No. 20-1063

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, EX REL. AZAM RAHIMI, ET AL.,
Relator-Appellant

v.

RITE AID CORPORATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan
Hon. Stephen J. Murphy III, Case No. 2:11-cv-11940-SJM-MAR

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

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W. – Suite 501
Washington, DC 20036
Tel: (202) 296-4826
Fax: (202) 296-4838
jdemar@taf.org

Frederick M. Morgan, Jr.
MORGAN VERKAMP, LLC
35 East 7th Street - Suite 600
Cincinnati, Ohio 45202
Tel: (513) 651-4400
Fax: (513) 651-4405
rmorgan@morganverkamp.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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Pursuant to Rule 29 of the Rules of this Court, Taxpayers Against Fraud Education Fund respectfully submits this brief as *amicus curiae* in support of Appellant, Azam Rahimi. Taxpayers Against Fraud Education Fund supports the Appellant for the reasons set forth below.[1]

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships made possible by the False Claims Act and other federal and state statutes.

TAFEF is committed to the development and preservation of effective anti-fraud legislation. 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 *amicus curiae*, and has provided testimony to Congress about ways to improve the False Claims Act. TAFEF has a strong interest in ensuring proper interpretation and application of the False Claims Act. TAFEF is supported by whistleblowers

[1] No party's counsel authored this brief in whole or in part, and no person other than TAFEF, its members, and its counsel contributed money intended to fund the preparation or submission of this brief. Counsel for Rite Aid has not responded to the request for permission to file as of filing of this brief. All other parties have given consent to file this brief.

and their counsel, by membership dues and fees, and by private donations. TAFEF is the § 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

B. The Importance of this Litigation

Interpretation of the False Claims Act in accordance with the purposes enunciated by Congress is of paramount importance to TAFEF and its members. Here, the district court's public disclosure holding read the essential phrase "allegations or transactions" out of the statute. And its original source analysis followed Circuit precedent which is inconsistent with Supreme Court authority to add an extratextual requirement to the original source provision. These holdings are inimical to the proper function of the Act, and both should be reversed.

II. Background and Relevant Provisions of the False Claims Act

The False Claims Act, 31 U.S.C. §§ 3729-3731, was enacted in 1863, with President Lincoln's full support, to combat procurement fraud during the Civil War. S. Rep. No. 99-345 at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Since that time, Congress has sought the right balance between encouraging people with knowledge of fraud against the United States (or, increasingly, a state, county, or city) to come forward in order to fight that fraud on the government's behalf, while precluding "opportunistic" litigants who seek to profit from the knowledge and effort of others, or the public reporting of misconduct.

In 1986, Congress passed a comprehensive revision of the Act. A central purpose was to encourage *qui tam* complaints. S. Rep. No. 99-345, at 1-2. In order to address the concern of *qui tam* complaints based on public information, the 1986 Amendments included a "public disclosure" provision, which provided that a fraud already disclosed in an enumerated manner cannot be the basis for a *qui tam* case, and an exception, which provided that an "original source" of the information could proceed even where there was public disclosure. 31 U.S.C. § 3730(e)(4)(A)-(B). The correct interpretation of these provisions impacts the FCA's effectiveness in addressing fraud in government procurement and programs.

The 1986 rewrite of the False Claims Act was motivated by Congress's desire to encourage *qui tam* suits precisely by removing a barrier erected by the public disclosure bar adopted in 1943. In *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the court held that the State of Wisconsin was not a proper relator where it investigated Medicaid fraud and provided its evidence to the federal government because "government knowledge" was a jurisdictional bar to a *qui tam* case under former 31 U.S.C. § 232(C), which provided that a *qui tam* case could not be "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time the complaint was filed." *Id*. at 1103 (citation omitted). Reversal of *Dean*

was "strongly urge[d]" by the National Association of Attorneys General. S. Rep. 99-345, at 13.

Congress amended the FCA in 1943 to bar *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609. The "government knowledge bar" necessitated dismissal of many cases which might have proven meritorious (S. Rep. No. 99-345 at 11-13), and left the False Claims Act moribund. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled"); Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 2.9 (Thomson Reuters 2016).

The decades after the 1943 Amendments made clear that Congress's effort to prevent copycats and parasites had gone too far, and actually harmed the FCA's core purpose of ferreting out fraud against the government. *Dean* was sufficiently absurd to catch congressional attention; the Senate Report for the 1986 amendments recognized that fraud in government programs and procurement presented an increasingly severe problem, and that the FCA was not serving its intended purpose. S. Rep. No. 99-345 at 1-4. After extensive study and hearings, the 1986

amendments were signed into law by President Reagan. "The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24. Congress recognized the need to solve the *Dean* problem and assure non-parasitic relators who were aware of important information that their efforts would lead to results, thus addressing the unwillingness among potential relators to report fraud to the government. *Id*. at 12-13. The resulting statute said:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (1986).

