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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 08-304, Graham County Soil and Water Conservation District v. The United States, ex rel. Wilson.

Mr. Browning.

ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

ON BEHALF OF THE PETITIONERS

MR. BROWNING: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the word "administrative" as used in the public disclosure bar of the False Claims Act includes State audits and reports or is limited to Federal sources.

If this Court were to hold that a relator can simply copy a State report or a State criminal indictment and then proceed with a qui tam action, there will be a proliferation of opportunistic qui tam actions brought under this statute.

Such construction of the statute would have a devastating effect upon States, local governments, and the Federal fisc.

Much of the work of State government involves cooperative Federal and State programs. States

1 have been an effective partner in fighting against fraud  
2 and abuse with respect to those programs. For example,  
3 many States have turned to computerized software to  
4 identify irregularities in connection with Medicaid  
5 billings. California has implemented a process of  
6 analyzing both its Medicare and its Medicaid databases  
7 in order to identify doctors who bill in excess of  
8 24 hours in a given day.

9 Under the decision below, that investigatory  
10 work can simply be copied by a qui tam plaintiff and an  
11 action brought based upon that public report. The  
12 result is --

13 JUSTICE SCALIA: But under your proposal a  
14 State that itself is guilty of fraud can, in effect,  
15 immunize -- if not immunize itself, at least render the  
16 information unusable by conducting a hearing.

17 MR. BROWNING: Well, Your Honor, the  
18 government certainly argues that it would result in  
19 State and local governments immunizing themselves from  
20 qui tam liability.

21 With respect to States, the Fourth Circuit's  
22 decision expressly includes reports of the State  
23 government. States, of course, are not liable under the  
24 qui tam provisions, as a result of this Court's decision  
25 in Vermont Department of Natural Resources v. United

1 States ex rel. Stevens.

2 JUSTICE GINSBURG: And it's also the  
3 original source, if -- if the relator is the original  
4 source of the information.

5 MR. BROWNING: Yes -- yes, Justice Ginsburg,  
6 that -- even if there is a State report that a -- that  
7 a -- is in the public domain, a local government could  
8 still be sued under that document, if -- in spite of  
9 that document, by either the United States or a qui tam  
10 plaintiff that stands as an original source. So --

11 JUSTICE GINSBURG: But what about the  
12 argument that Congress wanted to, in its most recent  
13 provisions, wanted to expand qui tam availability and  
14 this would -- if you would -- if you include State and  
15 local reports, that will shrink the availability?

16 MR. BROWNING: Your Honor, there is no  
17 question that Congress looked at the pre-1986 public  
18 disclosure bar, the provisions that existed between 1943  
19 and 1986, and during that time frame an action, a qui  
20 tam action, would be barred if it was based upon  
21 information that was available to the -- the Federal  
22 Government.

23 Congress decided that that cut off too many  
24 qui tam actions, and as a result it reached a  
25 compromise. Many members of Congress wanted to totally

1 eliminate the government knowledge bar. On the other  
2 hand, the United States Department of Justice at the  
3 time was arguing that the existing bar should remain in  
4 effect as a result of abusive and frivolous qui tam  
5 actions and their concern with respect to that. So a  
6 compromise was reached in which the bar was completely  
7 changed. It was changed to allow for a -- for an  
8 original source to bring the qui tam action, essentially  
9 a relief valve that addressed Congress's concerns with  
10 respect to cases such as United States ex rel.  
11 Wisconsin v. Dean.

12           It also in the 1986 amendments set out  
13 specific sources of information and directly identified  
14 the type of public information that a qui tam action can  
15 be based upon. That list, of course, includes many  
16 sources that might or might not be readily available to  
17 the United States Government. For example, it includes  
18 reports by a news media. A -- an obscure article in a  
19 weekly publication of limited circulation does not  
20 realistically put the government on notice of a  
21 particular fraud.

22           The same can be true -- said with regard to  
23 an action filed in Federal court, a private action  
24 between civil litigants based upon diversity  
25 jurisdiction. If that -- if there is a summary judgment

1 motion filed in that case and there are a number of  
2 depositions, one of which might indicate fraud, that are  
3 filed in that summary judgment motion and the case  
4 settles, that -- there will never be -- that summary  
5 judgment motion wouldn't be reviewed by the Federal  
6 district court judge. But still, there is no question  
7 that the filing of that document with the Federal court  
8 would constitute a public disclosure under the first  
9 clause of the public disclosure bar.

10 JUSTICE SCALIA: It would be a -- would it  
11 be a civil hearing? A deposition -- you would consider  
12 a deposition to be a civil hearing?

13 MR. BROWNING: Your Honor, I am referring to  
14 a deposition that is actually filed with the court in  
15 connection with the summary judgment motion and the case  
16 then settles. Generally, the -- the courts have --

17 JUSTICE SCALIA: What -- what provision  
18 would it come under?

19 MR. BROWNING: Justice Scalia, the phrase  
20 "criminal, civil, or administrative hearing." The  
21 courts have consistently read that word "hearing" as --  
22 as including all courts' proceedings, not simply the  
23 hearing itself, documents that are filed with the  
24 clerk's office --

25 JUSTICE SCALIA: Documents are -- documents

1 are a hearing?

2 MR. BROWNING: Your Honor, the -- if  
3 Congress had meant to limit that word "hearing" to  
4 literally in-person oral arguments or in-person  
5 testimony, it -- the result would be that a criminal  
6 indictment could be copied by a qui tam plaintiff and an  
7 action brought based upon that.

8 That, of course, was this Court's decision  
9 in United States ex rel. Marcus v. Hess. The -- it is  
10 clear from the congressional history that Congress  
11 wanted to change that result by -- so Congress used the  
12 word "hearing" that obviously meant more than -- than  
13 simply --

14 JUSTICE SCALIA: Meant more than hearing?

15 MR. BROWNING: Yes, Your Honor, and that's  
16 the part of the problem, is --

17 JUSTICE SCALIA: That's an argument that  
18 doesn't go very far with me. I mean, "hearing" means  
19 hearing.

20 MR. BROWNING: Your Honor, the -- the  
21 problem is -- is that Congress really did not speak very  
22 clearly at all with respect to the False Claims Act, and  
23 so we're -- we're left with this mess of trying to  
24 figure out exactly what Congress intended.

25 The phrase --



1 JUSTICE ALITO: In your view, must an  
2 administrative report be a report that is generated by  
3 some government unit? Could it be a report by the  
4 administration of a university, for example?

5 MR. BROWNING: Justice Alito, the  
6 Petitioners would not read that phrase as -- that  
7 broadly. When the Congress has used the word  
8 "administrative hearing," that would appear to indicate  
9 action by the government.

10 And, under any of the dictionary definitions  
11 of "administration," clearly a State administrative  
12 proceeding, a State administrative report, would fall  
13 within the scope of the dictionary definition. We don't  
14 believe the Court needs to read that language as  
15 including private hospitals, private universities.

16 JUSTICE ALITO: But I'm not sure why.  
17 You -- if -- unless "administrative" is informed by the  
18 other adjectives in that prepositional phrase, "in a  
19 congressional, administrative, or Government Accounting  
20 Office," presumably GAO, "report," it -- unless that is  
21 the -- you know, unless it's informed by those other  
22 references, and that's why it has to be governmental,  
23 I'm not sure how you limit "administrative" to  
24 governmental reports.

