No. _____

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

PETITION FOR WRIT OF CERTIORARI

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September 2008 * Counsel of Record

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).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

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.

Richard Greene, Billy Brown and William Timpson were parties to the proceedings below but did not join in the petition.

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

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The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-46a) is reported at *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292 (4th Cir. 2008). The opinion of the district court (Pet. App. 47a-152a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 9, 2008. (Pet. App. 1a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the jurisdictional bar of the False Claims Act. 31 U.S.C. § 3730(e)(4) (2000). This section provides:

> (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 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.

31 U.S.C. § 3730(e)(4). The False Claims Act is set out in Petitioners' Appendix at 153a - 188a.

STATEMENT

1. The False Claims Act establishes civil penalties in connection with the presentment of a false or fraudulent claim for payment by the United States. 31 U.S.C. § 3729(a)(1) (2000). An action to recover statutory damages and civil penalties may be brought by the Attorney General or by a private person ("relator" or "*qui tam* plaintiff") in the name of the United States. 31 U.S.C. § 3730(a), (b) (2000). When a relator brings such an action, the United States may intervene and pursue the prosecution of the claim or

decline to participate in the proceeding. 31 U.S.C. § 3730(b)(2) (2000). Regardless of whether the United States chooses to intervene, the relator stands to recover a monetary reward (ranging from 10 to 30% of the recovery, plus attorneys' fees) for filing the action. 31 U.S.C. § 3730(d) (2000).

Congress included a public disclosure bar in the False Claims Act to preclude opportunistic plaintiffs from filing *qui tam* actions based on the work of others. 31 U.S.C. § 3730(e)(4)(A) (2000). Under the public disclosure bar, a private person generally cannot bring a *qui tam* action based on the following public information: "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." *Id.* (Pet. App. 163a). If, however, the plaintiff is the original source of the information, the public disclosure bar does not preclude the action from being brought. *Id.*

2. On January 25, 2001, Plaintiff Karen T. Wilson filed a *qui tam* action and retaliatory discharge claim against Graham County Soil & Water Conservation District, Graham County, Cherokee County Soil & Water Conservation District and various individuals.[1] *See* 31 U.S.C. § 3730(b) (2000)

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[1] This Court addressed the statute of limitations applicable to Wilson's retaliatory discharge action in *Graham County Soil & Water Conservation District v.*

(*qui tam* provisions); 31 U.S.C. § 3730(h) (2000) (retaliatory discharge provisions). The jurisdiction of the district court was based on 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331. The United States declined to intervene in the action.

In February 1995, a storm struck portions of western North Carolina, causing flooding and erosion. Following this storm, both Cherokee County and Graham County applied for federal assistance under the Emergency Watershed Protection Program. *See* 16 U.S.C. § 2203 (2006); 7 C.F.R. §§ 624.1 to .11 (2008). Pursuant to the terms of this federal program, both Cherokee County and Graham County entered into project agreements with the United States Department of Agriculture ("USDA"). Under those agreements, the counties agreed to pay 25% of cleanup costs and the USDA agreed to pay the remaining 75%. In each county, the work performed under the Emergency Watershed Protection Program was coordinated by the soil and water conservation districts.

In her complaint and deposition, plaintiff asserted that the payments made pursuant to this program were false and fraudulent for the following reasons: (1)

United States ex rel. Wilson, 545 U.S. 409 (2005). Following remand from this Court, the Fourth Circuit dismissed Wilson's retaliatory discharge action as time barred. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.,* 424 F.3d 437 (4th Cir. 2005).

any work under this federal program was required to be sent out for bids, which was not done, (2) one of the individual defendants had a conflict of interest in performing work for Graham County, (3) certain work performed by one of the individual defendants was sub-standard and did not comply with the requirements for the project, and (4) one of the individual defendants (Richard Greene) stole logs during the storm cleanup.

