NO. 10-188

IN THE
# Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,

*Petitioner,*

v.

UNITED STATES OF AMERICA *ex rel.* DANIEL KIRK,

*Respondent.*

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

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

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* Taxpayers Against Fraud Education Fund ("TAFEF") 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*,[2] and has provided testimony to Congress about ways to improve the Act. TAFEF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAFEF 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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[1]All parties have consented to the filing of this brief. Counsel for *amicus curiae* represent that they authored this brief and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission.

[2]Taxpayers Against Fraud Education Fund has submitted briefs in this Court as *Amicus Curiae* in several cases in recent years, including: Brief for *Amicus Curiae*, *Rockwell Int'l Corp., et al. v. United States, et al.*, No. 05-1272 (U.S. Nov. 20, 2006); Brief of *Amicus Curiae*, *Allison Engine Co., Inc., et al. v. United States ex rel. Sanders*, No. 07-214 (U.S. Jan. 22, 2008); Brief of *Amicus Curiae*, *United States ex rel. Eisenstein v. City of New York, et al.*, No. 08-660 (Mar. 4, 2008); Brief of *Amicus Curiae*, *Graham County Soil & Water Conservation Dist., et al. v. United States ex rel. Wilson*, No. 08-304 (Oct. 26, 2009).

In this instance, *amicus curiae* TAFEF advocates against an expansive interpretation of the Act's public disclosure bar – a jurisdictional bar codified at 31 U.S.C. §3730(e)(4), as amended in 1986. TAFEF urges the Court to interpret the public disclosure bar consistent with its clear statutory purpose: to preclude only truly parasitic *qui tam* actions based upon public disclosure of the alleged fraud. Congress specified an exclusive list of public fora by which the jurisdictional bar may be triggered, intending to prevent opportunistic would-be litigants from riding the investigatory coattails of the government, the news media, or other civil litigants, unless they are an original source of information supporting the action.

When relators and their counsel obtain underlying documents and information from an agency during their pre-filing investigations, they fulfill their vital role envisioned by Congress in 1986 to root out fraud against the federal fisc. An expansive reading of the jurisdictional bar would preclude *qui tam* enforcement every time a federal, state or local government agency makes a search for agency records or discloses such records pursuant to the Freedom of Information Act ("FOIA") or other request by a single member of the public. This would be true even in cases where, as here, no governmental body or news agency conducted an inquiry into fraud upon the federal fisc alleged by the relator. Congress has recognized the importance of FOIA, stating that its use has led to the disclosure of waste, fraud, abuse and wrongdoing in the federal government. Relators and their counsel

who use FOIA during pre-filing investigations of possible *qui tam* actions are performing the exact role Congress envisioned for them in the passage of both FOIA and the False Claims Act.

Agency responses to a request for production of documents pursuant to FOIA or other public records laws are not the kind of disclosures that trigger the public disclosure bar. While an agency will look for and produce documents pursuant to FOIA requests, the agency does not engage in a substantive review or analysis of the requested records, investigate the underlying conduct reflected in the records, synthesize information, or report on allegations or substantive findings. Thus, agency responses to FOIA requests do not represent governmental work product in the nature of congressional, administrative and GAO reports, audits, hearings and investigations, and thus do not automatically trigger the jurisdictional bar of the False Claims Act.

## STATUTORY PROVISION INVOLVED

31 U.S.C. §3730(e)(4):

> (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 [General] 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.

## SUMMARY OF ARGUMENT

Schindler and its *amici* suggest this Court take an expansive view of the jurisdictional bar, and hold that *qui tam* actions are foreclosed any time a government entity searches for and produces documents in its possession. In their view, an agency's response under FOIA even to one individual constitutes a "public disclosure" in a statutorily specified forum. This is so even where – as is true here – there was no government effort to investigate possible fraud or wrongdoing. Contrary to that view, Congress did not intend to bar relators from using FOIA or other public disclosure laws during pre-filing investigations to assist in the prosecution of *qui tam* actions.

An expansive view of the bar could preclude a *qui tam* action any time there was a request for documents in the government's possession, a return to something akin to the 1943 law and the government knowledge bar. If Schindler's view is adopted, then the scope of the bar would practically encompass, or even exceed, the 1943 "government knowledge" standard. A request for disclosure of documents from a state or local government would, under that view, also result in an "administrative ... report ... or investigation" under §3730(e)(4), even though no federal, state or local entity had ever inquired into a fraud. The "federal government knowledge" bar would be replaced by one that is invoked any time a federal, state or local entity

searches for documents and reports the results of those searches to a private citizen.

