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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

OTHER MATERIALS

Respondents' attempts to sow confusion with their brief in opposition do not obscure these four basic points supporting a grant of certiorari in this case: (1) an entrenched and current conflict exists among the courts of appeals on the correct interpretation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(e)(4)(A); (2) the issue on which the courts of appeals disagree is of overriding importance to the effective operation of the FCA; (3) the decision below embodies a final resolution of discrete FCA claims based on the application of one of the conflicting interpretations of that provision; and (4) there are no outstanding issues in the case that render it unsuitable for certiorari at this stage. Notwithstanding respondents' efforts at obfuscation, this case presents an excellent vehicle for resolving a deep and abiding disagreement among the circuits on an important issue of federal law.

I. RESPONDENTS' ATTEMPTS TO DISPARAGE THE THIRD CIRCUIT'S *DUNLEAVY* DECISION CANNOT UNDERMINE THE EXISTENCE OF A SQUARE CIRCUIT CONFLICT

A. Respondents recognize (Opp. 3-6) that the decision below conflicts with *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997). But they attempt to dismiss the clear conflict between the Third Circuit's holding and decisions of the Eighth, Ninth, and Eleventh Circuits by suggesting (Opp. 1, 3, 6) that *Dunleavy* is a "decade old" and therefore "dated." That suggestion is baseless. *Dunleavy* is still good law within the Third Circuit. More significantly, the courts of appeals do not consider it dated or irrelevant.

On the contrary, the Ninth Circuit — explicitly acknowledging the *Hays*[1]-*Dunleavy* conflict — analyzed the Third Circuit's reasoning before disagreeing with *Dunleavy* and deepening the existing conflict. *See* Pet. App. 5a-8a. Moreover, the Third Circuit itself does not consider its ruling to be outdated. It has repeatedly and

[1] *See Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003).

recently reaffirmed *Dunleavy*, demonstrating that the decision not only remains valid but also is firmly embraced by the Third Circuit.

The Third Circuit first reaffirmed *Dunleavy* in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376, 383-84 (3d Cir. 1998) (Alito, J.). Although it is true that neither party directly challenged the established circuit precedent, the *Mistick* court's analysis necessarily assumed the continued validity of the *Dunleavy* rule. The opinion would have been written very differently if the panel had harbored any doubts. Far from distinguishing *Dunleavy*, as respondents claim (Opp. 7), the court cited *Dunleavy* approvingly and restated the prevailing rule: "In *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." *Mistick*, 186 F.3d at 383 (internal quotation marks and citation omitted). Moreover, the court's holding — that the product of a request under the *federal* Freedom of Information Act is a report within the meaning of § 3730(e)(4)(A), *see id.* at 383-84 — comports with *Dunleavy*'s holding that only federal administrative materials can trigger the public-disclosure bar.

The Third Circuit reaffirmed its interpretation of § 3730(e)(4)(A) as recently as January 2007, a month after the decision below. Of course, there was still no direct challenge to circuit precedent, but in *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007), the Third Circuit's analysis again assumed the continued validity of the *Dunleavy* rule. *See*, *e.g.*, *id.* at 520 n.21 ("a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A)").[2]

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[2] *Atkinson* held that, although "non-federal administrative reports are not public disclosures" that trigger the public-disclosure bar of § 3730(e)(4)(A), when "there is an independent basis for raising the public disclosure bar, . . . the public nature of the information [such as a state public record] upon which a relator bases his claim . . . is

That very recent decision of the Third Circuit belies respondent's claim (Opp. 9) of a "progressive and ongoing trend" against petitioner's position on the merits. The Third Circuit is squarely in conflict with the Eighth, Ninth, and Eleventh Circuits, and has unquestionably reaffirmed *Dunleavy* in a manner indicating that there is no realistic prospect that the circuits will resolve this conflict on their own.

B. In addition to mistakenly questioning *Dunleavy*'s continued vitality, respondents attempt (Opp. 4-6) to disparage the Third Circuit's reasoning in that case. They characterize the *Dunleavy* decision as a "result driven opinion" rendered "without careful analysis" and "based upon speculative assumptions" that are simply "wrong." Opp. 5-6. Those criticisms completely miss the mark. Whenever this Court resolves an inter-circuit conflict, it is all but inevitable that one of the conflicting positions will be considered "wrong," but that does not mean there is no conflict warranting this Court's resolution.