These provisions were intended to craft a middle ground between the pre-1943 version of the Act, which allowed oven those *qui tam* actions overtly and wholly based on public information, and the 1943 amendments, which barred even those relators who independently discovered, investigated, and reported fraud to the government, if mention of the fraud could be found in a government file. As

the Supreme Court observed in *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011), "the public disclosure bar was 'an effort to strike *a balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits'" (citation omitted; emphasis in original).

But as it turned out, the 1986 version of the public disclosure and original source provisions were near misses. For example, under the 1986 version, mention of the facts of a fraud scheme in a deposition or motion in a state court lawsuit, if included in a summary judgment motion or trial testimony, constituted a "public disclosure." And because the statute used the word "jurisdiction," dozens, or hundreds, of cases were promptly dismissed. So, in 2010, Congress tried again. The revision it passed then is the current version of the public disclosure and original source provisions:

> (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who

> has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. 3730(e)(4) (2010).

Simply put, whether the government did or did not have knowledge of allegations is wholly immaterial to the vitality of a *qui tam* complaint: What matters is whether the fraud was publicly disclosed, as defined by statute. As most relevant here, Congress squarely clarified that a relator whose knowledge was different from that already possessed by the government qualified as an original source, so long as the information was provided to the government before filing.

Against this background, we turn to the two issues in this case which TAFEF views as justifying the offering of our views to the Court.

III. POINTS AND AUTHORITIES

A. Under either version of the public disclosure provision, disclosure that Rite Aid stopped giving discounts to consumers in order to comply with Connecticut's Medicaid law in no way publicly disclosed that it was cheating that, much less any other, public insurance program.

The press release issued by the Connecticut Attorney General, which the district court found to constitute a public disclosure of Mr. Rahimi's *qui tam* fraud allegations, said:

> Rite Aid increased prices for some generic drugs and eliminated discounts for oral contraceptives, brand medications and some medical supplies for Connecticut members of its Rx Savings program,

> Attorney General Richard Blumenthal said in a statement issued on Wednesday.
>
> Blumenthal said the chain posted signs saying the changes were needed to comply with a new law requiring pharmacies to provide members of Medicaid and other state programs the same prescription drug discounts they offer the public.
>
> Blumenthal issued a subpoena for more information about the changes and said the law doesn't require Rite Aid to change its savings program.
>
> The drug store chain intends to cooperate with the attorney general, Rite Aid spokeswoman Ashley Flower said.

R. 104-23.

To summarize: Rite Aid eliminated certain discounts in order to comply with a Medicaid requirement even though the state said it did not have to, the state was going to look into the changes, and Rite Aid was going to cooperate. There is simply no plausible argument that these facts constitute the "allegations or transactions" which Mr. Rahimi alleges—Rite Aid's refusal to give the same discounts to Medicaid insureds that it gave to members of its "Rx Savings" program, in violation of Medicaid rules. Moreover, this short press release in no way revealed "allegations or transactions" which would constitute Medicaid fraud in, much less outside of, Connecticut.

When viewed through the lens of the 2010 amendment to the public disclosure provision (which predated the Connecticut press release), the point is even clearer. The public disclosure must be of "substantially the same allegations

or transactions as alleged in the action or claim" brought by the relator. There is no connection at all between the transactions which Mr. Rahimi's complaint alleges (Medicaid claims which failed to afford patients the same discounts as under the "Rx Savings" program) and the transactions identified in the press release (discontinuation of the program in order to satisfy a "new law" relating to Medicaid discounts).

In short, there is no way to get from the brief mention of a company taking steps to comply with a new law, to a years-long scheme to cheat Medicaid programs coast-to-coast by failing to comply with most-favored-customer pricing laws. TAFEF respectfully urges the Court to reverse the public-disclosure findings of the district court under both the 1986 and 2010 versions of the False Claims Act.

B. Because this Court's decision in *ex rel. McKenzie* holding that only a *qui tam* relator who discloses fraud to the government before a public disclosure is inconsistent with a subsequent decision of the Supreme Court, this Court should reverse that portion of *McKenzie*.

As noted, the 1986 version of the False Claims Act defined an "original source" as

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action.

