No. 24-1047

United States Court of Appeals for the Tenth Circuit

UNITED STATES EX REL. FIORISCE, LLC,

Plaintiff – Appellee,

v.

COLORADO TECHNICAL UNIVERSITY, INC.,

Defendant – Appellant,

and

PERDOCEO EDUCATION CORPORATION, and
AMERICAN INTERCONTINENTAL UNIVERSITY, INC.,

Defendants.

Appeal from the United States District Court
for the District of Colorado
Hon. R. Brooke Jackson, No. 1:21-cv-573-RBJ

AMICUS CURIAE BRIEF OF THE ANTI-FRAUD COALITION SUPPORTING APPELLEE AND DISMISSAL OR AFFIRMANCE

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GLOSSARY

FCA	False Claims Act
GAO	Government Accountability Office

INTEREST OF THE AMICUS[1]

The Anti-Fraud Coalition ("TAF Coalition") is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. The organization has worked to publicize the *qui tam* provisions of the federal False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as an *amicus curiae*, including advocacy relating to the public disclosure defense, and has provided testimony to Congress about ways to improve the FCA. TAF Coalition has a strong interest in defending the FCA and ensuring its proper interpretation and application.

SUMMARY OF ARGUMENT

The district court held that appellant was not entitled to dismissal at the pleading stage on public disclosure grounds. That interlocutory order is not subject to immediate appeal as of right, and is correct in any event.

[1] All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than amicus and its counsel contributed any money intended to fund preparing or submitting this brief.

I. This Court should dismiss this appeal for lack of appellate jurisdiction. As appellee explains, the denial of a motion to dismiss on public disclosure grounds is not an appealable collateral order. Instead, it is a typical interlocutory order denying an ordinary affirmative defense, and therefore not subject to immediate appeal as of right. Tellingly, even though the public disclosure defense has been on the books since 1986, and has been frequently litigated since then, appellant cannot cite a single case holding that denials of motions to dismiss on public disclosure grounds constitute collateral orders—because none exist. Indeed, even when the public disclosure defense was phrased in jurisdictional terms (before 2010), denials of such motions were not immediately appealable as of right. Now that Congress has intentionally stripped any jurisdictional language from the statute, the case against collateral-order treatment is overwhelming.

Allowing immediate appeals from public disclosure dismissals is also unnecessary because defendants can already seek interlocutory appeal under 28 U.S.C. § 1292(b). That statute provides adequate safeguards for the rare case in which an interlocutory appeal may be appropriate. Appellant's plea to expand the collateral order doctrine to cover *every* denial of a public disclosure defense, by contrast, would open the floodgates to meritless appellate litigation that would burden the court system and delay resolutions of meritorious cases. This Court should not countenance that result, and should accordingly dismiss this appeal.

II. If the Court reaches the merits, it should affirm, holding that the public disclosure defense does not apply—and that even if it did, appellee would qualify as an original source. In this regard, the Court should acknowledge the import of the 2010 amendments to the public disclosure defense, enacted to overrule judicial decisions that had interpreted the defense too broadly. Under those amendments, the public disclosure defense only applies in a narrow range of cases where substantially the same fraud has been publicly disclosed, and the relator's knowledge adds no material value to those public disclosures. The district court correctly concluded that this is not such a case.

ARGUMENT

I. This Appeal Should Be Dismissed for Lack of Appellate Jurisdiction

The Court should dismiss this appeal for lack of appellate jurisdiction. Under this Court's precedents, only two kinds of orders qualify as immediately appealable collateral orders: (1) orders denying "constitutionally based immunities" such as "qualified, absolute, tribal, Eleventh Amendment, or another immunity"; and (2) "orders that would be moot following final judgment," such as prisoner transfer orders, or orders permitting the government to force a defendant to take antipsychotic drugs. *Mohamed v. Jones*, 100 F.4th 1214, 1218-19 & n.5 (10th Cir. 2024). An order denying any other defense is not an immediately appealable collateral order. That is because "any error a district court makes in failing to apply an affirmative defense foreclosing liability can be reviewed and corrected after final judgment has been entered in the case." *Tucker v. Faith Bible Chapel Int'l,* 36 F.4th 1021, 1037 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 2608 (2023).

