No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES, EX REL. KAREN T. WILSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL LEAGUE OF CITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative * * * report, * * * audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF *AMICUS CURIAE*

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues.* Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, to provide programs and services that enable local leaders to better serve their communities, and to function as a national resource and advocate for the municipal governments it represents.

In *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that private plaintiffs may sue local governments under the False Claims Act. This case presents the question whether a private plaintiff's suit under the Act is barred when it is based upon allegations that have already been publicly disclosed in an audit report of a state or local government. The resolution of that question affects the exposure of local governments to liability under the False Claims Act, the consequences to local governments of conducting a self-audit, and, more generally, the conditions under which local government administer federally funded programs. For that reason, NLC has an obvious and substantial interest in the question presented and a unique per-

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* Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

spective on its proper resolution. NLC regularly files *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's cities.

REASONS FOR GRANTING THE PETITION

The False Claims Act authorizes suits by "relators," private citizens acting on behalf of the United States, against those who submit fraudulent claims to the federal government. 31 U.S.C. §§ 3729(a), 3730(b). The Act provides that courts lack jurisdiction over such actions, known as "*qui tam*" suits, if they are

> 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 * * * an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The question presented in this case is whether the second clause of the jurisdictional bar—"congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation"—applies to *qui tam* suits that are based upon public disclosures in an audit report prepared by a state or local administrative agency.

The very same question was before the Court last Term in *United States ex rel. Bly-Magee* v. *Premo*, No. 06-1269. The Court determined that that case was a strong enough candidate for certiorari to warrant a request for the views of the Solicitor General. *United States ex rel. Bly-Magee* v. *Premo*, 127 S. Ct. 2905 (2007). In his brief, the Solicitor General acknowledged that there was what was then a three-to-

one circuit conflict on the question, but recommended that the Court deny certiorari, in part because further developments in the lower courts might obviate the need for this Court's intervention. Br. for U.S. as Amicus Curiae at 7, 16, 18, 20, No. 06-1269 (Dec. 21, 2007). The Court ultimately denied certiorari. *United States ex rel. Bly-Magee* v. *Premo*, 128 S. Ct. 1119 (2008).

There have now been further developments in the lower courts. The Fourth Circuit has joined the Third Circuit, which was previously the only circuit in the minority, in holding that "administrative" in clause two of the False Claims Act's jurisdictional bar has an exclusively federal meaning. As a consequence of the Fourth Circuit's decision in this case, there is no reason for the Court to await still further developments in the lower courts. There is now a three-to-two circuit conflict, which will persist, and almost certainly expand, unless the Court grants review.

The petition spells out why the Court should do so. In addition to describing the entrenched circuit conflict (Pet. 8-16), it explains why the question presented is one of recurring importance (Pet. 16-19) and why the Fourth Circuit's interpretation of the False Claims Act is incorrect (Pet. 22-26). In this brief, we explain why the question presented is one of recurring importance from the specific perspective of NLC and the local governments it represents (see Point A, *infra*) and we elaborate on the reasons why the court of appeals' interpretation of the False Claims Act is incorrect (see Point B, *infra*).

A. The Decision Below Harms Local Governments.

For most of the long history of the False Claims Act, *qui tam* actions were not brought against States or local governments. In 2000, this Court confirmed that *qui tam* actions could not be brought against States. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000). Three years later, however, the Court held that local governments, unlike States, are subject to *qui tam* suits. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003). That decision has exposed more than 87,000 local governments to suits under the False Claims Act. See U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002, at 1, available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. At the same time, there has been a marked increase in the number of False Claims Act filings by private plaintiffs. In the four years after the decision in *Cook County*, for example, over 1,500 *qui tam* suits were filed, with resulting awards of more than $680 million to relators. See U.S. Department of Justice, Civil Division, *Fraud Statistics Overview,* at 2, available at http://www.taf.org/STATS-FY-2007.pdf.

Many of the *qui tam* suits since *Cook County* have been filed against local governments, which participate in a variety of federal programs and receive substantial federal funding. See *Cook County*, 538 U.S. at 129. In 2001-2002, the most recent period for which statistics are available, federal payments accounted for $15.2 billion of municipal governments' revenues. See 2002 Census of Governments, *Finances of Municipal and Township Gov-*

ernments: 2002, Apr. 2005, at 1, available at http://www.census.gov/prod/2005pubs/gc024x4.pdf. Federal payments have likely grown in more recent years, given the dramatic rise in the number of federally funded programs since September 11, 2001. See, *e.g.*, Steven Maguire & Shawn Reese, *CRS Report for Congress, Department of Homeland Security Grants to State and Local Governments: FY2003 to FY2006*, Dec. 22, 2006, available at http://www.fas.org/sgp/crs/homesec/RL33770.pdf (discussing various grant programs instituted after September 11, 2001, including the Law Enforcement Terrorism Prevention Program and the Metropolitan Medical Response Program). Counties and municipalities participating in federally funded programs regularly conduct audits or investigations in connection with the programs—often as a condition of their participation, occasionally at the request of the relevant federal agency, and sometimes simply as a matter of good governance.