Although a non-federal agency may be unlikely to publicly disclose an investigation or report of its own fraud as a way of inoculating itself against *qui tam* enforcement, an expansive view of the bar here would permit a scenario much worse. Any entity receiving federal funds would be able to escape *qui tam* jurisdiction by simply *requesting* public records of their dealings with the government. Any records obtained through FOIA would not be further disclosed to the general public. Thus, by merely causing a search for documents, and sitting on the results, private and public entities would be able to evade the Act without incurring any risk of self-exposure.

Schindler's interpretation also betrays the plain meaning of the text Congress enacted into law. Section 3730(e)(4) specified that the triggering public disclosure must fall within an enumerated list of public fora. In *Graham County*, this Court expressly noted the specification of "report, audit and investigation" was intended to limit to specific contexts the circumstances where an administrative agency's disclosure would trigger the bar. Yet under Schindler's proposed rule, every search for and production of records by an agency would be not just a disclosure, but also an administrative "investigation" and "report" as those terms are used in §3730(e)(4). In other words, every disclosure would be both a disclosure and an investigation and a report. The limiting words of the Act setting forth an exclusive list of contexts for the

bar's invocation by an agency disclosure would be ignored. Contrary to that view, Congress could not have intended for the public disclosure bar to be triggered every time there was a disclosure of information and records in a federal, state, or local administrative file.

In the Second Circuit below, the court correctly interprets the terms "report" and "investigation" in a manner consistent with the text, structure and context of the Act. "Report" and "investigation" cannot be interpreted in isolation; those terms must be read in the context in which they are used, and ike the other enumerated terms in the public disclosure bar, "report" and "investigation" suggest that someone has engaged in some activity involving the analysis or synthesis of information. As the court below found, it "strains the natural meaning of the statute to construe the terms 'report' and 'investigation' ... [to] include any and all materials produced in response to a FOIA request." An expansive view would transform the mere search for and disclosure of government documents into the "one type of context" where a government disclosure can trigger the bar, inconsistent with the meaning of the neighboring text. Disclosure of a public record is merely that, a disclosure; the mere fact that a public record has been disclosed does not automatically transform the record into an administrative report and investigation, consistent with the meaning of the words used in §3730(e)(4).

## ARGUMENT

I. Schindler's Expansive View of the Jurisdictional Bar Fails To Give the Terms "Investigation" and "Report" Their Natural Meaning as Used in the Context of §3730(e)(4)

This case involves allegations that Petitioner Schindler Elevator Corporation knowingly provided false reports and false certifications of statutory compliance to wrongfully procure federal contract funds, in violation of the False Claims Act, 31 U.S.C. §3729(a). Relator and respondent Kirk brought this action under the *qui tam* provisions of the False Claims Act, §3730(b), seeking to recover damages and penalties on behalf of the federal government for Schindler's alleged violations. During his pre-filing investigation of his potential False Claims Act suit, Kirk used FOIA to obtain underlying supporting documentation and information from the Department of Labor (DOL). Kirk's *qui tam* action was based, in part, on the underlying records and information disclosed by the agency.

Prior to Kirk's *qui tam* suit, no agency had conducted an inquiry into Schindler's compliance with federal requirements or the veracity of its reports. No criminal or civil hearing had inquired into its conduct. And no news media had publicly disclosed allegations regarding its claims for federal funds. Kirk himself, based upon his own suspicions, investigated claims that Schindler had violated the False Claims Act prior to filing suit. As part of his investigation, his wife made several requests under FOIA to obtain

underlying documents – Schindler's VETS-100 reports. "Kirk became suspicious, based on his own experience as a Vietnam veteran employed by Schindler, that Schindler was not in compliance ... To confirm this suspicion, however, he needed copies of Schindler's VETS-100 reports, and the readiest lawful means through which he could obtain them was a FOIA request. Once he had received copies of the existing reports, and learned that no reports had been filed for certain years, he was able to put the pieces of his lawsuit together." *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 110 (2nd Cir. 2010).