Over four years prior to the filing of the complaint, two of these items (failure to obtain bids for the work and the potential conflict of interest) were detailed in an audit report submitted to Graham County. That audit constitutes a public record under North Carolina law and was readily accessible to the general public. N.C. Gen. Stat. § 132-1 to -10 (2007). In addition to the March 1996 audit, a May 1996 report prepared by the North Carolina Department of Environment and Natural Resources also addresses various items that were later made the subject of plaintiff's complaint. Like the county audit, this document constitutes a public record under state law. *Id.*

3. On March 13, 2007, the district court held that plaintiff's claims are jurisdictionally barred pursuant to 31 U.S.C. § 3730(e)(4)(A). The district court held, in the alternative, that defendants are entitled to summary judgment with respect to the merits of plaintiff's claims.

In its decision, the district court concluded that a state audit or investigation is sufficient to constitute a

public disclosure under 31 U.S.C. § 3730(e)(4)(A). (Pet. App. 95a-97a) The district court further found that Wilson had based her complaint on such a document and that she was not an original source of the information. (Pet. App. 95a-98a)

On June 9, 2008, the Fourth Circuit reversed the district court's entry of judgment in favor of defendants. The Fourth Circuit concluded that a state audit, investigation or report does not constitute a public disclosure under 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit remanded the action to the district court for determination as to whether any portion of plaintiff's complaint had been based on a federal administrative report prepared by USDA and, if necessary, further consideration of whether defendants were entitled to summary judgment on the merits.[2]

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[2] Karen Wilson denies having had access to this USDA report. *See United States ex rel. Siller v. Becton Dickinson & Co.,* 21 F.3d 1339, 1349 (4th Cir.), *cert. denied,* 513 U.S. 928 (1994) (unless plaintiff actually derived the allegations of her complaint from a public disclosure, plaintiff's complaint is not barred by 31 U.S.C. § 3730(e)(4)(A)). Moreover, the USDA report does not address whether the work done under this federal program was required to be sent out for bids. (4th Cir. J.A. 1473-552) Thus, even though the Fourth Circuit remanded the action and directed the district court to give further consideration to the USDA report, the principal claim against Graham County Soil and Water Conservation District, Graham County and Cherokee County Soil and Water Conservation District is not barred

In its opinion, the Fourth Circuit expressly recognized that the issue of whether 31 U.S.C. § 3730(e)(4)(A) is limited to federal administrative audits and reports or also includes state administrative reports "has divided the circuit courts." 528 F.3d at 296 (Pet. App. 5a-6a); *see also id.* at 301 (Pet. App. 21a) (noting that circuits that have considered this issue "have come to different conclusions"). In reaching its conclusion, the Fourth Circuit rejected opinions of the Eighth, Ninth and Eleventh Circuits on this issue and adopted the rationale of the Third Circuit. 528 F.3d at 301-07 (Pet. App. 21a-37a).

The Fourth Circuit expressly recognized that the literal language of the statute, 31 U.S.C. § 3730(e)(4)(A), includes state administrative audits and reports. 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit concluded that congressional intent justified overriding the literal language of the False Claims Act. *Id.* (concluding that "examination of the relevant language in context" overrides Congress' literal language). The opinion of the Fourth Circuit concedes, however, that the meaning of the statute is "murky" and could only be definitively resolved with a "secret decoder ring." *Id.* at 305 (Pet. App. 32a).

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by the USDA report and must proceed on the merits.

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve a split among the circuits as to whether an administrative report prepared by a State falls within the scope of the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). Because of the prevalence of *qui tam* actions brought under the False Claims Act, the issue of whether the public disclosure bar is limited to federal administrative reports or also includes state administrative reports has arisen with great frequency. Resolution of this issue is important to the United States, state and local governments, government contractors and *qui tam* plaintiffs.

This Court should grant certiorari to ensure uniformity on this important and recurring question and to reverse the Fourth Circuit's manifestly erroneous ruling.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUITS.

The circuit courts are split on the issue of whether a report, audit or investigation conducted by a State (or its political subdivisions) will give rise to a public disclosure under 31 U.S.C. § 3730(e)(4). On the one hand, the Third Circuit (and now the Fourth Circuit)

has construed the public disclosure bar as limited to federal administrative reports. *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008). The Sixth Circuit, in dicta, has also expressed support for this construction of the Act. *United States ex rel. Burns v. A.D. Roe Co.,* 186 F.3d 717, 725 (6th Cir. 1999). On the other hand, the Eighth, Ninth and Eleventh Circuits have expressly held that the public disclosure bar is not limited to federal administrative reports but also includes reports prepared by state governments. *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.), *cert. denied*, 540 U.S. 877 (2003). Additionally, the Fifth Circuit appears to have recently embraced this result. *United States ex rel. Fried v. W. Indep. Sch. Dist.,* 527 F.3d 439 (5th Cir. 2008).

