No. 08-304

IN THE
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, ET AL.
KAREN T. WILSON,
Respondents.

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

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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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*[*]

Amicus Curiae Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it authored this brief and that no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus curiae* represents that counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The question before the Court concerns the meaning of the term "administrative" as it is used in the phrase, "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." This phrase is part of the False Claims Act's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A). Specifically, the Court is asked to decide whether, in that context, the term "administrative" refers only to federal proceedings, or whether it refers more generally to all government proceedings, including those at the state or local level.

The term at the heart of the instant case, "administrative," is inserted between two other terms, "congressional" and "Government Accounting Office," which refer exclusively to federal proceedings. The term "administrative" was inserted in this particular clause following discussions among various Senators working on two companion pieces of legislation, the False Claims Act and the Program Fraud Civil Remedies Act. The Program Fraud Civil Remedies Act was designed to create a new set of tools through which *federal* agencies could conduct administrative investigations and hearings. There is only one plausible explanation for the insertion of the term "administrative" into that particular clause in the public disclosure provision: Congress must have intended to treat public disclosures resulting from these newly-created federal proceedings in the same manner as public disclosures resulting from the more traditional federal investigative proceedings, namely, congressional or GAO proceedings.

The insertion of the term "administrative" between two terms that refer exclusively to federal matters, at a minimum presents an ambiguity as to what Congress intended when it employed the word "administrative" in this clause. The development of the Act's public disclosure provision is discussed extensively throughout the statute's legislative history, and in order to give effect to Congress' intent, the Court must look to the legislative history and the purposes Congress sought to achieve when it enacted the provision. Although the "public disclosure" provision consists of a single sentence that has resulted in numerous disputes and lower court decisions, the purpose of the provision has remained clear – to relax the Act's prior, restrictive "government knowledge bar" and encourage more *qui tam* suits, while guarding against parasitic suits filed by opportunistic relators. In an effort to strike the correct balance between these two objectives, Congress limited application of the public disclosure bar to certain fora that would likely put the federal government – the entity with enforcement rights under the Act – on notice of fraud that impacts the public fisc. State and local reports, audits and investigations rarely put the federal government on notice of federal False Claims Act violations, and were simply not contemplated by Congress as "administrative ... report[s] ... audit[s,] or investigation[s]" within the meaning of the public disclosure bar of the False Claims Act.

If the applicability of the public disclosure bar is restricted to disclosures through various federal proceedings or the news media, it is likely to result in the federal government learning about many fraud allegations that otherwise would escape its attention. Many such cases will bring in valuable information, resulting in significant recoveries, even though the relator may lack direct and independent knowledge of the fraud, and therefore not qualify as an original source. Conversely, if the public disclosure bar is extended to state administrative proceedings, of which the federal government will rarely be aware, the federal government stands to lose valuable information about fraud upon the federal Treasury.

ARGUMENT

I. THE USE OF THE TERM "ADMINISTRATIVE" TO DESCRIBE CERTAIN REPORTS, AUDITS AND INVESTIGATIONS REFERS TO ONE OF SEVERAL TYPES OF FEDERAL REPORTS AUDITS AND INVESTIGATIONS.

The question presented in this case requires the Court to interpret the False Claims Act's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), to determine whether it encompasses administrative reports, audits, and investigations on both the state and federal level, or only on the federal level. The public disclosure provision, which has spawned many disputes in the lower courts, is set forth in a single sentence which states: "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 brining the action is an original source of the information."

Petitioners urge the Court to resolve this question by looking at the "plain meaning" of the term "administrative" as it appears in conjunction with the words "report," "audit," and "investigation." Petitioners contend that because that term is not expressly modified by the word "federal," the public disclosure provision must encompass all administrative reports, audits, and investigations, whether federal or state.

