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All Hands on Deck: The Role of Government Employees as Qui Tam Relators

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ALL HANDS ON DECK: THE ROLE OF GOVERNMENT EMPLOYEES AS QUI TAM RELATORS

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[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs.

The cost of fraud cannot always be measured in dollars and cents . . . [fraud] causes not only a serious threat to human life, but also to national security.

Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities.

-Senate Report 99-345 (1986)[1]

I don't think it is right to presume that justice is going to be done and fraud is going to be prosecuted unless there is some encouragement for the Government employee to do that. And I don't think you should assume that just because the Government employee is paid to do that, that it is necessarily going to be done. [They] should be involved in the process as long as [they] can show that [they] first made a good faith effort within the proper channels, in any way lawyers need to write that because I am not a lawyer. But good faith efforts to first work through the system to expose fraud should be the guide. And, if that doesn't work, we should not cut [them] out of using qui tam. Because if we do then we are losing one of the basic resources to fight fraud in this country.

-Senator Chuck Grassley (1990) [2]

1. S. REP. NO. 99-345, at 2, 3 (1986).

2. *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. & Gov'tal Rels.*, 101st Cong., 2d Sess., 7 (1990).

INTRODUCTION

Individuals, often during their routine job duties, uncover evidence that their employer is defrauding the government—including, for example, fraud schemes involving government health care insurance programs such as Medicare and Medicaid, contracting and procurement, COVID relief, and cybersecurity. The False Claims Act ("FCA") is one of the government's most effective fraud-fighting tools to remedy and deter such corporate wrongdoing, fraud, and other unlawful business practices that result in unnecessary taxpayer expenditures.[3]

The FCA prohibits any person from knowingly submitting (or causing the submission of) a false claim, using a false or fraudulent statement to obtain payment from the government, or knowingly retaining an overpayment from the government.[4] The FCA permits individuals known as "relators" to "blow the whistle" and bring the corporate wrongdoing to the attention of the government through a "qui tam,"[5] or whistleblower lawsuit—often after unsuccessful attempts to remedy the fraud allegations internally or to report them to other government agencies.

Whistleblowers play an essential role in the FCA's effectiveness. In fiscal year 2022 alone, the federal government recovered more than $1.9 billion from whistleblower qui tam lawsuits and awarded $488 million to whistleblowers for their roles in bringing fraud to light.[6] Since 1986, when Congress substantially amended the FCA, whistleblowers have helped the government recover a significant portion of the more than $72 billion total recoveries and deterred further fraud.[7] In addition to the important public goal of recouping misspent funds, whistleblowers are often motivated by concerns for public health, safety and national security, and a drive to serve the public interest. Whistleblowers often stick out their neck at great personal risk and expense to bring corporate wrongdoing to light.

With whistleblower involvement, the FCA has proven effective at recouping misspent funds, holding fraudulent actors accountable, and deterring fraud. But one question that lingers is whether and how the

3. 31 U.S.C. §§ 3729-3733.

4. *Id.* § 3729(a)(1).

5. *Id.* § 3730(b)(1).

6. Press Release, U.S. Dep't of Just., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 [https://perma.cc/LT2P-HTJJ].

7. *See id.*; *see generally* JETSON LEDER-LUIS, CAN WHISTLEBLOWERS ROOT OUT PUBLIC EXPENDITURE FRAUD? EVIDENCE FROM MEDICARE (2020), https://sites.bu.edu/jetson/files/2020/07/ False-Claims-Act-Paper.pdf [https://perma.cc/4P5X-B29D].

public interest is served by allowing financial incentives for whistle-blowing by government employees who discover fraud while performing their job duties. Many states have recognized the public policy considerations in favor of permitting government employees to blow the whistle and gone the extra step to codify state government employees' rights to bring qui tams, incentivizing those state employees to come forward with allegations of fraud.[8] All three branches of the federal government—Congress, the courts, and the executive branch—have acted in support of government employee relators, whether through legislative amendments, favorable decisions, or relator share awards. The federal FCA relies upon its plain language—which allows "a person" to bring a qui tam—to include government employees. Government employees who seek to bring allegations of fraud to the government are referred to in this article as "government employee relators." Based on publicly available information, the government has almost always awarded relator shares in settled cases to government employee relators who file federal FCA qui tam suits based upon fraud uncovered while performing their job duties.[9]

Government employees have played important roles in bringing alleged fraud to the attention of the U.S. Department of Justice ("DOJ") for FCA enforcement. As one recent example, an employee of the New York City Department of Health and Mental Hygiene filed an FCA qui tam suit alleging that one of the nation's largest vendors of electronic health records ("EHR") software misrepresented its capabilities to the government. The employee discovered the alleged fraud in the course of his duties executing the rollout of the software and acting as an intermediary between the government agency using the software and the software vendor.[10] In May 2017, after the DOJ filed a complaint-in-intervention, the software vendor paid a $155 million settlement and entered into a Corporate Integrity Agreement

8. California, Indiana, New Hampshire, New Mexico, and Tennessee expressly define circumstances in which government employee relators may bring qui tams. CAL. GOV'T CODE § 12652(d)(4) (West); IND. CODE ANN. § 5-11-5.5-7(b) (West); N.H. REV. STAT. § 167:61-e(III)(b) (West); N.M. STAT. ANN. § 44-9-9(A) (West); TENN. CODE ANN. § 4-18-104(d)(4) (West). New Jersey permits government employee relators except for employees who file qui tams "based upon information discovered in any civil, criminal or administrative investigation or audit which investigation or audit was within the scope of the employee's or agent's duties or job description." N.J. STAT. § 2A:32C-9(d).

9. *See infra* notes 85-121 and accompanying text. The authors of this article are not aware of any case in which a government employee relator did not receive a relator share.

