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.

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

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amicus curiae* states that counsel of record for all parties received timely notice of its intention to file an *amicus curiae* brief with the Court. Petitioner has consented to the filing of this brief through a blanket consent letter filed with the Clerk. Respondent has consented through a consent letter filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* notes that no counsel for a party authored the brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae,* its members, or its counsel, made such a monetary contribution.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every sector, and from every region of the country. The Chamber actively represents the interests of its members in court on issues of widespread concern to the business community. The Chamber has participated as *amicus curiae* in numerous cases before the Court, including many cases involving the proper interpretation of the False Claims Act ("FCA"). *See*, *e.g.*, *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, -- U.S. --, 130 S. Ct. 1396 (2010) (*amicus* brief at petition and merits stages); *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457 (2007) (same); *Allison Engine Co., Inc.* v. *United States ex rel. Sanders*, 553 U.S. 662 (2008) (same); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (*amicus* brief at petition stage).

This case concerns the scope of the FCA's "public disclosure bar"—a provision that operates as a critical limitation on the reach of the Act's *qui tam* provisions. 31 U.S.C. § 3730(e)(4). A Second Circuit panel ruled below that a *qui tam* action based on information the relator obtained from the government pursuant to a Freedom of Information Act ("FOIA") request was not precluded by the FCA's public disclosure bar. The panel's ruling threatens to substantially expand the field of *qui tam* actions, will worsen abuse and misuse of the *qui tam* provisions, and is wrong on the merits.

The FCA provides a cause of action for a *qui tam* relator against any person who, among other things, submits "false claims" for payment to the government or "false statements" material to a false claim. 31 U.S.C. § 3729(a)(1). In asserting a FCA cause of action for a "false claim" or "false statement," a relator need not prove (or even allege) that the defendant had a specific intent to defraud the government. Merely alleging reckless disregard is sufficient. *Id.* § 3729(b)(1). Yet despite the lack of a specific intent requirement, the FCA "imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res.*, 529 U.S. at 784. A defendant faces treble damages and penalties of $5,500-$11,000 per false claim, along with attorneys' fees and costs. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). And a relator is entitled to a bounty for bringing a suit that results in recovery. If the United States intervenes and pursues the action, the relator gets paid 15 to 25 percent of any recovery, in addition to attorneys' fees and costs; if the United States declines to intervene in the case, a relator who nonetheless pursues it and secures a judgment gets paid up to 30 percent of any recovery, in addition to attorneys' fees and costs. 31 U.S.C. § 3730(d)(1)-(2).

The FCA's relaxed intent standard, harsh treble and per-claim damages specifications, and fee-shifting provision have combined to produce an expansive cottage industry of bounty-seeking relators. *Qui tam* lawsuits have ballooned in the past two decades; thirty such lawsuits were filed in 1987, and over *four hundred* were filed in 2009. *See* United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2009*,

available *at* http://www.justice.gov/civil/frauds/fcastats.html.

Even as the number of *qui tam* filings has swelled, the United States government—after investigating the allegations—declines to pursue more than two-thirds of those lawsuits—about the same percentage it always has, despite the vast expansion of the *qui tam* docket. But the relators press on in many such declined actions, motivated by the statute's bounty provision and unconstrained by the institutional wisdom that tempers the zeal of federal prosecutors. *Vermont Agency of Natural Res.*, 529 U.S. at 784; *cf. Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("*Qui tam* relators are * * * less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."); Department of Justice, Office of Legal Counsel, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel 207, 220 (1989) ("Relators who have no interest in the smooth execution of the government's work have a strong dollar stake in alleging fraud whether or not it exists.").

Defending declined *qui tam* lawsuits exposes the Chamber's members to immense costs and burdens, even when those cases are ultimately found to lack merit. And the vast majority of declined cases fall into that category: Over the past twenty-two years, only *three percent* of the amounts recovered for the United States have been awarded in cases that the United States government declined to pursue. *See* United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2009*,

supra (calculated by dividing the total recovery in declined *qui tam* cases by the total recovery in all *qui tam* cases).

The potential for lucrative awards has resulted not only in a cottage industry of relators; it has produced a *de facto* "relator's bar" of attorneys in regular pursuit of *qui tam* plaintiffs. *See, e.g., United States ex rel. Lopez* v. *Strayer Educ., Inc.*, 698 F. Supp. 2d 633, 641-644 (E.D. Va. 2010) (describing attorney's recruitment of disgruntled former employees to file *qui tam* suits). The Second Circuit's decision is a gift to that bar. Under the panel's guidance, *qui tam* plaintiffs' lawyers in that circuit no longer need to limit themselves to trolling for unhappy company employees to serve as relators; they can expand their search to include anyone willing to submit a FOIA request to serve in that role.