In responding to the Kirks' FOIA request, DOL disclosed to the Kirks some of Schindler's VETS-100 reports and that it could not find other such reports. *Id.* at 101. At no time prior to the filing of Kirk's *qui tam* action – including in its response to the FOIA request – did the agency investigate, audit or otherwise issue any report on Schindler's compliance. DOL conducted no analysis or synthesis of information contained in the letters or reports, made no substantive inspection of the content of those records, and issued no work product reflecting any government analysis or consideration. SA-100, 106; Res. Br., at 57.

As the Second Circuit noted, Kirk's use of FOIA during his pre-filing investigation was not exceptional. For instance, in *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006), a relator alleged that false statements were made to the National Institutes of Health to secure

federal funds in violation of the Act. Like Kirk, prior to filing suit, relator Haight investigated her own suspicions, used FOIA to obtain underlying documentation and did not learn of the fraud through any investigatory work product of NIH. Also like this case, prior to the time relator Haight filed action, no government agency had conducted any investigation or inquiry – publicly disclosed or not – into her allegations, nor had those allegations been publicly disclosed otherwise. The extent of the administrative action in *Haight* was *de minimus*, as the FOIA response she received only alerted her to the location of the documents relating to her fraud allegations. Far from putting any work product into those documents, in this instance the FOIA response did not even involve any duplication. *Haight*, 445 F.3d at 1155.

Neither this case nor Haight, then, involved a relator who used FOIA to obtain a pre-existing governmental report, audit, hearing or investigation that disclosed any governmental inquiry into the matters alleged to be fraudulent. No such government work product even existed. In both cases, documents disclosed through FOIA were the raw materials necessary for the investigation and pleading of the relators' respective *qui tam* actions.

Petitioner Schindler and its *amici* advocate for an expansive view of the False Claims Act's public disclosure bar, in which every response by a governmental agency to a private request for production of public documents is a public disclosure in at least one of the specified fora listed in

§3730(e)(4)(A). This view assumes that an agency's search for requested documents is always an "administrative investigation" and that an agency's disclosure of records and the results of its search to the requesting individual is always an "administrative report" triggering the bar. Schindler's proposed view is incorrect.

*Amicus curiae* agree with the Second Circuit that "it strains the natural meaning of the [False Claims Act] to construe" the terms administrative "report" and "investigation" "so that they include any and all materials produced in response to a FOIA request." *Kirk*, 601 F.3d at 107. "In this context, the term "report" most readily bears a narrower meaning than simply 'something that gives information.'" *Id.* (*quoting United States ex rel. Ondis v. City of Woonsocket,* 587 F.3d 49, 56 (1st Cir. 2009) (citing Webster's Third New Int'l Dict. 1925 (2002). The Petitioner's suggested interpretation of administrative "report" expands the type of governmental activity, or the context for agency disclosure, contemplated in §3730(e)(4), to the same contours as "disclosure." This interpretation swallows whole the intent to specify a subclass of government work product and processes of disclosure. As the Second Circuit stated, the term "report," as used in the public disclosure bar,

> [c]onnotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a "hearing" or "audit." It does not naturally extend to

> cover the mechanistic production of documents in response to a FOIA request made by a member of the public. Similarly, the term "investigation," in the context of the statute, must be construed more narrowly than simply a "detailed examination" or "search." Instead, an "investigation" here implies a more focused and sustained inquiry directed toward a government end – for example, uncovering possible noncompliance or assembling information relevant to a problem of particular concern to the government.

*Kirk*, 601 F.3d at 107 (internal citation omitted).

Both the majority and dissenting opinions in *Graham County* appear to support the Second Circuit's use of the *noscitur a sociis* canon, when determining the meaning of the words used in the public disclosure bar provision. *Kirk*, 601 F.3d at 107 n.6. As pointed out by Justice Sotomayor, both opinions invoked the canon when looking to the shared core of meaning for "audit, report and investigation" to conclude that "administrative" refers to a governmental entity. *See Graham County*, 130 S.Ct. at 1412 (Sotomayor, dissenting). This case is thus more like the situation in *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)), where the terms "exploration, discovery, or prospecting" shared a core connotation to describe income-producing activity in the oil and gas and mining industries. *See Graham County*, 130 S.Ct. at

1403 n.7. Indeed, the majority in *Graham County* specifically relied upon the shared core of meaning for "report, audit or investigation" in stating that these terms limited the "one type of context" in which a disclosure by an administrative agency could trigger the jurisdictional bar. *Graham County*,130 S.Ct. at 1410.

