within that period (including any extensions), the United States must either intervene and conduct the litigation or decline to intervene and leave the conduct of the litigation to the private relator. *See id.* § 3730(b)(2)-(4).

the 1943 Amendment, Congress imposed a "government information bar" to preclude *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 ("1943 Act"). Courts strictly construed that provision, leading to a substantial decline in the number of *qui tam* suits to enforce the FCA. *See S. Prawer & Co.*, 24 F.3d at 325; *Springfield*, 14 F.3d at 650.

The Seventh Circuit's decision in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), spurred Congress to amend the FCA again. In *Dean*, the court held that the "government information bar" precluded a *qui tam* action by the State of Wisconsin, despite the State's having uncovered the alleged fraud through its own investigation, because the information had been disclosed in a criminal trial and in newspaper stories. *See id.* at 1102-04. In response to *Dean* and other restrictive interpretations, and "in light of the belief that the Government lacked the resources to adequately address the growing problem of fraud upon the Government, Congress amended the FCA in 1986 in order to 'encourage more private enforcement suits.'" *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (quoting S. Rep. No. 99-345, at 23-24 (1986)).

The 1986 "public disclosure bar" was enacted to strike a balance between the overly restrictive "government disclosure bar" of the 1943 Act, which barred suits even by relators who have themselves investigated and reported information that the government otherwise lacked, and the overly permissive 1863 Act, which allowed opportunistic suits such as *Hess* by relators who brought nothing to the suit. *See Stinson*, 944 F.2d at 1154; H.R. Rep. No. 99-660, at 22-23 (1986); S. Rep. No. 99-345, at 4.[5]

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[5] To encourage more private enforcement suits, the 1986 Amendments also "increased monetary awards, adopted a lower burden of

The FCA's "public disclosure bar" precludes jurisdiction over *qui tam* actions based upon certain prior public disclosures of allegations or fraudulent transactions unless the suit is brought by the Attorney General or the relator is an "original source" of the information. But only certain disclosures mentioned in the statute implicate the public disclosure bar. More specifically, § 3730(e)(4)(A) enumerates three categories of sources of public disclosure that can trigger the jurisdictional bar: (i) a "criminal, civil, or administrative hearing," (ii) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation," or (iii) the news media.

This case concerns the interpretation of the second category — specifically, whether an "administrative" source includes only a source prepared by the *federal* government, or whether it also encompasses "administrative" reports, audits, and investigations prepared by *state and local* governments.

C. Proceedings Below

Petitioner, alleging violations of the FCA from fiscal year 1995-1996 through fiscal year 1999-2000, brought the present action in the Central District of California, invoking the district court's jurisdiction under 28 U.S.C. § 1331 and the FCA. The district court dismissed the action under the public disclosure bar, concluding that petitioner's complaint was based upon allegations or transactions that were publicly disclosed in a previous lawsuit and that petitioner had failed to establish that she was an original source of the information.[6]

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proof, and allowed the *qui tam* plaintiff to remain a party in the action even if the Government intervenes." *Stinson*, 944 F.2d at 1154.

[6] The present action is petitioner's third *qui tam* suit against CDR and its employees, each new case being filed as petitioner learned more facts. Of the two prior cases, only the second is relevant here. In that case, petitioner made allegations that were similar to those in the present case for the period between October 1992 and June 1997. The district court dismissed that case, and the Ninth Circuit affirmed. Pet. App. 2a, 3a-4a.

On appeal, the Ninth Circuit split petitioner's claims into three parts based on the time period covered. Only the middle period is at issue here.[7] For that middle period, from June 1997 through June 1999, the court of appeals held that the state audit report publicly disclosed the allegations or transactions on which petitioner's claims were based. Pet. App. 8a-9a. It accordingly affirmed the dismissal of that portion of her complaint. *Id.* at 9a.

In reaching the conclusion that a state audit report qualifies as "a congressional, administrative, or [GAO] report [or] audit," the Ninth Circuit followed *Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003). *See* Pet. App. 5a-6a. The court of appeals also acknowledged that the Third Circuit had held in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), that only *federal* administrative reports qualify as sources of public disclosure in § 3730(e)(4)(A)'s second category. Pet. App. 5a.

The State respondents filed a petition for rehearing, in which they were joined by the County respondents. The Ninth Circuit denied rehearing on January 11, 2007. *Id.* at 29a.