The Second Circuit is the seventh federal circuit to weigh in on the propriety of leveraging a FOIA request into a FCA claim. The panel's decision exacerbates the circuits' now 4-3 divide over whether the FCA's public disclosure bar applies where a *qui tam* complaint is based not on first-hand knowledge, but on information the government discloses in response to a FOIA request. This circuit split is of great concern to the Chamber. As a principal voice of the American business community, the Chamber is charged with ensuring that federal laws affecting the business community—like the FCA—are interpreted and applied fairly and consistently throughout the nation's lower courts. Federal funding pervades almost every sector of the Nation's economy and businesses. The proliferation of vexatious or otherwise non-meritorious *qui tam*

actions looms over every federal government contractor, subcontractor, and grant recipient—particularly as more and more relators file suit seeking to leverage honest mistakes, alleged violations of ambiguous statutes or regulations, or conflicting agency guidance into a lucrative FCA cause of action. The Second Circuit's errant ruling will only worsen this burgeoning trend. It should be reviewed and reversed.

SUMMARY OF ARGUMENT

The issues raised in this case involve the scope of the FCA's public disclosure bar—a fundamental constraint on a relator's pursuit of a *qui tam* claim and the monetary windfall that may accompany it. The Act's public disclosure bar ensures that only true whistleblowers can pursue a *qui tam* suit. *See In re Nat. Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 961 (10th Cir. 2009) ("The public disclosure bar is * * * chiefly designed to separate the opportunistic relator from the relator who has genuine, useful information that the government lacks."). How and when that bar applies is one of the most frequently litigated issues in FCA cases. In the last few years, the Court has twice addressed that provision. *See Rockwell Int'l Corp.*, 549 U.S. at 468; *Graham County*, 130 S. Ct. at 1410. This case presents a natural, and necessary, follow-on to those decisions.

The Second Circuit's decision substantially waters down the public disclosure bar. Instead of interpreting the provision to further the statutory goal of ensuring that only true whistleblowers are deputized to pursue FCA actions on behalf of the United States—as the First, Third, Fifth, and Tenth

Circuits have—the Second Circuit held that a relator can rely on information disclosed to the public in response to a FOIA request. The Ninth and Fourth Circuits have offered similar interpretations as the Second Circuit. According to the Fourth, Ninth, and now the Second Circuit, someone with no first-hand knowledge of fraud, but who merely has obtained publicly available information from the government's *own records*, can be deputized under the FCA's public disclosure bar to litigate a false claims action on behalf of the United States—and assert a right to tens of millions of dollars for doing so, as occurred in this case. The Court should review, and reverse, the decision below.

ARGUMENT

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER INFORMATION THE GOVERNMENT PUBLICLY DISCLOSES UNDER FOIA CONSTITUTES A "PUBLIC DISCLOSURE" UNDER THE FCA.

1. The FCA generally bars *qui tam* claims based on publicly disclosed information. *Rockwell Int'l*, 549 U.S. at 467 (discussing "original source" exception to bar). Since 1986, the FCA's public disclosure bar has barred suits based on publicly disclosed "reports" and "investigations" from federal administrative agencies. Until earlier this year, the statute used the descriptor "administrative" and stated that a relator's allegations of false claims "based upon the public disclosure of allegations or transactions * * * in a[n] * * * administrative * * * report * * * or investigation" were barred. 31 U.S.C. § 3739(e)(4) (2009).

As amended in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), the FCA now uses the descriptor "federal"—but continues to generally bar relator's allegations of false claims that have been "publicly disclosed * * * in a * * * Federal report * * * or investigation." 31 U.S.C. § 3730(e)(4) (2010), as amended by Pub. L. No. 111-148, § 10104(j)(2). Because a federal agency's action in response to a FOIA request is both "administrative" and "federal," the change in the descriptor has no bearing on the pure question of law in this case.[2]

2. Relator Daniel Kirk's wife submitted on his behalf several FOIA requests to the Department of Labor asking for copies of reports known as "VETS-100" reports that Schindler submitted in various years. Under FOIA, the Department of Labor was required "to search for the records" by "review[ing]" agency records to locate responsive materials. 5 U.S.C. § 552(a)(3)(C), (D). The FOIA requests "were handled by the Chief of the Investigation and Compliance Division within the DOL's Office of Veteran's Employment and Training, who, in his own words, conducted a 'search,' made a 'determination' and produced, on official stationary, a document

[2] Kirk's Brief in Opposition wrings as much mileage as possible, and then some, out of the recent change in statutory language. But Kirk does not and cannot dispute that "reports" or "investigations" issuing from federal administrative agencies were *and remain* subject to the public disclosure bar. There thus has been no change to the statute that matters in resolving the pure question of law the petition presents: Whether a federal agency's "investigation" into material responsive to a FOIA request and "report[ing]" of that material to the requester constitutes a public disclosure. 31 U.S.C. § 3739(e)(4) (2009 & 2010).

setting forth the results of his inquiry." Pet. App. 82a.

