No. 06-1269

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

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Under the "public disclosure bar" of the False Claims Act, 31 U.S.C. §3730(e)(4)(A), a court lacks jurisdiction over a *Qui Tam* action based on the "public disclosure of allegations or transactions" within a "government accounting office report, hearing, audit or investigation." Do the terms "audit" or "report" encompass a broadly distributed, published audit report by the State Auditor of the State of California?[1]

[1] The issue framed by Petitioner purports to encompass "local" agencies – an issue raised nowhere in the case at bar.

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INTRODUCTION

For over a decade, Petitioner, Charlotte Bly-Magee, has been fruitlessly crusading upon essentially the same general set of issues against various parties for similar perceived improprieties. This Petition relates to the third such action filed by Petitioner.

The Petition for Writ of Certiorari should be denied for several reasons. First, the Bly-Magee case is not final. No final judgment has been entered as to any party in the matter rendering the case unripe for review and creating the serious possibility that a decision by this Court would be rendered moot on other grounds. Second, despite the effort of Petitioner to create the illusion of a split in authority, Petitioner's reliance upon a decade old decision by one Circuit does not create grounds for review because that case has since been distinguished by the very Circuit that issued it and all but repudiated by this Court. Third, subsequent decisions in several Circuits demonstrate a *trend*, now joined by the Ninth Circuit in this case, in a developing area of law – not an area of conflict and confusion for Supreme Court resolution. The Court should permit this development in the law to take its natural course.

Fourth, even were there any serious question as to the proper application of the statute, it would be inappropriate for the Court to legislate the contents of the statute by adding terms and provisions not included in the statute. Last, the Ninth Circuit's determinations in the case at bar were fundamentally sound and consistent with both the intent of the law and extensive authority in both the Ninth Circuit and around the country.

THE DECISION OF THE NINTH CIRCUIT IS NOT A FINAL JUDGMENT PROPER FOR CONSIDERATION BY THIS COURT

In the matter at bar, the Ninth Circuit affirmed *only a portion of the dismissal* of the action by the District Court and *remanded* the matter to the District Court for further consideration of other possible infirmities of the complaint as to which, according to the Ninth Circuit's reasoning, the District Court had jurisdiction to rule. Hence the matter of *Bly-Magee v. Premo,* upon which this Petition rests, is potentially months, if not years, from being final.

While there is no hard and fast rule requiring absolute finality before this Court takes a case, appellate courts wisely are traditionally reluctant to consider appeals where the underlying action is not final.[2] Petitioner makes little effort to bring this matter within any recognized exception to common practice and effectively ignores the fact that the matter is far from being final. However, there are several reasons this Court should decline interlocutory review in this matter.

A portion of the case was remanded by the Ninth Circuit for consideration by the District Court of pleading infirmities which actually pervade the entire complaint. Rulings upon those infirmities in Defendants' favor, likely to occur long before this Court could hear this matter even if it were so inclined would render any decision by this Court moot since such pleading deficiencies pertain to the

[2] This court's jurisdiction on such matters is entirely discretionary (28 U.S.C. §1254). *Cf.* 28 U.S.C. §1257 [only "final judgments" from state courts subject to review]; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) [limitations in 28 U.S.C. §1291 militate against interlocutory appeals].

entire complaint and the court's dismissal of *Bly-Magee III* could ultimately be sustained on completely different grounds.

A ruling in favor of Defendants upon pleading motions which would ultimately dispose of the lawsuit by Bly-Magee would render any opinion by this Court merely advisory inasmuch as the underlying action itself would have been fully dismissed upon other grounds.

A lack of clarity as to the final outcome of litigation has led this Court to dismiss other interlocutory grants of Certiorari as improvident (See, *Nike Inc. et al. v. Kasky*, 539 U.S. 654 (2002) [dismissing Certioriari as having been improvidently granted in the context of a California Supreme Court decision remanding a case for further consideration by the trial court]). Respectfully, therefore, this Court's discretion to consider this matter which is not "final" in any sense, should not be exercised in this matter.