These are not Talmudic phrases. A relator who knows of the fraud without relying on the public disclosure which makes the original source inquiry necessary,

and who provides her information to the United States before filing her *qui tam* complaint, should be an original source for purposes of the Act.

Notwithstanding the seeming clarity of this language, in 1997, a panel of the Court of Appeals for the District of Columbia Circuit found it "clear to us" that Congress meant more than it said. In *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.D.C. 1997), the court found it "clear . . . that an 'original source' must provide the government with the information prior to any public disclosure." *Id*. at 690. Thus, under *Findley*, this:

> "An individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action"

was explicitly rewritten to be, in the District of Columbia, this:

> "An individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action" *and before any public disclosure occurred.*—

In *Findley*, the "public disclosures" at issue had occurred decades before the relator learned of the still-ongoing fraud; thus, the panel reasoned, the relator could not be an original source (*id*. a 691), even though the fraud, despite having been known to some for 40 years, was manifested in bid documents and practices of the defendants. And so, a provision which was intended to bar "only truly parasitic

cases"[2] came to bar any case where the possibility of fraud could be divined from public sources, even if the relator was a consummate insider. Concern over "parasitic" cases which parrot the public record became unrecognizably contorted.

A few months later, a panel of this Court adopted and amplified the *Findley* modification to the original source provision. In *United States ex rel. McKenzie v. BellSouth Telcomms*., 123 F.3d 935, 942-943 (6th Cir. 1997) ("adopting the D.C. Circuit's approach"), the panel "[found] it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." The Court reasoned, too, that it had previously concluded that only a "true whistleblower" could be a relator, the government's knowledge (through public disclosure) of fraud allegations before the relator brought the information to it necessarily defeated "true whistleblower" status–and thus put original sourcedom out of reach. *Id*. at 939, *quoting United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994).

Thus, although the phrase "true whistleblower" appears nowhere in the False Claims Act (and appears to have emerged fully-formed in *General Electric*), that undefined requirement, too, was strapped onto the 30 or so words of the original source provision enacted by Congress.

The judicially-adopted original source element which *Findley* and *McKenzie* welded onto the words of Congress was widely criticized. Reasoning that the statute "*defines* the term," the First Circuit chose to "honor[] the plain and unambiguous meaning" of the statute. *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 22-24 (1st Cir. 2009) (emphasis in original). In *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1014 (9th Cir. 2006), the court "[held] that there is no such requirement." In *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1051 (8th Circuit 2002) (emphasis supplied), the court held that it "*would change the balance Congress struck* if we were to further restrict the class of those whose discoveries had been made public but who were nevertheless permitted to proceed as relators."

No other circuit adopted the *Findley/McKenzie* rewrite of the original source provision. This is not surprising. The judicially-created requirement that relator notify the government before the public disclosure is certainly a sure-fire way to eliminate parasitic suits. In fact, that requirement makes the parasitic suit all but impossible. But that is not what Congress wanted. Rather, the drafters—seeking balance between unbridled parasitism and legitimate whistleblowing, even if a state-court witness wanted to allow for cases based on publicly disclosed information, if the relator had independent and direct knowledge. This cannot

happen if the public disclosure must follow the relator's disclosure to the government.

Years passed. The meaning of the original source statute (but not the additional language created in *Findley* and adopted in *McKenzie*) came before the Supreme Court in 2007. In *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (Scalia, J.), the Court addressed the question whether the original source provision was jurisdictional. The Court first examined whether "the phrase 'information on which the allegations are based' refer[s] to the information on which the relator's allegations are based or the information on which the publicly disclosed allegations that triggered the public disclosure bar are based." *Id*. at 470. It found that the information which the relator had to disclose to the government pre-filing was "*the information on which the relator's allegations are based*," rather than the publicly disclosed allegations. *Id*. at 470-471 (emphasis supplied).

More years passed. Eventually, the clarity of Justice Scalia's opinion led the D.C. Circuit to re-evaluate its holding in *Findley*. *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012) (*reh'g en banc denied*), raised just one question on appeal: The effect of *Rockwell* on *Findley*. In *Davis*, the court of appeals squarely rejected its earlier decision:

> In *Rockwell*, the Supreme Court rejected *Findley's* reading of what information a relator must provide the government, concluding that the word 'information' in § 3730(e)(4) refers to 'the information on which the relator's allegations are based[, not] the information on

> which the publicly disclosed allegations that triggered the public-disclosure bar are based.' 549 U.S. at 470. ***With the wrong 'information' in mind, Findley's argument that the information must be provided to the government not only before suit is filed but before a public disclosure is made simply unravels. Findley's concern about why Congress used the term 'original source' is answered: The relator can be an 'original source' to the government of his information even if the publicly disclosed information came from someone else.***

Davis, 679 F.3d at 838 (emphasis supplied).

