No. 08-304

In the Supreme Court of the United States

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

Petitioners

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent

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

BRIEF OF THE STATES OF PENNSYLVANIA, FLORIDA, HAWAII, INDIANA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici* are states which administer programs involving federal funds, in the course of which they investigate for improper or fraudulent claims and prepare audits and reports concerning the funds. The states have an interest in having these investigations, audits, and reports, which are available to the public, considered "public disclosures" for purposes of the False Claims Act so that persons who do no more than gain access to the state's work will not be able simply on that basis to file *qui tam* actions, potentially preventing the states from benefiting by their own work by filing such claims themselves.[1]

SUMMARY OF ARGUMENT

The Court should review this case to resolve a split among the circuits as to whether state investigations, audits and reports which are available to the public fall within that category of documents, which, together with newspapers and federal reports, are considered public disclosure for purposes of the False Claims Act. This is important to the states because, if state reports are not considered public documents, *qui tam* plaintiffs could simply take advantage of state work and file suit on that basis, and if they beat the state to the courthouse, foreclose the state from gaining the benefit of its own work by virtue of the False Claims Act first to file rule.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae* intention to file this brief.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition and reverse the judgment of the Court of Appeals, which is wrongly decided and adds to a split among the circuits on this important issue concerning the scope of the "public disclosure" jurisdictional bar of the False Claims Act.

1. The False Claims Act, 31 U.S.C. §§ 3729-2733 (FCA), provides that any "person" who submits a "false or fraudulent" claim to the United States Government for payment is liable to a civil penalty and treble damages. 31 U.S.C. §3729(a).[2] The FCA also allows for *"qui tam"* actions. That is, a private person may bring an FCA claim on behalf of the government. 31 U.S.C. §3730. The government may choose to intervene in a *qui tam* action, but whether or not it does, the private party is entitled to a share in the recovery. 31 U.S.C. §3730(d). The amendments to the law in 1986 which permitted *qui tam* actions also restrict the *qui tam* rights of persons who obtained their information from public sources and who were not themselves original sources of the information:

> 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,

[2] The Court has said that local governments are "persons" for purposes of liability under the FCA. *Cook County Illinois v. United States, ex rel. Chandler*, 538 U.S. 119 (2003), but that States and their agencies are not, *Vermont Agency of Natural Resources v. United States, ex rel. Stevens*, 592 U.S. 765 (2000).

> administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4)(A). The purpose of this amendment, many courts have recognized, is "to encourage legitimate private suits by legitimate whistleblowers while barring suits by opportunistic *qui tam* plaintiffs who base their claims on matters that have been publicly disclosed by others." *Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003), citing *Minn. Ass'n of Nurse Anesthetists, United States ex rel. v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1040-43 (8th Cir.), *cert. denied*, 537 U.S. 944, 123 S.Ct. 345, 154 L.Ed.2d 252 (2002); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649-51 (D.C.Cir. 1994); *United States ex rel. Stinson Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1152-54 (3d Cir. 1991); S. Rep. No. 99-346, 99th Cong. 2nd Sess., *reprinted* in 1986 U.S.C.C.A.N. 5266.

2. As Petitioner has pointed out, some courts of appeals that have considered the issue have promoted this sensible view of the statutory amendment by reading its plain language to include state administrative investigations, audits and reports among the categories of public disclosures which raise the FCA's jurisdictional bar to preclude *qui tam* suits by any besides original sources. *See United States ex rel. Bly Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied,* 128 S.Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 988 (8th Cir.), *cert. denied*, 540 U.S.

877 (2003); *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439 (5th Cir. 2008).

On the other hand, the decision of the Court of Appeals in this case, relying in large part on the reasoning of *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), has held that "the placement of 'administrative' squarely in the list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." Pet. App. 23a-24a. The Court of Appeals reached this result even though it acknowledged that its reading of the statute would mean that newspapers and state administrative hearings would qualify as "public disclosure" but that state audits, investigations, and reports (which could be public or subject to public disclosure) would not, and that the argument that this was an anomalous result had "some force." Pet. App. 28a. The court thought that its approach was nevertheless necessary to give effect to "every word in [the] statute." Pet. App. 31a.

3. It is important that the Court review the decision of the court of appeals because its reading of the FCA will have a direct impact on states which administer programs involving federal funds. In the first place it seems anomalous that federal audits and reports qualify as "public disclosure" while state audits and reports, available to the public and often performed as a requirement of the receipt or administration of federal funds, do not. Especially odd is that the court of appeals' reading of the FCA does not even accord these state documents, which are public, even the status of a newspaper, which

explicitly qualifies under the FCA as public disclosure.