DUNLEAVY **DOES NOT CREATE A DISPUTE AMONG THE CIRCUITS BECAUSE ITS RULING IS DATED AND NO LONGER VIABLE**

The Petition is premised almost entirely upon a purported dispute or disparity between a single decision by the Third Circuit on one end and the *admittedly consistent* rulings of several other Circuits including the Ninth Circuit (in multiple matters) on the other. The issue at bar is the interpretation of the "prior public disclosure" bar of the False Claims Act.

31 U.S.C. §3730(e)(4)(A) provides as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of

> allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

The genesis of Petitioner's argument for the existence of a split, is the matter of *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3rd Cir. 1997 – *Dunleavy I*). The gravamen in *Dunleavy I* was the question of whether a standard annual report prepared by the County, or prior newspaper accounts of certain conduct which was alleged to have constituted a violation of the False Claims Act, could trigger the prior public disclosure bar of the False Claims Act. In reaching its decision that it did not, the *Dunleavy* court made several assumptions or decisions which time and further development in the law have shown are wrong.

The first error by the Third Circuit in *Dunleavy I* is the Court's assumption that only actual prior allegations of fraudulent activity would qualify as prior public disclosure under the prior disclosure bar. This suggests a far too narrow reading of the statute and a predisposition to its ultimate holding. The position that actual allegations of fraud are necessary to trigger the bar has since been eroded in favor of holdings, more consistent with the intent of the statute, that it is the publication of *facts* from which fraudulent activity could be divined, rather than actual publication of allegations of fraud, which trigger the bar (See, e.g., *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998) (adopting broad interpretation of "based upon" and holding that

the relator's lawsuit was "based upon" an earlier state court action, although the basis for her *Qui Tam* lawsuit was her personal knowledge, because all that is required to trigger the bar is that the allegations or transactions in a complaint mirror the information in the public domain and not that the relator actually derive her information from the public information).[3] Even the Third Circuit which issued *Dunleavy,* has now apparently abandoned this very narrow interpretation (*United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 385-88 (3rd Cir. 1999), *cert. denied*, 120 S.Ct. 1418 (2000) [adopting the majority broad view of the phrase "based on" for prior public disclosure purposes]).

In the context of this narrow reading, the Court in *Dunleavy* found that the only documents which contained sufficient "disclosure of the allegations or transactions" was a (very minor) annual County report. The Third Circuit then without careful analysis and based upon speculative assumptions respecting the final disposition of the county report, concluded that such a report, being a standard annual report, submitted by every recipient of public funds and *likely to be hidden away in a file drawer rather than reviewed carefully*, could not be "the type" of a governmental report intended by Congress to foreclose a

[3] See also, *United States v. Board of Trustees of Stanford Univ*., 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999); *United States ex rel. McKenzie v. BellSouth Telecomms. Inc*., 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir.), *cert. denied*, 507 U.S. 951 (1993); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 at 567 (11th Cir. 1994).

Qui Tam action.[4] It appears therefore that the holding in *Dunleavy I* is a result driven opinion in which the Court, without adherence to the language of the statute, narrowly interpolated the code to achieve what it considered a "proper" result.

In light of the questionable rulings throughout the history of *Dunleavy*, it is necessary to question whether this is simply a case that the Third Circuit "got wrong."[5] In essence, this Petition is premised upon a decade old case, of questionable relevance, to attempt to establish the existence of a conflict amongst the Circuits.

SINCE ITS HOLDING IN *DUNLEAVY I*, THE THIRD CIRCUIT HAS JOINED THE TREND WITH OTHER CIRCUITS IN ADDRESSING THE BREADTH OF THE PRIOR DISCLOSURE BAR

Petitioner inexplicably cites two post 1997 instances in which Petitioner posits the Third Circuit "reaffirmed"

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[4] The Court observed in Fn. 11: There is no evidence that, prior to Dunleavy's filing of his Complaint, the federal government had done anything more than place this information, along with countless other reams of paper, in some government file room. This somewhat cynical view of federal record keeping appears to have driven the final outcome of the decision.