25 MR. BROWNING: Well, Your Honor, the public

1 disclosure bar uses the phrase "administrative hearing"  
2 twice, and it's referring to Black's Law Dictionary. It  
3 defines "administrative hearing" as, essentially, a  
4 hearing conducted by an administrative agency.

5 JUSTICE GINSBURG: When you say "twice," you  
6 mean in the first clause that says "in a criminal,  
7 civil, or administrative hearing"?

8 MR. BROWNING: Yes, Your Honor. And then in  
9 the second clause it proceeds to use the phrase  
10 "congressional, administrative, Government Accounting  
11 Office hearing, audit, investigation, or report."

12 JUSTICE GINSBURG: But there is a redundancy  
13 there if the statute means what you say it does; it says  
14 "administrative hearing" in both the first clause and  
15 the second clause.

16 MR. BROWNING: Yes, Your Honor, there is a  
17 redundancy based upon Petitioner's construction of the  
18 statute. But Congress was not particularly concerned  
19 about redundancy in the False Claims Act. For example,  
20 again it uses the phrase "congressional, administrative,  
21 or GAO."

22 GAO, of course, is a body that reports to  
23 Congress. Its head is appointed by the President. So  
24 under any definition GAO would either be congressional  
25 or administrative, so there is a redundancy there.

1 There's also --

2 JUSTICE SCALIA: Well, I think there would  
3 be a good lawsuit as to whether "congressional report"  
4 includes a GAO report. I think that's a lawsuit. I  
5 don't think it's at all as clear as you suggest.

6 MR. BROWNING: Well, Justice Scalia, let me  
7 also point out that there is a redundancy in connection  
8 with the use of "audit, report, or investigation."  
9 Essentially, Congress is using the same word to mean  
10 essentially the same thing in that clause as well.

11 But yes, our reading does result in a  
12 redundancy in the statute. Of course, the government  
13 reads this entire clause as being limited to Federal  
14 proceedings. They would urge a redundancy in the  
15 statute as well. But what's more important is this  
16 Court has consistently said that it will not read the  
17 same phrase as having a different meaning in the same  
18 sentence.

19 Yes, Congress has created a redundancy, but  
20 that is no more egregious than the fact that it used the  
21 phrase "Government Accounting Office" to refer to what  
22 was clearly the General Accounting Office.

23 JUSTICE SCALIA: Yes, well, that argument  
24 does not scare the government. I think the government  
25 would like to read "administrative hearing" in the

1 first -- in the first phrase as being limited to Federal  
2 administrative hearing as well.

3 MR. BROWNING: Yes, Justice Scalia. That is  
4 their argument today. Of course, just 11 months ago in  
5 United States ex rel. Poteet v. Medtronic, the  
6 government argued in the Sixth Circuit that a qui tam  
7 action should be dismissed based upon a State court  
8 complaint. They convinced the Sixth Circuit to accept  
9 that position and dismissed that complaint on January 14  
10 of this year.

11 JUSTICE SCALIA: And that was on -- on the  
12 basis of the first, the first phrase rather than the  
13 second?

14 MR. BROWNING: Yes, Your Honor, based upon  
15 the first clause of the statute.

16 JUSTICE GINSBURG: Is this particular audit  
17 report we are talking about, this is the audit report  
18 was done by an independent accountant? Is that --

19 MR. BROWNING: Yes, Your Honor. There are  
20 two audit reports -- I'm sorry, there are two reports.  
21 The key one is the report that identifies or asserts  
22 that this work at issue should have been sent out by  
23 bid. That was prepared by an accounting firm for Graham  
24 County, North Carolina, the same auditor that was  
25 engaged by the county to comply with the Single Audit

1 Act --

2 JUSTICE GINSBURG: Is that -- is that audit  
3 on file with the Department of Agriculture?

4 MR. BROWNING: Your Honor, I would have to  
5 go beyond the record, but yes, we have conducted a --  
6 submitted a Public Information Act request, and  
7 essentially a week after the document was transmitted to  
8 Graham County it was transmitted to the United States  
9 Department of Agriculture.

10 JUSTICE BREYER: The arguments in this case,  
11 my initial reading of them, are more balanced than any I  
12 can remember, really. For each one, there is a  
13 counterargument and I'm somewhat left up in the air.

14 So if -- since we have to decide it, it  
15 should -- should I take this into account: That if the  
16 Respondents are right, you are absolutely correct that  
17 there will be a lot of people, perhaps, who get rewards  
18 at the Federal Government's expense who shouldn't have  
19 them. No question. They front-run the government.  
20 They read the report, run in court fast, before it's in  
21 the newspaper.

22 But if you are right, then they are going to  
23 have to assign people to look at these obscure  
24 administrative reports that didn't even get in the  
25 newspaper. So they want to do that, they don't have

1 people to do it, and they say these people are  
2 performing a service of sorts by reading them, the  
3 reports, for them and telling them about it. And there  
4 it is, balanced.

5 But they are the ones who suffer. You see,  
6 they suffer both ways. They suffer if people don't tell  
7 them; they suffer if in fact too many people are getting  
8 unjustified rewards because the money comes from the  
9 Federal Government, the 10 percent, 25 percent. So if  
10 they're the ones who suffer, should I not pay special  
11 attention to their views as to how the balance works  
12 out?

13 MR. BROWNING: Well, Your Honor, Justice  
14 Breyer, first of all, the government hasn't been  
15 consistent. As we pointed out in *United States ex rel.*  
16 *Poteet*, they have taken the exact opposite position with  
17 regard to clause 1 in the first circuit.

18 But the real issue here and what should  
19 concern the Court is the fact that there will be a  
20 tremendous number of opportunistic qui tam plaintiffs  
21 that arise. If someone can simply go to an ongoing  
22 State or local government investigation, copy it, and  
23 bring it --

24 JUSTICE BREYER: As you can tell, I have  
25 taken that point in.

1 MR. BROWNING: Yes.

2 JUSTICE BREYER: So my question wasn't that.  
3 My question was, Should I or should I not give them a  
4 little expertise weight on the grounds that they are the  
5 ones who know it best, that they are the victims?

6 MR. BROWNING: Well, I would suggest that  
7 the weight that should be given is to the partners of  
8 the Federal government, States and local governments  
9 that are in the trenches administering these programs,  
10 that will have tremendous difficulty if there is a rash  
11 of qui tam actions that are brought that disrupt ongoing  
12 Medicaid and other investigations.

13 JUSTICE SOTOMAYOR: How will that happen?  
14 Meaning, how will they know, A, that the investigation  
15 is occurring; and second, what can they do under Federal  
16 or State law to require the disclose of ongoing  
17 investigative materials?

18 I don't know -- mind you, I haven't studied  
19 them -- but the ones that I am familiar with never  
20 permit the public -- none of the Freedom of Information  
21 Act-type legislation, never permit the disclosure of  
22 ongoing investigative material. So I am a little bit  
23 confused by how that would happen.

24 MR. BROWNING: Justice Sotomayor, there are  
25 going to be some exceptions to many States' Public

1 Information Act requests, things such as attorney-client  
2 communications, in some cases criminal investigations.  
3 But for most States there will not be any sort of  
4 prohibition against a plaintiff's attorney filing a  
5 Public Information Act request saying, print out -- give  
6 us a copy of all printouts that show disparities and  
7 irregularities with regard to Medicaid billings.

8           Moreover, most States are -- by law are  
9 required to receive complaints concerning the State's  
10 Medicaid program. Those are generally processed by the  
11 State's system integrity program. And those reports are  
12 going to be readily available to Public Information Act  
13 requests.

