No. SJC 12973

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS EX REL. JOHAN ROSENBERG,

Plaintiff-Appellant,

v.

JPMORGAN CHASE & CO., CITIGROUP, INC., MERRILL LYNCH & CO., INC., AND MORGAN SMITH BARNEY LLC, ET AL.,

Defendants-Appellees.

On *Sua Sponte* Transfer from the Appeals Court
for Review of a Decision of the Superior Court

BRIEF OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL OF THE SUPERIOR COURT'S ORDER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21 and Massachusetts Rule of Appellate Procedure 17(c)(1), Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act, upon which the Massachusetts False Claims Act is modeled.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Massachusetts Rule of Appellate Procedure 17, TAFEF submits this brief in support of plaintiff-appellant Johan Rosenberg ("Relator Rosenberg") and for reversal of the lower court's order dismissing his Second Amended Complaint. No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief.

TAFEF is a non-profit public interest organization dedicated to combatting fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and has provided testimony to Congress about ways to improve the FCA.

TAFEF regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

SUMMARY OF ARGUMENT

The Superior Court's decision dismissing Relator Rosenberg's Second Amended Complaint ("SAC") is based on a broad reading of the public disclosure bar under the Massachusetts False Claims Act ("MFCA") and a narrow reading of the statute's original source exception. While there is a dearth of caselaw interpreting the MFCA's public disclosure provision, the statute is modeled after the federal FCA, so discussion and analyses of the FCA's text and legislative history are instructive when interpreting the MFCA's provisions.

The MFCA and the FCA contain substantively similar public disclosure bars and original source provisions. The public disclosure provision under both statutes is triggered by disclosure of the complaint's allegations or transactions of fraud through one of three statutorily enumerated channels, including "from the news media." Both statutes also contain an "original source" exception to the public disclosure bar and define "original source" in substantively identical ways.

The lower court dismissed the SAC largely on the grounds that the public disclosure bar was triggered by disclosure "from the news media." The court concluded that a website that contained municipal bond rate information fell under the definition of "the news media." The court held that any such data/information from the aforementioned website rendered the "allegations and transactions" in the SAC publicly disclosed within the meaning of the bar.

Even if such websites are determined to be "the news media," the court erred in its conclusion that the allegations or transactions of fraud in the SAC had been publicly disclosed. It mistakenly assumed that the relevance of the information on the website to the lawsuit was sufficient to trigger the bar. But the pertinent statutory inquiry is whether the relator's "allegations or transactions" were publicly disclosed, not whether the information relevant to those allegations or transactions was publicly disclosed.

Moreover, the lower court's sweeping interpretation of "the news media" ignores the ordinary meaning of the phrase. While certain websites may fall within the ordinary meaning of this phrase, many do not. A broad construction of the phrase "the news media," as employed by the lower court, also disregards congressional intent and frustrates the purpose of the public disclosure bar.

Finally, contrary to the court's assumption, relators need not be insiders to be an "original source" of information under the exception to the public disclosure bar. The statute permits a relator who provides significant information that is independent of what is publicly disclosed to proceed. Such relators are not parasitic and can advance the whistleblower statutes' purposes of enlisting the assistance of persons with valuable information about fraud. Nothing in either the MFCA or the FCA requires relators to be insiders, and the FCA has a long history of successful cases brought by outsider relators.

ARGUMENT

The MFCA was amended in 2012 to be consistent with the amended federal FCA. *United States ex rel. Willette v. Univ. of Mass.*, 80 F. Supp. 3d 296, 299 n.4 (D. Mass. 2015) (citing *Scannell v. Attorney Gen*., 70 Mass. App. Ct. 46, 49 n.4, 872 N.E.2d 1136, 1138 n.4 (Mass. App. Ct. 2007)) ("[T]he MFCA was modeled on the similarly worded FCA[;] Massachusetts courts look to cases interpreting the federal statute for guidance in construing the MFCA"). The MFCA's public disclosure bar is identical to the FCA from which it is derived, and therefore a discussion of the latter is instructive in interpreting the former.

Under both statutes, the public disclosure bar is triggered when "substantially the same allegations or transactions as alleged in the action…[are] publicly disclosed" in one of three ways enumerated in the statutes, including, as relevant here, "from the news media." 31 U.S.C. §§ 3730(e)(4)(A)(iii); M.G.L.A. 12 § 5G(c).