Viewing the terms "report" and "investigation" in the context of the entire jurisdictional bar – especially in light of the structure and historical context of the False Claims Act – it becomes apparent that DOL did not make a public disclosure to the Kirks in any administrative report or investigation. Instead, the agency merely produced the reports that Schindler was required to submit, and informed the Kirks as to which ones were missing. There was no substantive review of the materials or any attempt to inquire into Schindler's compliance. Similarly, in *Haight*, NIH did not produce a written product at all in response to the FOIA request. In both cases – and in many other instances where relators use FOIA during pre-filing investigation of potential False Claims Act violations – the investigatory efforts of the relator helped identify the fraud. Petitioner's proposed expansive interpretation of administrative "report" and "investigation" would thwart the efforts of meritorious relators to file comprehensive *qui tam* complaints.

Petitioner's claim that the public disclosure bar was intended to promote *qui tam* actions only by relators with direct and independent knowledge of the fraud runs contrary to the true statutory purpose of

§3730(e)(4). That statutory bar is intended only to prohibit parasitic *qui tam* actions, and to create an exception for relators who would otherwise be parasitic but who made a meaningful contribution to the government's recovery. It is in §3730(d) that Congress offered graduated incentives for persons with knowledge to come forward; it is in the provisions of the public disclosure bar codified at §3730(e)(4) that Congress intended to deal with the problems of parasitic *qui tam* actions.

Contrary to Petitioner's assertion, there is no stand-alone requirement that relators enforcing the False Claims Act's *qui tam* provisions have direct and independent knowledge of the information of the fraud. The requirement of "original source" status does not arise unless all of the parasitic elements of *Hess* are present. As the text of §3730(e)(4) makes clear, the requirement that a relator have "direct and independent" information supportive of the action only comes into play after there has been a determination that the action is based upon the public disclosure of the allegations in one of the statutorily specified fora. Absent the parasitic scenario, a relator's knowledge of information going into the action – beyond that required to satisfy federal pleading requirements – is of no moment.

While it is true that Congress, in the False Claims Act as a whole, struck a balance between rooting out fraud with effective qui tam enforcement and prohibiting recovery on parasitic lawsuits, the particular provisions of §3730(e)(4) have to do

exclusively with the latter. Section 3730(d), which addresses the relator's share of the government's recovery, contains the provisions of the False Claims Act that are designed to encourage individuals to come forward with knowledge of potential fraud and seek qui tam enforcement. The express terms of this provision provide a graduating set of rewards based upon the extent of the relator's knowledge of the fraud and the extent to which the action is based on prior public disclosures. *See generally* Joel D. Hesch, Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar," 1 Liberty U. L. Rev. 111 (2006), at 112-117, 140-152 (explaining the significance of the Act's "graduated knowledge" structure). Simply stated, the public disclosure bar was designed to preclude parasitic relators from filing *qui tam* actions, and relator Kirk's use of FOIA to obtain raw documents in support of his investigation of Schindler's alleged fraud was not parasitic at all. Relators like Kirk should be encouraged to thoroughly investigate their suspicions before filing *qui tam* suits, and not barred from assisting the government in combating and prosecuting fraud.

## II. Schindler's Expansive View Ignores Congress' Specified Exclusive List of Public Fora Limiting to Specific contexts the Agency Disclosures that Trigger the Bar

Section 3730(e)(4) specifies that the triggering public disclosure must fall within an exclusive list of specified public fora: in a criminal, civil, or administrative hearing; in a congressional,

administrative, or GAO report, hearing, audit, or investigation; or from the news media. There is no disagreement that the specified public fora in §3730(e)(4) is an "exclusive list." *Kirk*, 601 F.3d at 104 ("Section 3730(e)(4)(A) furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply").

After this Court's decision in *Graham County Soil & Water Conservation District v. United States*, there also can be no disagreement that specification of "report, audit or investigation" as this exclusive list was intended by Congress as a limit on the types of agency disclosures that would trigger the bar to particular contexts. *See Graham County Soil & Water Conservation District v. United States*, 130 S.Ct. 1396, 1410 (2010) ("Today's ruling merely confirms that disclosures made in one type of context – a state or local report, audit, or investigation – may trigger the public disclosure bar"). Of the contexts in which an administrative entity could make a public disclosure of allegations or transactions, the "one type of context" where an agency disclosure triggers the bar is when there has been an administrative "report, audit, hearing or investigation."

