No. 08-304

In the

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *ET AL.*,

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Mark T. Hurt
Counsel of Record
ATTORNEY AT LAW
159 West Main Street
Abingdon, VA 24210
(276) 623-0808

RESTATED QUESTION PRESENTED

Whether a report prepared by a department of a State government or an audit report issued by an accounting firm at the request of a local government constitutes a "congressional, administrative, or Government Accounting Office report, hearing, audit or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 32 U.S.C. § 3730(c)(4)(A).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The respondent is the United States of America ex rel. Karen T. Wilson.

The petitioners are Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton, Eddie Wood, Graham County, Raymond Williams, Dale Wiggins, Lynn Cody and Keith Orr.

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CLARIFICATION OF PETITIONERS' STATEMENT

Petitioners failed to make clear that the March 1996 audit report that petitioners argue falls within the statutory definition of a "public disclosure" set forth in 31 U.S.C. § 3730(c)(4)(A) of the False Claims Act was issued by an accounting firm at the request of Graham County following an audit performed by that accounting firm. (Op. at 11a)

REASONS FOR DENYING THE PETITION

Respondent Wilson opposes the petition for a writ of certiorari because the Fourth Circuit's decision was not "manifestly in error," but was correctly decided, and because it is premature for the Court to consider the issue in question. While there is a split in the circuits on this issue, petitioners overstate its size and depth. The issue has not sufficiently percolated in the lower courts. The Fourth Circuit decision that is the subject of the petition is the first appellate decision to consider fully all of the arguments bearing on the issue. The Fourth Circuit correctly decided it based on a comprehensive and penetrating analysis of the particular statutory language in its context, and with consideration of the structure and object of the statute. Its decision is now the definitive ruling on this issue. Prior to this Court's consideration of the issue, courts in the other circuits should be given an adequate opportunity to consider the Fourth Circuit's decision to see if the force of its reasoning lessens or even reverses the existing split in the circuits, and if any court can mount convincing counter arguments against it.

I. THE FOURTH CIRCUIT'S DECISION WAS CORRECTLY DECIDED.

In its decision, the Fourth Circuit construed "administrative" in the following pertinent language of the False Claims Act involving the "public disclosure" bar as being limited to federal administrative reports, hearing, audits or investigations:

> No court shall have jurisdiction over an action under this section based on the public disclosure of allegations or transactions . . . in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation . . . .

31 U.S.C. § 3730(e)(4). The petitioners argue incorrectly that the Fourth Circuit's decision was "manifestly in error" because it ascertained the meaning of "administrative" by reading it in context, rather than in isolation. (Pet. 22-23) However, the word "administrative" is capable of several meanings depending on the content. *See, e.g., United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3rd Cir. 1997). As this Court has noted, "context gives meaning." *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008). Noting "the placement of 'administrative' squarely in the middle of a list of obviously federal sources" — "congressional" and "Government Accounting Office," the Fourth Circuit correctly applied the interpretative maxim *noscitur a sociis* ("a word is known by the company it keeps") to conclude that "'administrative' should likewise be restricted to *federal* administrative reports,

hearings, audits, or investigations."[1] (Dec. at 23-24a)

The Fourth Circuit demonstrated that its construction of the statutory provision is supported by the purpose and operation of the 1986 amendments to the False Claims Act. The 1986 amendments eliminated the government-knowledge jurisdictional bar, and furthered "the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." (Dec. at 34-35a (citation omitted)). Petitioners' contrary construction of the statute to include state and local investigations, audits, and reports is untenable in light of those twin goals. (Id.) As the United States observed in the amicus brief it filed at the request of this Court in the *Bly-Magee* proceedings, to which petitioners cite:

> While federal fraud inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports never come to the attention of federal authorities, and the theoretical availability of such state and local materials in no way suggests that the government is already looking into the matter.