While *Davis* did not address the implications of the *Findley/McKenzie* rule under the 2010 amendments to the original source provision (noted *supra* n. 2), the result is, from a statutory-construction perspective, nothing short of painful. The current version of the provision defines an original source as:

> an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

But under *McKenzie*, subdivision (2) of the statute requires an original source to have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section *prior to any public disclosure.*" If the relator's disclosure must precede any public disclosure, then the disjunctive clause is written out of the statute: A relator's

disclosure obviously cannot be "independent of" or "materially add[] to" public disclosures which have not yet occurred.

Even more years passed. It has now been more than 23 years since this Court adopted another court's rewrite of a statute which the originating court has now flatly abandoned. Because *McKenzie* was clear that it was adopting *Findley*, and because the *Davis* panel made pellucid that "*Findley's* argument . . . simply unravels," it is something of a surprise that, eight years after *Davis* (and 13 years after *Rockwell*), *McKenzie's* adoption of the "unraveled" *Findley* rewrite of the statute soldiers bravely on, untouched by *Davis*, by the Supreme Court, and by Congress's rewrite of the statute.

TAFEF respectfully submits that the *McKenzie* ruling was improvident when it was handed down in 1997, and is far more improvident today. Yet the district court in this case unquestioningly applied it, reasoning that because this Court "approvingly cited to [*McKenzie's*] definition of an original source" in *United States v. Antoon v. Cleveland Clinic Fdn.*, 788 F.3d 605, 617 (6th Cir. 2015), neither *Davis* nor even *Rockwell* itself impacted the authoritative nature of *McKenzie*. ECF No. 120 at 13-14.

Antoon is not alone in this regard. A panel of this Court first reaffirmed the *McKenzie* standard just two years after *Rockwell* in *United States ex rel. Poteet v.*

Medtronic, Inc., 552 F.3d 503, 514 (6th Cir. 2009), but did not acknowledge the fact that *Rockwell* and *McKenzie* cannot be reconciled.

The result is that district judges in this Circuit are left to find their own way. Some, like the court below, have clung to *McKenzie*–unraveled or not. *E.g*., *United States ex rel. Tingley v. PBC Fin. Servs. Grp., Inc*., 2016 U.S. Dist. LEXIS 55254 (W.D. Mich., Apr. 26, 2016). Some have simply articulated and applied the original source statute in the language written by Congress. *E.g*. *United States ex rel. McNulty v. Reddy Ice Holdings, Inc*., 835 F. Supp. 2d 341, 349-50 (E.D. Mich. 2011). And at least one has identified the issue, but not needed to resolve it. In *United States ex rel. Robinson-Hill v. Nurses' Registry & Home Health Corp*., 2012 U.S. Dist. LEXIS 142224, at *30 (E.D. Ky., Oct. 3, 2012), the court, citing *McKenzie*, noted that

> The Sixth Circuit requires that the [relator] 'must also provide the government with the information upon which the allegations are based prior to any public disclosure.' *Id*. The Supreme Court may have interpreted the FCA in a way that overrules this third element. *See Rockwell*, 549 U.S. at 470; *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 838, 400 U.S. App. D.C. 351 (D.C. Cir. 2012) (reh'g *en banc* denied July 27, 2012).

Robinson-Hill is the only post-*Rockwell* case TAFEF has identified in this Circuit which acknowledges that *Rockwell* cannot be reconciled with *McKenzie*, and the only post-*Davis* case in this Circuit which recognizes that the *raison d'etre*

of *McKenzie*–the D.C. Circuit's decision in *Findley*–was "unraveled" by Justice Scalia's opinion in *Rockwell*.

TAFEF respectfully urges this Court to bring its original-source jurisprudence into line with that of every other circuit, by overruling its decision in *McKenzie* that a *qui tam* relator can qualify as an "original source" only by disclosing information which is eventually publicly disclosed to the government prior to a statutorily-significant public disclosure. That decision and *Rockwell* simply cannot be harmonized: *Rockwell* held that the information which must be pre-disclosed is that of the relator, not that which makes up the public disclosure. And *McKenzie* held that the information which must be pre-disclosed is that which makes up the public disclosure–not that which is known to the relator.