Schindler's proposed rule would turn every search for and disclosure of records by an agency into the one type of government activity intended by Congress to preclude *qui tam* actions. Such a view ignores the clear directive of the statute, recognized by this Court in *Graham County*, that only a subclass of agency disclosures in one type of context, namely

agency reports, audits and investigations, triggers the bar. That view ignores the requirement that courts give meaning to the plain terms of the statute.

If every disclosure by an administrative agency of a document in its possession – without regard to the nature of that document – constitutes a "public disclosure in an administrative investigation and report," then the specification of a subclass of agency disclosures would be unnecessary. If Congress intended every agency disclosure of documents in its possession to be an "administrative report," then §3730(e)(4)(A) would have a different look. Rather than reading, in pertinent part, that a *qui tam* action is barred if it is "based upon the public disclosure ... in a congressional, administrative or GAO report, audit, hearing or investigation" the statute would bar actions "based upon a disclosure of documents or evidence in the possession of a congressional, administrative or GAO agency." Specification of the limiting fora would be superfluous and would be omitted from the text. Certainly, Congress intended to narrow the subclass of barred *qui tam* actions by specifying in the statute an exclusive list of sources for public disclosure. It could not have intended that the search for and disclosure of government records alone was equivalent to the performance of an administrative investigation and report, as those terms are used in the jurisdictional bar.

An expansive interpretation of §3730(e)(4) would clearly undermine the primary purpose of Congress in 1986 to increase *qui tam* investigation and

enforcement under the Act. It certainly did not express any intent to forbid relators from relying on FOIA in efforts to enforce the law's provisions. Indeed, in the stated "Findings and Purpose" of the 1996 FOIA amendment – coming 10 years after the False Claims Act amendments – Congress found "the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996). No reason exists to exclude this valuable tool from efforts by relators to investigate *qui tam* actions and enforce the False Claims Act.

Permitting *qui tam* claims to go forward based on otherwise non-public information obtained through FOIA has the "happy effect of encouraging private citizens with suspicions of fraud to take the most expeditious route toward uncovering information related to that fraud and hastening recovery for the government." *Haight*, 445 F.3d at 1155 n.5. Consistent with the purposes of both FOIA and the False Claims Act, relators and their counsel often need to rely upon FOIA and other avenues to access public records during a pre-filing investigation. "[H]olding that a FOIA response is necessarily a 'report' or 'investigation' would deter individuals who suspect fraud from investigating it. FOIA requests are one of the simplest vehicles by which interested citizens can uncover possible fraud against the government." *Id.*

With respect to pre-filing investigations, to proceed in court relators and their counsel must satisfy

the pleading requirements of Rules 8, 9(b) and 11 of the Federal Rules of Civil Procedure. Although some already possess information and evidence necessary to meet these pleading requirements with little additional pre-filing investigation, relators who suspect fraud often will turn to FOIA and state public records acts to obtain the underlying raw materials of their investigations. As noted supra, at page 13, the False Claims Act does not require relators to have direct and independent knowledge of new or inside information in order to seek *qui tam* enforcement of the law. By the time an action is filed, however, per Rule 8, relators and their counsel must be able to plead a concise statement of facts establishing entitlement to relief under the Act. In accordance with Rule 9(b), they must also plead matters of fraud with particularity. And pursuant to Rule 11, they must certify that their factual allegations and legal theories are or will be based upon evidentiary support and existing law, after an inquiry reasonable under the circumstances

An expansive view would discourage relators from using FOIA during pre-filing investigations, and might even cause them to forego the investigation of suspected fraud all together. Facing the requirements of Rules 8, 9(b) and 11, and the prospect of an expansive application of the jurisdictional bar, relators would limit their focus on only that fraud which could be investigated without review of government records, which is not what Congress intended when it created the public disclosure bar in 1986. As the Ninth Circuit observed, "prohibiting *qui tam* relators from basing their allegations on any information obtained in a

FOIA response would damage the fraud-detection purpose of the FCA while failing to serve its twin goal of preventing opportunism." *Haight* 445 F.3d at 1155; *see also Kirk*, 601 F.3d at 109 ("Congress' avowed goal was, generally, to 'encourage more private enforcement' of the FCA through expansion of its *qui tam* provisions, and, more specifically, to 'correct[] restrictive interpretations of the act's ... qui tam jurisdiction'") (internal citations omitted).