The MFCA's public disclosure bar provides:

> The court shall dismiss an action or claim…if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Massachusetts criminal, civil or administrative hearing in which the commonwealth is a party; (2) in a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or (3) from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information.

M.G.L.A., ch. 12, § 5G(c). This language tracks the FCA's public disclosure bar:

> The court shall dismiss an action or claim…unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed; (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, investigation; or (iii) 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.

31 U.S.C. § 3730(e)(4)(A).

Both statutes also define an "original source" in the same manner. The MFCA's definition states:

> [A]n individual who (1) prior to a public disclosure under paragraph (3) of section 5G, has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly-disclosed allegations or transactions, and who has voluntarily provided the information to the commonwealth or any political subdivision thereof before filing a false claims action.

M.G.L.A., ch. 12, § 5A. And the FCA defines "original source" as:

> [A]n individual who either (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)(4)(B).

I. The Text and Legislative History of the FCA Encourage a Narrow Construction of the Public Disclosure Bar and a Broad Construction of the Original Source Exception.

The public disclosure bar seeks to prevent so-called "parasitic" suits by a relator whose fraud allegations have already been publicly disclosed in certain ways and do not contribute new information to the Government's fraud prevention efforts. The bar, however, carves out an exception that allows certain relators to proceed even when their allegations of fraud have been publicly disclosed. An overview of the amendments to the FCA's public disclosure bar and original source exception demonstrates these points.

The FCA was enacted in 1863 to enlist private individuals to assist the Government in ferreting out fraud by authorizing those individuals (called "*qui tam* relators") to file suit in the name of the Government and to reward successful relators with a share of the recovery. S. Rep. No. 99-345 (1986), at 10-11. During World War II, however, the statute was amended to address a perceived problem with parasitic relators who copied publicly available information and then filed suit to collect a reward. *Id.* Congress amended the FCA to preclude such parasitic suits and barred *qui tam* lawsuits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609.

Known as the "government knowledge bar," this provision ultimately had the consequence of nullifying the FCA as a viable tool to combat fraud perpetrated against the Government. *See* S. Rep. No. 110-507 (2008), at 3 (noting that the government knowledge bar "significantly limited the number of FCA cases that were filed" and that "[b]y the 1980s, the FCA was no longer a viable tool for combating fraud against the Government"). *See also Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment [of the FCA], the volume and efficacy of *qui tam* litigation dwindled"); *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 297 (3d Cir. 2016) (observing that the government knowledge bar "did not just eradicate the parasitic lawsuits; it eliminated most FCA lawsuits" because of courts' strict interpretation that the provision "barr[ed] FCA actions even when the government knew of the fraud only because the relator had reported it"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (noting that enactment of the government knowledge bar "killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government").

In 1986, after extensive study and hearings, Congress determined that the FCA necessitated amendment to address, *inter alia*, courts' interpretations of the statute's provisions. *See, e.g.*, S. Rep. No. 99-345, at 2, 4 (noting that the "growing

pervasiveness of fraud necessitates modernization" of the FCA and "restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute" and have led to dismissal of meritorious cases). Among the changes, Congress repealed the government knowledge bar and adopted the public disclosure bar. The new provision stated that a *qui tam* relator could not proceed with a lawsuit alleging fraud that had been publicly disclosed in specific ways, including "from the news media." However, the provision permitted some relators to proceed, notwithstanding that their allegations had been publicly disclosed: The "original source" exception permitted a relator to proceed if s/he met certain requirements, including that the relator's information was "direct and independent." False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157.

The public disclosure bar sought "to strike *a balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quotation marks omitted) (emphasis in original). *See* S. Rep. No. 110-507, at 5, 22 (seeking "to ensure that any individual qui tam relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case" and explaining that the creation of the public disclosure bar and the original source exception "was intended to only bar truly

'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government").