In urging the Court to overrule *McKenzie*, TAFEF is cognizant of Sixth Circuit Rule 32.1, and that pursuant to custom, tradition and Sixth Circuit rules, a panel's published decision is binding on subsequent panels unless an "inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (overruled on other grounds). TAFEF urges that this is precisely such a case. Guidance in this context found in *Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686 (6th Cir. 2016). There, the Court re-examined its long-standing rule that in a fee-shifting case, *Coulter v.*

Tennessee, 805 F.2d 146, 151 (6th Cir. 1986), the plaintiff's compensation for appellate proceedings could not exceed three percent of the lodestar below. In *Husted* (with apologies for the protracted quote):

> Plaintiffs and Amici claim[ed] that a presumptive cap for fee awards in support of a successful fee petition is inconsistent with intervening Supreme Court precedent, namely *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 [] (1990). Although this court has reaffirmed the Coulter rule in the twenty-five years since *Jean* was decided, *see, e.g.*, [*Northeast Ohio Coalition v. Sec'y of Ohio*, 695 F.3d 563, 574 (6th Cir. 2012)] (and cases cited therein); [*Gonter v. Hunt Valve Co.*, 510 F.3d 610, 620-21 (6th Cir. 2007)], we have not examined whether *Jean*, which was decided four years after *Coulter*, calls for a re-examination of its presumptive cap. Although one panel may not disturb the ruling of a prior panel absent en banc review, *see* 6th Cir. R. 32.1(b) ("Published panel opinions are binding on later panels."); *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001) (holding that en banc review is required to overrule a prior published opinion), an intervening Supreme Court decision gives us the right to revisit this question, *see Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 183 (6th Cir. 1990). This is true even in the unusual situation where binding circuit precedent overlooked earlier Supreme Court authority. *Ballinger v. Prelesnik*, 709 F.3d 558, 561-62 (6th Cir. 2013) (holding that the rule for habeas review in *Brown v. Smith*, 551 F.3d 424 (6th Cir. 2008), had been called into doubt by *Harrington v. Richter*, 562 U.S. 86 (2011), even though *Robinson v. Howes*, 663 F.3d 819, 823& n.2 (6th Cir. 2011), which was decided after *Harrington*, applied *Brown*); *see also Atl. Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838 n.2 (Fed. Cir. 1992) ('A decision that fails to consider Supreme Court precedent does not control if the court determines that the prior panel would have reached a different conclusion if it had considered controlling precedent.'); *Tucker v. Phyfer*, 819 F.2d 1030, 1035 n.7 (11th Cir. 1987) (holding that the court may disregard prior panel decision that failed to reference previous Supreme Court opinions and stating that 'we do not view ourselves as violating the prior panel rule; rather, we are simply discharging our duty to follow clearly controlling Supreme Court precedent'); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981) (in the 'unusual and delicate

> situation' where a prior circuit case did not consider the impact of intervening Supreme Court precedent, the court must apply the Supreme Court decision, not the later-issued circuit case).

Husted, 831 F.3d at 720.

TAFEF submits that this Court should now discharge its "duty to follow clearly controlling Supreme Court precedent." This case presents circumstances more worthy of this Court's close attention than any of those discussed in *Husted*. Here, the original source statute briefly and clearly sets out two requirements. The *Findley* and *McKenzie* courts quite explicitly added an additional requirement: that only relators who disclose to the government before the public disclosure can be original sources. That requirement is flatly inconsistent with the Supreme Court's holding in *Rockwell* that the relator need only disclose *her own knowledge* to the government before filing.

IV. CONCLUSION

TAFEF respectfully urges this Court to reverse the dismissal of this case, because both the public disclosure and original source holdings are inconsistent with the statutes upon which they were founded, and because *McKenzie* cannot survive scrutiny under the rule of *Rockwell*.

Dated: July 24, 2020

Respectfully submitted,

/s/ Frederick M. Morgan, Jr.

Frederick M. Morgan, Jr.
MORGAN VERKAMP, LLC
35 East 7th Street - Suite 600

Cincinnati, Ohio 45202
Tel: (513) 651-4400
Fax: (513) 651-4405
rmorgan@morganverkamp.com

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W. – Suite 501
Washington, DC 20036
Tel: (202) 296-4826
Fax: (202) 296-4838
jdemar@taf.org

CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with the type-volume limit of Fed R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), this document contains 4,748 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief employs proportionally spaced 14-point Times New Roman font.

Dated: July 24, 2020

/s/ Frederick M. Morgan, Jr.
Frederick M. Morgan, Jr.