The public disclosure defense is neither a constitutionally based immunity nor an issue that becomes moot after final judgment. It is obviously not a constitutional immunity because it comes solely from the statute. And an order denying a motion to dismiss on this ground is a standard interlocutory order subject to appellate review after final judgment, so the issue does not become moot as the case progresses. Unsurprisingly, no federal appellate court has held that the denial of a motion to dismiss on public disclosure grounds is an appealable collateral order.

Hoping to make history, appellant argues that the public disclosure defense implicates the district court's subject matter jurisdiction—and therefore is tantamount to a grant of immunity from suit. As this Court has recognized, every appellate court that has squarely considered the issue has rejected this characterization of the public disclosure defense, which flies in the face of the clear statutory text and its amendment history. *See United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 737 n.1 (10th Cir. 2019).

Beginning no later than 2006, the Supreme Court recognized that courts had been "less than meticulous" in distinguishing jurisdictional requirements from non-jurisdictional requirements—and started the process of cleaning up the confusion. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). To promote uniformity and consistency, the Court adopted a clear-statement rule that "leave[s] the ball in Congress' court." *Id.* at 515. Thus, the legislature must "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional" for it to be so. *Id.* On the other hand, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516 (citation and footnote omitted). The Court has consistently adhered to this rule. *See, e.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 416-17 (2023) (explaining that this "clear-statement principle" ensures "that courts impose harsh jurisdictional consequences only when Congress unmistakably has so instructed").

Under *Arbaugh*'s clear-statement rule, the public disclosure defense cannot be treated as jurisdictional because the statutory text contains no explicit jurisdictional language. In fact, the public disclosure defense may be the clearest example of an affirmative defense that is not jurisdictional because Congress amended it specifically to *remove* jurisdictional language. Thus, when the Court decided *Arbaugh*, the public disclosure defense provided that "[n]o court shall have jurisdiction over an action under this section based upon" qualifying public disclosures. 31 U.S.C. § 3730(e)(4)(A) (1986). And in 2007, citing *Arbaugh*, the Supreme Court held that this language embodied a jurisdictional defense. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-68 (2007).

In 2010, Congress reacted to *Arbaugh* and its progeny, as well as *Rockwell*, by removing the jurisdictional language from the public disclosure defense. As amended, the defense never mentions jurisdiction. Instead, it provides that "[t]he court shall dismiss an action or claim under this section" when the statutory requirements are met. 31 U.S.C. § 3730(e)(4)(A). Congress accordingly did *exactly* as the Supreme Court instructed in *Arbaugh*: it saw a defense that previously had been described as jurisdictional (at a time when that word was thrown around loosely), recognized the Supreme Court's admonition to speak clearly when referring to subject matter jurisdiction, and intentionally stripped out any jurisdictional language. There is only one way to read the text and its amendment history—and that is to hold that the public disclosure defense is not a limitation on subject matter jurisdiction. Any other reading would fly in the face of *Arbaugh* and its progeny, create a split with every circuit that has squarely addressed the question, and stick a thumb in Congress' eye. *See Van Buren v. United States*, 593 U.S. 374, 393 (2021) ("When Congress amends legislation, courts must presume it intends the change to have real and substantial effect.") (quoting *Ross v. Blake*, 578 U.S. 632, 641-42 (2016)).

That is more than enough to settle the question—but there are other textual indications that the public disclosure defense is not jurisdictional. First, other provisions of the FCA—situated right next to the public disclosure defense—still contain express jurisdictional language.