Although Congress did not use the word "federal" to modify "report," "audit," or "investigation," it did describe two federal entities, in addition to administrative agencies, that conduct such proceedings. The Petitioners seek to have the Court ignore this fact, and look only at the plain language of the individual term "administrative." But if the Court followed the suggestion of Petitioners and paid attention only to the "plain language" of the individual terms of the public disclosure provision – and if the Court applied that approach *consistently*, using it to interpret not only the specific term at issue in this case, but instead, the *whole sentence* at issue – this approach would lead to absurd results that Congress did not intend.

For example, by its plain language, the application of the public disclosure bar would be limited to criminal "*hearings*," rather than to all stages of criminal *proceedings*. By Petitioners' logic, Congress could have instead used the word "proceedings" if it intended for the provision to encompass all stages of criminal proceedings, but Congress chose not to do that. According to this logic, then, the disclosure of allegations in a criminal indictment would *not* be covered by the public disclosure bar, since an indictment is not a "hearing," but rather, a different stage of a criminal proceeding. Thus, it would be permissible for a relator simply to copy a criminal indictment from a public record and use that information as the sole basis for a *qui tam* case.

If anything is clear from the history of the False Claims Act, it is that Congress did not intend such a result when it enacted the public disclosure bar as part of the 1986 amendments. Prior to 1943, relators and their attorneys were engaging in precisely this kind of conduct (*i.e.,* copying criminal indictments and repackaging the allegations as *qui tam* cases) – a practice that the Court criticized but nonetheless found to be lawful in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The *Hess* decision led directly to the enactment of the 1943 amendment to the False Claims Act barring cases based on information that the Government already possessed. When it enacted the 1986 amendments, Congress sought to relax the jurisdictional bar against cases based on information known to the Government.[1] However, Congress surely did not want to permit the same kind of abusive conduct

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[1] *See Cook County, Illinois v. United States, ex rel. Chandler*, 538 U.S. 119, 133 (2003); *Hughes Aircraft Co. v. United States, ex rel. Schumer*, 520 U.S. 939, 946 (1997).

that it had barred in 1943. Rather, Congress still intended to bar cases that were truly parasitic, *i.e.*, cases where a relator simply copied the federal Government's allegations from a public source and parroted them back in the form of a *qui tam* case. It is not surprising, then, that when interpreting the term "hearing" in the context of the public disclosure provision, lower courts have looked beyond the term's plain meaning and held that although Congress used the narrow term "hearing," it must have intended to use the more expansive term "proceeding."[2]

In the instant case, in order properly to interpret the term "administrative" in accordance with Congress' intent, the Court should look at the

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[2] *See, e.g., United States, ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994); *United States, ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1144, 1155 (3d Cir. 1991) (holding that the term "hearing" could encompass other "proceedings").

context in which the term was used, taking into account the legislative history leading up to the enactment of the public disclosure provision, as well as the policies Congress was seeking to advance.

II. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS REFLECTS THAT CONGRESS SOUGHT TO ENCOURAGE THE FILING OF MORE *QUI TAM* SUITS, WHILE LIMITING *QUI TAM* CASES BASED UPON PUBLIC DISCLOSURES THROUGH FEDERAL SOURCES OR THE NEWS MEDIA.

Since the *qui tam* provisions of the False Claims Act were originally enacted in 1863, their primary purpose has always been to give private citizens an incentive to help the federal Government fight fraud against the federal Treasury. By offering significant financial rewards to successful *qui tam* relators, the provisions encourage private citizens to disclose information about fraud to the federal

Government, and to contribute much-needed resources to supplement the Government's own anti-fraud fighting efforts.

The Act's "public disclosure" provision, and its companion, the "original source" exception, enacted as part of the False Claims Amendments Act of 1986 ("1986 amendments"), were not designed to defeat this purpose. Instead, these provisions were enacted for the limited purpose of preventing lawsuits by relators who are truly parasitic: that is, relators who learn of fraud allegations solely from public disclosures originating with the federal Government or news media, and then try to parrot them back to the Government for a profit.

