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

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the United States.[1] A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Amicus curiae the American Health Care Association (AHCA) is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and de-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Both petitioners and respondent have consented to the filing of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to any party wishing to file a brief in support of either petitioners or respondent, and respondent's written consent to the filing of this brief has been filed with the Clerk. Counsel of record for petitioners and respondent received notice of *amici*'s intent to file this brief more than ten days before the due date.

velopmental disabilities. One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members, including cases brought under the FCA that raise significant legal questions as to how the statute should be applied.

The Chamber, AHCA and their respective members have a substantial interest in this case. The FCA provides a *qui tam* relator or the Federal Government with a cause of action against "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Save for two exceptions, no proof of specific intent to defraud is required to create liability under the statute, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).[2]

Despite the fact that specific intent is not a required element in most FCA cases, the current ver-

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[2] The two exceptions occur under 31 U.S.C. § 3729(a)(2) and (3), respectively. Section 3729(a)(2) creates liability for "[a]ny person" who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," whereas § 3729(a)(3) creates liability for "[a]ny person" who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Specific intent is a required element under each of these provisions. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130-31 (2008).

sion of the statute "imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). A defendant found liable under the FCA is subject to mandatory treble damages, civil penalties as great as $11,000 per claim, attorneys' fees and costs. 31 U.S.C. §§ 3729(a), 3730(d)(1).[3]

A relator who brings an action under the FCA is entitled to share in any recovery with the Federal Government. If the Federal Government does not intervene to take over prosecution of the case, the relator receives a bounty of between 25 and 30 percent of the recovery. § 3730(d)(2). If the Federal Government intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

Because of the statute's punitive nature and relaxed intent standard, *amici*'s interest in the proper application of the FCA is especially heightened in cases brought by bounty-seeking *qui tam* relators, who are not subject to Executive Branch oversight and who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*,

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[3] On its face, the FCA provides for a minimum penalty of $5,000 and a maximum penalty of $10,000 per claim. 31 U.S.C. § 3729(a). In 1999, these amounts were adjusted upward to a minimum penalty of $5,500 and a maximum penalty of $11,000 per claim, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999) (codified at 28 C.F.R. § 85.3(a)(9)) (implementing the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890).

520 U.S. 939, 949 (1997); *see also Stevens*, 529 U.S. at 778 n.8 (reserving judgment on whether FCA's *qui tam* provisions "violate Article II [of the United States Constitution], in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3").

The number of *qui tam* suits under the FCA has grown dramatically over the past two decades. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* (2008) (charting 1048 percent increase in number of new *qui tam* cases filed in federal fiscal years 1987 and 2007, respectively), *as reprinted in* 2 John T. Boese, *Civil False Claims & Qui Tam Actions* app. H-2 (3d ed. 2008) (*Civil False Claims*). The United States pursues only a quarter of those lawsuits. *See* U.S. Dep't of Justice, *Fraud Statistics—Qui Tam Intervention Decisions & Case Status* (2008), *as reprinted in* 2 *Civil False Claims* app. H-7. The remainder are prosecuted by relators alone, who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, ___ F.3d ___, No. 07-3033, 2008 WL 4430668, at *8 (10th Cir. Oct. 2, 2008) (observing that relator's suit, which alleged that a single false certification on an annual cost report rendered legally false all of a hospital's Medicare reimbursement claims, would have "catastrophic" consequences for those that "provide medical services to the financially disadvantaged and the elderly").

The proliferation of parasitic, vexatious or otherwise unmeritorious *qui tam* suits threatens the legitimate business activities of every federal government contractor and federal grant recipient in the

United States. In 1986, Congress acted to preclude *qui tam* litigation predicated on publicly disclosed information. The "public disclosure bar," as it is commonly known, states:

> (A) 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 [sic] 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.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(4)).

The question of how to apply this "murky statute" (Pet. App. at 32a) has plagued courts and litigants ever since. *See, e.g.*, *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007) (resolving circuit split on meaning of original-source requirement after observing that statutory question was "hardly free from doubt"); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.) (cataloging public disclosure

bar's numerous textual shortcomings and reaching the "inescapable conclusion" that the statute "does not reflect careful drafting" or "precise use of language").