III. Schindler's Expansive View of the Jurisdictional Bar Conflicts With the Manifest Congressional Purpose to Expand *Qui Tam* Enforcement Through the 1986 Amendments

While Petitioner advocates for an unworkable, expansive view of the public disclosure bar, the Second Circuit correctly joined the Ninth Circuit and adopted a more balanced, moderate view, holding that a response to a FOIA request by a private party does not constitute a public disclosure triggering the bar, unless the documents themselves are a product of governmental processes exclusively listed in §3730(e)(4)(A). This view understands that an agency's search for and production of records – in and of itself – does not involve the investigatory processes or work product generated in the one limited context of the bar. The view permits relators to use FOIA during pre-filing investigations to obtain necessary documents and information on potential fraud.

Moreover, this moderate view is consistent with Congress' intent to abolish the "government knowledge bar" – a provision that preceded the public disclosure

bar and prohibited relators from filing *qui tam* suits that merely restated information that was already in the government's possession.

The False Claims Act, known as "Lincoln's Law," was originally passed in 1863 during the Civil War to help recover government funds lost through fraud and waste.[3] In its initial form, the law contained *qui tam* provisions authorizing private persons to enforce the statute's proscriptions, without limitation as to who could serve as a relator. The Act was based on the theory that providing to "a confederate a strong temptation to betray his coconspirator," would produce valuable information, but the scope of persons who could serve as relators was "not confined to that class." Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863).[4] Eventually, a concern rose among the Attorney General and lower federal courts about would-be

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[3]*See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"), *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-97 (11th Cir. 1991) (recounting FCA history); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354 (D. Mass. 1988) (same); H.R. Rep. No. 99-660, at 17 (1986); S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

[4]The phrase *qui tam*" is a shortened version of the Latin phrase "qui tam pro domino rege, quam pro se ipso in hac parte sequitur," meaning "who prosecutes this suit as well for the king, as for himself." *See United States ex rel. Garibaldi*, 21 F. Supp. 2d 607, 609 (E.D. La. 1998) (*citing* 2 William Blackstone, *Commentaries* 161), *rev'd on other grounds* 244 F.3d 486 (5th Cir. 2001).

relators who – acting only as parasites – "sued upon information copied from government files and indictments." *See Williams*, 931 F.2d at 1497; *Minnesota Ass'n*, 276 F.3d at 1041; *LaValley*, 707 F. Supp. at 1354.

This issue came before the Court in 1943, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). There, the federal government had already investigated a defendant for fraudulent activity and had made public its findings by filing a criminal indictment in the court files. Relator Marcus merely copied that criminal indictment and filed it as his own identical *qui tam* action under the False Claims Act. In *Hess*, the government sought to persuade this Court that the False Claims Act did not authorize Hess' purely "parasitic" suit. The Court, however, viewing the issue as a straightforward question of statutory construction, disagreed with the government, noting that the False Claims Act contained "no words of exception or qualification such as we are asked to find." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). The Court also rejected the Government's argument that allowing such suits was contrary to the purposes of the Act. The Court observed that even if the relator "contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed. The suit results in a net recovery for the government of … three times as much as fines imposed in the criminal proceedings." *Id.* at 545.

Following *Hess*, Congress immediately amended the False Claims Act. The 1943 amendments added a jurisdictional bar for the first time, formerly codified at 31 U.S.C. §232(C), precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." This "government knowledge bar," precluded *qui tam* enforcement on the basis of documents and information in the government's files. Courts interpreted the 1943 bar to apply whenever "the evidence and information in possession of the United States ... was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978).

The 1943 amendment was worded broadly, foreclosing important *qui tam* enforcement provisions without regard to who in the government bureaucracy had the information, whether the information was being processed, or whether the government was taking any efforts to recover from the fraud, since even when the government was in possession of such information, officials could determine, for lack of resources or political will, not to seek remedies. Furthermore, courts applying the 1943 law routinely barred *qui tam* actions based on information known to the government, even when it was the relator who had brought the information to the government's attention.

For example, in the seminal case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984), the Seventh Circuit reviewed the legislative history of the 1943 amendments in detail, rejecting the State of Wisconsin's request for an exemption from the "government knowledge" bar. Wisconsin had already investigated and convicted the defendant of Medicaid fraud, and pursuant to regulations, had reported information supporting the fraud to the federal government. The court noted that, while a draft of the Senate bill for the 1943 amendment would have permitted a qui tam action despite government knowledge when the relator was an original source of the information, it also noted that the House version would have abolished qui tam actions all together. Because the final compromise in the 1943 amendment retained *qui tam* enforcement, enacted the government knowledge bar and omitted any exception for an original source, the Seventh Circuit in *Dean* concluded that Wisconsin could not maintain its *qui tam* action. The court noted that any exemption should be obtained from Congress. *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1106 (7th Cir. 1984).