Thus, "[n]o court shall have jurisdiction over an action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces." 31 U.S.C. § 3730(e)(1). And "[n]o court shall have jurisdiction over an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought." *Id.* § 3730(e)(2)(A). These provisions (along with the text of the pre-amendment public disclosure defense) show that Congress knows how to include jurisdictional language in the FCA when it wants to. The fact that it made a different choice when amending the public disclosure defense merits weight. Indeed, "when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (cleaned up).

Second, the elements of the public disclosure defense and its exceptions require inquiries that are inconsistent with jurisdictional treatment. Courts are required, *sua sponte*, to verify their own subject matter jurisdiction. *See, e.g.*, *Arbaugh*, 546 U.S. at 514; *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). Treating the public disclosure defense as jurisdictional would accordingly require district courts, on their own initiative, to scour the entire universe of potentially relevant public sources (including each and every federal hearing in which the Government or its agents are parties, each and every federal report, investigation, and audit, and each and every news media source) to determine whether substantially the same allegations or transactions alleged by a relator had been publicly disclosed. Then, if the answer were "yes," the law would require district courts to consult the government to determine whether it opposed dismissal on public disclosure grounds, and also to conduct an independent inquiry into whether the relator qualified as an original source—which would include evaluating the relator's information, and also somehow verifying whether the relator had disclosed that information to the government prior to filing a suit. That would be burdensome and impractical—and is strong evidence that Congress did not intend for courts to treat the public disclosure defense as a jurisdictional limitation.

Appellant argues that the public disclosure defense must be jurisdictional because it constitutes a limitation on the relator's Article III standing. The theory goes that the relator has standing as a partial assignee of the government's claim, and the public disclosure defense is a condition on that assignment, and so must be treated as jurisdictional. No court has accepted this argument—and so again appellant seeks to create new limitations on subject matter jurisdiction. The argument fails for reasons similar to those advanced *supra*.

Most obviously, not every basis for dismissing an FCA action is a condition on the assignment of the claim to the relator. Instead, Congress gets to decide which provisions of the FCA are jurisdictional conditions on the assignment of claims, and which ones are ordinary affirmative defenses. When courts decide which requirements fall into which category, they must apply *Arbaugh*'s clear statement rule. For example, the FCA includes a statute of limitations, which provides that "[a] civil action under section 3730 may not be brought" after the limitations period has run. 31 U.S.C. § 3731(b). But nobody thinks that a relator who files an untimely action lacks Article III standing, because the statute does not specifically say so. To hold otherwise would violate *Arbaugh*.

The same is true of the public disclosure defense. For the reasons explained *supra*, the clear import of Congress' 2010 amendment stripping jurisdictional language out of the public disclosure defense is that Congress does not want courts to treat this defense as jurisdictional. It follows that Congress does not want courts to treat the public disclosure defense as a condition on assignment with jurisdictional effect. Otherwise, Congress' amendment removing jurisdictional language would have accomplished nothing. Any reading of the statute that nullifies the 2010 amendment must be rejected.

Independently of the amendment history, the language of the public disclosure defense does not clearly condition the assignment of claims to relators, and therefore satisfies neither *Arbaugh*'s clear statement rule, nor the general rule in contracting (which governs assignments) that conditions on performance should not be inferred "[u]nless the agreement makes it clear that the event is required as a condition," and not merely a promise, Restatement (Second) of Contracts § 227, cmt. d (Am. Law. Inst. 1981). Most clearly, the public disclosure defense does not set forth a prerequisite to filing a suit (which is the natural form a condition on suing would take). Instead, it establishes a defense that may defeat a suit that has already been filed. That is clearly not conditional language.

What is more, the statute provides that *even if* the public disclosure defense has been triggered, a relator may obtain a reward. *See* 31 U.S.C. § 3730(d)(1) (providing for an award of up to 10 percent of the proceeds in cases in which "the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in" the public disclosure defense's enumerated channels). If the relator had no standing, no federal court would have the power to reward the relator. This, too, indicates that Congress did not condition relators' standing on avoiding the public disclosure defense.