Based "in large part" on the Department of Labor's searching of its records and public disclosure of materials in response to the FOIA requests, Kirk filed a *qui tam* action alleging that Schindler violated the FCA obtaining government contracts in years when the company either had not submitted a report or had submitted an inaccurate one. Pet. App. 2a. Kirk made no allegation of any failure to provide the goods and services for which Schindler contracted with the United States. He nonetheless sought over $300 million dollars in treble damages, as well as per-claim civil penalties and attorneys' fees and costs. Pet. 5.

3. The Second Circuit specifically acknowledged that its "sister Circuits are divided on this issue." Joining two other circuits, the court of appeals held that the fact that a relator like Kirk based his *qui tam* action on materials publicly disclosed by the government in response to a FOIA request does not trigger the FCA's public disclosure bar. Pet. App. 2a-3a. Instead, in the court's view, the inquiry under the FCA is whether each of the records disclosed by the government would independently qualify as a public disclosure, such as by being a congressional report. Pet. App. 3a, 33a. Both the courts below and the petition have detailed the protracted seven-circuit split on this specific question: whether the government's public disclosure of information after searching its records in response to a FOIA request triggers the FCA's public disclosure bar. Pet. 10-13; Pet. App. 15a-26a, 79a-84a.

To briefly review the bidding: In *United States ex rel. Mistick* v. *Housing Authority of City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999), the court held that "the disclosure of information in response to a FOIA request is a 'public disclosure' "—a conclusion the court based on FOIA's directive that " '[e]ach agency shall make available *to the public*' certain specified categories of information," as well as FOIA's " 'central purpose' " of "ensur[ing] that government activities are 'opened to the sharp eye of *public* scrutiny.' " *Id.* at 383 (quoting 5 U.S.C. § 552(a) and *United States Dep't of Justice* v. *Reporters Comm.*, 489 U.S. 749, 774 (1989)) (emphasis in *Mistick*). The Third Circuit also focused on this Court's conclusion in *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) that the disclosure of information pursuant to FOIA constitutes a "public disclosure" within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1). 186 F.3d at 383. In that case, the Court held:

> [A]s a matter of common usage the term "public" is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of [the Consumer Product Safety Act].

GTE Sylvania, 447 U.S. at 108-109.[3] As the Third Circuit explained, there is "no sound basis for

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[3] Citing *GTE Sylvania*, the District Court explained that "[f]inding that the DOL's response to the Kirks' requests publicly disclosed the information in question, therefore, is consistent not only with this Circuit's FCA precedent, but also

construing the term 'public disclosure' any more narrowly [in the FCA] than the Supreme Court did in *GTE Sylvania*." 186 F.3d at 383.

Mistick is consistent with the Third Circuit's general recognition that the public disclosure bar operates to preclude *qui tam* suits "based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator"—which certainly includes *qui tam* suits based on information obtained by a member of the public through a FOIA request. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, PA* v. *Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991).

The Fifth Circuit expressly adopted the Third Circuit's reasoning. *See United States ex rel. Reagan* v. *East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004). It reasoned that an agency's response to a FOIA request is a "report" under 31 U.S.C. § 3730(e)(4) because the response is "official government action" that "provides information and notification regarding the results of the agency's search for the requested documents." *Id.* (citing *Mistick*, 186 F.3d at 383). The First and Tenth Circuits have reached the same conclusion. *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49 (1st Cir. 2009); *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir. 2004). *See also United States ex rel. Branahn* v. *Mercy Health Sys. of S.W. Ohio*, 188 F.3d 510, 1999 WL 618018 (6th Cir. 1999) (recognizing that

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with both the statutory language and the Supreme Court's understanding of the purpose behind the FOIA." Pet. App. 77a.

information is "publicly disclosed" under the FCA so long as it is "available to anyone who request[s] it").