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[7] With respect to the first period, the court of appeals affirmed the dismissal of petitioner's claims arising out of fraud committed before June 1997 — and therefore coming within the period covered by her previous *qui tam* action, *see supra* note 6 — because the court viewed them as based on a disclosure from a civil hearing and it concluded that petitioner was not an original source. Pet. App. 3a-4a. With respect to the final period, the court of appeals reversed the dismissal of petitioner's claims relating to fraud committed during the 1999-2000 fiscal year because it had not been publicly disclosed in any forum. *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT ON THE PROPER INTERPRETATION OF THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR

Four circuits and a passel of district courts sharply diverge on whether a state or local administrative report constitutes an "administrative" report under § 3730(e)(4)(A), which lists the categories of items constituting public disclosures that can bar a relator's FCA suit. After the decision below, that conflict deepened when the Third Circuit reaffirmed its conflicting — and correct — interpretation of § 3730(e)(4)(A) to preclude a state or local administrative report from falling within the public disclosure bar. The United States also formally adopted that position in a brief filed in the Eighth Circuit. By contrast, the Eighth, Ninth, and Eleventh Circuits have held that § 3730(e)(4)(A)'s second category *does* include "administrative" sources originating with *state and local* governments. Both the Eighth and Ninth Circuits expressly acknowledge the conflict. District court decisions addressing this issue in other circuits fall on both sides of that circuit split, further demonstrating the state of confusion that persists in the lower courts.

A. The Third Circuit Has A Firm And Entrenched Rule That § 3730(e)(4)(A)'s Second Category Includes "Administrative . . . Reports" Only If They Originate With The Federal Government

1. In *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), the Third Circuit, the first court of appeals to confront this issue, ruled that § 3730(e)(4)(A)'s reference to "administrative . . . reports" includes only administrative reports that originate with the federal government. There, a Delaware County consultant brought a *qui tam* action against the County under the FCA. *Id*. at 735. The consultant alleged that the County had violated a contractual agreement with the federal government by failing to inform the Department of

Housing and Urban Development ("HUD") that it retained proceeds from the sale of land it had previously acquired using HUD funds. *Id.* at 737. The district court dismissed the consultant's complaint under the public disclosure bar, finding that the action was based solely on information or allegations that had been publicly disclosed through several sources, including a Grantee Performance Report ("GPR") prepared by Delaware County and submitted to HUD. *Id.* at 735-36. Federal law explicitly requires entities accepting HUD funds, such as the County, to submit GPRs to the federal government. *Id.* at 743 (citing 42 U.S.C. § 5304(e) (Supp. IV 1992)).

On appeal, the Third Circuit held that the public disclosure bar's prohibition of suits based on an "administrative . . . report" does not include reports produced by non-federal government sources. *Id.* at 746. In a well-reasoned opinion, the Third Circuit explained that Congress intended category two to include only reports originating with the federal government. *Id.* at 745-46. To interpret the provision, the court applied the interpretive canon of *noscitur a sociis*, which presumes that a word gathers meaning from the words around it. *Id.* at 745. The court found it implausible that Congress intended the word "administrative" to refer to both state and federal reports when the word lies sandwiched between two modifiers, "congressional" and "GAO," which are unquestionably federal in nature. *Id.* The court also noted that, if state and local government reports qualified as administrative reports under category two, local governments who commit fraud could preemptively invoke the jurisdictional bar against *qui tam* suits by submitting reports to the federal government that are sufficient to constitute disclosure under the FCA but are insufficient to actually alert the federal government to the fraud. *Id.* Finally, the court reasoned that construing "administrative . . . reports" to include state reports would essentially revive the restrictive "government knowledge" standard that was in effect before Congress enacted the 1986 Amendments. *Id.* at 745-46. That standard barred any actions based on

information that had passed into the possession of the federal government prior to the suit's filing. *Id.* The court explained that Congress enacted the 1986 Amendments to eliminate that overly restrictive standard. *Id.* Accordingly, the court concluded that "§ 3730(e)(4)(A)'s reference to 'administrative reports' [bars] only those actions based on administrative reports that originate with the federal government." *Id.* at 746.[8]

2. The Third Circuit has reaffirmed the *Dunleavy* rule in subsequent cases. In *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376, 383-84 (3d Cir. 1998), the Third Circuit evaluated whether a response by HUD to a request under the Freedom of Information Act ("FOIA") qualified as an "administrative report" under category two of the public disclosure bar. Writing for the court, then-Judge Alito explained that, "[i]n *Dunleavy*, we concluded that the term 'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Id.* at 383 (internal quotation marks and citation omitted). Because the FOIA response by HUD "originated with a department of the federal government and constituted official federal government action," then-Judge Alito concluded that it "plainly satisfied *Dunleavy*'s definition of 'administrative.'" *Id.* By testing the HUD response against the *Dunleavy* definition, the Third Circuit made clear that it regards *Dunleavy* as announcing the relevant standard for the term "administrative" for purposes of the public disclosure bar.