A. **The False Claims Act Prior to the 1986 Amendments**

Originally enacted in 1863 during the Civil War, the False Claims Act authorized private individuals, known as "relators," to bring a "*qui tam*" suit on behalf of the United States to redress fraud against the Government. The Act provided for double damages and a $2,000 civil penalty per false claim. A relator who successfully pursued a claim was entitled to one half of the Government's recovery. The Act did not authorize the Government to intervene in the relator's case, nor did the Act preclude *qui tam* actions based upon the source of the relator's information.[3]

During the 1940s, relators and their lawyers were engaging in the practice of copying fraud allegations from criminal indictments and, solely on the basis of that information, filing *qui tam* lawsuits. These lawsuits were truly parasitic in that the relators were taking information from the "host," the federal Government, and seeking to profit at the

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3 Act of March 2, 1863, ch. 67, 12 Stat. 696.

Government's expense, while providing nothing useful in return. In 1943, the Supreme Court upheld this unsavory practice in *Hess*, 317 U.S. at 537. Later that year, Congress amended the False Claims Act to include a "government knowledge" bar. The "government knowledge" bar strictly precluded any *qui tam* lawsuit based on evidence or information that was already in the possession of the Government, regardless of whether the *qui tam* relator had been the source of the Government's information in the first place.[4]

Following the 1943 amendment, courts construed the False Claims Act to bar *qui tam* actions that were in no sense parasitic.[5] Henceforth, the *qui tam* provisions of the False Claims Act were

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[4] Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.
[5] *See, e.g.*, *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1949); *United States v. Rippetoe*, 178 F.2d 735 (4th Cir 1949); *United States, ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States, ex rel. Lapin v. Int'l Bus. Machs. Corp.*, 490 F. Supp. 244 (D. Haw. 1980).

rarely used. This helped set the stage for Congress to reconsider the "government knowledge" bar as part of its efforts to overhaul and modernize the False Claims Act in 1986.

B. The House and Senate Bills Leading to the 1986 Amendments

The 1986 amendments originated from two parallel legislative proposals: H.R. 4827 ("the House Bill"), and S. 1562 ("the Senate Bill"). The House Bill was reported out of the House Judiciary Committee along with a Report ("the House Report") dated June 26, 1986.[6] The Senate Bill, first introduced by Sen. Charles Grassley in August 1985, was reported out of the Senate Judiciary Committee accompanied by a Report ("the Senate Report") dated July 28, 1986.[7] Although the statute eventually

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6 H.R. Rep. No. 660, 99th Cong., 2d Sess. (1986) ("H.R. Rep.").

7 *See* S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266 ("S. Rep.").

enacted by Congress was different in significant respects from both proposals, the two reports reveal the concerns that Senate and House members had with the pre-1986 Act.

A central theme throughout both reports was the need to increase the incentives for whistleblowers to file *qui tam* lawsuits. *Qui tam* lawsuits, according to both reports, would serve two important purposes: (1) to bring the Government new, inside information about fraud;[8] and (2) to supplement the Government's inadequate law enforcement resources with the enforcement efforts of private attorneys general.[9] Both the Senate Bill and the House Bill sought to repeal the existing "government knowledge" bar against certain *qui tam* suits and substituted some form of a "public

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[8] *See* S. Rep. at 2, *reprinted in* 1986 USCCAN at 5267; H.R. Rep. at 23-24.
[9] *See* S. Rep. at 7-8, *reprinted in* 1986 USCCAN at 5272-73; H.R. Rep. at 22-24.

disclosure" bar.

1. The House Bill and Report

Under the House Bill, a relator would have been barred from bringing an action when the action: "(i) is based on specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or (ii) is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media." Even if the case met those criteria, the action would not be dismissed if the Government proceeded with the action, or if the Government possessed the information on which the lawsuit was based for six months and failed to act on it.[10] Consistent with way that term is used throughout

[10] H.R. Rep. at 2-3.

the False Claims Act, the term "Government" referred to the United States Government.