As we explain below, the court of appeals' decision harms local governments, and the citizens they serve, in two important ways. First, by adopting an unduly narrow interpretation of the jurisdictional bar, the court has made it easier for relators to bring *qui tam* suits against local governments, which will be required, as a consequence, to divert scarce resources to litigate suits by opportunistic plaintiffs that could not be brought under the correct interpretation of the statute. Second, by enabling relators to sue local governments on the basis of information obtained from the governments' own audits and investigations, the court of appeals has created a disincentive for local governments to conduct socially beneficial audits and investigations and to make their findings public.

1. The court of appeals' decision will require local governments to divert scarce resources to litigate opportunistic *qui tam* suits.

Under the correct interpretation of the False Claims Act, a *qui tam* suit is jurisdictionally barred if it is based upon the public disclosure of information in an audit or investigation conducted by a state or local administrative agency. See Pet. 22-26. Under the incorrect interpretation adopted by the court below, a *qui tam* suit is not barred in that circumstance. Unless this Court intervenes, therefore, counties and municipalities in many States, including New Jersey, Pennsylvania, Maryland, Virginia, and North Carolina, will have to pay the costs of litigation, and frequently of settlements and judgments, including treble damages and attorneys' fees, see 31 U.S.C. §§ 3729(a)(7), 3730(g), in cases that should have been dismissed for lack of jurisdiction under the correct interpretation of the statute. That money will necessarily come from the budgets of the counties and municipalities, many of which are already experiencing severe difficulties in funding essential services for their citizens.

A substantial proportion of local governments' budgets is devoted to law enforcement, emergency services, and other first responders. See U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2008-09 Edition, State and Local Government Excluding Education and Hospitals*, Mar. 12, 2008, available at http://www.bls.gov/oco/cg/cgs042.htm ("Local governments employ more than twice as many workers as State governments. Professional and service occupations accounted for more than half of all jobs; fire fighters and law en-

forcement workers, concentrated in local government, are the largest occupations."). In 2001-2002, for example, public safety accounted for over 15 percent of local governments' expenditures. See 2002 Census of Governments, *supra*, at 1. Over the past year, cities' budgets have become increasingly stretched. As a result of declining economic conditions driven by downturns in housing, consumer spending, jobs, and income, two thirds of city financial officers have reported that their cities are less able to meet fiscal needs in 2008 than in the previous year. See National League of Cities, *City Fiscal Conditions in 2008*, Sept. 2008, at 1, available at http://66.218.181.91/ASSETS/A49C86122F0D4DBD812B91DD5777F04D/CityFiscal_Brief_08-FINAL.pdf. In light of the current financial crisis, that trend is almost certain to continue. The costs associated with *qui tam* actions that are permitted under the minority rule will therefore impose significant hardships on local governments already struggling to provide adequate public safety and other essential services, including health care and education.

It is particularly unfair to require local governments to divert scarce resources to litigate the type of *qui tam* actions that are at issue in this case. As noted in the petition (at 17), one consequence of the court of appeals' decision is that individuals without independent knowledge of a false claim can simply monitor local government reports, audits, and investigations (or obtain them through freedom-of-information requests) and file opportunistic *qui tam* suits based on any improprieties that are publicly disclosed. The court's erroneous rule, therefore, not only will require local governments to spend money on *qui tam* litigation that could otherwise be spent on essential services, it will require them to use

those funds to pay a windfall to opportunistic plaintiffs who played no role in bringing the alleged wrongdoing to light.

2. The court of appeals' decision will discourage local governments from conducting self-audits and disclosing the results.

Under the court of appeals' interpretation of the jurisdictional bar, the results of audits and investigations can be used as the basis for *qui tam* suits against the counties and municipalities that conducted them. As the petition notes (at 17-18), local governments may understandably seek to avoid such suits by deciding not to conduct a particular audit or investigation or, if they do conduct one, by deciding not to make the results of the audit or investigation public. In either event, the citizens of the county or city will suffer.