The question presented by the petition for a writ of certiorari—whether a report, audit or investigation performed by a state or local government constitutes an "administrative . . . report, . . . audit, or investigation" within the meaning of the public disclosure bar—is of tremendous importance to *amici*'s members, many of which are subject to regular and numerous inspections and audits by a wide variety of state and local government agencies. These audits and inspections generally assess an entity's compliance with certain complicated (and often confusing) statutory and regulatory requirements that may affect participation in government programs receiving federal funds. The results of these inspections and audits are commonly made available to the public.

Relators, in turn, are increasingly using allegations of noncompliance with federal conditions of participation as the basis for FCA liability. *See, e.g.*, *Conner*, 2008 WL 4430668, at *2 n.5 (describing relator's allegations based on hospital's alleged noncompliance with Medicare conditions of participation); *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on university's alleged noncompliance with federal conditions of participation governing student-loan program even though federal agency in question treated noncompliance as an administrative enforcement matter, not fraud), *cert. denied*, 127 S. Ct. 2099 (2007); *United States ex rel.*

Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (describing relator's allegations based on nursing facility's alleged noncompliance with Medicare conditions of participation); *United States ex rel. Sweeney v. ManorCare Health Servs., Inc.*, No. C03-5320RJB, 2005 WL 4030950, at *5 (W.D. Wash. Mar. 4, 2005) (same).

The court of appeals below held that reports and audits created by state or local governments do *not* trigger the public disclosure bar. If allowed to stand, this ruling will encourage opportunistic bounty hunters to use publicly available information found in the reports of state and local governments as the basis for *qui tam* litigation despite the fact that the FCA would deny federal courts of subject-matter jurisdiction over a *qui tam* case based on the same information published in a small-town newspaper or in an obscure federal agency report. Thus, liability for hundreds of millions of dollars in mandatory treble damages and civil penalties will turn, not on whether the information on which the suit is based was publicly disclosed, but on whether the information was publicly disclosed by a federal, as opposed to a state or local, agency.

SUMMARY OF ARGUMENT

The circuits are in sharp disagreement as to whether a publicly available audit or investigation performed by a state or local government triggers the FCA's public disclosure bar. Respondent conceded this point in a recent district-court filing. *See* Joint Motion to Stay Proceedings at 2, *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. 2:01CV19 (W.D.N.C. filed Oct. 6, 2008) ("As set out in the petition, the circuit split has be-

come more entrenched with the decision of the Fourth Circuit in the present case."). Rather than repeat the petition's description of the deeply entrenched circuit split, *amici* wish to emphasize other reasons why the writ should issue in this case.

First, the question presented is of significant, national importance. Because federal funding flows though almost every segment of our Nation's economy, the reach of the FCA is not limited to one industry sector or one area of the United States; it affects all who receive federal funding, whether it be large, multinational corporations, small businesses or municipalities. In addition, the question of whether a relator's suit is precluded by the public disclosure bar is one of the most frequently litigated issues in FCA cases generally, resulting in substantial litigation expense and the expenditure of significant judicial resources.

Second, the issue is ripe for resolution by this Court. Over the past twenty-two years, federal courts have struggled to reach a consensus on the meaning of the public disclosure bar as it relates to audits and investigations performed by state and local governments. That effort has produced a long series of conflicting rulings. Because numerous courts of appeals have considered the question presented without reaching a common understanding, further percolation in the lower courts is unnecessary. Moreover, this case provides an excellent vehicle in which to decide the question presented, which is squarely raised and requires no additional factual development.

Third, the Fourth Circuit incorrectly decided the question presented. Protesting that it did not have a

"secret decoder ring" by which to "gain insight into the meaning of this murky statute" (Pet. App. at 32a), the court of appeals below conceded that the public disclosure bar did not expressly limit its reach to *federal* administrative reports, audits or investigations. The Fourth Circuit then misapplied the interpretive tool of *noscitur a sociis*—that a word is known by the company it keeps—by disregarding the fact that the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media.