14           Essentially, what this Court should be  
15 worried about are State employees who know where the  
16 documents can be located. You can simply copy the  
17 document, bring a qui tam action, and produce a windfall  
18 for yourself, potentially disrupting the State  
19 investigation. And if Congress really wanted to do  
20 that, if they wanted to create this rash of ill-advised  
21 qui tam actions, this flood that's about to fall upon  
22 the States, Congress should have written a little bit  
23 more clearly before doing so. It isn't consistent with  
24 the language of the statute or with congressional  
25 intent.



1           Throughout the legislative history it is  
2 clear that what Congress was intending to do was to have  
3 access to true insiders, the whistleblowers, to obtain  
4 information that would be confidential, that would not  
5 otherwise be available to the Federal Government.

6           JUSTICE SOTOMAYOR: But Congress obviously  
7 wanted more than that, because if Congress's intent was  
8 the one that you are announcing then it should have just  
9 permitted original sources to sue. But that's not the  
10 choice it made. It broadened the scope of qui tam  
11 actions to include more sources or more reward for  
12 individuals who don't have original information.

13           MR. BROWNING: Yes, Your Honor, it -- it  
14 added the original source provision, and it identified  
15 certainly sources of information and said, you cannot  
16 bring an action based upon those specific sources.

17           JUSTICE STEVENS: May I --

18           MR. BROWNING: Those include --

19           JUSTICE STEVENS: May I ask this question:  
20 Is the fact that they've included the news media  
21 consistent with your view?

22           MR. BROWNING: Yes, Your Honor.

23           JUSTICE STEVENS: That seems to be a much  
24 more open source of information than you're raising.

25           MR. BROWNING: Exactly. The government

1 argues that the False Claims Act is exclusively Federal,  
2 the public disclosure bar should therefore be read as  
3 exclusively Federal. But the existence of this category  
4 of news media indicates that Congress did not intend the  
5 public disclosure bar to be exclusively Federal sources.

6           There -- there -- under the government's  
7 theory that all of this fall -- the entire public  
8 disclosure bar should be read as limited to Federal  
9 sources, the only news media that would be able to -- to  
10 fall within the scope of the public disclosure bar would  
11 be the Voice of America, which is the only Federal news  
12 media currently in existence, to my knowledge.

13           JUSTICE SCALIA: Stars and Stripes, maybe.

14           MR. BROWNING: Yes, Your Honor. Thank you,  
15 Justice Scalia.

16           CHIEF JUSTICE ROBERTS: Well, but that's not  
17 terribly persuasive. In the statute there are separate  
18 provisions, they talk about disclosures "in criminal,  
19 civil or administrative hearings," "in a congressional  
20 administrative or Government Accounting Office report,  
21 or from the news media." Simply because you want to  
22 limit "administrative" or not limit "administrative"  
23 does not mean that the other side's view requires news  
24 media to be modified by "Federal."

25           MR. BROWNING: Mr. Chief Justice, two points

1 I would like to make in response is: First, these  
2 clauses -- and there are three clauses, the first one  
3 beginning with "in" and the third one beginning with  
4 "from" -- they do not serve different purposes. Rather,  
5 they serve to identify the sources that Congress did not  
6 want to give rise to a qui tam action. So this list has  
7 to be read as a whole.

8 The second point I would like to make is  
9 throughout --

10 JUSTICE SCALIA: We should stop calling them  
11 clauses. They are really phrases.

12 MR. BROWNING: Yes, Your Honor.

13 With respect to these three phrases, the --  
14 throughout the legislative history, the year and a half  
15 that the False Claims Act was being debated, there were  
16 only two clauses that began with --

17 JUSTICE SCALIA: Phrases.

18 MR. BROWNING: -- the preposition "in" --  
19 phrases.

20 (Laughter.)

21 MR. BROWNING: -- that began with the  
22 preposition "in" and then "from" in connection with  
23 "news media." It was only on October 3, 1986, that  
24 the -- when it was -- the provision was finally enacted  
25 by the Senate, that this second "in" was added before

1 the second clause.

2 So, Congress undoubtedly did not intend to  
3 make this 11th-hour change and have some substantive  
4 change to the statute. Rather, it should best be read  
5 as a last-minute insert to make the clause, the three  
6 clauses as a whole, read and flow much better than they  
7 did prior to that time.

8 JUSTICE KENNEDY: Can you tell me just as a  
9 practical matter, suppose -- suppose the county says,  
10 you know, we found out that we were defrauded by this  
11 contractor, and it sues the contractor. But its suit  
12 doesn't cover really all of the damages, only half of  
13 it. Can a qui tam action then be commenced for the  
14 portion that the county isn't seeking? I mean, how does  
15 that work?

16 MR. BROWNING: Your Honor, if there has been  
17 a public disclosure --

18 JUSTICE KENNEDY: Which there would be if  
19 there's a complaint filed by the county --

20 MR. BROWNING: Yes.

21 JUSTICE KENNEDY: -- against the contractor.

22 MR. BROWNING: Essentially what the lower  
23 courts have done is they would allowed a qui tam action  
24 to go with regard to a completely different claim. But  
25 if it were simply the fact that the public disclosure

1 covered a portion of the time period but not all of  
2 it --

3 JUSTICE KENNEDY: Depends on the identity of  
4 the claim?

5 MR. BROWNING: Yes. Yes.

6 JUSTICE KENNEDY: And -- and suppose in  
7 their race to the courthouse, the qui tam plaintiff  
8 files on Monday and the county files on Tuesday?

9 MR. BROWNING: Under -- under that scenario,  
10 if the qui tam action is filed before the public  
11 disclosure, then the qui tam action would not be bourne.  
12 -

13 If there are no further questions, I'd  
14 like --

15 JUSTICE STEVENS: May I, just one -- one  
16 quick question. I -- I -- I just want to be sure I  
17 understood. Do you draw any distinction between the  
18 preposition "in" and the preposition "from"?

19 MR. BROWNING: No, Your Honor. I think it  
20 is -- as Justice Alito pointed out when he served on the  
21 Third Circuit, that some of these prepositions are very  
22 awkward indeed.

23 JUSTICE SCALIA: Part of the random nature  
24 of the whole provision, right?

25 MR. BROWNING: Yes, Justice Scalia.

1           If there are no further questions, I would  
2 like to reserve the remainder of my time for rebuttal.

3           CHIEF JUSTICE ROBERTS: Thank you counsel.

4           Mr. Hurt.

5           ORAL ARGUMENT OF MARK T. HURT

6           ON BEHALF OF THE RESPONDENT

7           MR. HURT: Mr. Chief Justice, and may it  
8 please the Court:

9           The decision of the Fourth Circuit is  
10 correct because the text of the False Claims Act compels  
11 the result, and the purpose -- and also the purposes of  
12 the 1986 amendments to the Act. As the Fourth Circuit  
13 noted, Congress grouped the disclosure sources in  
14 paragraph (a) of the public disclosure bar into three  
15 distinct categories. In CATEGORY 2, the term  
16 "administrative" which is at issue here is sandwiched  
17 between the terms "congressional" --

18           JUSTICE GINSBURG: Let's begin at the  
19 beginning, and that is with the first phrase with the,  
20 what is it, "civil, criminal, administrative hearing."  
21 Do you as the government -- do you agree with the  
22 government that you have to insert "Federal" there, too?  
23 Or does that phrase --

24           MR. HURT: No.

25           JUSTICE GINSBURG: -- include States?

1           MR. HURT: No, the -- the text of category 2  
2 compels the result here, although we do believe that the  
3 better view of category 1 is that it is also Federal as  
4 well, and the context -- the overall context --

5           JUSTICE GINSBURG: Suppose -- suppose it  
6 isn't? Suppose the general "civil, criminal,  
7 administrative" is read to mean -- include State. Why  
8 shouldn't the second, if it we are picking Latin  
9 phrases, be read in pari materia?