Appellant argues next that even if the public disclosure defense is not jurisdictional, the collateral order doctrine still applies. Here, appellant contends that because the public disclosure defense does not extinguish all liability, but instead only stops certain relators from pursuing claims, it is somehow different from other affirmative defenses. But any difference in this regard is immaterial or—if anything—cuts against collateral-order treatment.

The question that matters is whether Congress, when it enacted the public disclosure defense, manifested its intent to protect defendants not only from potential liability, but from the costs of defending a suit. In this regard, the Supreme Court has cautioned that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994). But it has rejected the suggestion that ordinary finality rules should be set aside "for claims that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim." *Id*. (citations omitted). Instead, the Supreme Court has "held that § 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id*. Again, courts should demand a clear statement before recognizing such a robust immunity.

Nothing suggests that when Congress enacted the public disclosure defense, it intended to provide defendants with immunity from suit analogous to sovereign immunity or even qualified immunity. Instead, the public disclosure defense creates a limited shield from liability in a small subset of FCA cases where the plaintiff's actions parrot public disclosures, even if the defendant engaged in culpable conduct. The most closely analogous defense is the statute of limitations—which blocks a lawsuit to redress a defendant's culpable conduct due to the plaintiff's delay in bringing the action. The defenses are analogous because both turn on the plaintiff's litigation decisions, and neither turns on the defendant's culpability. But the denial of a limitations defense is not an appealable collateral order, *e.g., Marine Terminals Corp. v. Director, Office of Worker's Comp. Programs*, 2024 WL 3409850, at *1 (9th Cir. July 15, 2024), and there is no reason to treat the public disclosure defense any differently.

Indeed, the statute provides no reason to think that Congress intended to be more solicitous to defendants raising public disclosure arguments than to defendants raising any other defense. It is hard to see why a defendant solely pursuing a public disclosure defense should have any greater right to avoid trial than a defendant arguing that the allegations against it do not amount to fraud. From a public policy standpoint, assuming each defense to be meritorious, the opposite is true. The latter defendant (who did not commit fraud) is less culpable, and *nobody* could recover against it, so the entire litigation will be an exercise in futility. On the other hand, the former defendant actually defrauded the government, and it is unclear why we, as a society or a judicial system, would oppose such a defendant standing trial for its misdeeds. Indeed, it is possible that the trial proceedings will convince the government to intervene for good cause, or to oppose dismissal on public disclosure grounds, thus recovering public funds as contemplated by the statute. Logically, then, defendants raising public disclosure arguments ought to have *less* entitlement to avoid trial than others—not more.

Recognizing a new right to immediate appeal is also unnecessary because public disclosure rulings fall within a "class of claims" that "can be adequately vindicated by other means." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009). Defendants with meritorious public disclosure defenses can vindicate their rights through successful appeals after final judgment. Or, to the extent their defenses are likely to be meritorious, they can seek permission to immediately appeal under 28 U.S.C. § 1292(b) by showing that their arguments give rise to legal questions that raise a substantial ground for difference of opinion. In appropriate cases, those petitions may be granted, and appeals heard.

On the other side of the scale, allowing *every* defendant who loses a public disclosure defense motion immediately to appeal would result in the proliferation of meritless public disclosure defenses and interlocutory appeals, doing irreparable "damage to the efficient and congressionally mandated allocation of judicial responsibility." *Digital Equip. Corp.*, 511 U.S. at 873. These concerns are especially acute in FCA cases, which already take a considerable amount of time to resolve because the government conducts its own investigation (often for years) before the case is unsealed and litigation begins. Allowing collateral-order appeals at the pleading stage would likely inject at least an additional year of delay into every such case because parties that have defrauded the government have strong incentives to draw out proceedings, impose costs on their adversaries, and delay the onset of discovery. *See id.* (recognizing the collateral appeals may serve the "improper purpose" of an appellant "saddling its opponent with cost and delay"). And many of those appeals will be highly fact-intensive. The briefing in this case—involving over a dozen exhibits summarized in charts, the meaning of which the parties hotly dispute—provides a useful illustration of how deep in the weeds these appeals are likely to be. The upshot is that recognizing the denial of a public disclosure defense as a collateral order will likely prompt defendants to assert public disclosure defenses whenever possible, and to appeal every loss—wasting judicial, party, and government resources while delaying recoveries for fraud. At the margins, the increased costs may even deter whistleblowers (or their attorneys) from pursuing meritorious cases, harming the public interest.