On the other side, two circuits previously had weighed in with the view that an agency's response to a FOIA request is not an "investigation" or "report" under the public disclosure bar. *See United States ex rel. Haight* v. *Catholic Healthcare First*, 445 F.3d 1147, 1153 (9th Cir. 2006) (concluding that a response to a FOIA request is neither a "report" nor an "investigation" under the public disclosure bar because it does not include "an analysis of its findings" or "independent governmental leg-work"); *United States ex rel. Bondy* v. *Consumer Health Found.*, 28 F. App'x 178, 181 n.2 (4th Cir. 2001) (concluding that FOIA information does not trigger the public disclosure bar).

4. The Second Circuit's decision deepened that circuit split. After canvassing the divergent views of its sister circuits, the court of appeals held that the disclosure of information to a member of the public in answering a FOIA request does not trigger the public disclosure. To reach that conclusion, the court read the term "report" as including *only* a "compilation or analysis of information with the aim of synthesizing that information to serve some end of the government" and the term "investigation" as including only "sustained inquir[ies] directed toward a government end." Pet. App. 24a. Nothing in the statute, however, supports such a narrow reading of these terms. *See Graham County*, 130 S. Ct. at 1405, 1410 (rejecting proposed limitation on term in public disclosure bar that failed to account for the fact that it is the "public disclosure" itself that is the "touchstone" of the bar, which is why disclosures

even on a local television news program trigger the bar); *see also* Pet. App. 82a (District Court explaining that "the Oxford English Dictionary defines an 'investigation' as the 'making of a search or inquiry' and a 'report' as 'a formal statement of the results of an investigation' ").

The Second Circuit's cramped reading of the public disclosure bar is sharply at odds with the majority view of the other courts of appeals. The circuits on the majority side of the split construe "reports" and "investigations" by their plain meaning as including an agency's investigation of responsive material and reporting of those findings to a FOIA requester. Here, for example, the Department of Labor Chief of Investigation and Compliance within the Department's Office of Veteran Employment and Training "conducted a search and prepared a letter detailing that search and its results, a work process that produced a substantive government work product"—something Kirk did not dispute in the District Court. Pet. App. 83a-84a. As the District Court recognized, the mere fact that "the investigation and the resulting report may not have been lengthy does not obscure the fact that an administrative body conducted an investigation and produced a report disclosing to members of the public the critical elements of Kirk's claims." Pet. App. 84a.

In its opinion, the Second Circuit relied on the interpretation of the public disclosure bar urged by the United States—that the bar should only be triggered where the public disclosure "demonstrat[es] that the government is either actively investigating the alleged fraud or there is sufficient public awareness of the allegations to

pressure the government to start an investigation." Pet. App. 30a (quoting Brief for Amicus Curiae United States of America). But this Court rejected a nearly identical argument made by the relator and the United States in *Graham County*. There, in addressing whether state and local reports were public disclosures, the relator and the United States argued that these reports might not come to the attention of federal prosecutors. The Court pointed out that the focus of the statutory standard is whether a public disclosure *occurred*, not "whether [the reports] have landed on the desk of a DOJ lawyer." *Graham County*, 130 S. Ct. at 1410. So too here. It is the public nature of the information provided by the government—and equally available to anyone who asks to see it—that implicates the public disclosure bar, not what the government is doing or has done with that information.

5. The lower federal courts plainly need guidance on the interaction between FOIA and the FCA. For as matters exist now, the ability of a relator to impose the substantial costs and burdens of a *qui tam* action on businesses and courts alike turns on where that suit is filed. A New York district court will be constrained to follow *Kirk* and tolerate an action predicated on a FOIA fishing expedition, while a New Jersey district court will cite *Mistick* and dismiss the same action. In Arizona, a similar filing would survive dismissal, but not next door in New Mexico. North Carolina district courts would tolerate a FOIA-based FCA action; Texas courts would not. This sharp disparity of outcomes across circuits is especially problematic under the FCA, given a potential relator's unusual ability to broadly forum-shop for the best circuit's law in which to

bring a claim. *See* 31 U.S.C. § 3732(a); *see, e.g.,* Carolyn V. Metnick, *The Jurisdictional Bar Provision: Who is an Appropriate Relator?*, 17 Annals Health L. 101, 103 (Winter 2008) (specifically advocating that relators engage in forum shopping based on varying interpretations of the public disclosure bar).

II. THE ISSUE IS IMPORTANT AND WARRANTS REVIEW.

1. The growing practice of basing a *qui tam* action on information publicly disclosed through FOIA is especially concerning to the Chamber and its members given the rise in *qui tam* actions based on so-called "false certification" theories like the one presented in this case. Relators in such cases assert that even where the government receives the goods or service for which it paid, some other legal technicality, like non-compliance with a condition of participation or payment, can transform a claim into a "legally false" claim despite the fact that the government received exactly the goods or services that it sought.