10. As described on his LinkedIn page, his work while a government employee involved "[u]sing project management methodology, plan and execute the rollout of the new eClinicalworks (eCW) system in the City's 12 jail facilities with an annual inmate population of over 100,000[;] [p]rovid[ing] on-site implementation support in jail health clinics; and serv[ing] as the primary link between site staff and the Electronic Health Records (EHR) vendor." Brendan Delaney, LINKEDIN, https://www.linkedin.com/in/brendan-delaney-0910a85 (last visited Apr. 24, 2023).

with the U.S. Department of Health and Human Services-Office of Inspector General relating to the company's EHR software.[11] The former government employee was paid a $30 million share of the recovery.[12] The case was precedential in the FCA space because it was the first time an EHR software vendor was held accountable under the FCA. Since the discovery of this alleged fraud scheme, the DOJ uncovered and resolved at least six more alleged fraud schemes involving other EHR technologies.[13]

This article describes how every branch of government has recognized the enormous value of government employee relators who bring fraud to the attention of the government through the FCA qui tam provisions. Government employees can properly serve as relators under the FCA as courts have trended toward favoring financial incentives to government employees who avail themselves of the qui tam provisions. This trend is supported by clear public policy goals of rooting out fraud. Section I analyzes the history of the FCA from its enactment in 1863 to its current form, in which Congress sought to encourage whistleblowers to come forward with allegations of fraud, including government employee whistleblowers. Section II summarizes case law interpreting the current FCA, under which courts allow government employee relators to bring qui tams and the DOJ has awarded relator shares to government employee relators who have done so. Section III addresses policy concerns that would limit government employees as relators. Lastly, Section IV argues that

11. Press Release, U.S. Dep't of Just., Electronic Health Records Vendor to Pay $155 Million to Settle False Claims Act Allegations (May 31, 2017), https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations [https://perma.cc/7V2K-7K5F].

12. *See id.*

13. *See* Press Release, U.S. Dep't of Just., Modernizing Medicine Agrees to Pay $45 Million to Resolve Allegations of Accepting and Paying Illegal Kickbacks and Causing False Claims (Nov. 1, 2022), https://www.justice.gov/opa/pr/modernizing-medicine-agrees-pay-45-million-resolve-allegations-accepting-and-paying-illegal [https://perma.cc/G29X-WMNR]; Press Release, U.S. Dep't of Just., Miami-Based CareCloud Health, Inc. Agrees to Pay $3.8 Million to Resolve Allegations that it Paid Illegal Kickbacks (Apr. 30, 2021), https://www.justice.gov/usao-sdfl/pr/miami-based-carecloud-health-inc-agrees-pay-38-million-resolve-allegations-it-paid [https://perma.cc/347B-BS9S]; Press Release, U.S. Dep't of Just., Athenahealth Agrees to Pay $18.25 Million to Resolve Allegations that It Paid Illegal Kickbacks (Jan. 28, 2021), https://www.justice.gov/usao-ma/pr/athenahealth-agrees-pay-1825-million-resolve-allegations-it-paid-illegal-kickbacks [https://perma.cc/3WAS-GBFT]; Press Release, U.S. Dep't of Just., New Jersey Electronic Health Records Company to Pay $500,000 to Resolve False Claims Act Allegations (Aug. 27, 2020), https://www.justice.gov/usao-nj/pr/new-jersey-electronic-health-records-company-pay-500000-resolve-false-claims-act [https://perma.cc/2ZHR-LRUE]; Press Release, U.S. Dep't of Just., Electronic Health Records Vendor to Pay $145 Million to Resolve Criminal and Civil Investigations (Jan. 27, 2020), https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-145-million-resolve-criminal-and-civil-investigations-0 [https://perma.cc/MZ5K-9HRX]; Press Release, U.S. Dep't of Just., Electronic Health Records Vendor to Pay $57.25 Million to Settle False Claims Act Allegations (Feb. 6, 2019), https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-5725-million-settle-false-claims-act-allegations [https://perma.cc/3XYJ-XBWC].

public policy concerns weigh in favor of permitting government employee relators.

I. HISTORY OF GOVERNMENT EMPLOYEE RELATORS UNDER THE FCA

Interpreting the FCA's present scope and import requires an understanding of its past. The FCA has been the government's most-effective fraud-fighting tool since 1863, when then-President Abraham Lincoln enacted the law to combat defense contractor fraud during the Civil War. The FCA has undergone several subsequent amendments. Since 1986, all amendments have continued to solidify the government's commitment to FCA qui tam actions as an effective and necessary tool in the fight against fraud by permitting more persons to bring qui tam actions and to do so with fewer barriers.

A. The Original FCA Included Government Employee Relators as "Person[s]"

Under the initial version of the FCA enacted in 1863,[14] government employee relators were permitted to bring qui tams in the important fight against defense contractor fraud.[15] The FCA was first enacted as a means to combat widespread contractor fraud—and the attendant drain on national resources, safety, and national security threats—during the Civil War.[16] At this time, whistleblowers became a necessary avenue to thwart that fraud, recoup losses, and thus adequately defend the Union. Congress also envisioned that the FCA would serve longer term goals by promoting strict compliance with government contracts.[17]

Notably, the original FCA envisioned that any "person" could serve as a relator, including government employees.[18] In at least one reported

14. Act of March 2, 1863, ch. 67, 12 Stat. 696 (1863).

15. *See* Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908, 915 (E.D. Va. 1989) ("The purpose of the *qui tam* provision, then as now, was to aid in the effort to root out fraud against the government. To this end, it is well established the original False Claims Act permitted *qui tam* actions to be brought by government employees as well as private citizens.").

16. For discussion of the initial passing of the FCA, *see* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1496-97 (11th Cir. 1991); *Erickson*, 716 F. Supp. at 915; *see also* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (discussing "unscrupulous and corrupt government contractors" that enacted "abuses and damages…to the federal treasury and [Civil] war effort.").

17. *See* Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 48 (2004) (citing S. REP. NO. 99-345, at 6 (1986)).

18. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 546 (1943) (interpreting "person" within meaning of original FCA).

case under the 1863 version of the FCA, a government employee relator successfully obtained a judgment on behalf of the government and was entitled to a portion of the recovery.[19] In 1943, the Supreme Court in *Marcus v. Hess*, broadly interpreted the meaning of "person" within the FCA with no implicit restrictions;[20] neither the language of the FCA nor its history supported the government's arguments for a narrow interpretation.[21] *Hess* thus reinforced that "person[s]" within the meaning of the FCA included government employees.[22]

The FCA has been substantially overhauled only two times: in 1943 and in 1986. These and other amendments to the FCA have correlated with increases in defense spending by the federal government,[23] tracing back to the FCA's core purpose to root out defense contractor fraud.[24]

B. The 1943 Amendments Excluded Government Employee Relators

In 1943, Congress expressly banned federal government employees

19. United States v. Carlisle, 25 F. Cas. 293, 296 (E.D. Mich. 1871) (No. 14,724). While the relator and the government agency had already contractually determined how to split the judgment before the relator brought the qui tam, the court was not deterred by the relator's status as a federal employee. *See id.* However, the government does not appear to view this case as a successful prosecution by a government employee. *See* Patrick W. Hanifin, *Qui Tam Suits By Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 556, 564 n.28 (1991) (quoting Brief of the United States at 6, United States *ex rel.* LeBlanc v. Raytheon Co., Inc. ("*Leblanc II*"), 913 F.2d 17 (1st Cir. 1990) ("To our knowledge, no government employee has ever successfully prosecuted a case under the False Claims Act.")).