In discussing this proposal, the House Report stated:

> The Committee recognizes the validity of the reasons for enactment of the 1943 amendments. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action. Therefore, H.R. 4827 contains a provision which states that a *qui tam* action which is based solely on public information, such as congressional hearings, the news media, or criminal indictments, shall be dismissed. However, if the Government had had the information for six months before the *qui tam* action was filed, the section provides that the *qui tam* suit shall not be dismissed solely because the Government has not brought the case.
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> As an additional deterrent to

> unwarranted suits, the bill also provides that when a *qui tam* suit is based solely on public information, the award available to the relator may not exceed 10%. This limitation applies only to *qui tam* cases in which the Government enters the suit.[11]

The House Report also discussed the fact that the Government often lacked the resources to pursue fraud allegations.[12] Accordingly, the House Report stated that "the Committee bill expands the role of the relator so that when the Government enters an action filed by a relator, the relator remains a party to the suit ... ."[13]

2. The Senate Bill and Report

The Senate Bill, S. 1562, also would have repealed the 1943 Government knowledge bar and replaced it with a different jurisdictional limitation

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11 *Id.* at 22-23 (emphasis added).
12 *Id.* at 23.
13 *Id.* at 24.

similar to the one in the House Bill. The Senate Bill's limitation was to be codified at 31 U.S.C. § 3730(e)(4), which would have read:

> In no event may a person bring an action under this section based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.[14]

The Senate Bill called for an award structure under which a relator would be guaranteed between 10 and 20 percent of the proceeds in cases where the Government intervened, and between 20 and 30 percent where the Government declined to

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[14] S. Rep. at 43.

intervene.[15] The Senate Bill also sought to restrict a relator's recovery to a maximum of 10 percent where the lawsuit was "based solely on specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media," with the award depending on the relator's role in advancing the case to litigation.[16]

In discussing the Senate Bill, the Senate Report echoed the concerns expressed in the House Report about the need to enhance the incentives for citizens to participate in law enforcement efforts to combat fraud. The Senate Report described a "conspiracy of silence" among employees of government contractors, noting that an employee who is aware of fraud is often faced with "the

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[15] *Id.* at 42.
[16] *Id.* at 42-43.

difficult choice of either keeping quiet" about the fraud "or risking the loss of his job."[17] The Senate Report stated that the "proposed legislation seeks ... to encourage any individual knowing of Government fraud to bring that information forward."[18] The Senate Report noted that *qui tam* suits could increase the detection of fraud by enlisting "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[19]

The Senate Report also noted that *qui tam* suits could serve another important purpose, by providing additional private resources to assist the Government in the actual prosecution of fraud cases. Noting the lack of Government resources available to fight fraud, and the frequency with which valid

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[17] *Id.* at 5, *reprinted in* 1986 USCCAN at 5270.
[18] *Id.* at 2, *reprinted in* 1986 USCCAN at 5267.
[19] *Id.* at 4, *reprinted in* 1986 USCCAN at 5269.

allegations are simply “left unaddressed at the outset” because of a scarcity of Government resources, the Senate Report concluded: “The Committee believes that the amendments in S. 1562 which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government’s fraud enforcement effort.”[20]

The Senate Report also discussed the proposed jurisdictional bar, stating:

> Subsection (d)(4) provides that a court may award up to 10 percent of an action’s proceeds to persons bringing suits based on public information. The award ranges specified in (d)(1) and (2) do not apply to *qui tam* relators whose false claims disclosures were derived solely from public hearings, reports, or the news media. New subsection (e)(4) of section 3730 prohibits a suit based solely on

[20] *Id.* at 7-8, *reprinted in* 1986 USCCAN at 5272-73.