In *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), the Third Circuit attempted to discern whether Congress intended the phrase "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" to include audits conducted by a State. Applying the doctrine of *noscitur a sociis*, the Third Circuit construed the word "administrative" by looking to the words immediately before and after it –

"congressional" and "Government Accounting Office." *Id.* The Third Circuit concluded that "'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Id.* The Third Circuit also concluded that a broad reading of the disclosure bar would be contrary to congressional intent in that Congress wanted to encourage whistleblowers to come forward. *Id.* at 745-46.

The Fourth Circuit in the present case noted that "the statute by its express terms does not limit its reach to federal administrative reports or investigations." *Graham County,* 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit, following the lead of the Third Circuit, relied on the interpretive principle of *noscitur a sociis* to parse the statute, concluding that the placement of "administrative" between other federal sources suggested that "administrative" should be applied only to federal sources. *Id.* at 302-03 (Pet. App. 23a-26a). In doing so, the Fourth Circuit recognized that the issue was a close one that had divided the circuits: "Although we ultimately disagree with [defendants'] approach to the statute, we must admit that there is some force to the argument." 528 F.3d at 303 (Pet. App. 28a); *see also id.* at 296 (Pet. App. 5a-6a) (recognizing that the issue "has divided the circuit courts"). The Fourth Circuit acknowledged that discerning congressional intent was difficult given the ambiguities that plague the False Claims Act. *Id.* at 305 (Pet. App. 32a). Moreover, the

Fourth Circuit recognized that the doctrine of *noscitur a sociis* was not "the strongest of interpretative principles." *Id.* As if pleading for guidance from Congress or this Court, the Fourth Circuit observed that regrettably no one holds a "secret decoder ring with which to gain insight into the meaning of this murky statute." *Id.*

In addition to the Third and Fourth Circuits, the Sixth Circuit has embraced the view that 31 U.S.C. § 3730(e)(4) is limited to federal administrative reports and audits. *United States ex rel. Burns v. A.D. Roe Co.,* 186 F.3d 717 (6th Cir. 1999). Citing the *Dunleavy* decision with approval, the Sixth Circuit stated in dicta that the phrase "administrative . . . report" in 31 U.S.C. § 3730(e)(4) "likely" means "reports issuing from federal government agencies." 186 F.3d at 725; *see also United States v. Solinger,* 457 F. Supp. 2d 743, 752 n.7 (W.D. Ky. 2006) (noting that "some courts have interpreted the word 'administrative' in § 3730(e)(4)(A) to refer only to reports produced by federal sources").

In contrast to the Third, Fourth and Sixth Circuits, the Ninth Circuit has held that a state audit or report will give rise to a public disclosure. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008). In *Bly-Magee*, the Ninth Circuit expressly rejected the rationale of the *Dunleavy* decision and held that an audit prepared by the California State Auditor constitutes a public disclosure. The Ninth Circuit concluded that the language of 31 U.S.C. § 3730(e)(4)

does not compel a conclusion that Congress intended the phrase "administrative report or audit" to mean only "federal administrative" reports – "a phrase that Congress could have used but did not." 470 F.3d at 918. Because the language chosen by Congress could be applied without producing an absurd result, the Ninth Circuit saw no reason to resort to principles of statutory interpretation to alter the literal words of the statute. *Id.* The Ninth Circuit concluded that both the text of the False Claims Act and the goals of the jurisdictional bar compel the conclusion that a state audit report may constitute a public disclosure under the Act. *Id.* at 918-19.

The Eleventh Circuit has similarly concluded that a state audit can give rise to a public disclosure within the meaning of 31 U.S.C. § 3730(e)(4). *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). In *Battle*, plaintiff, a financial aid counselor at Fort Valley State University, informed her supervisor that she believed that federal funds had been fraudulently mishandled by the University's Work Study Program. *Id.* at 757-58. Thereafter, the Georgia Department of Audits conducted an audit of the University that "revealed serious noncompliance with federal regulations." *Id.* at 759. The Eleventh Circuit concluded that because plaintiff's claims "rely chiefly on information that was publicly disclosed in the . . . state audits, the claims are barred unless Plaintiff qualifies as an original source." *Id.* at 762.