20. 317 U.S. at 546. The relator, Morris L. Marcus, had filed a qui tam against electrical contractors based on information about an alleged collusive bidding scheme he discovered in a government indictment, according to the defendants and the government. *See id.* at 545.

21. *See id.* at 546; *see also id.* at 547 ("[Congress] concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here [by the government] militate against any informer action at all.").

22. *Id.* at 546.

23. Before the first amendments in 1943, "[t]he New Deal and World War I greatly expanded the role of the federal government in the national economy." Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 389 (2001); *see also* WHITE HOUSE, INTRODUCTION TO THE HISTORICAL TABLES 5, https://www.whitehouse.gov/wp-content/uploads/2022/03/hist_intro_fy2023.pdf [https://perma.cc/3UBW-UYME] ("[T]he combination of the Great Depression followed by World War II resulted in a long, unbroken string of deficits that were historically unprecedented in magnitude.") (last visited Apr. 24, 2023). Before the 1986 amendments, "[t]he traditional pattern of running large deficits only in times of war or economic downturns was broken during much of the 1980s" with a "substantial increases in defense spending" beginning in 1982. WHITE HOUSE, *supra*, at 5.

24. Increases in government spending "commensurately expanded the opportunities for unscrupulous contractors to defraud the government." Bales, *supra* note 23, at 389; Fraud in America, *What's Happening with Whistleblower Laws?*, TAXPAYERS AGAINST FRAUD, at 18:30 (Aug. 25, 2022), https://www.taf.org/podcasts/whats-happening-with-whistleblower-laws [https://perma.cc/Y8TK-WAWL] ("[The] root reason for needing to amend the Act was because there was so much defense fraud going on. That hasn't changed.").

from serving as relators.[25] After the Supreme Court's decision in *Hess*, Congress was concerned that the expansive reach of the FCA's qui tam provisions coupled with increased fraud would encourage "parasitical" suits, such as relators filing qui tam suits based on allegations the government was actively pursuing.[26]

The 1943 amendments significantly limited the FCA by stripping courts of jurisdiction "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any . . . employee thereof, at the time such suit was brought."[27] Not only were government employees prohibited from bringing qui tam actions under this government knowledge bar, but any other whistleblowers who had previously reported concerns to any government employee or agency were also precluded. The 1943 amendments also reduced the relator share from 50% to no more than 25% or 10%, depending on government intervention.[28]

These new limits had a nearly debilitating effect on the FCA's qui tam provisions: before 1986, the government received only approximately six FCA qui tams per year,[29] undermining the very purpose of the FCA.

C. The 1986 Amendments Returned to Original Broad Meaning of "Person"

The imposition of the government knowledge bar in the 1943 amendments caused the qui tam provisions to sit largely unused for four decades,[30] and the government and Congress became increasingly concerned that contractor fraud was going unreported by government employees.[31] Thus, in 1986, Congress sought to reinvigorate the FCA

25. Pub. L. 78-213, 57 Stat. 608 (1943), 31 U.S.C. § 232(C) (1946).

26. *See* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1497 (11th Cir. 1991) (discussing significance of 1943 amendments).

27. Pub. L. 78-213, 57 Stat. 608 (1943), 31 U.S.C. § 232(C) (1946). Although the House initially sought to repeal the qui tam provisions, the Senate merely restricted it, fearing the government would be unable to effectively and timely enforce compliance with government requirements without whistleblowers. CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES, 7-8 (2021), https://sgp.fas.org/crs/misc/R40785.pdf [https://perma.cc/M59W-T3KV].

28. Pub. L. 78-213, 57 Stat. 608, 609 (1943); *compare* 31 U.S.C. § 234 (1940) *with* 31 U.S.C. § 232(E) (1946).

29. Elletta Sangrey Callahan, *Double Dippers or Bureaucracy Busters? False Claims Act Suits by Government Employees*, 49 WASH. U.J. URB. & CONTEMP. L. 97, 103 (1996).

30. *See* S. REP. NO. 110-507, at 3 (2008) (discussing history of FCA amendments and noting FCA filings "plummeted" after government knowledge bar was imposed). "By the 1980s, the FCA was no longer a viable tool for combating fraud against the Government." *Id.*

31. *See* S. REP. NO. 99-345, at 2-3 (1986).

through its second major revision, which expanded incentives and protections for whistleblowers,[32] created the "public disclosure bar" which prohibits certain cases that include publicly disclosed information and the "original source" exception,[33] and expanded the types of false claims covered by the FCA.[34] The 1986 amendments also removed the express ban on government employee relators and again authorized "a person" to file a qui tam action, with limited enumerated exceptions, which did not include categorically barring government employee relators.[35]

The 1986 amendments expanded the availability of qui tams in recognition that "assistance from the private citizenry can make a significant impact on bolstering the [g]overnment's fraud enforcement effort."[36] And these amendments proved fruitful; from 1986 through February 1995, relators collectively filed 921 cases, resulting in $880 million in settlements and judgments.[37]

Since 1986, Congress has continued to support and encourage relators to come forward with allegations of fraud, including government employee relators. In 1990, Senator Grassley testified before Congress that government employee relators are "one of the basic resources to fight fraud in this country."[38] However, after courts began "creat[ing] a patchwork of applications of the FCA to [g]overnment employee relators," Congress was concerned that some circuit courts appeared poised to ban categories of government employees from serving as relators.[39] Specifically, the Senate Committee was

32. 31 U.S.C. § 3730(h) (1986) (creating cause of action for retaliation); *id.* § 3729(a) (increasing to treble damages and penalty of between $5,000 and $10,000); *id.* § 3730(d)(2) (increasing maximum award to not more than 30%).

33. *Id.* § 3730(e). The 1986 amendments enumerated certain types of public disclosures: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." *Id.*

34. *Id.* § 3729(a)(7) (creating explicit cause of action for reverse false claims calculated to reduce obligation to pay the government).

35. *See* Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908, 913 (E.D. Va. 1989) (quoting 31 U.S.C. § 3730(b) (1986)).