> previous public disclosures unless the Government has failed to act within 6 months of the public disclosure. The Committee recognizes that guaranteeing monetary compensation for individuals in this category could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best. However, in the event an action of this type results in a Government recovery, subsection (d)(4) provides that the court may award up to 10 percent of the proceeds, taking into account the significance of the information and the role of the person in advancing the case to litigation. The Committee believes that a financial reward is justified in these circumstances if but for the relator's suit, the Government may not have recovered.[21]

3. The Senate Amendments

The Senate Bill that was reported out of the Judiciary Committee (the "Senate Committee Bill")

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[21] *Id.* at 28, *reprinted in* 1986 USCCAN at 5293.

never reached the floor of the Senate. Instead, on July 28, 1986, Senators Grassley, Hatch, Cohen, and Thurmond reached a compromise that resulted in changes to two pieces of legislation: S. 1562 amending the False Claims Act, and a companion statute, S. 1134, that would create a new law known as the Program Fraud Civil Remedies Act ("PFCRA").

For purposes of the instant case, the Senate compromise of July 28, 1986 is perhaps the most significant event in the legislative history. On that day, the senators modified the "public disclosure" provision, dropping the six-month waiting period and dividing the earlier version into three parts. The first part, § 3730(e)(4) (later changed to § 3730(e)(5)), consisted of the bar against *qui tam* suits based on allegations that were already the subject of a pending lawsuit in which the Government was a party. The second part, § 3730(e)(5)(A) (later changed to § 3730(e)(4)(A)), stated:

> 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, 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.

The third part, § 3730(e)(5)(B) (later changed to § 3730(e)(4)(B)), the precursor of the "original source" provision, stated:

> 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 informed the Government or the news media prior to an action filed by the

Government.[22]

Prior to the July 27 compromise, the public disclosure provision would have barred *qui tam* lawsuits "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing*, a congressional or Government Accounting Office report or hearing*, or from the news media…." (emphasis supplied). As the result of the July 27 compromise, however, the italicized language was changed to the following*: "a congressional, **administrative**, or Government Accounting Office report, hearing, **audit**, or **investigation***" (emphasis supplied).

Why was the public disclosure provision modified to include the new terms "administrative," "audit," and "investigation"? The only plausible explanation lies in the fact that the Senate

[22] *132 Cong. Rec. 17,936 (1986).*

compromise of July 27 involved not just one statute, but *two* statutes that were designed to operate in tandem: the False Claims Act and the Program Fraud Civil Remedies Act.[23] The PFCRA was a statute that would grant powerful new tools to *federal Government agencies* to conduct, among other things, *audits and investigations*. It was natural, then, for the Senators who were crafting these new tools to ensure that – for purposes of the public disclosure provision that they were writing at the very same time – any public disclosures resulting from the use of these tools would be treated the same as public disclosures from other traditional federal investigatory tools, namely, congressional or GAO reports or hearings.

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[23] *See Vermont Agency of Nat. Res. v. United States, ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[T]here is no question that the PFCRA was designed to operate in tandem with the FCA. Not only was it enacted at virtually the same time as the FCA was amended in 1986, but its scope is virtually identical to that of the FCA."

On August 11, 1986, the Senate considered and passed the Senate Bill in its modified form resulting from the July 27 compromise.[24] In a contemporaneous comment about the new public disclosure and original source provisions, Senator Grassley stated: "The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(a); that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations."[25] It is clear that when Senator Grassley refers to the "Government," he means the *federal* Government, since the term "Government" is used interchangeably with "United

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[24] 132 Cong. Rec. 20,530 (Aug. 1986).
[25] *Id.* at 20,536 (statement of Sen. Grassley).

States" throughout the text of the False Claims Act.

The modified version of the Senate Bill was put to a vote and passed by the Senate on August 11, 1986.[26]

4. The House Bill Passed on September 9, 1986

The bill reported out of the House Judiciary Committee underwent some minor modifications and then was brought to the House floor on September 9, 1986.[27] The jurisdictional bar was identical to the version reported out of the House Judiciary Committee. During the brief debate on the bill, several Representatives reiterated the theme that the amendments would strengthen the incentives for private citizens to file *qui tam* lawsuits through various means – *i.e.*, by increasing the relator's participation in such lawsuits, providing guaranteed