In *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003), the Eighth Circuit held that an audit conducted by the Minnesota Department of Human Services constitutes a public disclosure. 325 F.3d at 988. In so holding, the court rejected the plaintiff's argument that "because the second use of the word 'administrative' in § 3730(e)(4)(A) is surrounded by 'congressional' and 'Government Accounting Office,' Congress must have meant to include only reports, audits, and investigations of federal government agencies." *Id.* The Eighth Circuit noted that the audit at issue was performed pursuant to a program (Medicaid) in which the state and federal government share the cost of the program and that the audit was conducted by the state in connection with the detailed rules and regulations governing that federal/state program. 325 F.3d at 989. Accordingly, the Eighth Circuit concluded that the state audit at issue "clearly qualif[ies]" as a public disclosure under 31 U.S.C. § 3730(e)(4). 325 F.3d at 989.

The Fifth Circuit has recently signaled that it will likely weigh-in with the Eighth, Ninth and Eleventh Circuits on this split. In *United States ex rel. Fried v. West Independent. School District,* 527 F.3d 439 (5th Cir. 2008), the Fifth Circuit held that because the plaintiff had relied on congressional hearings and GAO reports in preparing the complaint, the plaintiff's *qui tam* suit was barred by 31 U.S.C. § 3730(e)(4). In its opinion, the Fifth Circuit also noted that "a large

section of the evidentiary basis of Fried's claims is the information received pursuant to the Texas Public Information Act (the Texas equivalent to the federal Freedom of Information Act). This court has explicitly stated that response to a public records request constitutes a 'public disclosure' under the FCA." 527 F.3d at 442. Thus, the Fifth Circuit has strongly indicated, if not definitively held, that it will treat documents and reports prepared by a State the same as federal administrative documents for purposes of the public disclosure bar.

Not only has this issue divided the circuits, district courts are split within the remaining circuits that have not resolved the issue. In the Tenth Circuit, for example, district court cases have adopted completely opposite interpretations of the statute. In *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117 (D. Wyo. 2006), the district court concluded that limiting the word "administrative" to federal administrative reports, audits and investigations is "inconsistent with the plain language of [the statute]." *Id.* at 1143. The district court noted that construing the statute otherwise would lead to "the anomalous result of allowing public disclosure status to the most obscure local news report . . ., but denying public disclosure status to a formal public report of a state government agency." *Id.* at 1144; *see also United States ex rel. Eaton v. Kan. Healthcare Investors, L.P.*, 22 F. Supp. 2d 1230, 1235 (D. Kan. 1998) (indicating that investigation by the Kansas Department of

Health and Environment could give rise to a public disclosure). In *United States ex rel. Fine v. MK-Ferguson Co.,* 861 F. Supp. 1544 (D.N.M. 1994), *aff'd on other grounds*, 99 F.3d 1538 (10th Cir. 1996), the district court reached the opposite result and held that an audit report prepared by the State of Oregon cannot "form the basis for invocation of the section 3730(e)(4)(A) jurisdictional bar." *Id.* at 1550.

District courts in the Second Circuit are equally fractured. In *United States ex rel. Phipps v. Comprehensive Community Development Corporation,* 152 F. Supp. 2d 443, 453-54 (S.D.N.Y. 2001), the court concluded that an administrative investigation conducted by the New York Department of Health would constitute a public disclosure under 31 U.S.C. § 3730(e)(4). In *United States ex rel. Anti-Discrimination Center. v. Westchester County,* 495 F. Supp. 2d 375, 381-83 (S.D.N.Y. 2007), however, a different district court judge in the same district concluded that state and local reports prepared as part of an administrative investigation do not give rise to a public disclosure.