For the foregoing reasons, as well as those set forth in appellee's motion to dismiss and its response brief, the Court should dismiss this appeal for lack of appellate jurisdiction.

II. If the Court Reaches the Merits, It Should Affirm

If the Court determines that it has jurisdiction over this appeal, it should affirm because the district court correctly concluded that no public disclosure occurred, and that appellee qualifies as an original source. Rather than rehash the fact-specific arguments supporting that result, this brief offers some higher-level observations about the public disclosure defense and the 2010 amendments, which show that Congress intended for the public disclosure defense to be construed narrowly to bar only relators who are abusing the FCA—and not relators who, in good faith, bring actions to redress complex frauds that have not already been exposed.

The public disclosure defense was originally enacted in 1986. At that time, Congress determined that the "growing pervasiveness of fraud necessitate[d] modernization" of the FCA. S. Rep. No. 99-345, at 2 (1986). Congress was particularly concerned that "restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute" by dismissing meritorious cases. *Id*. at 4. The legislature, led by Senator Grassley, therefore enacted a suite of amendments designed to encourage more private enforcement suits. One of these was to replace the "government knowledge bar" with the public disclosure defense.

The public disclosure defense seeks "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quotation marks and emphasis omitted). Consistent with the purpose of the 1986 amendments, that balance favors enforcement. "In creating both the public disclosure bar and the original source exception," Congress's intent was "to only bar truly 'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government." S. Rep. No. 110-507, at 22 (2008).

Unfortunately, courts misapplied the public disclosure defense to dismiss meritorious cases. This prompted Senator Grassley and Representative Howard Berman, the sponsors of the 1986 Amendments, to explain that the public disclosure defense, "which was drafted to deter so-called 'parasitic' cases, has been converted by several circuit courts into a powerful sword by which defendants are able to defeat worthy relators and their claims," in a manner that threatened to undermine "the very purpose" of the 1986 Amendments. 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1546.

Those concerns were well-founded. After all, the public disclosure defense does not mean that the defendant didn't defraud the government. It only means that the fraud was revealed in specific channels. An overly broad application of the public disclosure defense will accordingly defeat meritorious cases. The better approach is to read the public disclosure defense to block truly abusive or parasitic cases—*i.e.*, cases that hurt the government rather than help it—but not others.

Starting in 2008, these legislators attempted to amend the public disclosure defense. Those efforts succeeded in 2010, when Congress "overhauled" and "radically changed" the statute to "lower the bar for relators." *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298-99 (3d Cir. 2016).

In addition to amending the statute to provide that the public disclosure defense is no longer jurisdictional, Congress enacted several additional amendments, two of which are important here. First, Congress replaced the previous language, under which the bar was triggered if the relator's allegations were "based upon" the information in public disclosures, with language requiring the relator's allegations to be "substantially the same" as the allegations or transactions that were publicly disclosed. 31 U.S.C. § 3730(e)(4)(A). The Sixth Circuit has recognized that this language is "more lenient" than the previous version. *United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 849 (6th Cir. 2020). In particular, the court has held that "[f]rom a textual standpoint, 'substantially the same' facially demands a greater degree of similarity between the *qui tam* complaint and the prior disclosures than 'based upon' does. And 'substantially the same' undoubtedly is more rigorous than 'even partly based upon,' as we interpreted 'based upon' to mean." *Id*. at 851.