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[26] *Id.* at 20,537-20,542.
[27] *See id.* at 22,330-22,335.

minimum awards, and creating statutory protections against employer reprisals.[28]

The House considered and passed H.R. 4827 on September 9, 1986.[29] The House then considered S. 1562, which the Senate had passed on August 11, 1986. The House struck the text from S. 1562 and, in its place, substituted the text from H.R. 4827, which the House had just approved. The House then voted on S. 1562 as amended; S. 1562, which now incorporated verbatim the text of H.R. 4827, was passed by the House.[30]

5. The House and Senate Compromise

After the House passed S. 1562 using the text from H.R. 4827, there was an informal conference between House and Senate negotiators. According to

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[28] *See*, *e.g.*, *id.* at 22,336 (statement of Rep. Brooks); *id.* at 22,339 (statement of Rep. Berman); *id.* at 22,340 (statement of Rep. Bedell).
[29] *Id.* at 22,340.
[30] *Id.* at 22,340-22,345.

Sen. Grassley, the Senate and House negotiators "met and reconciled the differences between S. 1562 as passed by the Senate and S. 1562 as amended and passed by the House."[31]

The Senate and House made several compromises with respect to the *qui tam* provisions. Congress adopted a modified version of the House proposal under which relators would remain parties to *qui tam* lawsuits even after the Government intervened, subject to the court's ability to limit the relator's participation in certain circumstances.[32] Congress also agreed to adopt the House's award structure, under which the relator would ordinarily receive 15-25 percent of the proceeds if the Government intervened and 25-30 percent if the Government declined to intervene.[33] Also, the

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[31] *Id.* at 28,580 (statement of Sen. Grassley).
[32] *Id.* at 28,575-28,576.
[33] *Id.* at 28,576.

Senate and House agreed to adopt the Senate's limitation of 10 percent for awards to relators whose actions were based "primarily" on certain prior disclosures of information.[34]

Most importantly, the Senate and House also agreed to adopt the Senate's "public disclosure" provision, with a slight change to the definition of "original source." In the final version of the statute, an "original source" was required to disclose the information on which the suit was based to the *Government* prior to *the relator's* filing the lawsuit.[35]

Because there was no formal conference committee to reconcile the conflicting versions of the legislation, there is no conference committee report

[34] *Id.* at 28,576. The earlier House version had limited recoveries for relators whose actions were based "solely" on such disclosures. *See id.* at 22,331.

[35] *Id.* Under the earlier version that was passed by the Senate on August 11, 1986, an "original source" was required to disclose the information to the government or the news media prior to the Government's filing a lawsuit. *See id.* at 20,531.

that would explain the final bill agreed to by the House and Senate negotiators. However, Rep. Berman, the principal House author of the 1986 amendments, introduced into the Congressional Record for October 7, 1986, a statement about the *qui tam* provisions. Rep. Berman stated:

> The final bill has adopted the Senate version of who may file an action under the False Claims Act. Before the relevant information regarding fraud is publicly disclosed through various Government hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long as it is filed before the Government filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action.[36]

[36] *Id.* at 29,322 (statement of Rep. Berman).

Because the term "Government" is used interchangeably with "United States" throughout the False Claims Act, and only the *federal* Government can file an action under the Act, Rep. Berman is presumably referring only to the *federal* "Government" when he uses that term.

The Senate passed the final version of the 1986 amendments on October 3, 1986.[37] That version was enacted by the House on October 7, 1986.[38] President Reagan signed the False Claims Amendments Act of 1986 into law on October 27, 1986.[39]

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37 *Id.* at 28,575-28,580.
38 *Id.* at 29,315-29,323.
39 False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986), *codified at* 31 U.S.C. §§ 3729-3733.