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[8] In a subsequent decision, the Third Circuit reaffirmed that category two includes only disclosures by federal sources, even when a state or local agency independent of the entity accused of fraud prepares the report. *See United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506, 520-23 (3d Cir. 2007) (county records, which showed that defendant contractors had not recorded security instruments as required under an agreement with the Navy, were not sources of public disclosure because they were not federal, but they were relevant to the relator's original source status once the same information was publicly disclosed in federal materials).

The Third Circuit again reaffirmed the *Dunleavy* holding shortly after the decision below was announced in petitioner's case. *See Atkinson*, 473 F.3d at 520 n.21 (confirming that "a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A)"). Had the Third Circuit given any thought to realigning itself with the other circuits, it could readily have done so in the years since *Dunleavy*. The court's subsequent decisions, however, demonstrate that the *Dunleavy* rule is deeply entrenched within the Third Circuit and the court is not likely to revisit its holding in light of the contrary holdings by the Eighth, Ninth, and Eleventh Circuits.

B. The Eighth, Ninth, And Eleventh Circuits Have Interpreted § 3730(e)(4)(A)'s Second Category In Square Conflict With The Third Circuit's Holding In *Dunleavy*

1. Eighth Circuit. In *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003), the Eighth Circuit acknowledged and rejected the Third Circuit's reading of § 3730(e)(4)(A) in *Dunleavy*, holding that audit reports prepared by a state agency qualified as public disclosures within the meaning of the public disclosure bar. Hays was a former nursing home employee who was fired by his employer after sending whistleblower letters to the Minnesota Department of Human Services ("DHS"), the agency that administers Medicaid in the state. *Id.* at 986. Prompted by the letters, DHS conducted a field audit of the employer. *Id.* Hays then obtained copies of the audit report and filed a *qui tam* action against the employer. *Id.* The district court entered judgment in favor of Hays, and the employer appealed. *Id.*

On appeal, the employer claimed that the public disclosure bar precluded the employee's suit because the claims were based on matters publicly disclosed in the DHS audit. *Id.* Relying on *Dunleavy*, Hays countered that the DHS audits were not "administrative" audits or reports for purposes of § 3730(e)(4)(A) because they were not

conducted by an agency of the federal government. *Id.* at 988.

Importantly, the United States intervened specially in the appeal to support Hays on that point. Stating that the issue of whether a state audit report is an "administrative" report under § 3730(e)(4)(A) is an issue of "fundamental importance to [the] United States," the United States argued that the purpose behind interpreting "administrative" to refer only to *federal* administrative reports was that "[*f*]*ederal* fraud inquiries and their outcomes are readily available to Department of Justice attorneys as potential sources of the allegations in FCA suits brought by the government itself. Many state and local reports, audits, and investigations, however, never come to the attention of federal authorities and, accordingly, they do not put the federal government in a position to pursue on its own the fraud they disclose." Hays U.S. Br. at 37, 41, Nos. 01-3888 & 01-3891 (8th Cir. filed May 6, 2002). Holding such reports to be public disclosures would thus "undermine the balance intended by Congress in section 3730(e)(4) between encouraging private citizens to expose fraud unknown to the federal government and preventing parasitic suits by would-be relators who disclose no new information." *Id.* at 41.

Notwithstanding the United States' strong support for the relator's interpretation, the Eighth Circuit disagreed with it. "We reject the Third Circuit's textual approach," the Eighth Circuit opined, "and conclude" that state audit reports "are public disclosures within the meaning of § 3730(e)(4)(A)." 325 F.3d at 988. The Eighth Circuit attempted to distinguish its decision in *Hays* from the Third Circuit's decision in *Dunleavy*. First, the Eighth Circuit noted that in *Dunleavy* the precise entity accused of defrauding the federal government had prepared the report in question, whereas in *Hays* a state agency independent of the entity accused of fraud prepared the audit report. *Id.* at 989. But that distinction is of no consequence under the rule adopted by the Third Circuit in *Dunleavy* that

only *federal* reports can trigger the public disclosure bar. *See* 123 F.3d at 745-46.