10          MR. HURT: Because each of those categories  
11 is distinct, not only grammatically, but as far as  
12 function. The first category is clearly adjudicative in  
13 nature. The second is non-adjudicative. And the third  
14 category is -- is news media and stands on its own.

15          JUSTICE SCALIA: Why -- why should we read  
16 the second category back to alter the meaning of the  
17 first, rather than reading the first phrase forward to  
18 alter the meaning of the second? It -- it is absolutely  
19 clear when you read this, "in a criminal, civil, or  
20 administrative hearing"; there is no limitation to  
21 Federal on that. And you acknowledge that the criminal  
22 and civil apply to -- to State civil and criminal  
23 proceedings, right? So when you read that phrase,  
24 "administrative" simply means, obviously means State  
25 administrative.

1           Now, why shouldn't I read that forward and  
2 say, well, since it means State there, it must mean  
3 State in the next one, in a congressional,  
4 administrative, or GAO report.

5           MR. HURT: The argument for category 2 is  
6 less compelling, we agree. The argument for category 1  
7 is most compelling because these categories are distinct  
8 and should be looked at as separate units for that  
9 purpose. You have category 2 as non-adjudicative, and  
10 category 1 is adjudicative. And so you have -- you have  
11 distinction there.

12           If you were looking at the three categories  
13 and, for instance, you don't say category 3 and say  
14 category 3 is nongovernmental, so therefore we should  
15 construe category 2 to include private administrative  
16 reports.

17           JUSTICE BREYER: The question is, what sense  
18 does that make? I mean -- and I thought you said that  
19 the category 1, which is the criminal proceeding, civil  
20 or administrative proceeding, I thought you said it does  
21 not apply to State proceedings in your view. You said  
22 that was the better view.

23           MR. HURT: Yes.

24           JUSTICE BREYER: What's the state of the law  
25 on that? I thought it was virtually -- what is the



1 state of the law?

2 JUSTICE SCALIA: You say that just as to  
3 administrative. Don't you acknowledge that the criminal  
4 and civil apply to State criminal and civil?

5 MR. HURT: No.

6 JUSTICE SCALIA: You want the whole thing to  
7 be just Federal?

8 MR. HURT: No, we think the better view is  
9 that the whole category is --

10 JUSTICE SCALIA: The whole category?

11 MR. HURT: -- exclusively Federal.

12 JUSTICE BREYER: I think you'd have to say  
13 that. But -- but now, what is the state of law on that?

14 MR. HURT: The -- the court of appeals have  
15 basically gone the other way, but they have looked at it  
16 in a very superficial matter and have not really  
17 directly addressed the issue.

18 JUSTICE BREYER: What are we supposed to do?  
19 I mean, to me it makes no sense. We are only talking  
20 about things that don't get into the newspapers. So --  
21 and the purpose of the Federal Government's reading of  
22 this would be, look, we don't have people to go send  
23 around to every -- read every State report. We just  
24 don't have that personnel. So we rely on these  
25 whistleblowers and we know some will be unjustified. I

1 would think the same thing would be absolutely true of  
2 State criminal proceedings that don't get into the  
3 newspaper. There are probably 50 -- several  
4 thousands -- thousands and thousands.

5 So how to read these differently is a  
6 problem for me. And I think that's on your side of it.  
7 But we are back to Justice Scalia's question, which to  
8 me is the -- is the question here.

9 MR. HURT: Well, the False Claims Act in  
10 sections, the pertinent sections 3729 and 3730, refers  
11 to the Federal Government many times but never with the  
12 modifier "Federal." They do it through context. And in  
13 fact --

14 JUSTICE BREYER: Is there any history, which  
15 I pay attention to -- is there any legislative history  
16 or anything else that you can point to, to me that's  
17 important, showing that that first criminal hearing  
18 means just Federal?

19 MR. HURT: Yes, the -- the legislative  
20 history shows throughout -- beginning with the House and  
21 Senate bills and going forward that these -- the earlier  
22 version shows these were exclusively Federal.

23 JUSTICE BREYER: And they meant criminal  
24 hearing. Criminal hearing meant Federal criminal  
25 hearing, not State.

1 MR. HURT: Exactly, and you have references  
2 --

3 JUSTICE BREYER: You say "exactly." I was  
4 looking for the backup for that.

5 MR. HURT: Yes. The legislative history is  
6 clear on that point, and in fact if you look at the  
7 Senate bill that was passed August 11, you have the  
8 final version of paragraph (A), and then you -- which  
9 was enacted in law, and paragraph (B) was somewhat  
10 different, but it had the phrase "government or news  
11 media," "disclosures to government or news media." It's  
12 clearly referencing back to paragraph (A) and  
13 categorizing those sources as either sources of capital  
14 "G" government, the Federal Government, or the news  
15 media.

16 And the changes -- the subsequent changes to  
17 paragraph (B) give no indication that Congress's  
18 background understanding of that changed. There is no  
19 indication of that. And of course you have the Senate  
20 sponsors of the bill making the same statements that  
21 this was clearly Federal.

22 JUSTICE GINSBURG: Why -- what was the  
23 reason for that be, given that there are so many joint  
24 Federal-State grant programs, like the one that's  
25 involved here? Why wouldn't a State report be as much

1 of a public disclosure as a Federal report? I mean, we  
2 are told that this particular report was filed with the  
3 U.S. Department of Agriculture.

4 MR. HURT: Because it gives no -- a report  
5 produced by a State or a local government -- and again,  
6 their argument is not just State but every little local  
7 entity producing these reports fall under the  
8 category 2, according to them. Simply the fact that a  
9 local or State official might be producing this report  
10 gives no indication that the Federal Government is  
11 focusing on it or looking at it. And in fact --

12 JUSTICE ALITO: You think the Federal  
13 Government is focusing on everything that is disclosed  
14 in every civil proceeding that occurs in Federal court?

15 MR. HURT: No, but Congress was selecting  
16 general categories and as a general category the Federal  
17 proceedings they thought were more likely to put the  
18 government on notice --

19 JUSTICE SCALIA: News media, they are likely  
20 to be keeping track of all local newspapers as well?

21 MR. HURT: Well, I think that as a general  
22 category it was reasonable for Congress to assume that  
23 the news media disclosures would be disseminated in  
24 general to the general public and would put pressure on  
25 the government to take action, and the government would

1 pay attention to that in general.

2 JUSTICE SCALIA: I mean, they could have  
3 said "national news media." It didn't say "national  
4 news media." It said "news media."

5 MR. HURT: It said "news media."

6 JUSTICE SCALIA: It includes a local radio  
7 station, a local community newspaper, right? All of  
8 that is included.