C. **The 1986 Amendments were Intended to Lower the Barriers Against Qui Tam Suits while Continuing to Bar Truly Parasitic Ones**

The False Claims Amendments Act of 1986 substantially altered many aspects of the *qui tam* provisions.[40] The amended statute granted relators the right to continue to participate as party plaintiffs even though the Government had intervened in the lawsuits.[41] The new law also guaranteed that, in cases where the Government intervened, the relator would receive a minimum of 15 percent of the proceeds, and as much as 25 percent, depending on the relator's contributions to the prosecution;[42] where the Government declined to intervene, the relator was guaranteed between 25 and 30 percent of

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[40] *Id.*
[41] 31 U.S.C. § 3730(c)(1).
[42] *Id.* at § 3730(d)(1).

the proceeds.[43] The amended statute also repealed the strict bar against lawsuits based upon evidence or information already possessed by the Government. Instead, the Act prohibited cases based upon certain kinds of public disclosures of information, unless the relator was an "original source."[44]

The 1986 amendments were designed to make the Act a more useful tool for fighting fraud by, among other things, easing the jurisdictional barriers against *qui tam* suits.[45] The changes to the *qui tam* provisions reflected an effort by Congress to "establish a solid partnership between public law enforcers and private taxpayers."[46] By repealing the

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[43] *Id.* at § 3730(d)(2).
[44] *Id.* at § 3730(e)(4).
[45] *Cook County, Illinois v. United States, ex rel. Chandler*, 538 U.S. 119, 133 (2003).
[46] 132 Cong. Rec. S15036 (Oct. 3, 1986) ("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars. The expanded qui tam provisions of this bill will serve to establish a solid partnership between public law enforcers and private

"government knowledge" bar and replacing it with a "public disclosure" bar, Congress intended to prevent truly parasitic lawsuits while permitting lawsuits that were likely to bring good new information, as well as additional prosecutorial resources, to the federal Government.[47]

III. THE PUBLIC DISCLOSURE PROVISION WAS NOT INTENDED TO BAR A *QUI TAM* CASE BASED UPON THE PUBLIC DISCLOSURE OF ALLEGATIONS IN AN ADMINISTRATIVE REPORT, AUDIT, OR INVESTIGATION CONDUCTED BY A NON-FEDERAL AGENCY.

When it enacted the 1986 amendments, Congress recognized that the decision to file a *qui tam* case very often involves great personal risks to career, income, savings, family, friendship, and in

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taxpayers in the fight against fraud.") (statement of Sen. Grassley).

[47] *See United States, ex rel. S. Prawer v. Fleet Bank of Me.*, 24 F.3d 320, 324-26 (1st Cir. 1994).

some cases, even personal safety.[48] Before deciding whether to take these risks, potential *qui tam* relators and their counsel must take into consideration the possibility that their lawsuits may be dismissed because of the public disclosure bar. If the public disclosure bar is interpreted in an expansive manner so that it covers disclosures made in obscure state or local government proceedings, this will inevitably result in fewer people willing to become *qui tam* relators. This effect will be magnified if, as the majority of lower courts have incorrectly held, a lawsuit is deemed to be "based upon" any prior public disclosure of a similar allegation regardless of whether the relator knew about the public disclosure and actually derived *qui tam* claims from that disclosure.[49]

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[48] *See S.Rep.* at 5-6, *reprinted in* 1986 USCCAN at 5270-71.

[49] *See, e.g., United States ex rel. Mistick v. Housing Auth.,* 186 F.3d 376, 388 (3d Cir. 1999); *United States ex rel. Boothe v. Sun*

The legislative history demonstrates Congress' concern that, if fewer people were willing to take the risk of filing a *qui tam* suit, the federal Government would have fewer opportunities to learn about fraud against the Treasury. For that reason, Congress did *not* intend for the public disclosure provision to bar suits that were likely to contribute to the Government's knowledge about, or ability to pursue, fraud claims.[50] The bar was meant to apply to situations in which a relator's complaint was based upon the public disclosure of allegations or transactions in a *limited* set of Government proceedings or the news media, *i.e.*, circumstances where federal law enforcement officials were most likely to learn about and investigate the allegations.