Second, the Eighth Circuit attempted to distinguish *Dunleavy* by noting that under the federal grant program at issue in *Dunleavy* Congress had delegated auditing responsibilities to federal agencies, whereas under the Medicaid program at issue in *Hays* Congress had delegated auditing responsibilities to a state agency. 325 F.3d at 989. But nothing in the statutory text of § 3730(e)(4)(A) indicates that Congress intended the meaning of the word "administrative" to vary depending upon the precise statutory scheme of the federal program under which the alleged fraud occurred. Moreover, the Ninth Circuit in the decision below did not read *Hays* as allowing non-federal sources to qualify under § 3730(e)(4)(A)'s second category only when the statutory scheme has delegated auditing authority to a state agency. Instead, the Ninth Circuit ignored that purported distinction and read *Hays* broadly to hold that § 3730(e)(4)(A)'s second category includes non-federal "administrative" sources regardless of the nature of the statutory scheme at issue. *See* Pet. App. 5a-6a ("We agree with the Eighth Circuit [in *Hays*] and now hold that the second category of sources includes non-federal reports, audits, and investigations.").

2. Eleventh Circuit. In *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (per curiam), the Eleventh Circuit sided with the Eighth Circuit, ruling that audits conducted by a state agency qualified as public disclosures under category two of § 3730(e)(4)(A)'s public disclosure bar. Battle was a former state university employee who brought suit against university officials alleging, *inter alia*, fraudulent practices in the Federal Work Study Program. *Id.* at 757. The Eleventh Circuit affirmed the district court's dismissal of Battle's *qui tam* claim. *Id.* at 762.[9] Without further discussion, the

[9] The district court cited the Eighth Circuit's decision in *Hays* in holding that § 3730(e)(4)(A)'s second category included "administrative

Eleventh Circuit concluded that, "[b]ecause Plaintiff's FCA claims rely chiefly on information that was publicly disclosed in the 1997-1998 and 1998-1999 state audits, the claims are barred unless Plaintiff qualifies as an original source." *Id.* at 762.

3. Ninth Circuit. The court below sided with the Eighth and Eleventh Circuits on the question presented and squarely rejected the Third Circuit's position, thereby creating a firm 3-1 split among the circuits. The Ninth Circuit explicitly acknowledged and rejected the Third Circuit's holding in *Dunleavy* that § 3730(e)(4)(A)'s second category includes only federal sources. Pet. App. 5a-6a. The Ninth Circuit instead expressly adopted the position of the Eighth Circuit in *Hays*, stating that "[w]e agree with the Eighth Circuit and now hold that the second category of sources includes non-federal reports, audits, and investigations." *Id.*

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In sum, the decision below deepens an existing conflict among the courts of appeals. By holding that § 3730(e)(4)(A)'s second category includes non-federal "administrative" sources, the Eighth, Ninth, and Eleventh Circuits have taken a position diametrically opposed to the settled precedent of the Third Circuit, which has recently reaffirmed its unequivocal holding that § 3730(e)(4)(A)'s second category refers exclusively to sources originating with the federal government.

C. Two Other Circuits Have Expressed Support For The Interpretation Adopted By The Third Circuit

Two circuits that have not yet ruled on the question presented, the Tenth and Sixth Circuits, have indicated support for the Third Circuit's position that

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audits . . . conducted by state agencies." *United States ex rel. Battle v. Board of Regents*, No. CIVA 100CV-1637-TWT, 2005 WL 4880633, at *9 (N.D. Ga. Feb. 10, 2005).

§ 3730(e)(4)(A)'s second category includes only federal sources.

1. Tenth Circuit. In *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996), a *qui tam* case decided before the Third Circuit's decision in *Dunleavy*, the Tenth Circuit observed that § 3730(e)(4)(A)'s second category could be construed to refer only to federal sources. The *Ramseyer* action was based upon information disclosed in a state audit and a state report. *Id.* But the relator failed to raise the argument that these state sources did not constitute sources of public disclosure under § 3730(e)(4)(A)'s second category. *Id.* The point was thus waived, and the court did not reach the merits of this issue. *Id.* Nonetheless, the Tenth Circuit pointedly indicated that the relator had missed the "potential argument" that neither the state audit nor the state report fell within the sources enumerated in § 3730(e)(4)(A)'s second category. *Id.*