[5] Upon remand of *Dunleavy I* to the District Court, the County moved to dismiss the matter upon the theory that the County was not a "person" under the auspices of the False Claims Act. The District Court *again* dismissed the matter on this ground. The Third Circuit then reconsidered the case in *Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002 – *Dunleavy II*) *affirming* the District Court's dismissal of the matter on that ground. However, this court, in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003) ruled directly opposite to this holding calling into serious question *any* continuing viability of the *Dunleavy* cases.

its adherence to *Dunleavy I*. While such adherence might be plausibly explained as misguided fealty to that Circuit's prior holdings, it is not necessary to do so as ***in both instances, the Third Circuit distinguished Dunleavy I and in both instances dismissed the cases under review based upon the prior disclosure bar.***

In *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1998), cited by Petitioner as evidence of the continuing viability of *Dunleavy*, the Third Circuit paid lip service to *Dunleavy* in holding that the product of a request under the Freedom of Information Act (FOIA) – itself a source of prior public disclosure that is mentioned nowhere in the False Claims Act, was a "report" as defined in the statute and thus a prior public disclosure of the information which thereupon led to the filing of a *Qui Tam* action.

Remarkably, after its having so improbably parsed the language of the statute in *Dunleavy*, the Third Circuit in *Mistick* decided that the language of the statute was ambiguous but that "In light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of §3730(e)(4)(A)" (186 F.3d 376, 388). The Third Circuit's continued adherence to *Dunleavy* is questionable at best.

Petitioner's citation of, and reliance upon, *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3rd Cir. 2007) to suggest any continuing viability of *Dunleavy I* is even less explicable. There, the Third Circuit affirmed dismissal of the *Qui Tam* action based upon the prior publication bar dismissively relegating the discussion of *Dunleavy* to the "rubric of *Dunleavy.*"

Petitioner's commentary upon the Tenth Circuit's decade old decision in *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) exemplifies the difficulty in finding cases which concur with *Dunleavy*. There, the Court *never reached* the issue at bar. It merely commented on the fact that the Appellant there never raised that issue for determination. This is hardly a "ringing endorsement" of *Dunleavy* sufficient to justify the conclusion that the Tenth Circuit is in conflict with the remainder of the country.

In fact, Petitioner cites neither Third Circuit nor any other Circuit authority that has actually applied *Dunleavy I* in any manner that would be inconsistent with the determination of the Ninth Circuit in *Bly-Magee*. Even the Third Circuit has construed the bar more liberally, consistent with the decision in *Bly-Magee* at times. For example in *United States ex rel. Stinson, Lyons Gerlin & Bustamante P.A. v. Prudential Insurance Company*, 944 F.2d 1149 (3rd Cir. 1991) the Third Circuit held that disclosure within the context of a state litigation not involving the Federal Government, could constitute prior public disclosure.

In 2005, the very circuit that issued *Dunleavy*, held in *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3rd Cir. 2005) that the prior filing of a civil complaint in state court constituted a source of prior public disclosure:

> These two characteristics [applicable to litigation and pleadings], filing with the court and public availability would persuade even those in

> disagreement with *Stinson* that a complaint is a public disclosure under the FCA.[6]

If there is any meaningful distinction between the "public disclosure" arising from pleadings in a state court litigation file at the local county courthouse and an audit report issued and widely published by the highest ranking financial officer of the most populous state in the country, it would certainly seem that the latter is better calculated to give meaningful notice to federal authorities than the former. Yet it is the former with which Petitioner takes no issue and the latter which is the subject of this challenge.