36. S. REP. NO. 99-345, at 6 (1986); *see generally* Fraud in America, *Sen. Chuck Grassley (R-Iowa)*, TAXPAYERS AGAINST FRAUD, at 5:53 (Mar. 18, 2022), https://www.taf.org/podcasts/sen-chuck-grassley-r-iowa/ [https://perma.cc/C4KJ-VX88] (chief proponent of 1986 amendments states 1986 amendments intended to return to and strengthen initial purpose of FCA)

37. *See* Callahan, *supra* note 29, at 103.

38. Hargrove, *supra* note 17, at 65 (quoting *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. & Gov't al Rels.*, 101st Cong., 2d Sess., 7 (1990)).

39. S. REP. NO. 110-507, at 20 (2008) (citing United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991); United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1214 (10th Cir. 2003) (en banc)).

concerned that "the prevailing case law in the First Circuit and the Ninth Circuit does not allow Government employees to act as qui tam relators,"[40] while "the prevailing case law in the Tenth and Eleventh Circuits supports the proposition that Government employees are not categorically barred from acting as relators in FCA cases regardless of whether reporting fraud was one of the employee's main duties."[41] Although the Senate Report was concerned that the First and Ninth Circuits imposed a blanket ban on government employee relators, neither circuit did so. Both circuits prohibited the specific government employee relators in the cases before them from qualifying as original sources under the FCA's public disclosure bar but limited the holdings to the facts of the cases.

With concerns that courts could limit the ability of government employee relators to pursue qui tams, members of Congress stepped forward with proposed solutions. In 1992,[42] 2007,[43] and again in 2009,[44] members of Congress introduced proposed amendments to expressly allow government employee relators to bring qui tams, albeit defining and limiting the circumstances in which they could do so. When addressing one such proposal, the Senate Committee indicated it "strongly agrees with the [en banc *Holmes*] majority opinion holding that [g]overnment employees may serve as qui tam relators without condition under the current FCA."[45] While the proposed amendments considered "restrictions [ ] currently not imposed upon [g]overnment employees," the Senate Committee made clear its intent to expressly allow government employees to serve as relators in defined circumstances in order to "clarify the split of authority across the country related to [g]overnment employee relators."[46] But even without further amending the FCA, courts have continued to interpret the post-1986 FCA to allow government employee relators to bring qui tam actions, effectuating congressional intent that the FCA is an important tool in the fight against fraud.

40. *Id.* (citing *LeBlanc II*, 913 F.2d 17 (1st Cir. 1990); United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740 (9th Cir. 1995) (en banc)).

41. *Id.*

42. *See* Hargrove, *supra* note 17, at 66-67 (discussing 1992 proposed amendments to allow government employee relators); Barry M. Landy, *Deterring Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File Qui Tam Lawsuits*, 94 MINN. L. REV. 1239, 1250-51 (2010).

43. Landy, *supra* note 42, at 1251 (discussing 2007 proposed amendments to allow government employee relators).

44. *Id.* at 1251-52 (discussing 2009 proposed amendments to allow government employee relators).

45. S. REP. NO. 110-507, at 13 (2008) (citing United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 119 (10th Cir. 2003) (en banc)).

46. *Id.*

The number of whistleblower suits has continued to grow over the years, as Congress has taken further efforts to encourage qui tam suits. In 2010, Congress enacted amendments to the FCA that most notably narrowed the public disclosure bar and expanded the definition of an "original source" of information,[47] allowing more cases to proceed even when information is publicly disclosed within the meaning of the public disclosure bar. In fiscal year 2022 alone, whistleblowers filed 652 qui tam suits and helped the federal government recoup more than $1.9 billion in FCA settlements and judgments under the modern FCA.[48] Government employee relators have played crucial roles in bringing fraud to light.

II. THE FCA ALLOWS GOVERNMENT EMPLOYEE RELATORS

"[N]othing in the FCA expressly precludes federal employees from filing qui tam suits,"[49] and thus no court has held the FCA per se bars government employee relators from bringing a qui tam suit based on information they learn in the course of their employment.[50] The DOJ has occasionally made arguments advocating that government

47. Pub. L. 111-148, § 10104(j)(2), 124 Stat. 901 (2010) (amending 31 U.S.C. § 3730(e)(4)); Pub. L. 111-203, § 1079A(c), 124 Stat. 2079 (2010) (amending 31 U.S.C. § 3730(h)). 31 U.S.C. § 3730(e)(4) now provides:

> (A) The court shall dismiss an action . . . if substantially the same allegations . . . were publicly disclosed . . . unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

Prior to these amendments, "original source" was limited to "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *See* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 476 (2007).

48. Press Release, *supra* note 6.

49. *Holmes*, 318 F.3d at 1212.

50. United States *ex rel.* Griffith v. Conn ("*Griffith I*"), No. 11-157, 2015 WL 779047, at *10 (E.D. Ky. Feb. 24, 2015) (citing United States v. A.D. Roe Co., 186 F.3d 717, 722 n.5 (6th Cir. 1999)). Although the District Court in *LeBlanc I* did hold there was a categorical ban on government employee relators under the 1986 amendments, United States *ex rel.* LeBlanc v. Raytheon Co., Inc. ("*LeBlanc I*"), 729 F. Supp. 170 (D. Mass. 1990), *aff'd*, 913 F.2d 17 (1st Cir. 1990), the First Circuit did not accept this reasoning on appeal in *LeBlanc II*; instead, this decision was affirmed on different grounds because the relator was not an original source, and the First Circuit limited its holding to the facts of that case. 913 F.2d 17, 20 (1st Cir. 1990). *See also* United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038, 1039 (M.D. Ga. 1991), *aff'd sub nom.* McDowell v. McDonnell Douglas Corp., 999 F.2d 1583 (11th Cir. 1993) ("In essence, the *LeBlanc* [*II*] court conceived of factual situations when a government employee could be a person with independent knowledge or an 'original source' under the Act.").

employee relators should be categorically prohibited from bringing qui tam actions based on information they learn in the course of their employment: that government employee relators cannot recover under a constructive trust theory,[51] that the 1986 FCA incorporates the 1943 ban against government employee relators,[52] and that the word "person" should be narrowly interpreted to exclude government employees.[53] Each of these categorical arguments has been rejected by federal district courts or rejected on appeal by every court to have considered them.[54]