By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, audits or investigations trigger the public disclosure bar, the court of appeals below gave an impermissibly narrow construction to the statute. The Fourth Circuit's decision will not only force government contractors and grant recipients to incur substantial litigation costs, it will encourage *qui tam* relators to institute litigation based on information they had no role in uncovering and, if successful, will reward them handsomely for doing so by paying them a statutory share of hundreds of millions of dollars in mandatory treble damages and civil penalties.

Accordingly, the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

ARGUMENT

I. THE PETITION RAISES A PURE QUESTION OF FEDERAL LAW THAT IS OF SIGNIFICANT, NATIONAL IMPORTANCE

Because federal funding pervades almost every segment of the Nation's economy—from health care, education, transportation, defense, housing, technology and beyond—the potential defendants who can be sued under the FCA run the gamut from large, multinational corporations to small businesses and municipalities. The FCA, however, has become a vehicle by which bounty-seeking *qui tam* relators file suits predicated on honest mistakes and alleged violations of often-ambiguous statutes, regulations and informal agency guidance. At the same time, regular inspection and audit by state and local governments, and the concomitant publication of the results of such investigations, have become the norm in modern America. The combination of widely available compliance audits and the possibility for lottery-sized "paydays" creates the perfect environment for opportunistic litigation under the FCA as interpreted by the court of appeals below.

Perhaps reflecting the sizeable rewards potentially available in such opportunistic litigation, the question of whether a relator's suit is precluded by the FCA's public disclosure bar is one of the most often litigated issues in FCA cases, devouring countless attorney hours and significant judicial resources. *See* 1 *Civil False Claims* § 4.02[A] at 4-47 (observing that, "despite Congress's attempts to simplify jurisdiction over *qui tam* suits," the public disclosure bar "has become the most frequently litigated issue in

such actions"); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11.36 at 632 (2004) (observing that the public disclosure bar has "generated much of the litigation over the [FCA]").

Therefore, the question of whether an audit or investigation performed by a state or local government deprives a court of subject-matter jurisdiction over a *qui tam* relator's suit is one of wide-ranging importance deserving of plenary review.

II. FURTHER PERCOLATION IS UNNECESSARY AND THIS CASE PROVIDES AN EXCELLENT VEHICLE

A. For more than two decades, lower federal courts and litigants have wrestled with application of the FCA's public disclosure bar as it relates to reports resulting from inspections and audits performed by state and local governments. The Fourth Circuit's decision below is the latest in a long series of conflicting and frustrating appellate rulings that began over eleven years ago with the Third Circuit's decision in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997).

The courts of appeals today are no closer in reaching a consensus as to the meaning of the public disclosure bar vis-à-vis non-federal audits and reports. At last count, clearly conflicting positions have been taken by the Third, Fourth, Eighth, Ninth and Eleventh Circuits. *Compare United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006) (holding non-federal reports and audits can trigger the public disclosure bar), *cert. denied*, 128 S. Ct. 1119 (2008) (No. 06-1269); *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (same); *Hays v.*

Hoffman, 325 F.3d 982, 989 (8th Cir.) (same), *cert. denied*, 540 U.S. 877 (2003) (No. 03-92), *with United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 306-07 (4th Cir. 2008) (Pet. App. at 37a) (holding non-federal reports and audits cannot trigger the public disclosure bar); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 746 (3d Cir. 1997) (same).

This case provides the Court with the opportunity to define the application of the public disclosure bar with the benefit of considerable analysis from the courts below. In addition, continued uncertainty as to how the FCA's public disclosure bar should be applied imposes substantial burdens on courts, litigants and federal funding recipients. *See, e.g.*, Pet. App. at 28a, 32a (acknowledging the "logic and symmetry" of sister circuits' contrary rulings and lamenting the fact that Congress did not provide a "secret decoder ring" by which to interpret the public disclosure bar).