Furthermore, respondents' principal critique (Opp. 4-5) — that the *Dunleavy* court misinterpreted the phrase "based upon" in § 3730(e)(4)(A) — has nothing to do with the question presented. Even assuming that the court erred in determining whether the suit was "based upon" a public disclosure, that is irrelevant to whether the court properly held that the term "administrative" in the second category of § 3730(e)(4)(A) should be interpreted in light of the federal company that it keeps. Put another way, the petition involves whether there was a "public disclosure" in the first place — not whether the suit was "based upon" that disclosure within the meaning of the statute.

Finally, respondents assert (Opp. 5-6) that *Dunleavy* willfully misinterpreted § 3730(e)(4)(A) because the court did not believe that the report at issue had been

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relevant in determining whether [the relator's] knowledge [of the fraud] is direct and independent" for purposes of the FCA's original-source exception in § 3730(e)(4)(B). 473 F.3d at 523.

sufficiently publicly disclosed. On the contrary, the Third Circuit's decision was based on the unambiguous language of the statute, which makes clear that Congress intended to bar only suits based on federal administrative reports because the term "administrative" appears between two plainly federal modifiers, congressional and GAO. *See Dunleavy*, 123 F.3d at 745.[3]

C. Respondents predict that the Third Circuit will eventually reject the *Dunleavy* rule, and suggest that such predictions somehow justify this Court's ignoring a clear four-circuit conflict on an important matter of statutory construction. *See* Opp. 8-9. But both cases on which they base their prediction — *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), and *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) — concern the interpretation of a different clause of § 3730(e)(4)(A). They are completely irrelevant to the future development of the conflict implicated in this case.

This case involves § 3730(e)(4)(A)'s *second* category, which bars FCA actions based upon public disclosure of allegations or transactions "in a congressional, administrative, or [GAO] report, hearing, audit, or investigation." In contrast, the first category — at issue in *Stinson* and *Paranich*, and referenced repeatedly by respondents (*see* Opp. 11-12, 16-17) — concerns "allegations or transactions

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[3] Respondents' suggestion (Opp. 13-14) that the statute's reference to the "Government Accounting Office" means an accounting office of *any* government is baseless; no court has adopted it, and it defies common sense. Congress's capitalization of the name makes clear that it meant the federal General Accounting Office (now called the Government Accountability Office), and courts and the compilers of the U.S. Code have had no trouble recognizing that scrivener's error for what it is. *See Mistick*, 186 F.3d at 387 ("Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language. To begin with a small example, this section refers to the General Accounting Office as the 'Government Accounting Office' and thus misnames an instrumentality that Congress has consistently viewed as its own."); 31 U.S.C. § 3730 n.2 (2000).

in a criminal, civil, or administrative hearing." While respondents unjustifiably conflate the two categories, the Third Circuit has properly recognized that they are entirely distinct. In *Mistick*, for example, the court held that disclosures under category one include *state* civil hearings but also reaffirmed the *Dunleavy* rule that category two includes only *federal* administrative reports. *See* 186 F.3d at 383, 389. That result is consistent with the textual differences between the two clauses: while the first category speaks generally of "a criminal, civil, or administrative hearing," the second category — which is at issue here — explicitly refers to *federal* (congressional and GAO) sources.

Moreover, *Stinson* and *Paranich* both predate *Atkinson*, in which the Third Circuit once again reaffirmed its view that category two includes only federal administrative reports. *See* 473 F.3d at 520 n.21. Thus, the decisions in *Stinson* and *Paranich* concerning category one in no way imply that the Third Circuit might reexamine its established position that the second category of § 3730(e)(4)(A) includes only federal administrative reports.