Second, Congress broadened the "original source" exception by removing the requirement that the relator's knowledge must be "direct and independent," replacing that language with a requirement that the relator's knowledge must be "independent of and materially add[] to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B). By removing the requirement of direct knowledge, Congress opened the door to many more whistleblowers—as it had intended all along.

Applying this statute, the district court correctly resolved the key disputes in this case. The first dispute is over how similar a relator's claim must be to public allegations to be "substantially the same." 31 U.S.C. § 3730(e)(4)(A). This Court considered this question in *Reed*. There, the Court reasoned that the 2010 amendment codified a standard that had previously existed in this circuit, and thus adhered to its prior precedent, which holds that public disclosures may trigger the bar if they are "sufficient to set the government on the trail of the alleged fraud without the relator's assistance." 923 F.3d at 744 (cleaned up). The district court applied that standard here, holding that "defendants have not shown that public disclosures have been sufficient to set the government on the trail of CTU's alleged fraud in the certification of credit hours without the Relator's assistance." App. Vol. 7 at 1329. Specifically, the court reasoned that although some of the public disclosures discussed wrongdoing in the online education industry, none of the public disclosures revealed the specific fraud alleged against CTU.

For the reasons given in appellee's brief, that holding was correct, and the district court faithfully applied this Court's standard to the specific facts of this case. If this Court reaches the merits, it should agree. We add, however, that appellant's request for reversal risks taking this Court in a dangerous direction that would expand the public disclosure defense far beyond its intended limits.

Specifically, appellant asks the Court to take a broad view of when a public disclosure might set the government "on the trail" of a fraud. This "trail" metaphor is a judicial gloss on the statutory text that various courts, including this one, have adopted from time to time. Although there are situations where this gloss is harmless, it can also lead to results that conflict with the statutory text. After all, a bread crumb is not "substantially the same" as a house—even if a trail of bread crumbs may (or may not) lead to a house in the woods. And a musky scent is not substantially the same as a herd of deer, even if a trained hound may sometimes find the latter by following the former. It is worth asking whether the "trail" is a helpful metaphor, given that the statute doesn't use it, and that it may invite readers to speculate about the government's enforcement abilities in unrealistic ways.

To be sure, the Court applied the "trail" metaphor in *Reed*. However, the relator in that case "waived" any challenge to it. 923 F.3d at 744. Moreover, the result in *Reed* didn't require a broad application of the metaphor: There, the government had already prosecuted one of the defendant's employees for misconduct closely resembling that alleged in the complaint, and other public sources revealed misconduct by three players, including the defendant. *See id.* at 746-49. Thus, even though many of the public disclosures did not specifically name the defendant, it was reasonable to conclude that the publicly disclosed allegations or transactions were substantially the same as the relator's. Other cases have reached similar results when public disclosures discussed specific frauds involving a small number of industry participants. *See United States ex* *rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) (holding that when public disclosures alleged misconduct at "nine, easily identifiable, DOE-controlled, and government-owned laboratories," the defendant laboratory was identifiable); *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999) (defendant need not be named when the disclosures identify "a narrow class of suspected wrongdoers"); *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 238 (3d Cir. 2013) (holding that when public disclosures identified fraud in an industry that only had one participant at each relevant time period, disclosure had occurred). Although TAF Coalition believes the better rule is the one adopted by the Eleventh Circuit, which requires disclosures that actually name a specific defendant, *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994), we acknowledge that this Court's precedents interpret the public disclosure defense more broadly to include disclosures from which defendants are easily identifiable, even if they are not named.

There is a real risk, however, that a broad application of the "on the trail" metaphor can produce results that deviate from the statutory text by allowing disclosures that are attenuated from the alleged fraud to bar a relator's claim based on speculation that some hypothetical government lawyer or investigator could blaze a trail from one to the other. That would clash with the text and with Congress's recognition when it enacted the public disclosure defense that "the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies," which means that "[a]llegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." S. Rep. No. 99-345, at 7.