The same rationale and reasoning underlies the Ninth Circuit's decision in *Bly-Magee*, its decisions in other cases of similar nature and the decisions in other Circuits all consistently applying the same principles as are further discussed below.

THERE IS NO CONFLICT BUT ONLY A PROGRESSIVE AND ONGOING TREND IN THE LAW WHICH DOES NOT INVITE SUPREME COURT CONSIDERATION

Contrary to Petitioner's assertion of conflict, a review of case law in the area shows a progressive, consistent, and ongoing trend among the Circuits to interpret the prior disclosure bar consistently with its intent. That intent was well stated by the Third Circuit itself in *Stinson, supra*, where the Court observed:

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[6] The Third Circuit quoted Justice Scalia's dissent in *Stinson* observing "that information gleaned from browsing through public court files would constitute a public disclosure" (*Stinson*, 944 F.2d 1149, 1170-71).

> The provision was designed to preclude *Qui Tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator.

The Seventh Circuit noted in *United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 857-58 (7th Cir. 1999):

> Among the congressional aims of the FCA and the 1986 amendments was "to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud. While Congress intended the 1986 amendments to continue to encourage whistleblowers to come forward with information, it also intended to prevent opportunistic and parasitic lawsuits.

This Court has consistently declined to review these decisions applying the FCA prior publication bar consistently with *Bly-Magee*. Nothing in the Petition suggests grounds for a different perspective in this matter.

Beyond the cases from the Third Circuit noted above demonstrating an abandonment of any strict application of *Dunleavy* by the very Circuit that issued the opinion, there is a progressive, consistent and ongoing trend in the law to apply the prior publication bar to include state and/or local government reports and disclosures as prior public disclosure sufficient to trigger the bar.

The examples cited in the Petition (*Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), *cert. denied*, 540 U.S. 877, 124 S.Ct. 277, 157 L.Ed.2d 139 (2003) and *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006)) clearly represent

the current trend in the law. In *Hays*, the Eighth Circuit held that a state audit report, indistinguishable from the audit that is at issue in *Bly-Magee*, was a previous public disclosure sufficient to bar a *Qui Tam* action based upon transactions disclosed in the report. This Court recently cited *Hays* favorably in *Rockwell International Corp. v. United States*, (Docket 05-1272) ___ U.S. ___ (March 27, 2007) (See Opn. p. 18).

The Ninth Circuit's decisions in this area have been particularly consistent and this Court has consistently declined review (though for some reason Petitioner seems reluctant to include citation to the denial of Certiorari). For example in *A-1 Ambulance Service Inc. v. California*, 202 F.3d 1238 (9th Cir. 2000), *cert. denied*, 529 U.S. 1099, 120 S.Ct. 1833, 146 L.Ed.2d 777 (2000), this Court let stand a decision in which the prior disclosure bar was applied to public hearings at a County Board of Supervisors at which the circumstances underlying a later *Qui Tam* action were discussed.

The Ninth Circuit noted there:

> We further reject A-1's contention that administrative hearings must be federal in order for the public disclosure bar to apply. The unambiguous text of the first category of public fora described in §3730(e)(4)(A) does not contain any federal limitation. Congress could have easily limited the public disclosure bar to "federal criminal, civil, or administrative hearings," but chose not to do so. If the statutory language is clear, that is the end of our inquiry. See *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). We will not add a term to the statute that Congress elected not to include.

The Fifth Circuit likewise has developed a liberal construction of the prior publication bar, holding in *U.S. ex rel. Reagan v. East Texas Medical Center etc.,* 384 F.3d 168 (5th Cir. 2004) that the previous allegations of similar facts by the relator in her prior state lawsuit against the Defendant and information gained in a FOIA request constituted a prior publication sufficient to trigger the bar.

The Court in the instant case merely continued this same line of reasoning to enforce the intent of the legislature. Again, these prior decisions created no conflict worthy of review. Their continued consistent application, does not justify review here.