2. Sixth Circuit. In *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999), the Sixth Circuit favorably addressed the reasoning of *Dunleavy*. The *Burns* court considered whether a FOIA request constituted a public disclosure under § 3730(e)(4)(A)'s second category. *Id.* at 723. In discussing category two, the Sixth Circuit noted the Third Circuit's reasoning in *Dunleavy* and cited it for the proposition that "'administrative reports' refer[s] only to reports produced by federal sources." *Id.* at 725. Although dictum, the Sixth Circuit's discussion of *Dunleavy* suggests that it found the Third Circuit's interpretation of § 3730(e)(4)(A)'s second category persuasive.

Both the Tenth and Sixth Circuits have thus expressed support in dictum for the construction of § 3730(e)(4)(A)'s second category adopted by the Third Circuit in *Dunleavy*. Given the well-reasoned and persuasive holding of the Third Circuit and the diametrically opposite position of the Eighth, Ninth, and Eleventh Circuits, there is little

prospect that the conflict among the circuits will resolve itself without a decision from this Court.

D. Opposing District Court Decisions In Several Circuits Further Demonstrate The Confusion Among The Lower Courts

In circuits in which courts of appeals have not yet addressed the issue, district courts have similarly split on whether § 3730(e)(4)(A)'s second category refers exclusively to sources originating with the *federal* government.

District courts in the Tenth Circuit, for example, have taken diametrically opposite positions on the question whether a non-federal report is an "administrative" report within the public disclosure bar of § 3730(e)(4)(A). One such court held that an audit report originating with the State of Oregon did *not* constitute a source of public disclosure under § 3730(e)(4)(A)'s second category. *See United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1544, 1550 (D.N.M. 1994). A different district court in the Tenth Circuit, on the other hand, held that a report originating with a state did fall within § 3730(e)(4)(A)'s second category. *See In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1143-44 (D. Wyo. 2006) (following *Hays* and holding that a report prepared by the State of Alabama constituted a public disclosure).

In the Fifth Circuit as well, district courts have taken conflicting approaches. In *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 274 F. Supp. 2d 824, 845 (S.D. Tex. 2003), the court held that an audit prepared by Blue Cross and Blue Shield of Texas fell within § 3730(e)(4)(A)'s second category because Blue Cross acted as a "federal administrative agency" when it served as the fiscal intermediary for Medicare. In *United States ex rel. Farmer v. City of Houston*, No. Civ.A. H-03-3713, 2005 WL 1155111, at *4 (S.D. Tex. May 5, 2005), the court held that a response by a state agency to a request under the Texas Public Information Act constituted a public disclosure within the meaning of § 3730(e)(4)(A).

In the Sixth and Seventh Circuits, district courts also illustrate the confusion among the federal courts on this issue. One district court in the Sixth Circuit has observed — without reaching the issue — that, under *Dunleavy*, reports obtained via the Kentucky Open Records Act would not fall within § 3730(e)(4)(A)'s second category "unless the underlying information included reports or investigations performed by federal administrative agencies." *United States v. Solinger*, 457 F. Supp. 2d 743, 752 n.7 (W.D. Ky. 2006). And in *Feingold v. Associated Insurance Cos.*, No. 98 C 4392, 2001 WL 1155250, at *5 (N.D. Ill. Sept. 28, 2001), the court held that reports prepared by the federal Health Care and Financing Administration fell within category two precisely because the reports originated with an agency of the federal government. *See also United States ex rel. O'Keeffe v. Sverdup Corp.*, 131 F. Supp. 2d 87, 92 (D. Mass. 2001) (holding that a report co-authored by the Massachusetts Bay Transit Authority and the U.S. Department of Transportation fell within category two because a federal agency was the co-author of the report).

The foregoing district court cases thus demonstrate that the question presented is frequently litigated, that the courts are deepening the conflict among the circuits, and that this Court's construction of § 3730(e)(4)(A) is urgently needed to bring clarity to this important question.