Unfortunately, following the 1986 Amendments, courts interpreted the bar and the original source exception in a manner that led to the dismissal of meritorious FCA suits. As Senator Charles Grassley and Representative Howard Berman (the sponsors of the 1986 Amendments) noted, the public disclosure bar had "been converted by several circuit courts into a powerful sword by which defendants [were] able to defeat worthy relators and their claims" and threatened to undermine the purpose of the 1986 Amendments, which was to encourage more private FCA suits. 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1546. Of particular concern were cases holding that FCA suits "are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents." *Id.* at *E1547. In the legislators' view, a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a qui tam action." *Id.*

The legal landscape concerning the original source exception also raised congressional concern. At the time, courts had interpreted the provision to "require[] the relator to be an eyewitness to the fraudulent conduct as it occurs." *Id.* The legislators explained that they had intended that "a relator's knowledge of the fraud is 'direct and independent' if it results from his or her own efforts." *Id.*

In 2010, Congress amended the statute's public disclosure bar as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The amendments "radically changed" the statute to "lower the bar for relators." *Moore*, 812 F.3d at 298-99. The amendments narrowed the types of disclosures that triggered the bar and expanded the scope of the original source exception.

One important change was to the original source exception: Instead of requiring an original source to have "direct and independent knowledge," which (as noted *supra*) some courts had read as requiring firsthand factual knowledge, the current version eliminates the term "direct" and, like the operative provision of the MFCA, merely requires a relator to have "independent" knowledge that "materially adds to" the public disclosures. 31 U.S.C. § 3730(e)(4)(B).

II. Use of Publicly Disclosed Information Does Not Cause "Allegations or Transactions" to be Subject to the Public Disclosure Bar.

The lower court's dismissal of the SAC should be reversed because the use of data and information from websites (even those that may be considered "the news media") does not constitute a public disclosure of "substantially the same allegations or transactions alleged." 31 U.S.C. §§ 3730(e)(4)(A); M.G.L.A. 12 § 5G(c). "Facts showing fraud may be publicly disclosed either in the form of direct allegations of fraud or through disclosure of transactions that give rise to an inference of fraud." *Silbersher v. Allergan Inc., et al.*, No. 18-cv-03018 JCS, 2020 U.S. Dist. LEXIS

233570, at *53 (N.D. Cal. Dec. 11, 2020) (citing *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 571 (9th Cir. 2016)). While the FCA does not define the terms "allegations" and "transactions," courts have interpreted "allegation" to mean a direct claim of fraud and "transaction" to refer to facts from which fraud can be inferred. *Mateski*, 816 F.3d at 570-71 (citing *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F3d 228, 235-36 (3d Cir. 2013); and *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653-54 (D.C. Cir. 1994)). "In the latter scenario, fraud is publicly disclosed where the material elements of the allegedly fraudulent transaction are disclosed in the public domain." *Silbersher*, 2020 U.S. Dist. LEXIS 233570, at *53-54 (quoting *United States ex rel. Found. Aiding the Elderly*, 265 F.3d 1011, 1014 (9th Cir. 2001)) (internal quotations omitted).

The FCA's public disclosure bar is not triggered merely because *information* that a relator may rely on is in the public domain; the "*allegations or transactions*" alleged by the relator must be publicly disclosed. *See* 31 U.S.C. §§ 3730(e)(4)(A) (emphasis added); *Springfield*, 14 F.3d at 653-54. Thus, the proper inquiry is "whether the information conveyed [in the public disclosure] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *Springfield*, 14 F.3d at 654.

Some courts have described this inquiry as follows:

> [I]f X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.

Id. "In terms of th[is] mathematical illustration, when X by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistle-blower's suit is banned."[1] *Id.*

This concept is not novel, as there are many examples of relators who have been allowed to proceed with their *qui tam* case even when they relied on publicly disclosed information to form their claims. *See, e.g., United States ex rel. Girling v. Specialist Doctors' Grp., LLC,* No. 8:17-cv-2647, 2020 U.S. Dist. LEXIS 229018 (M.D. Fla. Dec. 7, 2020) (relator who relied on information from a Centers for Medicare and Medicaid database allowed to proceed with FCA claims); *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 Dist. LEXIS 125352 (C. D. Cal. July 16, 2019) (relator who relied in part on government reports and claims data was not precluded from bringing FCA claims); The Morning Call, *Victaulic settles whistleblower claim over imports*

[1] In the present matter, the lower court relied on this equation, but struggled with its elements. *Commonwealth ex rel. Rosenberg v. JP Morgan Chase & Co.*, 36 Mass. L. Rep. 72, at *25 (Sup. Ct. of Mass. July 23, 2019) ("…it is somewhat difficult to identify just what constitutes X and Y.").

for $600k, ending nearly six years of litigation (May 9, 2019), https://www.mcall.com/news/police/mc-nws-victaulic-customs-whistleblower-settlement-20190509-f4wszaykb5hnzmvyfkqwyg2uu4-story.html (former government employees used industry expertise, as well as public shipping records, to identify fraud scheme involving mislabeled imports in order to evade customs duties).