Indeed, those concerns are even more grave today than they were when Congress first voiced them in 1986. A recent report by the Government Accountability Office ("GAO") based on data collected from 2018 to 2022 "estimated direct annual financial losses to the federal government from fraud to be between approximately $233 billion and $521 billion." GAO, *Fraud Risk Management: 2018-2022 Data Show Federal Government Loses an Estimated $233 Billion to $521 Billion Annually to Fraud, Based on Various Risk Environments*, GAO-24-105833, at 18 (2024), https://www.gao.gov/assets/gao-24-105833.pdf. By contrast, in 2023, the latest year for which data are available, FCA settlements and judgments totaled less than $2.7 billion—or approximately 1% of the low-end fraud estimate. *See* U.S. Dep't of Justice, *Press Release: False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023* (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023. Those low recovery numbers are a function of the paucity of government resources and the abundance of fraud. Against that backdrop, courts should be cautious about interpretations of the statute that would bar meritorious cases based on overly sanguine estimations of the government's enforcement capacity. *See* S. Rep. No. 110-507, at 24 (explaining that "[a]ll cases that have expanded the public disclosure bar and narrowed the original source doctrine threaten to limit the FCA more than the Committee ever intended in passing the 1986 Amendments").

Recognizing this risk, courts refuse to hold that broad disclosures of wrongdoing in a large industry put the government on the trail of fraud by every business in that industry—or that disclosures of generalized wrongdoing put the government on the trail of specific frauds. As the Ninth Circuit recognized, "[a]llowing a public document describing 'problems'—or even some generalized fraud in a massive project or across a swath of an industry—to bar all FCA suits identifying specific instances of fraud in that project or industry would deprive the Government of information that could lead to recovery of misspent Government funds and prevention of further fraud." *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 577 (9th Cir. 2016). Thus, rather than "conducting the substantial similarity inquiry at too high a level of generality," courts must "take a careful look at the details of each alleged fraud." *Sturgeon v. PharMerica Corp.*, 438 F. Supp. 3d 246, 264 (E.D. Pa. 2020). "By requiring courts to look carefully at the factual similarity between a relator's allegations and a public disclosure, this approach strikes the proper balance between 'encouraging private persons to root out fraud and stifling parasitic lawsuits.'" *Id*. (quoting *Schindler Elevator Corp.*, 563 U.S. at 413).

A few examples illustrate the point. In *Leveski v. ITT Educational Services, Inc.*, 719 F.3d 818, 829 (7th Cir. 2013), two relators had brought a *qui tam* action against the defendant educational institution for violating a provision of the Higher Education Act that restricted paying incentive-based compensation to recruiters. The Seventh Circuit held that this action did not bar a later *qui tam* action against the same defendant, by a relator holding the same job title as the relators in the first case, alleging violations of the exact same law—because the alleged violations "cover[ed] a different time period," related to "a second department" of the company, and "involve[d] a much more sophisticated—and difficult to detect—violation" of those same laws. *Id*. at 829-30. The court asked whether these allegations were "different enough" from the allegations in the first action "to bring [the relator's] suit outside the public disclosure bar," and concluded that the answer was "yes" because courts should not compare public disclosures with allegations only "at the highest level of generality." *Id*. at 831 (quotation marks omitted).

For support, the court relied on *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 867 (7th Cir. 2011), where a public disclosure revealed "that 57% of chiropractors' claims (in a sample of 400) were for services not covered by the Medicare program, and another 16% were for covered services that had been miscoded." The defendant argued that this provided enough information to publicly disclose that a specific chiropractor had inflated its bills—but the Seventh Circuit disagreed. The court explained that "[a] statement such as 'half of all chiropractors' claims are bogus' does not reveal *which half* and therefore does not permit suit against any particular medical provider." *Id*. at 867-68. Instead, "[i]t takes a provider-by-provider investigation to locate the wrongdoers," and the allegation that the specific defendant was engaged in fraud was "not based on public reports; it [was] based on [the relator's] knowledge about defendants' practices." *Id*. at 868. "By placing defendants among the perpetrators of fraud, [the relator] performed the service for which the False Claims Act extends the prospect of reward (if the allegations are correct)." *Id*.