Courts have relied on statutory interpretation to determine whether government employee relators can bring qui tam actions based on information they learn in the course of their employment.[55] The first case to consider whether the modern FCA permits government employee relators was *Erickson* ex rel. *United States v. American Institute of Biological Sciences*,[56] decided in 1989, three years after enactment of the modern FCA. Erickson was an employee at the United States Agency for International Development ("USAID") responsible for ensuring the proper administration of a contract to develop a malaria vaccine.[57] While reviewing contract compliance, Erickson discovered false claims submitted by a contractor and its subcontractor and reported his concerns to his supervisors, but USAID did not pursue or investigate the allegations.[58] Erickson then filed a qui tam action.[59]

Although the United States District Court for the Eastern District of Virginia dismissed the government employee relator's suit on

51. United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla. 1990) ("The [g]overnment opposes such an award, essentially arguing that [relator] Mr. Weinstein is not entitled to such compensation because the [g]overnment already paid for Mr. Weinstein's services and information, while he was a federal employee."), *opinion vacated in part on reconsideration*, 932 F. Supp. 277 (M.D. Fla. 1993).

52. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991) ("[T]he United States advances the more general proposition that the comprehensive bar against *qui tam* suits by government employees in the 1943 version of the False Claims Act was never repealed by the 1986 amendments to the Act.").

53. Brief for Amicus Curiae the United States of America in Support of Appellees, United States *ex rel.* Little v. Shell Expl. & Prod. Co., 690 F.3d 282 (5th Cir. 2012) (No. 11-20320), 2011 WL 5834291 (arguing courts should interpret the FCA to exclude government employees by reference to word "private" and conflict-of-interest provisions); *Holmes*, 318 F.3d at 1208 ("[T]he government argues that a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is not a 'person' entitled to bring a civil action under § 3730(b)(1).").

54. *See, e.g.*, *Stern*, 818 F. Supp. at 1522 (rejecting government's argument that government employee relator cannot recover under constructive trust theory); *Williams*, 931 F.2d at 1502 (rejecting government's argument that 1986 amendments implicitly incorporate 1943 ban on government employee relators); *Little*, 690 F.3d at 286-90 (rejecting government's arguments to narrowly construe text of FCA).

55. *See, e.g.*, *Williams*, 931 F.2d at 1502-03; *Little*, 690 F.3d at 286-89.

56. 716 F. Supp. 908 (E.D. Va. 1989).

57. *Id.* at 910.

58. *Id.* at 911.

59. *Id.* at 909.

unrelated procedural grounds, the Court stated in dicta that qui tam suits by government employee relators are generally permitted:

> In defining the classes of persons eligible to bring *qui tam* actions, Congress had a choice: It could have chosen to make eligible as *qui tam* relators only certain defined groups of persons and exclude all others or it could have chosen to include all persons as eligible *qui tam* relators with certain specific exceptions. It chose the latter scheme. The statute first permits any "person" to bring a *qui tam* action, and then specifically excludes four groups. . . . Government employees are included in the general universe of permissible *qui tam* plaintiffs unless, in the particular circumstances, they fall into one of the four specifically defined excluded groups.[60]

Currently, those four specifically defined excluded groups under the statute include: (1) former or present members of the armed forces bringing an action against another member of the armed forces arising out of their military service,[61] (2) an action against a member of Congress, a member of the judiciary, or a senior executive branch official based on evidence or information already known to the government,[62] (3) an action based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party,[63] and (4) an action or claim if substantially the same allegations or transactions were already publicly disclosed within the meaning of the FCA.[64]

Since *Erickson*, courts have continued to rely upon statutory construction to permit government employee relators. For example, in *United States* ex rel. *Williams v. NEC Corp.*,[65] the Eleventh Circuit looked to "[t]he structure of the 1986 version of the Act and several basic canons of statutory interpretation" to hold that the modern FCA does not contain a general prohibition against government employee relators.[66] The Eleventh Circuit found the following statutory constructions insightful to reach its decision. First, the FCA enumerates certain actions which are barred but does not explicitly exclude government employee relators.[67] Additionally, in its 1986 amendment, Congress deleted the express ban on government employee relators

60. *Id.* at 912, 913 (citation omitted).
61. 31 U.S.C. § 3730(e)(1).
62. *Id.* § 3730(e)(2).
63. *Id.* § 3730(e)(3).
64. *Id.* § 3730(e)(4).
65. 931 F.2d 1493 (11th Cir. 1991).
66. *Id.* at 1502.
67. *Id.* (citing 31 U.S.C. § 3730(e)).

from the 1943 version of the FCA.[68] Lastly, a ban on government employee relators would render the prohibition on U.S. service members suing other service members superfluous, and "where a statute explicitly enumerates certain exceptions to a general grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary."[69] Other circuit courts have followed suit by interpreting the language of the FCA to permit government employee relators.[70]

One such case reached the Fifth Circuit in 2011. Randall Little and Joel Arnold were government auditors with the Minerals Management Service under the U.S. Department of the Interior when they uncovered an alleged fraudulent scheme to underpay royalties to the federal government under various mineral leases. The government auditors reported their allegations through proper government channels, but no action was taken to stop the scheme.[71] In February and March 2006, the government auditors filed two qui tam complaints, and in September 2006, the DOJ declined to intervene. In 2007, the cases were consolidated and transferred to the Southern District of Texas, and in June 2007, the defendants filed a motion for summary judgment on the grounds that relators' complaint was based in whole or in part upon prior public disclosures and relators were not original sources, and alternatively, relators were not "person[s]" within the meaning of the FCA. In April 2011, the district court granted the defendants' motion, dismissing relators' claims on the grounds that the FCA excludes government employee relators.[72] The relators then appealed to the Fifth Circuit.

The DOJ filed an amicus brief in the Fifth Circuit arguing for a narrow interpretation of the word "person" to exclude subclasses of government employees because "[t]here is no indication in either the text or the legislative history of the FCA that Congress intended to carve out a special exception to the federal conflict-of-interest laws to

68. *Id.* ("Where, as here, the legislature deletes language that contained a general prohibition and replaces it with a grant of jurisdiction followed by certain enumerated exceptions, it is logical for a court to conclude that Congress intended to do away with the general prohibition.").

69. *Id.*

70. Little v. Shell Expl. & Prod. Co., 690 F.3d 282, 286-89 (5th Cir. 2012) (analyzing "unambiguous" language of FCA and context of statute to hold "[t]he text of the False Claims Act supports the [government employee] relator's standing"); United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1208-12 (10th Cir. 2003) (en banc) (analyzing meaning of term "person" and history of FCA qui tam provision to hold 1986 amendments permit government employee relators).