In this case, for example, Kirk did not allege that Schindler had filed claims for, but had failed to perform, the work for which it had contracted—servicing elevators and escalators for the federal government. Instead, Kirk alleged that Schindler's claims for payment were "false" because a statute dictates that an agency may not enter a contract covered by the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA") when the contractor has not submitted a VETS-100 report, a regulation says that that an offeror subject to VEVRAA's reporting requirements represents in submitting an offer that

"it has submitted the most recent VETS-100 report required of that [Act]," and Schindler had not submitted an accurate VETS-100 reports in certain years. 31 U.S.C. § 1354(a)(1); 48 C.F.R. § 52.222-38; Pet. App. 41a, 58a-59a.

VEVRAA, like numerous statutes, provides a specific administrative mechanism for dealing with noncompliance. 38 U.S.C § 4212(b) (providing that a veteran who "believes any [federal] contractor * * * has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor"). Kirk availed himself of that very procedure: "On April 15, 2004, Kirk filed a complaint with the Secretary of Labor, the DOL's Office of Federal Contract Compliance Programs conducted an investigation, [and] the investigation resulted in an official report finding no evidence of non-compliance[.]" Pet. App. 69a.

But in addition to pursuing VEVRAA's specified administrative remedy, Kirk also went for the bounty, alleging in a *qui tam* suit that Schindler's purported noncompliance with the VETS-100 regulation meant that every dollar in payment sought by Schindler for its later work was a "legally false" claim because Schindler had not submitted an accurate VETS-100 report. *See* Pet. App. 39a-41a, 62a-68a (discussing the FCA false certification theory and the distinction between factually and legally false claims); *see also, e.g., Ebeid ex rel. United States* v. *Lungwitz*, -- F.3d --, 2010 WL 3092637, at *2-*3 (9th Cir. Aug. 9, 2010) (following Second, Sixth, Tenth, and Eleventh Circuits in

recognizing implied false certification theory and holding that "[i]mplied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim"); *United States ex rel. Hendow* v. *University of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on alleged non-compliance with a condition of participation in student loan program even though Department of Education treated alleged noncompliance of condition as an administrative enforcement matter, not fraud).

Implied and express "false certification" theories have become the theories *du jour* of the relator's bar. And when coupled with the Second Circuit's broad tolerance of *qui tam* actions predicated on FOIA disclosures, that combination is guaranteed to foster further abuse of the FCA. The FCA's objective is to enlist those with knowledge of fraud to help the government ferret it out, not to arm citizens with a heavy statutory weapon to challenge every alleged instance of minimal regulatory noncompliance. Where a relator has no knowledge of wrongdoing or fraud, but instead bases a FCA action on publicly available FOIA materials, the relator is simply not the true whistleblower that the FCA is intended to foster and encourage. *See, e.g., Wang* v. *FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime."); *United States ex rel. McKenzie* v. *BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (a

"true whistleblower" alerts the government to an alleged fraud "before such information is in the public domain"). The FCA was never meant to encourage citizens to go hunting through the government's *own files* looking for minor reporting violations that, regardless of applicable administrative enforcement mechanisms, the relator can prosecute for a bounty as a FCA action.

By permitting Kirk's bounty-hunting *qui tam* suit to proceed after his administrative complaint had been filed, addressed, and resolved against him, the Second Circuit both circumvented the appropriate administrative mechanisms and second-guessed the agency's determination. As the Office of Legal Counsel explained over twenty years ago, the contracting agency should decide whether a deviation constitutes a breach and whether a breach amounts to fraud—taking care "to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party" and considering whether "the contractor's performance otherwise has been adequate or even excellent." Office of Legal Counsel, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel at 220. Relators have no such tempering influences; their strategy is recovery-or-bust, as they only reap the financial reward (and attorneys' fees) if they can obtain a judgment or settlement based on allegations of technical noncompliance. There is no basis in law or logic for using FOIA materials from the government to purse a FCA action that displaces the normal agency compliance and enforcement mechanisms.

3. The limitation on relators imposed by the public disclosure bar is vital to American business. As Kirk's FOIA request demonstrates, relators and the relators' bar are engaged in a relentless drive to stretch the statute's *qui tam* provisions into a private, and punitive, enforcement mechanism for other statutes—like VEVRAA—that supply a carefully calibrated administrative remedy bearing no relation to the FCA's severe regime. Resolving the circuit split presented in the petition on a pure question of law frequently aired in FCA litigation will help guarantee that only proper whistleblowers can pursue *qui tam* litigation and receive a bounty for their success.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant the petition and reverse the Second Circuit's judgment.

Respectfully submitted,

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