No. 08-304

In the

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In her brief in opposition, Respondent concedes that there is a circuit split on an important issue of federal law – whether a *qui tam* action is jurisdictionally barred under the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), when that action is based on an audit conducted by a State or its political subdivisions. (Br. in Opp. 1) Respondent's concession is understandable given that both the United States and *qui tam* plaintiffs have repeatedly recognized the existence of this circuit split and the importance of this issue. Br. for U.S. at 37, *Hays v. Hoffman,* 325 F.3d 982 (8th Cir.) (filed May 6, 2002); Br. for U.S. as *Amicus Curiae* at 18, *United States ex rel. Bly-Magee,* 128 S. Ct. 1119 (No. 06-1269) (filed Dec. 21, 2007); Petition for Writ of Certiorari, *United States ex rel. Bly-Magee,* 128 S. Ct. 1119 (No. 06-1269) (filed Mar. 16, 2007); *see also* Pet. App. 5a-6a (noting that issue "has divided the circuit courts"). Respondent, however, attempts to downplay the magnitude of the circuit split. She also argues that this Court need not grant certiorari because the decision below was correctly decided. Respondents' arguments are unavailing.[1]

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[1] Respondent notes that one of the audits at issue (the March 1996 audit by Graham County) was performed by an independent auditor hired by the County, rather than a county employee. (Br. in Opp. 1) The fact that this audit was conducted by an independent auditor retained by the County versus a county employee is immaterial. *See, e.g., United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.,* 384 F.3d 168, 174-75 (5th Cir. 2004); *Hays v. Hoffman,* 325 F.3d 982, 988-89 (8th Cir. 2003).

I. THE CIRCUIT COURTS ARE INTRACTABLY SPLIT ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Despite the significant split among the circuits, Respondent argues that this Court should not grant certiorari and should await to see if the decision below will result in all other circuits eventually falling in line behind the Fourth Circuit. (Br. in Opp. 1) Respondent's approach is unrealistic.

Six circuits have expressly stated how they would construe this provision of the public disclosure bar. Three circuits have embraced the construction advocated by Petitioners. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003); *see also United States ex rel. Fried v. W. Indep. Sch. Dist.,* 527 F.3d 439 (5th Cir. 2008) (indicating that state reports should be treated the same as federal reports).[2] Three

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[2] Respondent argues that the Eighth Circuit "did not squarely address" the issue raised by the petition. (Br. in Opp. 5) The Eighth Circuit, however, expressly held that state audits fall within the scope of 31 U.S.C. § 3730(e)(4)(A) when a state audit is conducted as part of a cooperative federal-state program. *Hays*, 325 F.3d at 988. That holding is in direct conflict with the decision of the Fourth Circuit. Respondent also attacks the Eleventh Circuit's decision in *Battle* as lacking "analysis or citation

circuits have embraced the construction advocated by Respondent. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008)*; United States ex rel. Burns v. A.D. Roe Co.,* 186 F.3d 717, 725 (6th Cir. 1999) (dicta); *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). The Fourth Circuit's decision has simply deepened the split that already existed. Moreover, with the Fourth Circuit decision, the split is no longer lop-sided. Thus, it is less likely that the circuit split could be resolved without this Court's intervention.

Respondent asserts that the Fourth Circuit's decision is so well reasoned that the Eighth, Ninth and Eleventh Circuits may eventually fall in line with the Fourth Circuit. In making this argument, however, Respondent overlooks the fact that the Fourth Circuit clearly struggled with how 31 U.S.C. § 3730(e)(4)(A) should be read. The Fourth Circuit expressly stated: "Although we ultimately disagree with [defendants'] approach to the statute, we must admit that there is some force to the argument." (Pet. App. 28a) The Fourth Circuit further conceded that the meaning of the statute was "murky" and could only be resolved with a "secret decoder ring." (Pet. App. 32a) The

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to authority." (Br. in Opp. 5) Although Respondent may not like the outcome of the *Battle* decision, the holding of the Eleventh Circuit is clear and unambiguous and has been repeatedly followed in the Eleventh Circuit. *See, e.g., McElmurray v. Consol. Gov't of Augusta-Richmond County,* 501 F.3d 1244, 1253 (11th Cir. 2007).