71. *See* Edmund L. Andrews, *Suits Say U.S. Impeded Audits for Oil Leases*, N.Y. TIMES (Sept. 21, 2006), https://www.nytimes.com/2006/09/21/business/suits-say-us-impeded-audits-for-oil-leases.html [https://perma.cc/MP4E-GJW7].

72. Little v. Shell Expl. & Prod. Co., No. 07-CV-871, 2011 WL 1370565, at *6 (S.D. Tex. Apr. 8, 2011), *rev'd*, 690 F.3d 282 (5th Cir. 2012).

allow government employees to file *qui tam* actions based upon information acquired in the scope of their official duties."[73] The DOJ cited various conflict-of-interest provisions to support its argument, including a criminal conflict-of-interest statute,[74] regulations governing "standards of ethical conduct for employees of the [e]xecutive branch,"[75] and more stringent conflict-of-interest rules that apply to federal auditors.[76] "Viewed in light of the [cited] federal conflict-of-interest rules," the DOJ argued, "the plain language of the FCA suggests that Congress did not intend to authorize *qui tam* suits by government employees based upon information acquired in the scope of their employment."[77] In the DOJ's view, this argument was "not merely based on 'policy' concerns," but rooted in "well-established canons that statutes must generally be construed to minimize conflict with other provisions of law, and that repeals by implication are disfavored."[78]

The Fifth Circuit rejected the DOJ's arguments, holding that conflict-of-interest concerns are "extraneous to the False Claims Act," and "[h]ow they operate on these [government employee] relators is an issue for another time and place."[79] The Fifth Circuit, consistent with case law predating it, held that the plain language of the modern FCA unambiguously permits "a person"—including government em-

73. Brief for Amicus Curiae the United States of America in Support of Appellees at 6, Little v. Shell Expl. & Prod. Co., 690 F.3d 282 (5th Cir. 2012) (No. 11-20320), 2011 WL 5834291.

74. *Id.* at 4 (citing 18 U.S.C. § 208). 18 U.S.C. § 208 prohibits: "an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee" from "participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."

75. Brief for Amicus Curiae the United States of America in Support of Appellees at 4, Little v. Shell Expl. & Prod. Co., 690 F.3d 282 (5th Cir. 2012) (No. 11-20320), 2011 WL 5834291. The government described these ethics regulations as prohibiting government employees from: using nonpublic Government information to further private interests, 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a), participating in any matter in which they have a financial interest, *id*. §§ 2635.402, 2635.501, 2635.502, using government property or time for personal purposes, *id*. §§ 2635.704, 2635.705, and holding a financial interest that may conflict with the impartial performance of government duties, *id*. § 2635.403.

76. Brief for Amicus Curiae the United States of America in Support of Appellees at 5, Little v. Shell Expl. & Prod. Co., 690 F.3d 282 (5th Cir. 2012) (No. 11-20320), 2011 WL 5834291 (citing U.S. GOV'T ACCOUNTABILITY OFF., GOVERNMENT AUDITING STANDARDS, http://www.gao.gov/yellowbook [https://perma.cc/7CZF-8PDL] (also known as "generally accepted government auditing standards" or the "Yellow Book")).

77. *Id.* at 7.

78. *Id.* at 6-7.

79. *Little*, 690 F.3d at 289.

ployees—to file qui tam suits, and there is no reason to narrow that interpretation.[80] The Fifth Circuit even noted the executive branch itself envisions providing relator shares to government employees: the DOJ manual on relator shares identifies whether "[t]he relator learned of the fraud in the course of his [g]overnment employment" as a criterion in setting the relator share.[81]

Thus, government employee relators are unequivocally "person[s]" within the meaning of the FCA and meet the threshold requirement to bring qui tam actions.[82] Since 1986, numerous courts have permitted government employee relators to proceed with their qui tam actions,[83] and have safeguarded the ability of government employee relators to receive relator shares upon successful resolution of those cases.[84]

A. The DOJ Has Awarded Relator Shares to Government Employees

The DOJ has awarded relator shares to government employee relators at least over a half dozen times since 2010.

1. Government Researcher as Relator in 2010: *United States* ex rel. *Oberg v. Nelnet, Inc. et al.*, 07-CV-960 (E.D. Va.)

Dr. Jon Oberg was a researcher for the U.S. Department of Education ("ED") when he discovered student aid lenders' fraudulent

80. *Id.*

81. *Id.* at 290 (discussing the DOJ manual entitled "Relator's Share Guidelines"); *see also* U.S. DEP'T OF JUST., DOJ RELATOR SHARE GUIDELINES 2 (1996), https://www.vsg-law.com/wp-content/uploads/2016/08/doj_relator.pdf [https://perma.cc/5Q9M-UP7G].

82. *Little*, 690 F.3d at 284 ("[T]here is no basis to except such an [government] employee from personhood.").

83. *See, e.g.*, *id.* at 286-91; United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1184 (10th Cir. 2008); United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1215 (10th Cir. 2003) (en banc); United States. *ex rel.* Burns v. A.D. Roe Co., Inc., 186 F.3d 717, 722 n.5 (6th Cir. 1999); United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1494 (11th Cir. 1991); United States *ex rel.* Griffith v. Conn ("*Griffith II*"), 117 F. Supp. 3d 961, 972 (E.D. Ky. 2015); United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993), *opinion vacated in part on reconsideration*, 932 F. Supp. 277 (M.D. Fla. 1993); United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038, 1040 (M.D. Ga. 1991), *aff'd sub nom.* McDowell v. McDonnell Douglas Corp., 999 F.2d 1583 (11th Cir. 1993); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1161 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992). *See generally* Callahan, *supra* note 29, at 109 n.80 (collecting cases); Hargrove, *supra* note 17, at 69 tbl. 4 (same).