Given the current split among the courts, commentators have appropriately noted that this issue will continue to divide the circuits until resolved by this Court. *See, e.g.,* John T. Boese, Civil False Claims and Qui Tam Actions § 4.02[B], at 4-59 (3d ed. 2006) (31 U.S.C. § 3730(e)(4) "remains an area of sharp dispute between the circuits that must be resolved by the Supreme Court"); *id.* § 4.02[B][2][b], at 4-75 to -76

(Supp. 2007) (detailing split of authority as to whether a state audit or investigation should give rise to a public disclosure); Theodore K. Stream & Jamie E. Wrage, *Preserving the False Claims Act*, 45 Federal Lawyer 56, 59 (June 1998). This is particularly true given that, with the Fourth Circuit's decision, the Third Circuit no longer stands alone among the circuits with respect to its interpretation of 31 U.S.C. § 3730(e)(4).

The Fourth Circuit's decision deepens an existing split between the circuit courts. Review is warranted to resolve this conflict.

II. THE DECISION OF THE FOURTH CIRCUIT RAISES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW.

The issue of whether the public disclosure bar encompasses state audits and investigations (rather than being limited to federal investigations) is an important and recurring issue of federal law. As the United States has emphasized, this specific issue is of "fundamental interest to [the] United States." Br. for U.S. at 37, *Hays v. Hoffman,* 325 F.3d 982 (8th Cir.) (filed May 6, 2002); *see also* 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) (noting circuit conflict on the issue of whether a state audit or investigation can give rise to a jurisdictional bar under 31 U.S.C. § 3730(e)(4)). The United States recoups

billions of dollars each year as a result of the False Claims Act. The proper and consistent application of this statute therefore affects the public fisc.

The resolution of this issue also significantly impacts state and local governments. Under the Fourth Circuit's decision, a plaintiff who has no independent knowledge of a false claim could, pursuant to a FOIA request, obtain a copy of an ongoing state investigation and proceed to file a *qui tam* action with respect to any misappropriation of funds of the United States identified in the report. Such a parasitic claim is the very type of action that the public disclosure bar was intended to cut off. More importantly, if the work product of state agencies can be used by creative plaintiffs to obtain a windfall, States run the risk of being deluged by FOIA requests as counsel race to be the first to file a *qui tam* action based on the State's investigative efforts. *See* 31 U.S.C. § 3730(b)(5) (2000) (under the first-to-file provision, the filing of a *qui tam* action by one plaintiff bars all subsequently filed *qui tam* actions brought by other private plaintiffs). Such information requests run a substantial risk of disrupting on-going investigations.

The Fourth Circuit's decision also poses substantial problems when a State investigates one of its political subdivisions. Under the Fourth Circuit's decision, state and local officials may now have reservations about conducting an investigation of a political subdivision of the State – knowing that such

an investigation could subject it to a *qui tam* plaintiff coming in and seeking treble damages and attorneys' fees. The False Claims Act should not be construed in such a way as to result in a chilling effect on state administrative audits and investigations.

The issue raised in the petition is also of great importance to *qui tam* plaintiffs. As *qui tam* plaintiffs have previously argued to this Court, "[u]ncertainty regarding the scope of the public disclosure bar will deter relators and their counsel" from pursuing false claims on behalf of the United States. Petition for Writ of Certiorari, *United States ex rel. Bly-Magee,* 128 S. Ct. 1119 (No. 06-1269) (filed Mar. 16, 2007). Currently, a plaintiff who relies on a state report in pursuing a false claims action against a particular industry faces dramatically different outcomes depending on whether the action is filed in Augusta, Georgia versus a few miles away in Columbia, South Carolina. The district court's decision in *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117 (D. Wyo. 2005), emphasizes the magnitude of this problem. In that case, the plaintiff filed 73 different actions against approximately 300 gas pipeline companies. These 73 cases were ultimately consolidated for multidistrict litigation. Had the cases not been consolidated for pretrial proceedings, the actions filed in the Fifth, Eighth, Ninth and Eleventh Circuits would likely have been dismissed, those in the Third, Fourth and Sixth Circuits would likely survive, and those in the remaining circuits would face an

uncertain outcome. Neither the government, plaintiffs nor defendants are served by such inconsistency in the application of the False Claims Act.