EVEN WERE THERE SOME QUESTION IN THE INTERPRETATION OF THE STATUTE, CLARIFICATION SHOULD BE MADE BY THE LEGISLATURE NOT THE COURTS

While it is clearly the province of the Court to *interpret* the laws consistently with the patent intent of the Legislature, it is *not* properly the province of the Court to rewrite a statute to encompass limitations which the legislature itself did not consider necessary or proper. The simplicity of the issue at bar suggests that the Court should decline to do so here. The Ninth Circuit noted in *Seal v. Seal A.*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, *U.S. ex rel. Gale v. Zenith Data Systems*, 535 U.S. 1017, 122 S.Ct. 1605, 152 L.Ed.2d 620 (2002):

> If a legislative purpose is expressed in plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms. Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance

> with the policy of the enactment as a whole . . . One of the policy goals behind the [1986] amendments was to "reject[ ] suits [that] the government is capable of pursuing itself, while promoting those [that] the government is not equipped to bring on its own.

The statute contains a listing of potential sources of prior public disclosure which will trigger the jurisdictional bar. No great feats of legislative legerdemain would have been necessary to compose a limitation upon this listing had the legislature so intended. Congress elected to utilize the phrase "Government Accounting Office" as one of the listed sources of reports or audits for determining the existence of a public disclosure. The Third Circuit called attention to this language in *Mistick, supra* parsing this language (contrary to its own stated intent to avoid doing so) and arguing, in dicta, that it was "ambiguous" because Congress elected to use the term "Government" Accounting Office rather than "General" Accounting office – the latter being more readily discerned as relating exclusively to the Federal Government.

Respectfully, this dictum purports to find ambiguity where none exists. In fact, the intent of the 1986 Amendments (to avoid opportunistic and parasitic suits) is unquestionably well served by the assumption that Congress meant exactly what it said in the statute – that any *Government* audit or report could contain information which could trigger the prior disclosure bar.

Had it been in the contemplation of the legislature to constrain those sources to encompass *only* federal sources of information, *the addition of that single word "federal" would have sufficed to clearly and succinctly spell out such intention*. Alternatively, simply using the term "General"

Accounting Office could have satisfied the same end (See *Mistick, supra*). That Congress omitted so simplistic a limitation cannot be read as license for the judiciary to add language to a statute which the legislature itself could so easily have done had it wished to do so.

This Court recently declined just such an "invitation" in *Rockwell*, *supra* (issued March 27, 2007) in which this Court declined to rewrite the "Original Source" saving provision of the prior disclosure bar by placing a judicial gloss upon the language used by Congress. Likewise, there is no compelling reason here for any such reconstruction of the immediately preceding paragraph of the very same statute.

Nor can it be presumed that Congress is oblivious or insensitive to the clear trend of the Federal Courts. Had Congress found fault with these interpretations, it could readily have addressed the situation in the decade since *Dunleavy*. That it has elected not to do so should not encourage the judiciary to take up the cause and rewrite the statute for the legislature.

THE NINTH CIRCUIT'S DETERMINATIONS IN *BLY-MAGEE* WERE SUBSTANTIVELY CORRECT

A. The Decision in *Bly-Magee* is Equally Supportable Without Reference to the State Audit

In considering whether this matter warrants review, and putting aside the fact that there exists no final judgment in this matter to review, the Court should not lose sight of the unchallenged alternative basis articulated by the Court in this matter for determining the existence of the jurisdictional bar. Specifically, the Ninth Circuit also recognized that the prior publication of the principle

claims and allegations of *Bly-Magee III* occurred in *Bly-Magee II* and that the relator had failed to establish she was the original source of those facts (App. 3a-4a).[7] In fact, these circumstances are all but indistinguishable from *ex rel. Reagan, supra* where such prior publication in the relator's own previous lawsuit, barred the subsequent action "based upon" those same facts and allegations.