84. *Stern*, 818 F. Supp. at 1522 (rejecting government's argument to prevent government employee relator from receiving relator share and awarding 15% of settlement amount); *cf. CAC-Ramsey*, 744 F. Supp. at 1161 (safeguarding government employee relator's ability to receive relator share but reducing amount because suit was based primarily on information provided by other entities and relators had minor role in prosecution of suit (citing 31 U.S.C. § 3730(d)(1)).

scheme to inflate their entitlement to interest rate subsidies.[85] He reported his allegations through multiple complaints to the ED-Office of Inspector General, detailed his concerns through his chain of command at the ED, and provided detailed information to assist with audits.[86] In response to his internal reports, relator Oberg's superior instructed him not to investigate the defendants' activities.[87] In September 2007, relator Oberg filed a qui tam complaint, and in August 2009, the DOJ declined to intervene. In its declination notice, the DOJ "reserve[d] the right to object, at the appropriate time, to any award made to the relator under 31 U.S.C. § 3730(d), of a percentage of the proceeds of the action or settlement of the claim" because "some or all of the material facts and documents that serve to support the allegations made in the complaint were gained by the relator while he served as an employee of the United States."[88] Outside of the DOJ's reservation of rights clause, the court did not address the relator's government employment.[89] In December 2009, the court denied defendants' motions to dismiss non-state agency defendants.[90] In October 2010, the DOJ approved settlements totaling $57.75 million with four non-state agency defendants, including a $55 million settlement with Nelnet, Inc.[91] The DOJ paid relator Oberg over 28% of the settlement amount.[92]

85. Complaint for Violations of False Claims Act ¶¶ 14-16, 32-41, United States *ex rel.* Oberg v. Nelnet, Inc., No. 07-cv-00960 (E.D. Va. Sept. 21, 2017).

86. *Id.*

87. First Amended Complaint for Violations of Federal False Claims Act ¶ 51, United States *ex rel.* Oberg v. Nelnet, Inc., No. 07-cv-00960 (E.D. Va. Aug. 24, 2009), 2009 WL 5071190.

88. The Government's Notice of Election to Decline Intervention, United States *ex rel.* Oberg v. Nelnet, Inc., No. 07-cv-00960 (E.D. Va. Aug. 24, 2009).

89. One defendant, Southwest, argued that relator Oberg could not qualify as an original source because, as a former government employee, he had a duty to report fraud and could not satisfy the voluntariness requirement to be an original source. *See* Memorandum of Law in Support of Southwest Student Services Corporation's Motions to Dismiss, United States *ex rel.* Oberg v. Nelnet, Inc., 2009 WL 10676201 (E.D. Va. Dec. 1, 2009) (No. 07-cv-960), 2009 WL 5081031. However, the court did not make any findings on public disclosure and thus did not address this argument in its order denying Southwest's motion to dismiss. *See* United States *ex rel.* Oberg v. Nelnet, Inc., No. 07-CV-960, 2009 WL 10676201, at *1 (E.D. Va. Dec. 1, 2009), *vacated sub nom.* U.S. *ex rel.* Oberg v. Kentucky Higher Educ. Student Loan Corp., 681 F.3d 575 (4th Cir. 2012).

90. Oberg, 2009 WL 10676201, at *3. The court did dismiss certain defendants it deemed were state agencies. Following settlement with the non-state agency defendants, relator Oberg continued to litigate his appeal against the dismissed defendants.

91. Press Release, U.S. Dep't of Just., Four Student Aid Lenders Settle False Claims Act Suit for Total of $57.75 Million (Nov. 17, 2010), https://www.justice.gov/opa/pr/four-student-aid-lenders-settle-false-claims-act-suit-total-5775-million [https://perma.cc/AR5M-6BT4]. The settling defendants were Nelnet Inc. and Nelnet Educational Loan Funding Inc., Southwest Student Services Corp., Brazos Higher Education Authority and Brazos Higher Education Service Corp., and Panhandle Plains Higher Education Authority and Panhandle Plains Management and Servicing Corp. *Id.*

92. *See id.* The DOJ did not object to relator Oberg's relator share award.

2. Government Auditor as Relator in 2012: *United States* ex rel. *Bobby Maxwell v. Kerr-McGee Oil & Gas Corp.*, 04-CV-01224 (D. Colo.)

Bobby Maxwell was a senior auditor in the Minerals Management Service under the U.S. Department of the Interior when he learned about an oil and gas producer's alleged fraudulent scheme to underpay royalties to the federal government under various federal offshore oil leases. He reported his allegations through proper government channels, but no action was taken to stop the scheme.[93] In June 2004, Maxwell filed a qui tam complaint, and in January 2005, the DOJ declined to intervene. A jury found in favor of relator Maxwell and awarded a $7.5 million jury verdict.[94] After trial, the defendant moved to dismiss on public disclosure grounds for lack of subject matter jurisdiction.[95] In March 2007, the district court granted the motion to dismiss, finding there had been a public disclosure and Maxwell did not qualify as an original source.[96] Relator Maxwell appealed and won. The DOJ filed a statement of interest and an amicus brief in the proceedings on the issues of public disclosure and original source.[97] The DOJ argued that the district court erred in finding there was a public disclosure.[98] With respect to whether the relator was an original

93. Andrews, *supra* note 71.

94. *See* Beth Daley, *Whistleblower Wins Oil Royalty Lawsuit: $7.5 Million Underpaid by Kerr-McGee*, PROJECT ON GOV'T OVERSIGHT BLOG (Jan. 24, 2007), https://pogoblog.typepad.com/pogo/2007/01/whistleblower_w.html [https://perma.cc/67V3-CH57].

95. In December 2005, before trial, defendants filed a motion for summary judgment for lack of subject matter jurisdiction on the grounds that (1) a federal auditor could not serve as a relator under the FCA, and (2) that relator Maxwell's case was premised upon public disclosures and that he did not qualify as an original source. *See* United States *ex rel.* Maxwell v. Kerr-McGee Chem. Worldwide, LLC, No. 04-CV-01224, 2006 WL 1660538, at *3 (D. Colo. June 9, 2006), *supplemented*, No. 04-CV-01224, 2006 WL 2869515 (D. Colo. Oct. 6, 2006), *on reconsideration*, *sub nom.* United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 486 F. Supp. 2d 1217 (D. Colo. 2007), *rev'd and remanded*, 540 F.3d 1180 (10th Cir. 2008). In June 2006, the District Court denied defendant's motion for summary judgment, finding that Maxwell was an original source as that term is defined under the FCA, 31 U.S.C. § 3730(e)(4)(B). *Maxwell*, 2006 WL 1660538, at *5. Because of this holding, the District Court concluded it did not need to decide whether there was a public disclosure. *See id.* The case subsequently proceeded to a successful jury trial for relator Maxwell.

96. *Maxwell*, 486 F. Supp. 2d at 1233. The district court based its public disclosure finding on an email from a Department of Interior employee to a state auditor confirming "numerous problems" with the defendant's payments but did not reach the defendant's other alleged instances of public disclosures premised on previous FCA and state litigation. *Id.* at 1225, 1228.