9 MR. HURT: Congress was drawing the lines --

10 JUSTICE SCALIA: And yet, State proceedings,  
11 which are excluded, right?

12 MR. HURT: Yes.

13 JUSTICE SCALIA: Even state supreme court  
14 cases and so forth. It seems strange to me.

15 MR. HURT: Well, under, under -- this Court  
16 recognized in Cook County that the 1986 amendments  
17 abolished the government knowledge rule and allowed the  
18 qui tam relators to bring cases even where the  
19 government, Federal Government, had possession of  
20 information about the fraud.

21 What we are doing here is not even -- we are  
22 not even sure the government has possession of these  
23 reports. A lot of these reports are just sitting in  
24 file cabinets all around the country in these little  
25 administrative office buildings.

1 JUSTICE STEVENS: Mr. Hurt, let me just give  
2 you what's really troubling me about this case. You  
3 have two citizens of a small town. One of them goes to  
4 the hearing and gets all this information, the other one  
5 doesn't go to the hearing and reads about it in the  
6 newspaper. The latter is a permissible plaintiff, the  
7 former is not; is that correct?

8 MR. HURT: Correct.

9 JUSTICE STEVENS: Does that make any sense?

10 MR. HURT: It does, because Congress drew  
11 it -- picked it as a general category. They were  
12 thinking probably most likely The New York Times or  
13 newspapers that have actual investigative reporting  
14 resources, and that was what they had in mind.

15 Here you have a whole --

16 JUSTICE SCALIA: That doesn't show that it  
17 makes sense. It just shows that Congress wasn't  
18 thinking clearly. There's a difference between the  
19 two.

20 MR. HURT: One of the huge problems with  
21 Petitioners' position is it's going to sweep into  
22 category 2 an enormous number of reports and audits that  
23 the Federal Government is likely to never see, never  
24 come across, and you need these concerned citizens to  
25 go -- you want the citizens to go and look at these.

1 CHIEF JUSTICE ROBERTS: Counsel, are you  
2 sure that -- your argument is that this is sandwiched  
3 between two Federal descriptions? Are you sure  
4 "congressional" is limited to Federal Congress? The  
5 first definition in Black's Dictionary is "a formal  
6 meeting of delegates." And I don't know -- maybe I  
7 should -- I don't know if all 50 States refer to their  
8 legislature by some term other than "Congress."

9 MR. HURT: The Petitioners have not pointed  
10 to an example of a State congress. I think it's  
11 generally conceded that that would be Federal. And  
12 also, when you look at GAO, that's clearly a Federal  
13 entity there as well.

14 JUSTICE KENNEDY: I'd like to go back to  
15 Justice Ginsburg's very first question. I want you to  
16 assume that in category 1 it means State or Federal.  
17 Maybe you disagree, maybe you don't. I want you to  
18 assume that. If we assume that, does it make any sense  
19 to confine category 2 to Federal only?

20 MR. HURT: Yes --

21 JUSTICE KENNEDY: And what's the  
22 practical -- your answer was, well, that's because -- I  
23 want to know the practical rationale for that, the  
24 practical reasons why that should make sense.

25 MR. HURT: Because reports and audits are

1 just a totally -- a category that is much -- many  
2 magnitudes greater than the number of criminal, civil,  
3 and administrative hearings. You are going to have  
4 millions of documents all over this country in file  
5 cabinets that are generated by local and State  
6 governments that there is no possibility the vast  
7 majority of those would ever come across the attention  
8 of the Federal Government. And so you want concerned  
9 citizens to be looking through, monitoring their local  
10 governments, digging up these reports and bringing  
11 lawsuits based on those. The Federal Government's  
12 simply not going to do it.

13 JUSTICE SCALIA: Which decision of ours do  
14 you think would prompt Congress to go back and do this  
15 right? I mean, do you think that finding the way the  
16 government wants us to find will produce a revision of  
17 this really terrible text so that it makes sense; or do  
18 you think that finding for the other side, giving the  
19 government some incentive to get this fixed, would  
20 likely produce a proper amendment? What do you think?  
21 I think the latter, to tell you the truth.

22 MR. HURT: Well, unfortunately we have to  
23 deal with the statute as it is. And, you know, the --  
24 our position uses all the clues in the statute to  
25 construe it. The other side construes it in a crude



1 manner and says, let's treat it like a laundry list,  
2 let's not use any of the grammatical clues in construing  
3 this language, and also let's construe it in a way that  
4 ignores what Congress did in 1986, which was to abolish  
5 the government knowledge part. This is a reimposition  
6 of that bar.

7 JUSTICE ALITO: Suppose that the second  
8 phrase said "in a congressional, news media, or GAO  
9 report." Would you read "news media" to be  
10 governmental?

11 MR. HURT: No, I would not.

12 JUSTICE ALITO: What's the difference  
13 between that and the way it's phrased now?

14 MR. HURT: Because it is -- Congress did put  
15 it in a separate category, so --

16 JUSTICE ALITO: No, no. Right now we have  
17 "in a congressional, administrative, or Government  
18 Accounting Office report." And you say you have to read  
19 "administrative" in light of "congressional" and "GAO."  
20 But what if it said "in a congressional, news media, or  
21 Government Accounting Office report"?

22 MR. HURT: I think that --

23 JUSTICE ALITO: Why wouldn't you make the  
24 same argument with relation to "news media"?

25 MR. HURT: I think the contextual clues

1 would be less compelling there in that situation, and  
2 you would have --

3 JUSTICE ALITO: Why is that?

4 MR. HURT: Because you would have a category  
5 that would have a mixture of exclusively Federal and  
6 nonfederal. Here you have a category that you can't  
7 construe consistently as exclusively Federal, given the  
8 contextual clues in there. So as it is drafted now, if  
9 you look at all the clues you do have distinct  
10 categories that can be construed each on its own merits.

11 JUSTICE GINSBURG: This audit report is  
12 required by Federal law, isn't it?

13 MR. HURT: Yes, as are many reports,  
14 Medicaid reports by private recipients, today. This  
15 report was only done because the local government was a  
16 recipient of Federal money, no different from any  
17 private recipient, a not-for-profit. So there was no  
18 real distinction there. It was not really a  
19 governmental report, in the truest sense of the word, as  
20 it should be construed or regarded for purposes of the  
21 public disclosure bar.

22 And that's -- that shows the real -- one of  
23 the real problems of going down to the -- to the local  
24 and State level. You get all of these problems where  
25 the recipient is generating the reports rather than the

1 -- the administrator versus the recipient. You get all  
2 those problems going down to this level, the local and  
3 State governments, and it shows the real problem with  
4 that.

5           Again, this is the -- the overall statute is  
6 Federal, it's to recover the Federal Government's money.  
7 The statute has a strict dichotomy between the Federal  
8 Government and everyone else. If the States or local  
9 governments are going to be qui tam relators, they bring  
10 it as a private person. Thank you.

11           CHIEF JUSTICE ROBERTS: Thank you, counsel.

12           Mr. Hallward-Driemeier?

13           ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER,  
14           ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,  
15           SUPPORTING THE RESPONDENT

16           MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,  
17 and may it please the Court:

18           As I think the discussion this morning  
19 illustrates, the Federal nature of the second category,  
20 the phrase that is directly at issue in this case, is  
21 self-evident from the text. The terms congressional and  
22 GAO are Federal and under the doctrine or canon of  
23 construction noscitur a sociis --

24           JUSTICE GINSBURG: Let me go back to the  
25 other Latin phrase. If you begin at the beginning and

1 you begin with a phrase that you have no reason to say  
2 is modified by Federal, "civil, criminal or  
3 administrative proceeding," why shouldn't that drive the  
4 statute, what's in the first phrase?