Congress responded in 1986, and in the midst of increasing concern over fraud, the False Claims Act was overhauled once again, "to make the FCA a 'more useful tool against fraud in modern times.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 99-345, p. 2 (1986)). In the 1986 version of the Act, Congress sought to overturn the federal courts' "severely restrictive

interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *see also Graham County* 130 S.Ct. at 1409 ("We do not doubt that Congress passed the 1986 amendments to the FCA 'to strengthen the Government's hand in fighting false claims,' and 'to encourage more private enforcement suits,'") (citations omitted).

Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law that the *qui tam* provisions were designed to assist the government only when it was not in possession of the information supporting the claim of fraud. *See Graham County*, 130 S.Ct. at 1410 (because the statutory touchstone is whether the allegations of fraud have been publicly disclosed in a specified forum, whether the information is likely to come to the attention of, or into the possession of, the government is not the right question).

Through the 1986 amendments, Congress also dispensed with the idea that, in order to be a non-parasitic relator, the *qui tam* plaintiff must bring forth new or inside information of the fraud. "By replacing the Government knowledge bar with the current text of § 3730(e)(4)(A) and including an exception for 'original source[s],' Congress 'allowed private parties to sue even based on information already in the Government's possession.'" *Graham County*, 130 S.Ct. at 1415 (Sotomayor, J., dissenting) (*quoting Cook County*, 538 U.S. at 133).

[I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability

"to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." *See, e.g. United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (internal citation omitted), vacated on other grounds, 520 U.S. 939 (1997). The 1986 amendments also reflected Congress' recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct. *See id.*

Congress enacted the precise terms of §3730(e)(4) to narrow the subclass of excluded *qui tam* actions to include only those that were truly "parasitic" like the case of *Hess*, where the relator learned of the fraud through the public disclosure of the government's own allegations in a criminal indictment following the government's own investigation into the defendant's conduct. As this Court noted in *Graham County*:

> Congress apparently concluded that a total bar on qui tam actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress replaced it with the public disclosure bar in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in Hess.

*Graham County*, 130 S.Ct. at 1407.

That Congress had *Hess* in mind when it amended the bar in 1986 is made clear by the fact that each of the four elements in *Hess* was made an express requirement of the 1986 version of the jurisdictional bar:

(1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.

(2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.

(3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims, and not just information and evidence upon which the allegations are based; as occurred in *Hess* when the information in the indictment expressly stated that the defendant had engaged in fraud.

(4) The medium of the disclosure must be one of the specified public fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

Congress's purpose in amending the public disclosure bar – at least with respect to the issue here – is thus readily evident. The 1986 amendments were designed to eliminate the government knowledge defense and to narrow the class of excluded *qui tam* actions to those situations where opportunistic relators ride the investigatory coattails of the government's own processes. Congress chose the precise text of

§3730(e)(4) to parallel the circumstances in *Hess*, and it created an express exception based perfectly on the parallels of *Wisconsin v. Dean* (disclosure of direct and independent information by the relator prior to suit).

The expansive view advocated by the Petitioner would return the False Claims Act's *qui tam* provisions to the old "government knowledge bar," as it would create a framework within which all government agencies' responses to FOIA requests would automatically be deemed public disclosures that would bar relators from filing *qui tam* actions, regardless of the nature of the information (or lack thereof) contained in the agencies' responses. Congress has already explicitly rejected that standard.

Indeed, in light of *Graham County*, an expansive reading of the public disclosure bar would even exceed the 1943 "government knowledge" standard, since any request for the disclosure of documents made to any state or local administrative government would result in an "administrative ... report ... or investigation" under §3730(e)(4). This would be so even though no federal, state or local entity ever made any inquiry in to the substance of the alleged fraud. The 1943 bar applied when information was in the possession of the federal government – yet the Petitioner's proposed more expansive rule would invoke the bar based on the mere search for records by a local agency.