In the present case, even if this Court agrees with the lower court's broad definition of "the news media" (and, for the reasons set forth *infra*, this Court should not adopt such a broad meaning), the allegations and transactions alleged by Relator Rosenberg were not publicly disclosed. A review of municipal bond rates on the EMMA website[2] would not have alerted the Government to the robo-resetting fraud or the conspiracy alleged in the SAC. It was Relator Rosenberg's additional analyses of bond interest rates (made possible because of his industry expertise) and additional investigation (e.g., witness interviews) that uncovered the defendants' fraud and conspiracy. Thus, even assuming the rate information on EMMA was publicly disclosed, Relator Rosenberg's reliance on that information does not mean that the SAC's "allegations and transactions" are subject to the bar. *See Springfield*,

[2] EMMA is a service provided by the Municipal Securities Rulemaking Board, which was created by Congress to regulate the municipal bond market. *See* Securities Acts Amendments of 975, Pub. L. 94-29, 89 Stat. 97. The EMMA website is found at www.msrb.org.

652-56 (finding that disclosure of information in civil discovery fell within an enumerated channel for public disclosure, but that did not mean that the relevant "allegations and transactions" that utilized the information were disclosed; the disclosed information merely allowed the relator to conduct an investigation that revealed the fraud).

III. Websites that the Public may Access do not Automatically Fall Under "the News Media" Channel of the Public Disclosure Bar.

This Court should reject a broad reading of "the news media" that encompasses every website (including EMMA) with information that is publicly available. *See Integra*, 2019 Dist. LEXIS 125352, at *35-36 (concluding "that applying the news media provision to anything ever published publicly on the Internet is contrary to the ordinary meaning of the term 'news media' and has the potential to eviscerate the balance Congress struck between encouraging private parties to bring forth evidence of fraud and preventing parasitic suits.")

The phrase "from the news media" is not defined in the FCA and thus must take its ordinary meaning in the absence of a clear or compelling reason not to do so. *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning'") (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610, 613 (10th Cir. 2018) (first step of statutory construction is to "determine whether the language at issue

has a plain and unambiguous meaning," and the inquiry ends there if that meaning is "coherent and consistent" with the statutory scheme). *See Schindler Elevator Corp.*, 563 U.S. at 407 (construing the word "report" in the FCA's public disclosure bar to have its "ordinary meaning"); *In the Matter of E.C.*, 479 Mass. 113, 118 (Mass. 2018); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (interpreting the undefined word "pending" in the FCA "in accordance with its ordinary meaning").

In ordinary speech, the "the news media" refers to professionals who focus on reporting news to the public. Such media includes, *inter alia*, print and broadcast news, as well as some Internet sites. The phrase places equal emphasis on the type of content (i.e., "news" refers to current events) and the type of speaker (i.e., the professional "media," such as journalists, as opposed to individuals or entities that incidentally discuss, but do not primarily focus on, current events). *See Integra*, 2019 Dist. LEXIS 125352, at *32-33 (walking through ordinary meaning of the words "news" and "medium"). While some websites may fit under this ordinary understanding of "the news media," not all do.

There are "guideposts" to help "determin[e] whether information from an online source has been disclosed 'from the news media' within the meaning of the FCA's public disclosure bar." *Id.* at *43-46. The most important of them is the "ordinary meaning" analysis discussed *supra*. *Id.* at *45-46. Other "guideposts"

include: "the extent to which the information typically conveyed by a source would be considered newsworthy;" whether the website "collects information from outside sources, exercises some editorial judgment in deciding what to publish, and then transmits the published information to an audience;"[3] whether the website intends "to disseminate the information widely, as opposed to only to a few individuals;" and how closely the website "functions like…traditional [news] outlets," such as newspapers and radio and television stations. *Id. See also Silbersher*, 2020 U.S. Dist. LEXIS 233570, at *78 (agreeing with approach in *Integra* and rejecting suggestion that information on Patent Office's Patent Application Information Retrieval website was "from the news media").