The type of publicly disclosed self-policing at issue here serves a number of important purposes. It reveals improprieties in the administration of federal programs; it informs local voters how elected officials are performing their duties; and it provides a general deterrent to local employees. If publicly disclosed self-policing can expose local governments to *qui tam* actions by opportunistic relators, with the attendant possibility of treble damages and attorneys' fees, there is likely to be a reduction in either self-policing or public disclosure, in which case many of these benefits will be lost. The court of appeals in effect applied the principle that no good deed should go unpunished; under its interpretation of the jurisdictional bar, the "reward" for publicly disclosed self-policing is a lawsuit. Because a predictable consequence of the court's decision is that counties and

municipalities will, when possible, either decline to investigate themselves or decline to disclose their findings, the decision, in addition to being incorrect as a matter of law, is both unfair and unwise. Local governments should not be put to the Hobson's choice of subjecting themselves to litigation or avoiding self-investigation.

B. The Decision Below Misinterprets The False Claims Act.

The court of appeals began its analysis by acknowledging that the False Claims Act's jurisdictional bar "by its express terms does not limit its reach to federal administrative reports or investigations" and that "there is nothing inherently federal about the word 'administrative.'" Pet. App. 22a-23a. One might have thought that that would be not only the beginning of the analysis but the end, inasmuch as the "cardinal canon" of statutory interpretation is that "a legislature says in a statute what it means and means in a statute what it says," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992), and inasmuch as "statutory terms are generally interpreted in accordance with their ordinary meaning," *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006). Rather than relying on the ordinary meaning of "administrative," however, the court relied on a much more obscure interpretive canon—*noscitur a sociis*—and what it perceived to be the purpose of the jurisdictional bar. As we explain below, neither provides a basis for the court's holding that "administrative" in the jurisdictional bar's second clause has an exclusively federal meaning.

1. The canon *noscitur a sociis* does not support the court of appeals' interpretation of the jurisdictional bar.

While acknowledging that "it may not be the strongest of interpretive principles" (Pet. App. 32a), the court of appeals rested its decision primarily on the canon *noscitur a sociis*. *Id.* at 22a-26a, 30a-33a. That canon "reminds us that 'a word is known by the company it keeps,' and is invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995), and *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990)). Applying the canon here, the court concluded that the reference to two federal sources in the second clause of the jurisdictional bar—"congressional" and "Government Accounting Office"—required the remaining source in that clause—"administrative"—to be likewise limited. The court's application of *noscitur a sociis* is flawed in multiple respects.

First, the canon may be applied only when "the legislative intent or meaning of a statute is not clear" and the meaning of particular words is "doubtful." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutory Construction* § 47.16 at 347 (7th ed. 2007). *Noscitur a sociis* "ha[s] no place * * * except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923); see, *e.g.*, *S.D. Warren*, 547 U.S. at 378-380 (concluding that the "everyday sense of the term" governed and that resort to *noscitur a sociis* was inappropriate).

As the petition explains (at 23), and as the court of appeals essentially acknowledged (Pet. App. 22a-

23a), there is nothing doubtful or ambiguous about the term "administrative" in the second clause of the jurisdictional bar. The term has no distinctive federal connotation and plainly covers state and local proceedings and the work product of state and local agencies. The very premise for invoking *noscitur a sociis* is therefore absent. Instead of using the common attribute of the terms in a list to illuminate the meaning of an otherwise unclear provision—the proper application of the canon—the court of appeals found a common attribute and then grafted it onto an otherwise clear provision. The court in effect applied the canon backwards.

Second, even if the term "administrative" in the jurisdictional bar's second clause is thought to be ambiguous, the *noscitur a sociis* canon still does not apply. Just last Term, this Court emphasized that canons of construction in general, and *noscitur a sociis* in particular, should not be applied "woodenly," and that they must "yield when the whole context dictates a different conclusion." *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831, 840-841 (2008) (quoting *Norfolk & W. Ry.* v. *Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991)). Consistent with that principle, courts have declined to apply *noscitur a sociis* when "the meaning of a word is unclear in one part of a statute but clear in another part." 2A Singer & Singer, *supra*, § 47.16 at 357. In that circumstance, "the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute." *Ibid.*

The term "administrative" appears not only in the second clause of the jurisdictional bar, but also in the first, which extends the bar to actions based upon the public disclosure of information in a "crimi-

nal, civil, or administrative hearing." As the Ninth Circuit has correctly observed, "[t]he unambiguous text" of that clause "does not contain any federal limitation." *A-1 Ambulance Serv., Inc.* v. *California*, 202 F.3d 1238, 1244 (9th Cir. 2000). Indeed, the term "administrative" in the first clause of the jurisdictional bar has been uniformly interpreted to cover state and local administrative proceedings, as the court below recognized. See Pet. App. 26a (collecting cases). Accordingly, even assuming that the meaning of "administrative" in the second clause is unclear in isolation, it has an unambiguous meaning in the first clause (one that has no federal limitation), and thus *noscitur a sociis* does not apply to the second clause. Otherwise, the same terms, in the same provision, might be interpreted differently. The presumption that "a given term is used to mean the same thing throughout a statute" is "at its most vigorous" when, as here, "a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Third, even if the meaning of "administrative" is thought to be unclear in both the first and the second clause of the jurisdictional bar, so that resort to *noscitur a sociis* is warranted, the court of appeals applied the canon incorrectly. If it is true, as this Court has repeatedly said, that courts should "construe statutes, not isolated provisions," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995), it is *a fortiori* true that courts should not construe isolated *clauses* in a statutory provision. Yet that is what the court of appeals did here.