D. Respondents' omissions are even more telling. They essentially ignore the confusion in the lower courts that further justifies this Court's intervention. *See* Pet. 17-18. Nor do respondents make any mention of the considered position taken by the federal government in supporting the *Dunleavy* rule. *See* Pet. 13. In a brief in the Eighth Circuit, the United States emphasized that the position now taken by the Eighth, Ninth, and Eleventh Circuits is incorrect because it "undermine[s] the balance intended by Congress" between encouraging suits by relators and barring suits based on public disclosures. *See* Brief for the United States of America at 41, *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003) (Nos. 01-3888 & 01-3891), 2002 WL 32181440 ("*Hays* U.S. Br.").[4] Any further percolation

[4] Because the government addressed that issue as an *amicus curiae*, *see Hays* U.S. Br. at 1 n.1, the Solicitor General was required to approve the filing of the brief. *See* 28 C.F.R. § 0.20(c).

of the issue at this point merely provides a windfall to parties defrauding the United States.

II. THE CONFLICT IN THE COURTS OF APPEALS INVOLVES A MATTER OF FUNDAMENTAL IMPORTANCE TO THE EFFECTIVE OPERATION OF THE FCA

Given the extensive nature of federal-state benefit programs, the question presented is of critical importance in preserving meritorious *qui tam* suits that would otherwise be snuffed out at the jurisdictional stage on the basis of "public disclosures" not known to the federal government. *See* Pet. 23-25. Respondents have no answer, save that, if the problem is serious enough, Congress can fix it. *See* Opp. 12-14. If that argument were valid, this Court would never accept for review a case presenting a question of statutory construction. Because the question presented raises a straightforward issue of statutory interpretation, there is no reason for this Court to abstain from performing its proper judicial role of resolving conflicts among the circuits on questions of statutory interpretation. Nor do respondents point to any pending legislation before Congress — and petitioner is aware of none — that would resolve the conflict and clarify the proper construction of § 3730(e)(4)(A).

With literally tens of billions of dollars flowing from the federal to state governments each year for a wide variety of programs, it is imperative to obtain clarity on whether statements in state administrative reports are the types of "administrative . . . reports" that Congress intended to include in the public disclosure bar. Without such clarity, only certain FCA suits — claims of fraud against the United States uncovered in States outside the Eighth, Ninth, and Eleventh Circuits — will receive a hearing on the merits when the defendant shows that the allegations were previously disclosed in a state administrative report of which the federal government may have been completely unaware. *Cf. Hays* U.S. Br. at 41 ("Many state

and local reports, audits, and investigations . . . never come to the attention of federal authorities[.]").

III. PETITIONER SEEKS REVIEW OF A PART OF THE JUDGMENT THAT IS FINAL

Respondents claim (Opp. 2-3) that the petition should be denied because this case is in an interlocutory posture. But as to the claims at issue in the petition — namely, petitioner's claims of fraud from June 1997 through June 1999 — the case is *not* interlocutory. Rather, the court of appeals *affirmed* the district court's *dismissal* of those claims. *See* Pet. 8 (discussing procedural history). Thus, there will be *no* further proceedings as to those claims.

Respondents' theory seems to be that, because the Ninth Circuit remanded the claims that arose *after* the period covered by the state audit report, this Court should refrain from resolving the clear circuit conflict exacerbated by the court of appeals' affirmance of the final dismissal of the claims at issue in the petition. To be sure, it often makes sense to postpone review of a particular claim until that claim has been finally resolved by the lower courts (although it is not uncommon for this Court to review a claim that a court of appeals has remanded for further proceedings[5]). But that prudential principle has no application here because the claims at issue have been finally resolved.

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[5] *See*, *e.g.*, *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956-57 (2006) (granting certiorari after court of appeals reversed district court's grant of summary judgment and remanded for further proceedings); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (granting certiorari after court of appeals reversed district court's dismissal for failure to state a claim and remanded for further proceedings); *United States v. Olson*, 546 U.S. 43, 45 (2005) (granting certiorari after court of appeals reversed dismissal and remanded for further proceedings); *see also* 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036, at 36-37 (3d ed. 2007) ("In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment.").

Moreover, postponing a decision on the issues before this Court will not simplify matters; it can only complicate them. If this Court waits for the district court to resolve the unrelated remanded claims, it would not make the issues here any easier to resolve. The Court would have to undertake precisely the same statutory analysis of whether "administrative" in § 3730(e)(4)(A) encompasses state reports. But postponing review might burden the issues that are now cleanly presented by introducing extraneous issues that could complicate the resolution of the circuit conflict. And, if this Court subsequently reversed the decision below, a second trial on the merits would be necessary. The preservation of judicial resources, in both this Court and the district court, counsels for the immediate resolution of the question presented.