5 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
6 -- I want to start by making clear that we disagree that  
7 that's a better interpretation of the first clause, but  
8 I will take it as the premise.

9 JUSTICE GINSBURG: Well, it's a lot hard to  
10 say you have to put a caret mark and say -- vidi --  
11 means Federal civil, criminal and administrative  
12 hearings.

13 MR. HALLWARD-DRIEMEIER: It -- it may indeed  
14 be harder to do that. We think that it is warranted in  
15 light of the policy that motivated Congress and in light  
16 of other references to Federal administrative, civil and  
17 criminal hearings in the statute. But even if those  
18 reasons which we think justify limiting the first  
19 category to Federal proceedings -- the Court were to  
20 disagree with that, that would not justify disregarding  
21 the clear indications of the Federal limitations on the  
22 second clause. And there is no policy --

23 CHIEF JUSTICE ROBERTS: Well -- I didn't  
24 mean to interrupt. Clear limitations, you really have  
25 only one, right? I mean you have no argument construing

1 administrative in a Federal way other than it is  
2 sandwiched between two other Federal --

3 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
4 think that -- that again, as Justice Alito's question at  
5 the very beginning of the argument illustrated, the  
6 literal language of the word administrative would  
7 encompass hearings conducted by private hospitals or  
8 universities as well. Now Petitioner es hewed that  
9 interpretation --

10 CHIEF JUSTICE ROBERTS: Well, we would just  
11 -- we would just take the sections from your brief today  
12 and say well no, you have got to read it in the context  
13 in which it appears and this is all Federal, which means  
14 it's all governmental.

15 MR. HALLWARD-DRIEMEIER: That's -- that's  
16 right, Your Honor, and governmental in a particular  
17 nature, of a particular nature, the Federal Government.  
18 As is the Court's decision in Cook County made clear,  
19 municipal governmental entities are with respect to the  
20 False Claims Act the same as private corporations. The  
21 -- the Court recognized that municipalities are the  
22 recipients of many Federal dollars. In that case the  
23 local governmental entity whose conduct is at issue was  
24 a county hospital. And -- and county hospitals receive  
25 funds under the same programs that private hospitals --

1 JUSTICE BREYER: I just want to get your  
2 expertise on this, because you have probably read the  
3 legislative history of the 1986 amendment. All right,  
4 am I right in thinking this? If I go back and read  
5 it -- which I will -- I will discover, not once in this  
6 entire 1986 history anywhere, House, Senate or  
7 conference, does the word State appear in any relevant  
8 context?

9 MR. HALLWARD-DRIEMEIER: No.

10 JUSTICE BREYER: I'm not right. Okay. So  
11 when it appears --

12 MR. HALLWARD-DRIEMEIER: Well, I guess it  
13 depends on what you mean by the relevant context.

14 JUSTICE BREYER: What I'm -- the relevant  
15 context has to do in my mind at the moment primarily in  
16 respect to the first clause, "criminal, civil, or  
17 administrative proceeding." Is there any indication  
18 that those were meant to apply -- any indication that  
19 those were meant to apply to State as opposed to  
20 uniquely Federal, criminal, civil, or administrative  
21 proceedings?

22 MR. HALLWARD-DRIEMEIER: No, Your Honor, it  
23 is -- it is clear from the legislative --

24 JUSTICE BREYER: Yeah. Clear from the  
25 record -- clear that --

1 MR. HALLWARD-DRIEMEIER: That it was Federal  
2 proceedings that Congress had in mind. And -- and if  
3 you would take --

4 JUSTICE BREYER: And the word hearing --

5 MR. HALLWARD-DRIEMEIER: If you would look  
6 on page 19 of the --

7 JUSTICE SCALIA: Could you be more specific  
8 when you say that Congress had in mind? Just so I know  
9 what you are talking about?

10 MR. HALLWARD-DRIEMEIER: I'm sorry, Your  
11 Honor.

12 JUSTICE SCALIA: The committee that reported  
13 the bill.

14 MR. HALLWARD-DRIEMEIER: I'm -- that's  
15 right. That's right, Your Honor.

16 JUSTICE SCALIA: In both houses or just one  
17 house?

18 MR. HALLWARD-DRIEMEIER: Well, we have the  
19 -- the committee report and the bill that was recorded  
20 by the House which states specifically at that point,  
21 the public disclosure bar referenced information which  
22 the Government, capital G, disclosed the basis of  
23 allegations in a prior administrative civil proceeding.  
24 That was the House.

25 JUSTICE SCALIA: The House.

1 CHIEF JUSTICE ROBERTS: Well -- well, North  
2 Carolina has got a government, too.

3 MR. HALLWARD-DRIEMEIER: Excuse me?

4 CHIEF JUSTICE ROBERTS: North Carolina has a  
5 government, too.

6 MR. HALLWARD-DRIEMEIER: Well, as we note,  
7 Your Honor, the statute uses the term "Government" with  
8 a capital G throughout to refer to the Federal  
9 Government.

10 CHIEF JUSTICE ROBERTS: Same rule for  
11 Congress?

12 MR. HALLWARD-DRIEMEIER: Excuse me?

13 CHIEF JUSTICE ROBERTS: Same rule for  
14 congressional?

15 MR. HALLWARD-DRIEMEIER: Well, congressional  
16 -- the -- the term congressional is frequently used  
17 without a capital, but State legislatures are not  
18 referred to as congresses. And that is one of the  
19 anomalies that petitioners simply cannot explain: why  
20 Congress would have thought that an administrative  
21 report issued by a local school board should give rise  
22 to the bar, but a report or a hearing conducted by a  
23 State legislature would not.

24 JUSTICE GINSBURG: There was an explanation  
25 for it in the opposing brief, that Congress in -- what



1 was it -- 1986 didn't think that the legislature was  
2 generating reports, audits, as distinguished from  
3 administrative agencies.

4 MR. HALLWARD-DRIEMEIER: Well -- well, Your  
5 Honor, it is of course a -- a truism, that -- that  
6 programs are administered by the executive branch more  
7 than the legislative branch, but that is no reason to  
8 think that Congress would have meant to exclude, if  
9 those State legislatures did conduct a hearing with  
10 respect to fraud by the State, exclude that as a public  
11 disclosure. The reason that Congress didn't include  
12 State legislative reports is because it didn't include  
13 State reports at all. It was --

14 JUSTICE GINSBURG: Well that -- that doesn't  
15 follow like the night the day. It could be, as it was  
16 explained, they didn't include State legislatures  
17 because they didn't think they would be generating  
18 relevant material.

19 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
20 -- I think that it is more likely as -- as the  
21 development and progress of the clause reflects, that  
22 Congress was focused on what does the government know  
23 and what does the disclosure show about the whether the  
24 government is already or is likely to focus on the  
25 fraud.

1 JUSTICE SCALIA: Is the Justice Department  
2 seeking to get this -- this piece of -- of statutory  
3 text clarified? I mean, you do have some operation over  
4 there that proposes to Congress amendments of those  
5 provisions that are not working out well. Is there --  
6 is there any effort to get this clarified?

7 MR. HALLWARD-DRIEMEIER: There -- I -- there  
8 are currently under consideration bills or, and as I  
9 understand it, they are not, there are other bills that  
10 are in contemplation that would revise the language of  
11 the statute, but -- but would not necessarily focus on  
12 this. There are a number of other issues connected --

13 JUSTICE SCALIA: Could it make it worse?

14 (Laughter.)