Similarly, the Third Circuit's decision in *United States v. Omnicare, Inc.*, 903 F.3d 78 (3d Cir. 2018), is instructive. There, public disclosures revealed a widespread practice in the nursing home pharmacy industry known as "swapping," which was a kickback scheme whereby pharmacies gave nursing homes discounts on drugs that were paid for by the homes themselves, in exchange for contracts to supply drugs that were paid for by the government. *See id.* at 81. But none of the disclosures identified the defendant, PharMerica. The Third Circuit held that the public documents did "not point to any specific fraudulent transactions directly attributable to PharMerica," but instead "merely indicate[d] the possibility that such a fraud could be perpetrated in the nursing home industry, which is an allegation that would alone be insufficient to state a claim for fraud." *Id.* at 86. The relator was able to allege fraud by PharMerica only after reviewing its non-public contracts with nursing homes. *See id.* The Third Circuit thus held that no public disclosure had occurred.

Synthesizing these precedents, it is not enough for public disclosures to generally allege fraud or misconduct in a large industry. Instead, at a minimum, "[i]n order to bar claims against a particular defendant, the public disclosures relating to the fraud must either explicitly identify that defendant as a participant in the alleged scheme, or provide enough information about the participants in the scheme such that the defendant is identifiable." *United States v. CSL Behring, L.L.C.*, 855 F.3d 935, 944 (8th Cir. 2017). "This means that the public disclosures must set the government squarely on the trail *of a specific and identifiable defendant's participation in the fraud*." *Id.* (emphasis added, quotation marks omitted). This requires the public disclosures to reveal both the specific fraud and provide enough information to identify the specific defendant's participation. Any other rule would allow fraud to go unchecked—especially in industries where fraud is widespread. And it would create a disincentive for relators to perform necessary and valuable investigative work on the government's behalf—thus undermining the efficacy of the FCA's *qui tam* provisions.

The district court also correctly held that appellee qualifies as an original source. Specifically, like the relator in *Reed*, who disclosed a specific fraud that did not appear in the public disclosures, and provided allegations germane to scienter, appellee alleged specific knowing misconduct that was not discussed in the public sources—and therefore provided knowledge that was independent of and materially added to those disclosures. And, as appellee further explains (Br. 47), that knowledge all came from working for appellant in high-level roles for years—which is exactly the sort of insider knowledge embraced by even the narrowest understanding of the original source exception.

Appellant's main responses are technical in nature, based on the idea that only natural persons suing in their own names can qualify as original sources. For the reasons explained in appellee's brief (at 51-54), that is incorrect. Institutional relators can bring FCA claims, and can be original sources. That conclusion is especially easy to reach when, as here, an institutional relator is a closely held proxy for a natural person. In that context particularly, it makes no sense to treat the relator as any different from the person who owns it.

The bottom line is that appellant's interpretation of the statute would bar meritorious claims based on insider knowledge, with no concomitant policy benefit deterring parasitic or opportunistic lawsuits. It would also arbitrarily disadvantage institutional relators across the board, including municipal governments and private-sector corporations, in ways that Congress never intended. And it would make it more difficult for individual whistleblowers to expose wrongdoing through the use of a closely held institutional plaintiff—again at odds with Congress's objective of redressing and deterring fraud on the government. If it reaches the question, this Court should decline to adopt appellant's hypertechnical narrow reading of the original source requirement.

CONCLUSION

The appeal should be dismissed, or the district court's judgment should be affirmed.

Respectfully submitted,

s/Tejinder Singh

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July 26, 2024

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I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system on July 26, 2024. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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July 26, 2024