Last term, this Court invited the views of the Solicitor General when this exact issue was before the Court on a petition for writ of certiorari from the Ninth Circuit. *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (order of May 29, 2007 inviting views of the Solicitor General); *see* 128 S. Ct. 1119 (2008) (denying certiorari). In response to this invitation, the United States recognized the split among the circuits. 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). The United States, however, advocated that certiorari should not be granted in that case for two reasons. *Id.* First, the United States noted that the Third Circuit was the only circuit to hold that a state administrative audit will not give rise to a public disclosure. *Id.* The United States therefore urged the Court "to await further development of the issue in the lower courts" before granting certiorari. *Id.* Second, the United States noted that Bly-Magee had filed a series of three successive lawsuits arising from the same allegations and that her most recent complaint would likely "be dismissed as insufficiently particularized even if this Court holds that they are not barred by Section 3730(e)(4)." *Id.* at 19. Neither of these two concerns are applicable here.

At the time of the petition for writ of certiorari in *Bly-Magee*, the Third Circuit stood alone in its reading

of Section 3730(e)(4). Because the Fourth Circuit has joined the Third Circuit on this issue, the split among the circuits has become entrenched. The Fourth Circuit's decision ensures that the conflict among the circuits will remain even if the Third Circuit were one day to reconsider and overrule its decision in *Dunleavy*. Consistency among the circuits can only be achieved if this Court grants review of this issue to resolve a circuit split that is now well developed.

Additionally, the fact that petitioners in the present case might eventually prevail on the merits should not weigh against granting the petition. This Court has recognized that the public disclosure bar is jurisdictional. *Rockwell Int'l Corp. v. United States,* 127 S. Ct. 1397, 1401 (2007). Accordingly, petitioners should not be required to defend on the merits if there is no claim that can properly be heard by the courts.[3] *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.,* 127 S. Ct. 1184, 1191 (2007).

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[3] Given the procedural posture of *Bly-Magee*, it was appropriate for this Court to consider the fact that the plaintiff/petitioner was likely to lose on the merits, thereby making review futile. Because the Ninth Circuit held that Bly-Magee's claims were jurisdictionally barred, the defendants were not required to respond on the merits. In contrast, the Fourth Circuit's decision requires petitioners to defend on the merits – a task they should not be subjected to if the Fourth Circuit is wrong and Wilson's claim is jurisdictionally barred.

Here, the district court, after concluding that plaintiff's claims were jurisdictionally barred, held in the alternative that summary judgment should be granted to defendants as a result of plaintiff's failure to come forward with admissible evidence as to the existence of a false claim. The Fourth Circuit, however, concluded that the district court erred in rendering such an alternative ruling on the merits. The Fourth Circuit remanded with instructions that the district court is to consider whether any portion of plaintiff's claims is jurisdictional barred as a result of a report issued by the USDA.[4] The Fourth Circuit directed that the district court should then proceed to consider the merits of any claims not so barred. In doing so, the Fourth Circuit noted that "nothing in our mandate should be read to preclude the district court from considering the merits of the *qui tam* claims anew." 528 F.3d at 310 (Pet. App. 46a). Thus, the district court's decision on the merits has been expressly vacated by the Fourth Circuit with a directive that this decision may be considered "anew." *Id.* The Court's resolution of the issue raised in the

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[4] As previously noted, the USDA report does not address plaintiff's principal claim against the soil and water conservation districts (i.e., whether the work at issue was required to be sent out for bids). Accordingly, that portion of plaintiff's complaint must go forward on the merits unless the decision of the Fourth Circuit is reversed by this Court.

petition has a direct and immediate impact on the claims in this action.

Unlike *Bly-Magee,* the present petition presents a good vehicle for resolving the circuit split on this important issue.

III. THE FOURTH CIRCUIT ERRED IN CONCLUDING THAT A STATE AUDIT DOES NOT CONSTITUTE AN "ADMINISTRATIVE . . . REPORT . . . AUDIT, OR INVESTIGATION" AS THAT PHRASE IS USED IN THE FALSE CLAIMS ACT.

Not only is there an entrenched circuit split on an issue of fundamental importance to the United States, this Court should grant certiorari because the decision of the Fourth Circuit is manifestly in error. The plain language of the statute directs that federal courts are without subject matter jurisdiction to hear a *qui tam* action that is based on an "administrative . . . report . . . audit, or investigation." 31 U.S.C. § 3730(e)(4). In its decision, the Fourth Circuit recognized that, under the literal language of the statute, the state audit at issue would constitute a public disclosure. 528 F.3d at 301 (Pet. App. 22a). The Fourth Circuit, however, read additional words into the statute. The decision below is therefore directly contrary to prior opinions of this Court.