The case of *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, No. 06 Civ. 2860 (S.D.N.Y.), provides a representative example of the consequences of leaving the question unresolved. In *Anti-Discrimination Center*, the district court held in a published opinion that the public disclosure bar does not include a report, audit or investigation performed by a county government. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007). As a result, a *qui tam* action seeking over $100 million in treble damages and statutory penalties was allowed to proceed based on the relator's

allegation that the county-defendant falsely promised that it would "affirmatively further fair housing" in return for federal funding. *Id.* at 377 (quoting 24 C.F.R. § 91.425(a)(1)(i)).

Citing the entrenched circuit split that existed even before the Fourth Circuit's decision below, the county-defendant asked the district court to issue an order under 28 U.S.C. § 1292(b) allowing the county to pursue an interlocutory appeal to the Second Circuit. Although the Second Circuit is one of the few remaining circuits not to have decided the question, the district court refused the county's request in a brief, unpublished opinion. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, No. 06 Civ. 2860, 2007 WL 2402997 (S.D.N.Y. Aug. 22, 2007).

Review of the case's electronic docket indicates that, following the district court's decision, the parties have engaged in substantial motions practice and extensive discovery. Among other things, seven expert witnesses have been deposed and the parties have only recently filed cross-motions for summary judgment. Unquestionably this process has resulted in significant expense to the parties and the expenditure of substantial judicial resources.

The need to invest judicial and other resources should be dictated by the requirements of the FCA, not by whether a defendant is sued in North Carolina as opposed to California. This Court should remove the climate of uncertainty that currently requires courts and litigants to invest such extensive resources that could have been—and ultimately perhaps should have been—devoted to other matters.

B. This case provides an excellent vehicle by which to decide the question presented. The pure question of federal law raised by the petition is cleanly presented, requires no factual development, and is unencumbered by subsidiary issues. Moreover, the parties in this case are represented by able counsel who have previously appeared before this Court to argue an important statutory question arising under the FCA. *See Graham County Soil & Water Conservation Dist. v. Wilson*, 545 U.S. 409 (2005) (deciding limitations period applicable to FCA retaliation claims), *rev'g* 367 F.3d 245 (4th Cir. 2004). Therefore, the Court can issue the writ "satisfied that the relevant issues [will be] fully aired." *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003).

Moreover, unlike *Bly-Magee*, this case does not involve an FCA suit of dubious merit whose dismissal upon remand is a foregone conclusion. *See* Brief for the United States as *Amicus Curiae* at 18-19, *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (U.S. filed Dec. 21, 2007) (conceding existence of circuit split but counseling against plenary review due to "substantial likelihood" relator's case would be dismissed upon remand for failure to plead fraud with particularity). Also in contrast to *Bly-Magee*, this case presents the broader question of whether a report or audit performed by a state *or* local government triggers the public disclosure bar. *See* Pet. App. at 6a; Brief for the Respondents in Opposition at i n.1, *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (U.S. filed Apr. 17, 2007) (objecting to petitioner's framing of the question presented and observing that case only raised question of whether state disclosures triggered the public disclosure bar).

III. THE DECISION BELOW IS INCORRECT

Federal courts have a "duty to construe statutes, not isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995). An Act of Congress "should not be read as a series of unrelated and isolated provisions." *Id.* at 570. The court of appeals below lost sight of these fundamental principles in holding that the FCA's public disclosure bar does not encompass public disclosures resulting from state or local government reports, audits or investigations.

Conceding that the statute did not expressly limit its reach to *federal* administrative reports, audits or investigations, the Fourth Circuit concluded that the word "administrative" was ambiguous. The court of appeals then looked to the doctrine of *noscitur a sociis* as a substitute for the "secret decoder ring" the court said Congress failed to provide in order to "gain insight into the meaning of this murky statute." Pet. App. at 32a. The court of appeals then misapplied the doctrine by focusing myopically on only one part of the statutory language in question.

A. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The maxim can be a "useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923).