15 MR. HALLWARD-DRIEMEIER: I -- I don't know.  
16 But of course --

17 JUSTICE GINSBURG: I think the question was  
18 has the Department of Justice, recognizing that there's  
19 a circuit split this very question recommended that  
20 Congress amend the statute in this particular --

21 MR. HALLWARD-DRIEMEIER: I -- I don't  
22 believe that as of yet the department has taken a  
23 specific position on -- on the legislation that is  
24 contemplated in this particular ambiguity.

25 JUSTICE BREYER: There is one ambiguity

1 whether this clause, the first -- what we call first and  
2 second refers to State as well as Federal. If the  
3 debate took place in a context where everyone's just  
4 thinking of Federal, it's not surprising they didn't put  
5 in the word Federal. They don't think of everything.  
6 All right. Now, that's my question.

7           You started with the House. The House to me  
8 does think just of Federal. The Senate's ambiguous on  
9 that point --

10           MR. HALLWARD-DRIEMEIER: The Senate --

11           JUSTICE BREYER: -- and the conference is  
12 yet more ambiguous on that point. So is there  
13 anything -- when I look at the conference and the Senate  
14 versions, I'm going to say, gee, they did -- sorry, they  
15 did actually think of Federal and State, too, and it's  
16 sort of mixed up? Or am I going to see that that  
17 context there is Federal?

18           MR. HALLWARD-DRIEMEIER: The context is --  
19 is Federal. References to States in connection with the  
20 act that Congress has thought about it are treating  
21 States like other private qui tam relators.

22           They Petitioner referred to the Dean case,  
23 and, in fact, that was something that the -- the  
24 legislative history refers to, but what was offensive  
25 about the decision in the Dean case was that Wisconsin

1 had been the original source of the information, but had  
2 been barred because it had provided that information to  
3 the government.

4 And, under the government knowledge bar,  
5 they had been precluded, so -- so Wisconsin would have  
6 been taken care of under the original source provision,  
7 but it doesn't reflect a view that States have a  
8 particular distinctive role.

9 In fact, as this Court's decision in Cook  
10 County reflects, municipalities are treated just like  
11 any private corporation for purposes of the act. They  
12 can be defendants, they could be plaintiffs, qui tam  
13 relators, but there is no reason to construe the statute  
14 in a way that would allow a local government,  
15 technically, to shield itself from qui tam suits by  
16 disclosing the facts that would be the underlying  
17 information support of the fraud claim in, perhaps, a  
18 report that was intended to -- to whitewash the  
19 situation --

20 JUSTICE GINSBURG: Do you think that the --  
21 when a -- when State employees want to immunize  
22 themselves from fraud, they are going to say, okay, we  
23 will disclose it where anybody -- a prosecutor could pick  
24 it up, but we will take care of the qui tam obligation.

25 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I

1 think it's important to note that, in order to be a  
2 public disclosure -- the second category at the very  
3 least -- all that needs to have happened is that  
4 information be disclosed to -- to one additional person.

5           That -- and that makes a lot of sense when  
6 we are talking about disclosures of the government --  
7 Federal government's own reports because, if the Federal  
8 government is already investigating and pursuing the  
9 fraud, one other person that finds out about it and then  
10 files a qui tam action on the basis of the government's  
11 own effort is precisely the situation that Congress  
12 sought to preclude.

13           But it doesn't make any senses when we are  
14 talking about a disclosure to an individual by a State  
15 or local --

16           JUSTICE GINSBURG: But there's lots of  
17 disclosures -- there's lots of disclosures in Federal  
18 reports that the government isn't pursuing.

19           MR. HALLWARD-DRIEMEIER: Well, we think that  
20 the -- the disclosures -- the allegations in the types  
21 of reports, audits, investigations, that are referenced  
22 in the clause are the type that would evidence that the  
23 government is pursuing them.

24           And -- but where a State -- perhaps a local  
25 school board discloses facts that might give rise to an

1 allegation of fraud in a hearing where there was only  
2 one or two members of the public in attendance, there is  
3 no reason to think that that information is going to be  
4 brought to the Federal government's attention.

5           The purpose of the bar is to balance --  
6 Congress was seeking to balance two rules. One is to  
7 encourage qui tam relators to bring information and  
8 bring suit where the information was unlikely to be  
9 something that the government -- Federal government was  
10 focusing on.

11           Where the Federal government was able to  
12 protect itself and bring this suit on its own, then  
13 there's no reason for the Federal government to have to  
14 share its recovery.

15           JUSTICE SOTOMAYOR: But why can't it -- why  
16 can't it protect itself if these reports are in its  
17 possession? How are they any more in the -- or less in  
18 the government's possession than articles in the news  
19 media, than State, criminal, civil, and administrative  
20 hearings?

21           You, yourself, make it very clear that the  
22 government -- it isn't keeping track of all of those  
23 other sources.

24           MR. HALLWARD-DRIEMEIER: Well, Your Honor,  
25 Petitioners' reference to this audit being in the

1 possession of the government -- it's happenstance that  
2 this particular report, the Crisp & Hughes report, was  
3 sent to the Federal government official.

4           But the vast majority of State and local  
5 governmental investigations, audits, and reports, are  
6 not going to be given to the Federal government, and  
7 even though they are -- they cite the Single Audit Act,  
8 which is only a very narrow subset of audits that States  
9 or local governments perform -- do not actually disclose  
10 the allegations of the fraud.

11           In order to get to the actual information of  
12 the fraud, the -- first of all, it would have to be  
13 brought to the attention of the relevant Federal agency.  
14 Usually, the cognizant agency is the one that has the  
15 most money at stake, but the fraud may have to do with a  
16 different Federal program, so it has to be brought to  
17 the attention of the program whose interests are  
18 actually at stake.

19           They have to go beyond the report that is --  
20 that is publicly available in the clearinghouse website,  
21 which tells you virtually nothing, to an underlying  
22 report which is itself, generally, fairly vague, and all  
23 Petitioners say is that the working papers of the  
24 auditor are available to the government, not even in the  
25 government's possession, they are available to the

1 government if it requests it.

2 The government has to drill down many levels  
3 before it necessarily is going to know about that fraud.

4 JUSTICE SOTOMAYOR: Isn't that argument  
5 suggesting that the court didn't even need to reach this  
6 issue, even assuming that the State administrative  
7 reports are included in the bar?

8 MR. HALLWARD-DRIEMEIER: No -- no, Your  
9 Honor, I don't think so.

10 JUSTICE SOTOMAYOR: Well, aren't you arguing  
11 that what was in this audit report wasn't sufficient to  
12 show the fraud? That's not your argument?

13 MR. HALLWARD-DRIEMEIER: No -- again, this  
14 report here did have information that was indicative of  
15 fraud, and this report --

16 JUSTICE SOTOMAYOR: In which way?

17 MR. HALLWARD-DRIEMEIER: Excuse me?

18 JUSTICE SOTOMAYOR: Which way? All it said  
19 was that this person wasn't chosen by bidding. But  
20 aren't there situations in which non-bids are permitted?

21 MR. HALLWARD-DRIEMEIER: There -- there were  
22 multiple allegations. One of the allegations underlying  
23 the relator's claim is that the government -- the county  
24 certified that certain procedures were followed that  
25 would have included a requirement that it be bid out,



1 and that it was not.