For example, bostonglobe.com and boston.com—both of which are run by a traditional news media organization, report current events at the local, regional, and national level, have editorial staff, and aim to reach all sectors of the general population—are easily classified as being part of "the news media." But nobody would describe the website of a chain restaurant, like Dunkin Donuts, as "the news media." The site may provide information (such as menu and nutrition information),

[3] In its discussion of this factor, the *Integra* court found it instructive that the Freedom of Information Act defines "a representative of the news media" as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Id.* at *44 (citing 5 U.S.C. § 552(a)(4)(A)(ii)(III)).

but its primary purpose is not to report on current events, and it is designed to reach only those individuals who are interested in the company or its food. EMMA is akin to the Dunkin Donuts website: It provides municipal bond interest rate information but does not report on current events and is intended to reach only select parties that are involved with such bonds.[4]

Not only would a broad reading of "the news media" (such as the one employed by the lower court) discount the ordinary meaning of the phrase, it improperly ignores congressional intent in enacting the public disclosure bar. It is well settled that the purpose of statutory interpretation is to realize the intent of the drafters; courts are "obliged to give effect, if possible, to every word Congress used."

[4] Massachusetts federal courts do not diverge from this proposition. For example, in *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 329-330 (D. Mass. 2011) (Woodlock, J.), the court dismissed the relator's allegations because it found that the defendants' alleged fraudulent activity was publicly disclosed in "the news media." However, "the news media" in that case took forms that comport with the ordinary meaning of the term, e.g., in publications like the *New York Times* and industry journals. Moreover, the reporting "from the news media" specifically discussed the defendants' alleged false certification and off-label promotions.

Similarly, in *United States ex rel. Bartz v. Ortho-McNeil Pharm., Inc.*, 856 F. Supp. 2d 253, 263-65 (D. Mass. 2012) (Stearns, J.), the court dismissed an FCA action because, *inter alia*, the allegations of false Average Manufacturer Price and Best Price reporting were disclosed through prior federal and state cases, as well as reports in "the news media." The media at issue—industry publications and traditional journalism outfits—fit the phrase's ordinary meaning.

Neither case stands for the proposition that a website providing interest rates constitutes a public disclosure.

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 632 (2018) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). *See also Potts,* 908 F.3d at 613 ("When interpreting a statute, our primary task is to determine congressional intent, using traditional tools of statutory interpretation") (internal quotations omitted). As discussed *supra*, Congress intended that the FCA's public disclosure bar filter out *qui tam* cases with allegations of fraud of which the Government is already aware through specific channels identified in the statute.

But to adopt a broad definition of "the news media" that encompasses virtually every active website on the Internet because they provide some type of information accessible to the general population does not serve, and in fact undermines, the purpose of the public disclosure bar. *See Integra*, 2019 U.S. Dist. LEXIS 125352, at *33-35 (rejecting argument that all publicly available information on the Internet has been publicly disclosed "from the news media"). The Government could not reasonably be expected to cull everything on the Internet to detect and investigate fraud schemes. Thus, such an expansive definition ignores that the bar was intended to prohibit suits based on information that was "sufficiently publicized" so as to allow the Government to take action. *See* 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1546-47.

IV. The False Claims Act Contemplates Actions by Outsider Relators.

As discussed *supra*, the clear intent of Congress in amending the FCA's public disclosure provisions was to promote a public-private partnership between the Government and whistleblowers. *See* S. Rep. No. 99-345, at 1 (recognizing that "only a coordinated effort of both the Government and the citizenry" could prevent rampant fraud on the government). With each amendment of the statute, Congress has strived to encourage relators to bring *qui tam* cases and to remove barriers to encouraging whistleblowers with valuable information to come forward.

It is therefore no surprise that Congress has never limited the class of potential relators to insiders. *See* S. Rep. No. 99-345, at 1 (FCA amendments designed to "encourage any individual knowing of Government fraud to bring that information forward"). When courts adopted a restrictive interpretation of "original source"—requiring relators to have firsthand knowledge (i.e., be "insider" relators)—Congress reacted by removing the requirement that a relator have "direct" knowledge and instead required only that a relator's knowledge "materially add" to the publicly disclosed information and be independent of the publicly disclosed information. 31 U.S.C. § 3730(e)(4)(B).