When statutory language is plain, the sole function of courts, in the absence of a scrivener's error or text that would produce an absurd result, is to enforce the statute according to its terms. *See, e.g., Arlington Cent. Sch. Dist. v. Murphy,* 548 U.S. 291, 296 (2006). A federal court judge is not at liberty to rewrite a statute to reflect a meaning that he or she deems more desirable. *Ali v. Fed. Bureau of Prisons,* 128 S. Ct. 831, 841 (2008). Rather, courts must "give effect to the text Congress enacted." *Id.*

Here, the text of the statute is plain. Congress has used the phrase "administrative" audit, report or investigation rather than employing the phrase "federal administrative audit." Giving effect to the statute as written would not produce an absurd result. Rather, the text chosen by Congress reflects a public policy choice – to place the work product of state government (consistent with principles of federalism) on the same par as a federal investigation. It also reflects a policy choice not to treat state audits and investigations as inferior to local news reports. *See* 31 U.S.C. § 3730(e)(4)(A) (public disclosure may be based on information in report by news media).

The Fourth Circuit justified rewriting this provision of the False Claims Act by relying on the doctrine of *noscitur a sociis*. 528 F.3d at 305 (Pet. App. 32a). The docrine of *noscitur a sociis*, however, is of "no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1849 (2006). Here, 31

U.S.C. § 3730(e)(4) includes a disparate listing (ranging from "criminal hearings" to a "Government Accounting Office report" to "news media") from which no common feature can be extrapolated. Moreover, such a rule of statutory construction should not be employed when Congress has not given careful consideration to either its word choice or the order of the listing. Congress' inattention to detail is reflected by the fact that this section uses the phrase "Government Accounting Office" when it clearly intended "General Accounting Office."[5]

By inserting the word "federal" into the public disclosure bar, the Fourth Circuit has rewritten the False Claims Act in such a way as to produce highly anomalous results – results that Congress clearly did not intend.

First, Congress has expressly provided that information "from the news media" will give rise to a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Under the Fourth Circuit's decision, a one paragraph newspaper report in an obscure weekly paper of

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[5] The Fourth Circuit glosses over this problem by simply noting that years after Congress adopted this provision, the name of the General Accounting Office was changed to the Government Accountability Office. 528 F.3d at 300 n.4. The fact that Congress' sloppiness was fortuitously lessened years later does not alter the fact that Congress' imprecision makes reliance on the doctrine of *noscitur a sociis* highly questionable.

limited circulation will give rise to a public disclosure while a formal audit conducted by an elected state official that is widely disseminated will not.

Second, the statute expressly states that information available through "a criminal, civil, or administrative hearing" shall constitute a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Every circuit that has considered whether a state "administrative hearing" can give rise to a public disclosure has concluded that such proceedings fall within the scope of 31 U.S.C. § 3730(e)(4). *See Graham County,* 528 F.3d at 303 (citing cases) (Pet. App. 26a). Congress should not be presumed to have split such fine hairs between state administrative hearings and state administrative audits.

Third, as set out above, the Fourth Circuit's decision will encourage opportunistic plaintiffs to scour state government investigations in hopes of finding potential claims that could produce a bounty based on work already performed by the State.

Fourth, the decision below threatens to jeopardize the claims of true whistleblowers who are pursuing false claims investigations based on their own independent knowledge. Under the first-to-file provision of the False Claims Act, the filing of a *qui tam* action by one plaintiff cuts off all subsequently filed *qui tam* actions brought by other plaintiffs. 31 U.S.C. § 3730(b)(5) (2000). Thus, under the Fourth Circuit's opinion, an insider who has worked for years in gathering information in order to expose corruption

could find his *qui tam* action gutted when a complete stranger to the fraud wins the race to the courthouse and files a parasitic lawsuit that is based solely on information available to the public in a state audit.

The Fourth Circuit's decision cannot be squared with either the literal language of the False Claims Act or congressional intent. The Court should grant the petition and reverse the decision of the Fourth Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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