Healthcare Group, Inc., 496 F.3d 1169, 1171-72 (10th Cir. 2007); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684-85 (D.C. 1997); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

[50] *See In re Natural Gas Royalties, ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 963 (10th Cir. 2009).

Congress had no reason to assume that the disclosure of fraud allegations in local government proceedings,[51] or even private lawsuits,[52] would put the federal Government on sufficient notice of the fraud allegations so that federal law enforcement officials would be likely to pursue them.

Congress could have made the public disclosure bar *generally* applicable to cases based on any kind of publicly available information. Instead, Congress chose to limit its application to disclosures in certain types of fora, *i.e.*, the kinds of disclosures that were likely to trigger a federal law enforcement investigation without any need for a *qui tam* relator.

Some have argued that "parasitic" relators are the only ones affected by an expansive interpretation of the public disclosure bar, because "true

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[51] *See, e.g., A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000).

[52] *See, e.g., United States, ex rel. Gebert v. Trans. Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001).

whistleblowers" who have first-hand knowledge of a fraud will be covered by the "original source" exception.[53] This argument twists the meaning of the term "parasite," and it also misses an important point. A "parasite" is an organism that takes something of value from a host and returns nothing of value back to the host.[54] A relator who gathers information from public, non-federal and non-news media sources and provides it to the federal Government is not a "parasite." By contrast, in this situation, a relator can offer a useful service by providing the Government with information it otherwise would not have obtained.

Congress created a two-tiered system in § 3730(e)(4), under which a *qui tam* suit is be barred

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[53] *See* Brief of *Amici Curiae* the Washington Legal Foundation and the Allied Educational Foundation in Support of Petitioners, at 16-18 (September 3, 2009).

[54] *United States, ex rel. S. Prawer v. Fleet Bank of Me.*, 24 F.3d at 327-28.

(a) only if it is based upon certain kinds of public disclosures, and (b) even then, the lawsuit may go forward if the relator is an "original source." Congress created this two-tiered system in recognition of the fact that in many instances, the Government stands to benefit from *qui tam* cases that are brought by relators who do not have "direct and independent knowledge" of the fraud scheme. Even when the relator is not an "insider" to or "close observer" of the fraud, the relator is often in a position to learn and report something that would otherwise have escaped the attention of federal law enforcement officials. Many of these cases have merit and result in the United States reaping significant financial recoveries.

For example, James Alderson was a non-insider whose *qui tam* lawsuit and exposure of healthcare fraud directly led to the return of more than $85 million to the federal Treasury. [55] Alderson was employed as the Chief Financial Officer for a small hospital in Montana. When the hospital's new management company directed Alderson to prepare two sets of Medicare cost reports – an "aggressive" report to submit for Medicare reimbursement, and a "reserve" report for submission to the company's auditors – he refused and was terminated from his job. Alderson filed a wrongful termination lawsuit against the hospital, and during the course of discovery in that case, he discovered that the Medicare fraud scheme he was asked to participate in was a widespread practice, encouraged by much larger healthcare management companies. He subsequently filed his *qui tam* suit.[56] Alderson's case proves that non-insider relators need

[55] *See United States, ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323, 1324-25 (M.D. Fla. 2001).
[56] *See id.*

not be parasites; rather, they can be essential to False Claims Act prosecutions.

It is the rare case where federal law enforcement officials will learn about fraud allegations through the public disclosure of a state or local administrative report, hearing, audit, or investigation. For that reason, a relator can provide a useful service to the Government by filing a *qui tam* case based on the public disclosure of such allegations, even though the relator may not have direct and independent knowledge of the fraud scheme. If the Department of Justice finds that a relator's allegations are not worth pursuing, then it can decline to do so. Congress intended that the Department of Justice should at least be given the opportunity to make that decision.

CONCLUSION

For the reasons set forth herein, as well as any others that appear just to the Court, *amicus curiae* respectfully asks this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit, and to hold that the “public disclosure” provision does not encompass public disclosures in state or local administrative reports, hearings, audits, or investigations.

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