Fourth Circuit's decision expressly recognizes that the issue presented by this petition is a close one. Accordingly, Respondent's belief that the Fourth Circuit's decision may result in this long-standing split dissipating is not well founded.

Industry groups, States and municipalities are vitally concerned that this important issue be resolved now because it is unlikely that this entrenched conflict in the circuits will disappear. Amici Br. of U.S. Chamber of Commerce *et al.* 10-21; Amici Br. of PhRMA *et al.* 4-14; Amici Br. of Washington Legal Found. *et al.* 4-22; States' Amici Br. 2-8; Amici Br. of Nat'l League of Cities 2-16. Further percolation would not facilitate this Court's consideration of the merits of this issue.

II. THE FOURTH CIRCUIT ERRED IN ITS CONSTRUCTION OF THE FALSE CLAIMS ACT.

Respondent's Brief in Opposition rests primarily on an argument that the Fourth Circuit's decision was correctly decided. (Br. in Opp. 2-5) The Fourth Circuit's decision, however, is inconsistent with both the language of the False Claims Act and congressional intent.

The False Claims Act expressly provides that a *qui tam* action is jurisdictionally barred if it is based on an "administrative . . . report, . . . audit, or investigation." 31 U.S.C. § 3730(e)(4)(A) (2000). As the Fourth Circuit recognized, the word "administrative" is not limited to federal agencies – the

word, in normal parlance, would also include state agencies. (Pet. App. 22a) Rather than relying on the express language of the statute, the Fourth Circuit turned to an obscure principle of statutory construction (*noscitur a sociis*) even though that principle has no applicability when, as here, there is no common feature that can be extrapolated from the statutory list. Moreover, by re-writing the statute, the decision below has produced multiple anomalies – anomalies that Congress should not be presumed to have intended. Respondent's effort to address these judicially created anomalies is not persuasive.

Respondent argues that it is unlikely that *qui tam* plaintiffs will bring parasitic actions based on state government reports, because it is "farfetched" that any State's FOIA laws would result in investigations being available to the general public. (Br. in Opp. 4) Respondent's very actions in this case prove the opposite. Here, the March 1996 audit asserted that the work at issue should have been sent out for bids. That report was readily available to the public under North Carolina's Public Records Act. N.C. Gen. Stat. § 132-1 to -10 (2007). Respondent learned of the information set out in the March 1996 audit and subsequently brought a *qui tam* action in which she claims the payments were false and fraudulent because the work was not sent out for bids.

Respondent also argues that this Court should not be concerned that, under the Fourth Circuit's decision, a plaintiff with no knowledge of a fraudulent payment (other than what is set out in a state audit) may win the race to the courthouse, thereby foreclosing a *qui*

tam action brought by an insider. (Br. in Opp. 4) Respondent argues that it is speculative to assume that under the first-to-file rule, 31 U.S.C. § 3730(b)(5) (2000), a hypothetical insider will be barred from bringing a *qui tam* action because an opportunistic plaintiff learns of wrongdoing through a government report and files an action based on such a report. In making this argument, Respondent ignores the fact that 19 States have filed an amicus brief with the Court, emphasizing that the Fourth Circuit's decision poses a very real danger for States when they are acting as *qui tam* plaintiffs. States' Amici Br. 6. The anomaly created by the Fourth Circuit's decision is neither hypothetical nor speculative.

The purpose of the public disclosure bar is to prevent parasitic lawsuits. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir. 1994) (purpose is to prevent suits by "opportunistic plaintiffs who have no significant information to contribute of their own"). Congress intended that a *qui tam* plaintiff who does not have independent knowledge of the wrongdoing, but simply relies on public information, should not be rewarded based on the work of others who actually disclosed the fraud. Allowing a *qui tam* plaintiff who does not stand as an original source to build a false claims action on state administrative reports encourages the filing of parasitic actions. *See, e.g.,* Natalie R. Gregory, *State and Local Government Documents as "Public Disclosures" under the False Claims Act: Walking the Tightrope between Parasitic Litigation and Legitimate Claims*, 32 S. ILL. U. L.J. 699, 722 (2008) (concluding that unless state and local government reports and

audits are included within scope of public disclosure bar, False Claims Act will be subject to abuse "in the form of frivolous or parasitic litigation"). Accordingly, the decision of the Fourth Circuit should be reversed.

CONCLUSION

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

Respectfully submitted,

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