IV. NO ALTERNATIVE GROUND SUPPORTS THE JUDGMENT BELOW

Respondents claim (Opp. 14-15) that this Court's review is unwarranted because an alternative basis supports the Ninth Circuit's decision — namely, that § 3730 bars the case because it is based upon allegations publicly disclosed in one of petitioner's prior suits. Although the allegations in that prior suit covered only a portion of petitioner's current claims (those involving the time period before June 1997, *see* Pet. App. 3a-4a), the district court nevertheless held that they provided a basis for dismissing *all* of petitioner's claims. *See id.* at 17a-18a. But the Ninth Circuit *rejected* that contention. *See id.* at 4a, 9a (refusing to rely on the prior suit to bar claims involving fraud occurring after June 1997).[6] Thus, there is no risk that the Ninth Circuit will reinstate the district court's judgment if this Court grants review and reverses.

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[6] *See also Bly-Magee v. Lungren*, No. 05-55968, 2006 WL 3699494, at *1 (9th Cir. Dec. 13, 2006) (holding that the facts underlying the portion of *Bly-Magee II* that covered October 1992 through June 1997 could not have been publicly disclosed by *Bly-Magee I* because the fraudulent events had not yet taken place).

Moreover, respondents' theory is not properly before this Court because respondents failed to file a cross-petition. It is well-settled that a respondent cannot raise an alternative ground for affirmance when the effect of the Court's adopting that argument would be to invalidate a portion of the judgment on which the petitioner prevailed, regardless of whether the respondent specifically requests that relief. *E.g.*, *Strunk v. United States*, 412 U.S. 434, 435-37 (1973); *see* Robert L. Stern et al., *Supreme Court Practice* 445-46 (8th ed. 2002) (citing cases). Here, accepting respondents' contention that the prior suit bars this entire case would require reversal of the court of appeals' decision to remand for further proceedings petitioner's claims involving fraud occurring after June 1999 (*see* Pet. App. 9a). Thus, because respondents failed to file a cross-petition, their contention is not properly before this Court.

In any event, respondents' theory is incorrect. Respondents assert that, although petitioner's current claims involve false claims that occurred *after* the time period involved in her prior suit, even a "partial disclosure" can bar an entire suit. Nothing in the text of § 3730 supports that counter-intuitive proposition. *Cf. Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007) ("'[t]he plaintiff's decision to join all of his or her claims in a single lawsuit . . . should not result in the dismissal of claims that would have otherwise survived'") (quoting *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.)) (first alteration in *Rockwell*). And none of the cases cited by respondents holds that the bar applies when the alleged fraud occurred *after* the time period covered by the public disclosure.[7]

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[7] *See United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) (nothing indicated that the relator's allegations regarded false claims that occurred after the public disclosure took place through the state-court lawsuit); *United States ex rel. Biddle v. Board of Trustees*, 161 F.3d 533, 535

Finally, respondents contend (Opp. 14-18) that the decision below is correct, but in so doing offer no analysis of why "administrative" should be construed to include state reports, when the references on either side of that word — "congressional" and "[GAO]" — clearly refer to *federal* sources. *See* Pet. 18-22. Although the existence of an entrenched circuit conflict is a sufficient basis for this Court to grant certiorari (and briefing on the merits can proceed after certiorari is granted), it is noteworthy that respondents offer no legal support for the Ninth Circuit's judgment.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

(9th Cir. 1998) (nothing indicated that relator's allegations covered a time period after public disclosure occurred through the news media); *United States ex rel. Fine v. M-K Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996) (holding that "based upon" meant "supported by" rather than "derived from"; no allegations of false claims that postdated the public disclosure); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553-54 (10th Cir. 1992) (public disclosure occurred in three previous lawsuits, congressional hearings, and news reports; nothing indicated that relator alleged false claims occurring after the time period covered by all the public disclosures).

Respectfully submitted,

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