Br. for United States as Amicus Curiae, 128 S. Ct. 1119 (filed Dec. 21, 2007). In that brief, the United States expressed its agreement with the Third Circuit's (and now the Fourth Circuit's) construction of the statute on this point. (Id. at 9-12)

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[1] The Fourth Circuit followed the Third Circuit in *Dunleavy*, which reached the same conclusion.

In an attempt to buttress their arguments, Petitioners conjure up a parade of horribles that they argue will result from the Fourth Circuit's decision. It is unconvincing.

They suggest that an opportunistic plaintiff could obtain, through a state FOIA request, the work product of ongoing investigations by state governments of suspected fraud against the United States, and then use the information to file a *qui tam* action. That such sensitive matters would ever be subject to FOIA requests under any states' laws appears farfetched.

Petitioners shed crocodile tears for the hypothetical "insider who has worked for years in gathering information in order to expose corruption" only to lose the race to the courthouse by a stranger to the fraud who files a *qui tam* action based on the revelation of fraud in a publicly disclosed state audit. (Pet. 25-6) However, the False Claims Act is designed to give little comfort to the slow and plodding whistleblower. The "race to the courthouse" promoted by the False Claim Act's "first to file" rule is called that with good reason. The "first to file" rule deliberately rewards the speedy whistleblower in order to encourage prompt reporting of fraud.

Finally, petitioners argue that the Fourth Circuit decision may discourage state and local officials from investigating suspected fraud by a local government against the United States because the investigation could subject the target of the investigation to a *qui tam* claim. This concern is overblown. First, the Fourth Circuit decision in no way affects the right of the U.S. Attorney General to bring a False Claims Act action based on that investigation. Second, other

incentives against investigating the fraud, such as the potential loss of federal grant monies by the communities or states involved, would weigh more heavily on the investigation decision than would the prospect of a *qui tam* action. The greater danger appears to be the failure of state investigators to take decisive action in response to the discovery of fraud or suspected fraud and instead, relegating the results of the investigation to a report destined for a dusty file cabinet. Petitioners' position, if adopted, would make it more likely that those reports remain in the file cabinet, unread and unused.

II. THE ISSUE HAS NOT SUFFICIENTLY PERCOLATED IN THE LOWER COURTS.

The petitioner argues that the Ninth, Eighth and Eleventh Circuits hold a view that is contrary to that of the Fourth and Third Circuits. (Pet. 11-13) However, petitioner overstates the significance and depth of this split because the Eighth Circuit did not squarely address the issue, *see Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006)(court merely assumes, without any analysis or citation to authority, that a "state audit" is an applicable public disclosure), while the Eleventh Circuit "took the middle road, not quite agreeing with the Ninth Circuit and Eleventh Circuits," (Dec. at 21a) *citing Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (court stated that it "did not disagree with the Third Circuit's decision in *Dunleavy*")).

Accordingly, the Ninth Circuit's decision in *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006), is the *only* appellate decision that has analyzed the issue and that has arrived at a conclusion directly contrary to that of the Fourth

and Third Circuits. While the Fourth Circuit devoted twenty-one pages to addressing all facets of the issue (see Dec. 17a-38a), the Ninth Circuit addressed it in only nine paragraphs. Consequently, the Ninth Circuit's statutory construction analysis is much less robust than that of the Fourth Circuit. In fact, *Bly-Magee* failed to address or consider some of the most persuasive points raised in the Fourth Circuit decision.

The only two courts that have cited *Bly-Magee* have both rejected its reasoning and conclusions as unpersuasive. *See Wilson*, 528 F.3d 292 (4th Cir. 2008); *United States ex rel. Anti-Discrimination Ctr. Of Metro New York, Inc. v. Westchester Co.*, 495 F. Supp. 2d 375, 382 (S.D. N.Y. 2007). It appears likely that this trend will continue, particularly in light of the fact that the Fourth Circuit's contrary definitive analysis and decision is now available.

Accordingly, the issue that the Fourth Circuit decision addresses has not percolated enough in the lower courts and it is premature for the Court to address it at this time.

CONCLUSION

The petition for writ of certiorari should be denied.

Mark T. Hurt
Counsel of Record
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