The door has long been open to outsider relators with FCA claims; there is a lengthy history of successful FCA cases involving such relators. For example, *United States ex rel. Shea v. Verizon Communications, Inc.*, 844 F. Supp. 2d 78

(D.D.C. 2012), discusses the efforts of an outsider relator that resulted in a $93.5 million recovery. The relator, Stephen Shea, was a former employee of a consulting firm that helped its clients manage telecommunication-related investments. Through his employment experience and expertise, in addition to information he learned from working with private clients, Shea was able to conduct research and analyses that led to the discovery that wireless carriers were improperly charging the Government under two telecommunications contracts. Though Shea was not an "insider" at any telecommunications company, the court found that "[i]t is absolutely true that the Government had no knowledge of the fraud…" and "had never previously identified the overcharges" alleged by the relator. *Shea*, 844 F. Supp. 2d at 86.

In another matter, an outsider businessman discovered that a laboratory was supplying faulty tests to the Government. The businessman filed a *qui tam* case, which ultimately settled for $302 million. *See* Phillips & Cohen, *Businessman Exposed Problems with Quest Subsidiary's Blood Test Kits; Led to $302 Million Settlement* (Apr. 15, 2009), https://www.phillipsandcohen.com/businessman-exposed-problems-quest-subsidiarys-blood-test-kits-led-302-million-settlement/.

There are several other examples of successful outsider relators who have detected fraud and whose allegations have led to Government recovery. *See*, *e.g.*, *United States ex rel. Farmer v. City of Houston*, No. H-03-3713, 2005 U.S. Dist. LEXIS 18387 (S.D. Tex. May 5, 2005) (relator who analyzed records obtained

pursuant to a state public records statute and discovered that a non-profit corporation was submitting false claims to the government was found to be an original source); U.S. Dep't of Justice, *Nearly 500 Hospitals Pay United States More Than $250 Million to Resolve False Claims Act Allegations Related to Implantation of Cardiac Devices* (Oct. 20, 2015), https://www.justice.gov/opa/pr/nearly-500-hospitals-pay-united-states-more-250-million-resolve-false-claims-act-allegations (data miner and a cardiac nurse identified a widespread scheme to install medically unnecessary implantable cardioverter defibrillators, resulting in several hundred hospitals settling for over $250 million); Relman Colfax, *Case Profiles - Anti-Discrimination Center v. Westchester County*, https://www.relmanlaw.com/cases-westchester (public interest organization brought an FCA suit alleging that a county was violating its fair housing obligations; case settled for $62.5 million). TAFEF has collected several other examples of successful FCA recoveries resulting from outsider relators. *See* TAFEF, *Whistleblower Stories*, https://www.taf.org/whistleblower-stories (last visited December 15, 2020).

These outsiders use their expertise and experience in various subject matter areas to, *inter alia*, review data and other available documentation, conduct analyses, and complete thorough investigations, in order to uncover and report fraud against the Government that would otherwise go undetected. This is exactly the result that

Congress intended. *See* 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1547.

CONCLUSION

For the foregoing reasons, TAFEF respectfully urges that the Superior Court's dismissal of the SAC be reversed.

Respectfully submitted,

December 16, 2020

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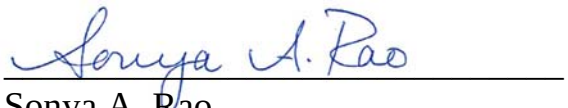
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) and Rule 17(c)(9)
of the Massachusetts Rules of Appellate Procedure

The undersigned counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Massachusetts Rule of Appellate Procedure ("Mass. R.A.P.") 20 because it: contains 5,114 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Mass. R.A.P. 20(a)(2)(D); and has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman font, at size 14 type, for both text and footnotes.

Dated: December 16, 2020



Sonya A. Rao

CERTIFICATE OF SERVICE

I, Sonya Rao, hereby certify that on this 16th day of December, 2020, I served the within Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund in Support of Plaintiff-Appellant and for Reversal of the Superior Court's Order, in *Commonwealth of Massachusetts ex rel. Johan Rosenberg v. JPMorgan Chase & Co., et al., SJC-12973*, pending in the Supreme Judicial Court of Massachusetts, by the Court's e-filing system, to counsel of record for the parties:

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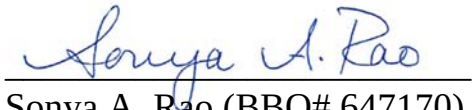

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