II. THE CALIFORNIA AUDIT DOES NOT CONSTITUTE "PUBLIC DISCLOSURE" UNDER 31 U.S.C. § 3730(e)(4)(A) BECAUSE IT IS NOT A FEDERAL ADMINISTRATIVE REPORT OR AUDIT

Section 3730(e)(4)(A) of the FCA lists the sources of public disclosure that give rise to a jurisdictional bar when the relator is not an original source of the information. The listed sources can be divided into three categories: (1) "a criminal, civil, or administrative hearing"; (2) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) "the news

media." 31 U.S.C. § 3730(e)(4)(A). The court below erroneously concluded that the audit report produced by the California State Auditor constitutes a source of public disclosure under the second category, thereby barring petitioner's FCA action. *See* Pet. App. 5a-6a. This conclusion is contrary to the plain language of the statute and inconsistent with the structure and purpose of the 1986 Amendments to the FCA.

A. The Second Category Of The FCA's Public Disclosure Bar Refers To Federal, Not State And Local, Administrative Actions

The FCA's public disclosure bar is triggered by a public disclosure of allegations or transactions of fraud in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A). Standing alone, the word "administrative" may be capable of many meanings. Within the context of § 3730(e)(4)(A), however, it refers to *federal* administrative reports, hearings, audits, and investigations.

The plain language of § 3730(e)(4)(A) indicates that Congress intended the second category of this provision to bar *qui tam* actions only when the basis of the fraud is disclosed in *federal* administrative sources. The word "administrative" is sandwiched between references to Congress and the GAO, two obviously federal sources. When interpreting a statutory phrase that includes a string of terms, the fact that "several items in [the] list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning.") (internal quotation marks omitted). The common attribute in § 3730(e)(4)(A)'s second category is the federal nature of the specified sources of public disclosure. Because Congress placed "administrative" between references to

Congress and the GAO, the term "administrative" plainly refers to federal administrative disclosures only.

A contrary interpretation — reading the term "administrative" in the second category to include non-federal sources, expands the scope of the public disclosure bar substantially beyond the plain meaning of the statute. When a potentially ambiguous statutory word is included in a list of terms with clear meanings and common attributes, interpreting the ambiguous word consistently with the common attributes of the surrounding terms prevents courts from "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson*, 513 U.S. at 575 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This form of judicial restraint is particularly important when interpreting a jurisdictional bar added in an amendment process designed to expand, not constrain, the ability of relators to bring FCA claims. *See*, *e.g.*, *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (concluding that the phrase "any note" in the Securities Exchange Act of 1934 "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts").

B. The History Of The 1986 Amendments To The False Claims Act Confirms The Statute's Plain Meaning

The current version of the FCA deliberately contains a public disclosure bar intended to preclude only truly parasitic *qui tam* actions based upon information already disclosed in sources likely to alert the federal government to the alleged fraud. Interpreting § 3730(e)(4)(A)'s second category to include non-federal sources would frustrate the purposes of the 1986 Amendments.

The 1986 Amendments responded to the extraordinary restrictions on *qui tam* actions contained in the 1943 FCA and to the pressing need to supplement federal anti-fraud

efforts with greater private enforcement. Congress emphasized the difficulty of detecting such fraud "without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4. The 1986 Amendments thus focused on creating greater incentives for potential relators with information about fraud to bring *qui tam* suits. Accordingly, Congress "increased monetary awards, adopted a lower burden of proof, and allowed the *qui tam* plaintiff to remain a party in the action even if the Government intervenes." *Stinson*, 944 F.2d at 1154.

In addition, Congress replaced the very general "government disclosure bar" of the 1943 Amendment with the current act's more specific and more limited "public disclosure bar." *See* 31 U.S.C. § 3730(e)(4)(A). Unlike the 1943 "government disclosure bar," which prohibited the filing of a *qui tam* action based on "evidence or information in the possession of the United States . . . at the time such suit was brought," the current public disclosure bar enumerates and limits the sources that constitute public disclosures. Those 1986 Amendments to the disclosure bar provision, therefore, serve a critical function of limiting the scope of the jurisdictional bar and expanding the number and type of permissible *qui tam* actions. To broadly construe that bar to include state and local sources, as three circuits have now done, functionally eviscerates an important facet of the 1986 Amendments' effort to expand the types of suits that relators can bring.

C. Interpreting The Second Category Of The Public Disclosure Bar To Prohibit *Qui Tam* Actions Based On State And Local Administrative Disclosures Would Create Perverse Incentives For States And Localities, And Would Substantially Undermine The Federal Government's Ability To Redress Fraudulent Activity By State And Local Actors

State and local administrative reports, audits, hearings, and investigations are not the types of public disclosures

likely to put the federal government on notice of fraud by state and local actors. These reports are often prepared by the very entity committing the fraud, making blatant and transparent disclosure highly unlikely. The public disclosure bar is triggered whenever all of the essential elements of the fraud are made public, regardless of whether those disclosures are "readily comprehensible" or easily deciphered. *See Springfield*, 14 F.3d at 655. Expanding the bar to include state and local administrative reports would permit — even encourage — state and local agencies to creatively disclose fraudulent behavior in their reports, thereby insulating themselves from *qui tam* actions and making it exceedingly unlikely that the federal government will discover their fraudulent activities.