In applying the *noscitur a sociis* canon, the court focused narrowly on the second clause of the jurisdictional bar; it relied on the fact that that the two

terms in the second clause other than "administrative"—"congressional" and "Government Accounting Office"—are inherently federal entities. The court ignored the fact that *none* of the terms in the two *other* clauses of the jurisdictional bar has a distinctly federal connotation. The first clause covers information in a "criminal, civil, or administrative hearing," and the third clause covers information from the "news media." There is nothing inherently federal about "criminal," "civil," or "administrative" hearings, which are obviously conducted by state and local courts and agencies, and there is nothing inherently federal about the "news media," which obviously have state and local outlets. The common attribute of the terms in the jurisdictional bar *in its entirety*—including the terms in the second clause ("congressional," "administrative," and "Government Accounting Office" reports, hearings, audits, and investigations)—is not that they are federal in character, but that they describe proceedings or work product that are commonly disseminated in the public domain. Accordingly, if *noscitur a sociis* is applied to the jurisdictional bar as a whole, as it should be, and the "list" of relevant items is assembled from the entire provision rather than from the second clause alone, the canon confirms that "administrative" should be given its customarily broad meaning.

2. The statutory purpose does not support the court of appeals' interpretation of the jurisdictional bar.

In holding that "administrative" in the jurisdictional bar's second clause has an exclusively federal meaning, the court of appeals also relied (Pet. App. 33a-36a) on what it believed to be the purpose of the 1986 amendments to the False Claims Act: "fur-

ther[ing] 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.'" Pet. App. 35a (quoting *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)). The court reasoned that this statutory purpose justifies its interpretation because "[i]nformation about federal investigations and audits is easily available to the members of the Department of Justice," while "information about most state and local investigations, audits, or reports is [not] particularly likely to come to the attention of the federal government." Pet. App. 35a-36a. This reasoning is flawed in multiple respects.

As an initial matter, Congress indisputably intended to bar *qui tam* suits based on certain publicly disclosed information that is no easier for the federal government to obtain than information in state and local administrative audits and investigations. For example, a state administrative *hearing* is covered by the first clause of the jurisdictional bar, as the court of appeals acknowledged (Pet. App. 26a), and "[t]he federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing." *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918 (9th Cir. 2006). Likewise, an obscure report in a local media outlet is covered by the third clause of the jurisdictional bar, and the federal government is no less likely to obtain a state or local administrative audit or investigative report than it is to obtain an obscure local news report. Indeed, given the vast scale of federal administrative activity, many of the *federal* sources covered by the second clause of the jurisdictional bar are no more likely to come to the attention of the Department of Justice than a state

or local administrative audit or investigation. The statutory purpose identified by the court of appeals thus provides no basis for excluding state and local administrative audits and investigations from the jurisdictional bar.

In any event, interpreting the jurisdictional bar to include state and local administrative audits and investigations does not defeat that purpose. The statute provides that the information at issue must be "publicly disclosed" before the bar applies, and courts have held that information is "publicly disclosed" if it is made accessible to the public through an affirmative act. See*, e.g.*, *United States ex rel. Hochman* v. *Nackman*, 145 F.3d 1069, 1072 (9th Cir. 1998); *United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996). This requirement significantly reduces the likelihood that state and local audits and investigations to which the bar applies will go unnoticed by the federal government.

Finally, promoting suits that the federal government is not in a position to bring itself is not the only purpose of the 1986 amendments to the False Claims Act. Congress also had the objective of providing "adequate incentives for whistle-blowing insiders with genuinely valuable information" and discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Although the court of appeals alluded to this distinct purpose in its opinion (Pet. App. 33a-34a), the court essentially ignored it in holding that "administrative" audits and investigations in clause two exclude those conducted by state and local governments. The goal of discouraging opportunistic suits is no less under-

mined by plaintiffs who obtain their information from state and local audits and investigations than by those who obtain their information from a federal source. Under the court of appeals' interpretation, a relator could literally copy information out of the relevant state or local government source and then recover a windfall. Indeed, he could do so even if the federal government were fully aware of the information. Congress could not have intended that result.

CONCLUSION

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

Respectfully submitted.

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