States are potential *qui tam* plaintiffs themselves, but may be barred from filing an action if they are beaten to the courthouse by another plaintiff who has gotten this information from a state report or audit concerning federally funded programs. These programs are too numerous to detail, but Medicaid, a health insurance program for the poor, jointly funded by the state and federal governments, 42 U.S.C. §1396, *et seq.*, is a good example of the type of program administered by states which involve federal funds and state audits. *See Hays v. Hoffman*, 325 F.3d 982 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003). In the case of Medicaid, the court in *Hays* noted, state audits are required by federal regulations to audit records and investigate fraud and report the findings of their investigations to the federal Department of Health and Human Services. 325 F.3d at 989.[3]

The Medicaid program has also accounted for large numbers of FCA recoveries. In 2006, for example, the Department of Justice reported FCA recoveries of $3.1 billion in settlements and judgments (bringing the total from 1986 to $16 billion), of which $1.3 billion of

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[3] Besides the specific requirements regarding Medicaid, States that expand in a fiscal year total federal grants in excess of $300,000 must prepare audit reports, 31 U.S.C. §7502(a)(1)(A), an independent auditor must conduct the audit in accordance with generally accepted government auditing standards. 31 U.S.C. §7502(c). State Agencies which act as a "pass-through" entity for federal funds are subject to additional investigative and monitoring responsibilities, 31 U.S.C. §7502(f)(2)(B)-(D), which also contemplate the use of an independent auditor.

the total for the year were attributable to *qui tam* actions. *Department of Justice Release #06-783*, http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html; That year, 72% of the recoveries were based on healthcare, with Medicare and Medicaid "bear[ing] the brunt of healthcare fraud." *Id.* In 2005, Medicare and Medicaid were responsible for the "lion's share" of the $1.4 billion in settlements and judgments under the False Claims Act, of which $1.1 were attributable to *qui tam* actions; Department of Justice Release #05-595, *http://*www.usdoj.gov/opa/pr/2005/November/05_civ_595.html;and for 2003, the Justice reported that, "as in the last several years, healthcare fraud accounted for the lion's share" of that year's $2.1 billion in FCA recoveries, of which $1.48 billion was attributable to *qui tam* actions. *Department of Justice Release #03-613*, http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.html.

States are potential *qui tam* plaintiffs in programs, like Medicaid, that they administer, and their investigation, audits, and reports may well uncover instances of fraud or abuse. The decision of the court of appeals, however, affects their rights to do so, because it enables persons who do no more than obtain these public documents to file a *qui tam* action themselves on this basis and, if they are first to file to defeat a state's claim. The first filer of a *qui tam* action forecloses all subsequent *qui tam* claims. 31 U.S.C. §3730(b)(5). The operation of this rule and the court of appeals' reading of the FCA means that a state may be prevented from getting the benefit of its own work, by a party whose only involvement is reading and taking advantage of that work.

This is not a far-fetched scenario. A perusal of "*qui tam*" on the internet reveals that these types of claims are a special area of practice with many firms advertising their expertise in the area. *See, e.g.,* Phillips and Cohen, LLP website http://www.phillipsandcohen.com/?source=overture (law firm); Bauman & Rasor Group, Inc. website http://www.quitam.com/id1.html (investigative firm); Qui Tam Online Network website http://www.quitamonline.com (lawyers). These firms, and presumably the clients they represent will be scouring state records to discover and support a claim. Because the state and local investigations and audits are available to the public it would be a simple matter for a would be *qui tam* plaintiff with no independent knowledge of the facts surrounding a false claim to simply monitor state and local investigations and reports, and then file a claim based solely on those reports. In some cases, this may be as easy as going to an online website. The reports of the Pennsylvania Auditor General, for example, are posted online. http://www.auditorgen.state.pa.us, and some reports sent to the federal government are also available online from the Federal Audit Clearinghouse. http://harvester.census.gov/sac/. In other cases, information could be made available by a simple request under a state's version of the Freedom of Information Act. In this case, a North Carolina statute made the report available to the public. N.C.Gen. Stat. §132-1 to-10 (2007). Pennsylvania has a similar statute, the "Right to Know" Law, Pa. Stat. Ann. tit. 65 §66.1 (effective now), Pa. Stat. Ann. tit. 65 §67.101, *et seq.* (effective Jan. 1, 2009), as do other states. The very effort by potential plaintiffs to obtain these records may in itself be harmful. A barrage of

requests for records under a state's Freedom of Information Act for purposes of *qui tam* litigation has the potential to disrupt ongoing investigations.

In addition, these reports and audits, available to the public, in many cases will be performed by independent auditors at the behest of the state rather than by the state agencies themselves. *See* fn 3, *infra*, the states may well be beaten to the courthouse by *qui tam* plaintiffs who take advantage of state work to file suits if the FCA is not read to include state investigations, audits and reports within the category of "public disclosures" barring suits by all but original sources.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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