Moreover, state and local administrative reports are likely to be of very limited public circulation. For example, the report that forms the basis of the public disclosure ruling in this case was transmitted to the Governor of California, the President Pro Tempore of the State Senate, and the Speaker of the California Assembly. *See* State Defendants'/Appellees' C.A. Br. 24. It was also posted on the Internet with a link on the home page of the Bureau of State Audits. *See supra* note 3. Disclosures buried this deeply in state or local bureaucracies are extremely unlikely to alert the federal government to fraudulent action.

The *qui tam* provisions of the FCA are intended to create incentives for private attorneys general to ferret out hidden evidence of fraud against the federal government. Interpreting the public disclosure bar to encompass disclosures made in state and local administrative reports creates just the opposite incentives: it encourages states and localities to cloak disclosures of their fraudulent activities in their own administrative reports and thereby to insulate those activities from the fruitful scrutiny of private attorneys general.

III. WHETHER AN ADMINISTRATIVE REPORT, AUDIT, OR INVESTIGATION MUST COME FROM A FEDERAL SOURCE TO TRIGGER THE PUBLIC DISCLOSURE BAR IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The rule applied below by the Ninth Circuit substantially impairs the federal government's ability to police fraud costing taxpayers tens of billions of dollars each year. Moreover, the uncertainty and lack of uniformity is profoundly unfair to both plaintiffs and defendants, and deters legitimate *qui tam* actions.

A. The Rule Permitting Non-Federal Sources To Trigger The Public Disclosure Bar Insulates State And Local Governments From *Qui Tam* Suits, Substantially Impairing The Federal Government's Ability To Police Fraud

State and local fraud against the federal government is a long-standing problem. Each year the federal government distributes more than $400 billion in federal funds to state-administered programs and other non-federal entities.[10] For fiscal year 2005, estimated improper payments in this area exceeded $38 billion, not including some of the largest and highest-risk state-administered programs such as Medicaid.[11]

The *qui tam* provisions of the FCA play a crucial role in policing this type of fraud by encouraging relators to discover and prosecute misconduct that the federal government would be unlikely to discover on its own. In the

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[10] *See* U.S. Gov't Accountability Office, *Improper Payments: Federal and State Coordination Needed to Report National Improper Payment Estimates on Federal Programs* 1 (Apr. 2006), *available at* http://www.gao.gov/new.items/d06347.pdf. State-administered programs are federal programs that are managed on a day-to-day basis at the state level. Such programs include Medicaid, Highway Planning and Construction, the Food Stamp Program, Temporary Assistance for Needy Families, and Unemployment Insurance. Medicaid alone had outlays exceeding $181 billion dollars in fiscal year 2005.

[11] *See id.*

Eighth, Ninth, and Eleventh Circuits, however, disclosure in state and local documents — no matter how obscure or inaccessible — of the factual basis for a fraud claim effectively insulates states and localities from *qui tam* actions based on those disclosures. That safe harbor exists regardless whether anyone associated with the federal government actually receives or reads the report. Thus, the majority rule in the circuits essentially repeals an important component of the 1986 Amendments and substantially undermines the federal government's ability to police fraud in the multi-billion dollar arena of state-administered programs.

B. Lack Of Uniformity Among The Circuits About Whether State And Local Sources Trigger The Bar Creates Profound Unfairness For *Qui Tam* Relators Who Sue Defendants That Are Not Subject To Suit In The Third Circuit

The lack of uniformity among the circuits makes a relator's ability to pursue a *qui tam* suit arbitrarily and unfairly depend on where the defendant is subject to suit.[12] If petitioner had brought an otherwise identical suit against the Pennsylvania Office of Vocational Rehabilitation in the United States District Court for the Eastern District of Pennsylvania, for example, disclosures of an identical nature contained in an audit by the State of Pennsylvania would not have barred her *qui tam* action.