Although the Ninth Circuit's ruling in this respect was limited to only one year of "overlap" between allegations of *Bly-Magee II* and *Bly-Magee III,* the Ninth Circuit apparently did not consider the significant case law holding that even *partial* disclosure will bar a parasitic *Qui Tam* action like *Bly-Magee III* (*U.S. ex rel. Biddle v. Board of Trustees of Stanford*, 161 F.3d 533, 536-40 (9th Cir. 1998); *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996); *U.S. ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992)). Hence, though it elected not to base its decision solely upon this ground, the Ninth Circuit's holding finding a prior public disclosure and thus a jurisdictional bar is equally sustainable on this ground alone.

B. The Decision in This Case Was Correct

Although there is no real reason for this Court to even consider substantive review in this matter, Respondents are obliged to point out that the substance and reasoning of the decision by the Ninth Circuit are unassailable and

[7] *Bly-Magee II* was dismissed by the District Court *inter alia* for failure to state a claim under FRCP Rule 9(b). *Bly-Magee II* and *Bly-Magee III* were consolidated for oral argument before the Circuit Court which ultimately affirmed the dismissal of *Bly-Magee II* in an unpublished Memorandum Opinion.

the position urged by Petitioner would engender absurd results.

As pointed out above, there appears to be unchallenged consistency amongst the Circuits that disclosures in state court pleadings clearly constitute a valid basis for the jurisdictional bar to apply. Justice Scalia's concession in *Stinson, supra* that such material would constitute a public disclosure further validates this conclusion.

On February 10, 2000, the Office of the State Auditor of the State of California, under the signature of then Acting State Auditor, Mary Noble, published and delivered to the Governor of the State and its people a complete audit report respecting the State Department of Rehabilitation's administration of the Vocational Rehabilitation Program (which is the subject of relator's action). This report was made available *free* to any member of the public. It was also published on the World Wide Web at www.bsa.ca.gov/bsa/. The Audit report clearly disclosed the very transactions and circumstances upon which the *Qui Tam* action by Bly-Magee (in *Bly-Magee III*) was premised. The Report, comprising over seventy pages, comprehensively addressed the methods, manner and processes in which Respondents herein engaged to administer the subject program – including the cooperative agreements which are particularly at issue in *Bly-Magee III*.

There is no principled distinction which could support the proposition that a state court pleading, filed in the local county courthouse fulfills the legislative intent behind the jurisdictional bar – to assure knowledge of possible fraud by federal authorities, but a widely distributed, broad-ranging audit of public funds by the highest

ranking financial officer in the State of California information is not.[8]

Petitioner offers a strained argument to judicially legislate the content of the statute by adding limiting terms omitted by Congress, but makes no effort to explain *why* such extraordinary interpolation is necessary or appropriate, particularly given the authority (even in the Third Circuit) holding such disclosures as state litigation, FOIA requests and even county supervisorial hearings effect the intent of Congress and constitute sufficient prior publication to impose the bar.

Respectfully, the interpretation urged by Petitioner would result in the absurd and anomalous state of the law in which of a body of respected (and unchallenged) authority holds that the congressional intent to avoid opportunistic and parasitic claims is served by a partial if not complete public disclosure of the facts in such fora as a state law complaint filed in a local courthouse or local agency administrative hearings. However, that a widely published, easily accessible and readily available audit by the State Auditor of the State of California specifically disclosing the very transactions upon which a subsequent *Qui Tam* action is based would not serve that same intent. Given the absence of clear language so stating or drafting history which compels this irrational distinction, this Court should not voluntarily create it.

[8] This is particularly cogent here where the Second Amended Complaint in *Bly-Magee III* alleges that relator gained her knowledge by "investigation" nearly a decade after her last position with any agency affiliated with the State of California (App. 13a).

The determination by the Ninth Circuit of the proper means to fulfill the legitimate and plainly distinguishable intent of the Legislature is correct and unassailable. It should not be disturbed by further review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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