2 Another was that certain work was paid for  
3 or billed for, but wasn't performed or was not performed  
4 well, so there were -- there were different allegations,  
5 and where that would be disclosed to a single person,  
6 that would constitute a public disclosure, at least with  
7 respect to Federal --

8 JUSTICE SCALIA: Of course, the Attorney  
9 General can always bring suit, right? I mean, all we  
10 are arguing about is whether this information that is in  
11 the in the State and local thing could be the basis of a  
12 qui tam suit.

13 MR. HALLWARD-DRIEMEIER: But only if we --

14 JUSTICE SCALIA: If the government finds out  
15 about it, the Attorney General could always bring suit,  
16 right?

17 MR. HALLWARD-DRIEMEIER: And what is at  
18 issue here is whether the Federal government is ever  
19 going to learn of the fraud.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Browning, you have six minutes.

22 REBUTTAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

23 ON BEHALF OF THE PETITIONERS

24 MR. BROWNING: Thank you, Mr. Chief Justice.

25 Justice Breyer, if I could first turn to

1 your comments or your questions about legislative  
2 history; here, I think the legislative history tells us  
3 very little because of the many changes in the Senate  
4 version and the House version, and unfortunately, there  
5 was not a conference committee report, so we won't know  
6 the nature of the compromise.

7 At most, the legislative history helps us to  
8 show what Congress was generally concerned about, and  
9 throughout the original committee, the Senate and House  
10 report, there is a concern about qui tam actions based  
11 upon public information.

12 JUSTICE BREYER: Now, I agree with you about  
13 that. I think it's the silence, though, that might cut  
14 against you.

15 MR. BROWNING: Well --

16 JUSTICE BREYER: And the reason that it's --  
17 it's basically silence -- the reason I am thinking that  
18 cuts against you is because of this sorting of the  
19 context where they are focusing on Federal.

20 And, if everybody is working in that  
21 context, then nothing said about State means they are  
22 just assuming it's all applying to Federal.

23 Now, what I'm looking for, you might be able  
24 to put your finger on, is something that shows that my  
25 last statement is not right.

1           MR. BROWNING: Yes, Justice Breyer, that the  
2 government assumes and repeats throughout its brief that  
3 the False Claims Act is exclusively Federal in nature;  
4 therefore, you read all of its terms as essentially  
5 being -- being Federal.

6           That, of course, does not answer what  
7 Congress intended with the public disclosure bar --

8           JUSTICE SCALIA: When we say everybody's  
9 working in a certain context, how -- how many people is  
10 everybody? What percentage of the House and of the  
11 Senate were involved in these committees that were  
12 drafting these bills and that issued the committee  
13 report?

14          MR. BROWNING: Yes, Justice Scalia, your  
15 point is well-taken, that this would only be --

16          JUSTICE BREYER: I think in the -- it was --  
17 it probably came out in governmental affairs in the  
18 Senate, which I think had 17 members at the time.

19          MR. BROWNING: Yes.

20          Continuing with your -- your question, if I  
21 could, Justice Breyer, that there is nothing to indicate  
22 that the public disclosure bar should be exclusively  
23 Federal.

24          It, of course, includes news media, which is  
25 not Federal. It also includes criminal, civil, or

1 administrative hearings. But moreover, there are many  
2 aspects of the False Claims Act that are not exclusively  
3 Federal in nature.

4 The very change that we are talking about --  
5 the -- the change to the public disclosure bar was a  
6 result of a push by the National Association of Attorney  
7 Generals to actually change the public disclosure bar to  
8 make sure that States could bring qui tam actions.

9 That is why the public disclosure bar  
10 includes an original source provision.

11 CHIEF JUSTICE ROBERTS: To -- to follow up,  
12 I think it was a question that Justice Breyer asked  
13 earlier. Do you have any tie-breaker on your side?

14 I mean, if we do decide the arguments are  
15 pretty much in equipoise, the suggestion was that the  
16 Federal government is both the beneficiary and the loser  
17 in the qui tam actions, from the sense they lose a  
18 percentage of recovery, and so we ought to let them  
19 strike the balance.

20 What argument do you have on your side?

21 MR. BROWNING: Your Honor, again, that our  
22 concern from the perspective of the States -- and it's a  
23 concern shared by local governments -- is the reading  
24 that Respondents advocate will produce a flood of qui  
25 tam --

1 CHIEF JUSTICE ROBERTS: That's the same --  
2 that's one of the arguments that, I think, is balanced  
3 on the other side. For example, is -- do -- have we  
4 ever said -- and this is an unusual statute, of course,  
5 with a private Attorney General and all that.

6 Have we -- does -- is there any authority  
7 for the idea that we should read it restrictively  
8 because of that?

9 MR. BROWNING: Your Honor, it does give rise  
10 to a -- a false claim will, of course, give rise to  
11 criminal liability. Moreover, it is a case dealing  
12 with --

13 CHIEF JUSTICE ROBERTS: Have we ever -- have  
14 we ever said that that's a basis for reading the act  
15 restrictively?

16 MR. BROWNING: Your Honor, there is some  
17 older authority to that affect. The specific case -- I  
18 apologize. The name escapes me.

19 JUSTICE SCALIA: But what your claim is --  
20 is that the government -- the Federal government is not  
21 the only person harmed?

22 MR. BROWNING: Yes.

23 JUSTICE SCALIA: And, therefore -- you know,  
24 we should listen to them, so long as they don't -- they  
25 want to come out this way, you are saying the State and

1 local governments --

2 MR. BROWNING: Absolutely, Justice Scalia.

3 JUSTICE SCALIA: -- are significantly  
4 harmed.

5 MR. BROWNING: We are -- we are partners --

6 JUSTICE SCALIA: Which the Federal  
7 government doesn't care about, right?

8 MR. BROWNING: The Federal government has, I  
9 think, taken a very short-sighted view because these  
10 sort of qui tam actions will be very disruptive to what  
11 the Federal government's partners are actually doing in  
12 the trenches in administering these programs.

13 Moreover, the Federal False Claims Act -- it  
14 is clear that it is not exclusively Federal. When it  
15 was amended in 1986, Congress changed Section 3732(b),  
16 which allowed pendent State claims to be brought, so a  
17 State, if there is a Federal false claims action, could  
18 intervene to protect the State's portions of the -- the  
19 monies that are at issue.

20 Moreover, in Section 3733(1)(7)(A), the  
21 civil investigative demand provisions, Congress  
22 expressly viewed the word "administrative" to include,  
23 not only Federal administrative proceedings, but State  
24 administrative proceedings as well.

25 JUSTICE BREYER: So your point here is -- I

1 will put it in cash terms, is the Federal government,  
2 who will pay a lot of qui tam lawyers some percent to go  
3 and look through all these State criminal hearings and  
4 State reports and all these things that didn't get into  
5 the newspaper and to bring cases, so it may be cheaper  
6 to pay them than it would be to hire staff to do that.

7 Now, your point is that they get a little  
8 over-enthusiastic sometimes, and they can bring actions  
9 that maybe not be so well-justified, and the -- the  
10 Federal government is going to have to hire people to  
11 sort those out anyway, and so would the States in that  
12 kind of mess.

13 Is that your point?

14 MR. BROWNING: Yes. They will be very  
15 enthusiastic if they can simply take a State report  
16 showing Medicaid fraud and bring a qui tam action. That  
17 will be very disruptive to states and to local  
18 governments.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:04 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25

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