The 1986 Amendments were intended to facilitate the exposure and prosecution of fraud against the federal government where it occurs. The ability of a citizen to

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[12] This Court recently recognized the importance of uniformity in the context of the public disclosure bar by hearing argument on a closely related provision of § 3730(e)(4). *See United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 05-1272 (argued Dec. 5, 2006). At issue in *Rockwell* is the proper interpretation of the original source exception to the public disclosure bar. This case raises the antecedent question of which sources trigger the public disclosure bar. So long as uncertainty exists as to when the bar applies, this Court's efforts to clarify the exception to that bar through *Rockwell* will be undermined by litigants who seek an expansive interpretation of the public disclosure bar.

protect the federal coffers from state and local fraudulent claims should not depend on the geographic placement of the state within our union.[13]

C. Continuing Uncertainty About The Scope Of The Public Disclosure Bar Deters Relators From Bringing Legitimate *Qui Tam* Actions

Pursuing a *qui tam* action on behalf of the federal government against a large defendant is time consuming and expensive,[14] and entails significant risk of retaliation.[15] Uncertainty regarding the scope of the public disclosure bar will deter relators and their counsel from making these investments and incurring these risks. Thus, the existing conflict among the circuits serves to undercut the principal goal of the 1986 Amendments, which was to encourage more *qui tam* actions by private relators. As a consequence, ongoing fraud that would be a legitimate target of a valid *qui tam* action continues unabated, costing the federal government billions of dollars.

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[13] The lack of uniformity also unfairly affects defendants. Under § 3732(a), the FCA permits an action to be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a). Thus, a company with offices in New Jersey and California may be sued within the Third Circuit and not receive the same benefit from the public disclosure bar as a competing company that does business only in the Ninth Circuit, which will be protected by the public disclosure bar in precisely the same circumstances.

[14] Congress expressly recognized the impact of these costs by permitting relators to recoup attorneys' fees and litigation expenses in successful actions. *See* 31 U.S.C. § 3730(d).

[15] Again, Congress addressed these risks in the 1986 Amendments, but the availability of a legal remedy for retaliation does not eliminate all the risk inherent in a *qui tam* action. *See* 31 U.S.C. § 3730(h) (addressing employee discharge, harassment, suspension, and threats); *see also* Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 Sup. Ct. Econ. Rev. 135, 159 (2006) (noting that, despite protection under the FCA, whistleblowers face substantial private risks that may prevent them from disclosing the fraud).

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT AMONG THE COURTS OF APPEALS

The proper interpretation of the second category of the FCA's public disclosure bar is ripe for this Court's review. Moreover, this case cleanly presents that important issue. It is accordingly an ideal vehicle to resolve the entrenched conflict among the courts of appeals.

A. This Court Will Not Benefit From Further Percolation In The Lower Courts

The courts of appeals have analyzed the question presented here for more than a decade, and the Eighth, Ninth, and Eleventh Circuits have staked out positions that clearly conflict with the Third Circuit's entrenched *Dunleavy* rule. Indeed, both the court below, *see* Pet. App. 5a-6a, and the Eighth Circuit, *see Hays*, 325 F.3d at 988, have acknowledged the conflict. And the Third Circuit reaffirmed its *Dunleavy* rule earlier this year, after the Ninth Circuit issued the incompatible decision below. *See Atkinson*, 473 F.3d at 520 n.21, 523. Commentators, beginning in 1998, have also discussed the Third Circuit's position and the likelihood that this Court would need to resolve the conflict. *See* Theodore K. Stream & Jamie E. Wrage, *Preserving the False Claims Act*, 45 Fed. Law., June 1998, at 56, 58-59.

The conflict is fully developed without any realistic prospect of being resolved in the lower courts, therefore, and it is ripe for adjudication by this Court. Further percolation is likely only to increase confusion and impede the ability of relators to bring viable *qui tam* actions.

B. This Case Raises The Question Presented In Pure Form, Without Extraneous Issues Or Alternative Grounds Of Decision

The decision below cleanly presents the question whether a state or local administrative audit or report triggers the public disclosure bar of the FCA. This petition addresses only this one aspect of the decision below, which affected only the claims from June 1997 through

June 1999. No other claims are implicated. And, for those claims that are involved, no other aspect of the public disclosure bar is relevant. Thus, the only question to be decided is whether as a matter of law an administrative report must be federal to trigger the public disclosure bar under the FCA. Because there was no dispute about which report constituted the public disclosure or the source of that state report, the Ninth Circuit's construction of the FCA is a holding that presents an especially clean vehicle for the resolution of the conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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