In *Russell Motor Car*, for example, this Court was asked to decide whether a statute authorizing the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or materials" for a limited time following the end of World War I applied only to contracts between private parties, as the petitioners argued, or whether government contracts could also be modified by the President. *See id.* at 519. It was "apparent," the Court found, that the words of the statute, "read with literal exactness, include[d] all contracts, whether private or governmental." *Id.* In response, the petitioners argued that since the Federal Government could not "requisition" its own contracts—an assertion accepted by the Court—the doctrine of *noscitur a sociis* counseled that the general words "modify, suspend, [or] cancel" should be similarly limited so that only private contracts could be modified, suspended or canceled by the President. *See id.*

In rejecting the petitioners' argument, the Court observed that *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." *Id.* at 519.

The Court found that application of the doctrine produced an illogical result in the case before it, noting that "there is nothing in the rule or in the statute which requires us to assimilate the words 'modify' and 'cancel' to the scope of the word 'requisi-

tion,' simply because the latter has a necessarily narrower application." *Id.* at 520. The Court further explained:

> The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu* [with a different view, purpose or design], giving each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate 'requisition' will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

Id. at 519-20.

B. *Russell Motor Car* is instructive for how the Court should approach the question presented by this case. It cannot be gainsaid that, "read with literal exactness," *Russell Motor Car*, 261 U.S. at 519, a report, hearing, audit or investigation performed by a state or local government falls within the plain language of the FCA's public disclosure bar. Again, the public disclosure bar provides, in relevant part:

> 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 . . . .

31 U.S.C. § 3730(e)(4)(A). Simply because the words "congressional" and "Government Accounting Office"

connote federal activity does not mean that the word "administrative" must be so limited or that the word "administrative" is ambiguous. Instead, the "meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, . . . giving each its natural value and appropriate scope when read in connection with the object . . . which they are severally meant to control." *Russell Motor Car*, 261 U.S. at 520.

The "object" which the public disclosure bar is "meant to control" is the prevention of parasitic lawsuits. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) ("The 1986 amendments [to the FCA] attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud."); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943) (allowing relator's case to proceed even though it was based on criminal indictment filed by federal authorities). Excluding public disclosures simply because they emanate from state- or local-government sources conflicts with the core purpose of the statute by encouraging *qui tam* suits based on public information.

As reflected by the Fourth Circuit's decision, the answer to the question presented is dictated in large part by how wide of a lens one uses when applying the doctrine of *noscitur a sociis*. The court of appeals focused its attention only on the words immediately before and after the word "administrative"—"congressional" and "Government Accounting Office," respectively—in order to extract a common charac-

teristic of the "company" kept by the word "administrative." The Fourth Circuit erred in doing so, however. As one federal court has aptly observed:

> [L]imiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A). The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. . . . Likewise, this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency . . . .

In re Natural Gas Royalties Qui Tam Litig., 467 F. Supp. 2d 1117, 1143-44 (D. Wyo. 2006) (citations and

footnote omitted), *appeal pending*, No. 06-8099 (10th Cir. argued Sept. 25, 2008).

In other words, the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media. By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, audits or investigations trigger the public disclosure bar, the court of appeals below gave an impermissibly narrow construction to the statute.

Nor was it necessary to interpret the statutory language as the Fourth Circuit did in order to "avoid the giving of unintended breadth to [an Act] of Congress." *G. D. Searle*, 367 U.S. at 307. As the court of appeals itself acknowledged, the words that precede "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" have been uniformly held to include disclosures made in non-federal settings. *See* Pet. App. at 26a ("This court and others have understood [the words 'criminal, civil, or administrative hearing'] to encompass state as well as federal hearings."). Therefore, interpreting the words "administrative . . . report, . . . audit, or investigation" in a similar fashion does not expand the statute's meaning past the non-federal boundaries already established by Congress in other portions of the public disclosure bar. *Cf.* 132 Cong. Rec. S11,238-04 (daily ed. Aug. 11, 1986) (remarks of Sen. Grassley) ("The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection [(4)(A)]; that is, Government includes Con-

gress, the General Accounting Office, any executive or independent agency *as well as all other governmental bodies that may have publicly disclosed the allegations*.") (emphasis added).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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