Adoption of an expansive view of the jurisdictional bar would also undermine Congress' intentions by permitting any private or government entity to inoculate itself against *qui tam* enforcement

by setting in motion a request for the private disclosure of raw documents. In *Graham County*, this Court found the concern over local governments insulating themselves from *qui tam* liability through careful "low level" disclosures to rest on "rather strained speculation," since the effort would require a public self-disclosure of fraud. *Graham County*, 130 S.Ct. at 1410 ("it is unlikely that an agency trying to cover up its fraud would reveal the requisite 'allegations or transactions' underlying the fraud in a public document") (quoting *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006)). In this case, though, the concern issue is not public self-reporting of fraud; instead, the worry is that potential defendants could escape liability by simply making a request for documents from an agency under FOIA or other state law. Under an expansive view of the public disclosure bar, courts would be deprived of jurisdiction over a relator's claims even when there was no governmental investigation into fraud – as is the cases in *Kirk* and *Haight*.

Moreover, if a disclosure to one individual under FOIA is considered a "public disclosure," then application of an expansive bar would be unworkable. As interpreted by some lower courts, a relator need not even know about a "public disclosure" for his or her *qui tam* action to be "based upon" it. *See United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr., University*, 161 F.3d 533, 538-40 (9th Cir. 1998). Thus, if the disclosure of records pursuant to FOIA to one person always constitutes a public disclosure in a specified forum, *qui tam* actions would be barred by the

single production of records to people who might never publicize them to anyone else. Indeed, under an expansive view, a potential private or government defendant could secure protection from *qui tam* litigation themselves by processing public records requests for raw documentation of their own conduct. Such conduct would not result in the public self-reporting of fraud; it would be the private search for records in an agency's possession. Any records produced could be kept from publication. While others may well have "access" to the same records through FOIA, such access to documents and information in the government's files cannot – after the 1986 amendments – be a basis for excluding *qui tam* actions as parasitic.

As Schindler acknowledges (Pet.'s Br. at 22), citing *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000), when interpreting a statute, this Court's "obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result." In amending the False Claims Act in 1986, Congress sought to expand, not restrict, *qui tam* enforcement. Schindler urges an overly expansive view of the public disclosure bar which, if adopted, would have the opposite effect. In "interpreting the jurisdictional bar," the Court should "'look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.'" *Haight*, 445 F.3d at 1153 (citations omitted). Construing the language in light of its text, object and policy, the evident purpose behind the 1986 amendments was to preclude truly parasitic actions where would-be relators attempt to

ride the investigatory coattails of a governmental process or the news media. Congress would have no purpose served, and many defeated, by legislating that an agency's mere response under FOIA triggers the bar.

In *Graham County*, this Court found "no 'evident legislative purpose' to guide [its] resolution of the discrete issue that confront[ed]" it in the same subsection of the Act. 130 S. Ct. at 1406-07. *Graham County* answered whether an administrative agency under §3730(e)(4) must be federal, a discrete issue that is distinct from the one presented here. The clear purpose of Congress in amending the Act in 1986 was to remove the government knowledge bar and replace it with one that excluded only truly parasitic actions, as defined by the circumstances presented in *Hess*. While such purposes did not inform on whether "administrative" meant exclusively federal, they control the interpretation of the words "report" and "investigation" as those terms are used in §3730(e)(4).

There is a crucial distinction between the two issues of statutory construction. In *Graham County*, the question was whether the agency conducting an administrative effort leading to the public disclosure of alleged fraud must be federal to activate the Act's jurisdictional bar. This Court found these purposes had no bearing on the issue of whether states and local agencies were included. Here, however, it is not the character of the governmental entity at issue, but the nature of the administrative effort required to trigger the bar. On that distinct issue, there is a palpable

overriding purpose: to limit the bar to purely parasitic lawsuits, where the relator rides the investigatory coattails of the government or news media. The 1986 Congress – reacting to the scope of the 1943 version of the bar, which itself was a reaction to the circumstances of *Hess* – specified an exclusive list of public fora in which public disclosures would bar *qui tam* actions. Each of the specified governmental sources that could trigger the bar involve official work-product: investigations, hearings, audits and reports. All of these sources are of "the one type of context" that could lead to public allegation of fraud in a manner that would trip the bar. Congress clearly intended to define the parasitic *qui tam* relator as one whose action under the False Claims Act was based upon public disclosure of that official work product. Petitioner's proposed view is at odds with Congressional intent, and should not be adopted by this Court.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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