97. United States' Statement of Interest at 3, United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., No. 04-cv-01224 (D. Colo. May 17, 2007); Brief for the United States as Amicus Curiae, United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180 (10th Cir. 2008) (No. 07-1193), 2007 WL 5071576.

98. Brief for the United States as Amicus Curiae at 18-22, United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180 (10th Cir. 2008) (No. 07-1193), 2007 WL 5071576 (arguing

source, the DOJ argued the relator would not qualify as an original source because, as a federal auditor required to report fraud by the terms of his employment, he could not satisfy the FCA's voluntary disclosure requirement.[99] The Tenth Circuit agreed with the DOJ that there was no public disclosure and further held that "Mr. Maxwell was not prevented from serving as a relator on the basis that he is a federal auditor who discovered the information underlying his suit in his official governmental role."[100] In January 2012, the DOJ intervened for good cause, settled the case, and paid relator Maxwell 30% of the more than $23 million settlement amount.[101]

3. U.S. Military Active Duty Servicemember as Relator in 2013: *United States* ex rel. *Lt. Colonel Timothy Ferner v. SAIC et al*., 10-CV-00741 (M.D. Fla.)

Lieutenant Colonel Timothy Ferner was an active duty service-member assigned to the Air Force's Coalition and Irregular Warfare Center when he discovered defense contractor Science Applications International Corporation, Inc.'s ("SAIC") alleged fraudulent procurement scheme. Lt. Col. Ferner reported the allegations through his chain of command.[102] When his allegations were ignored, he filed an FCA qui tam complaint against SAIC in March 2010. According to a DOJ press release, in July 2013, the DOJ intervened and settled claims against SAIC for $5.75 million and paid relator Lt. Col. Ferner 17% of the settlement because "he made the allegations which initiated the government's investigation."[103]

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email did not constitute public disclosure because it was "far too vague," and recipient of email was under "an obligation *not* to disclose that information publicly").

99. *Id.* at 22-27.

100. *Maxwell*, 540 F.3d at 1183-84.

101. *See* Alan Pendergast, *Bobby Maxwell, Fed Whistleblower, Earns $7.5 Million in Oil Company Battle*, WESTWORD (Jan. 12, 2012), https://www.westword.com/news/bobby-maxwell-fed-whistleblower-earns-75-million-in-oil-company-battle-5909301 [https://perma.cc/3UWH-DZGV]; Settlement Agreement, United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., No. 04-cv-01224 (D. Colo.), https://www.michaelsporterlaw.com/wp-content/uploads/sites/1201137/2019/09/826MFCAOilRoyaltyFraudSettlement.pdf [https://perma.cc/NQX9-AXCG] (last visited Apr. 24, 2023).

102. Patty Ryan, *Military Fraud Lawsuit Settled*, TAMPA BAY TIMES (July 9, 2013), https://www.tampabay.com/archive/2013/07/09/military-fraud-lawsuit-settled [https://perma.cc/7PTS-L22M]; Neil Gordon, *SAIC Fraud Case Leaves Whistleblower Unsettled*, PROJECT ON GOV'T OVERSIGHT (Jan. 26, 2015), https://www.pogo.org/analysis/2015/01/saic-fraud-case-leaves-whistleblower-unsettled [https://perma.cc/52K7-BEPE]; *Defense Contractor Defrauds Military and Taxpayers of Millions*, BERGER MONTAGUE, https://bergermontague.com/defense-contractor-defrauds-military-and-taxpayers-of-millions [https://perma.cc/6GNU-CFTG] (last visited Apr. 24, 2023).

103. Press Release, U.S. Dep't of Just., Science Applications International Corporation Agrees To Pay $5.75 Million to Settle False Claims Act Allegations (July 3, 2013), https://www.justice.gov/opa/pr/science-applications-international-corporation-agrees-pay-575-million-settle-false-claims-act [https://perma.cc/89PH-PXD5].

4. Government Auditors as Relators in 2017: *United States* ex rel. *Randall Little and Joel Arnold v. Shell Expl. & Prod. Co. et al*., 07-CV-00871 (S.D. Tex.)

After remand from the Fifth Circuit,[104] Randall Little and Joel Arnold proceeded to litigation and summary judgment briefing, and the DOJ filed a statement of interest on the merits to "clarify five principles addressed in [defendant] Shell's Motion for Summary Judgment."[105] In December 2017, the DOJ approved a settlement by the parties and paid relators Little and Arnold 25% of the settlement amount.[106]

5. Government Project Manager as Relator in 2017: *United States* ex rel. *Brendan Delaney v. eClinicalWorks*, 15-CV-00095 (D. Vt.)

In addition to federal government employees, city and state government employees effectuate public policy goals by coming forward to report fraud. As just one example, Brendan Delaney was a software technician with the New York City Department of Health and Mental Hygiene when he first discovered that electronic health records vendor eClinicalWorks was misrepresenting its software capabilities to government customers.[107] In his city government position, Delaney was responsible for "plan[ning] and execut[ing] the rollout of the new eClinicalworks (eCW) system in the City's 12 jail facilities . . . Provid[ing] on-site implementation support in jail health clinics; and serv[ing] as the primary link between site staff and the Electronic Health Records (EHR) vendor."[108] Through his role as the "primary link" between eClinicalWorks and its on-the-ground implementation, Delaney discovered material deficiencies in the electronic health records software and significant risks to patient health and safety as a result. In May 2015, relator Delaney filed a qui tam complaint,[109] and the DOJ intervened in January 2017, settling the case a few months later for $155 million. Without disputing relator Delaney's status as a

104. *See supra* notes 71-81.

105. United States' Statement of Interest at 1, United States *ex rel.* Little v. Shell Expl. & Prod. Co., No. 07-cv-00871 (S.D. Tex. Dec. 23, 2016).

106. *See* Exhibit A to Joint Motion to Dismiss, Little v. Shell, C.A., No. 07-cv-00871 (S.D. Tex. Dec. 15, 2017).

107. Press Release, *supra* note 11; Complaint for Violation of Federal False Claims Act ¶ 51-62, United States *ex rel.* Delaney v. eClinicalWorks, 15-cv-00095 (D. Vt. May 1, 2015).

108. Delaney, *supra* note 10.

109. Complaint for Violation of Federal False Claims Act, United States *ex rel.* Delaney v. eClinicalWorks, 15-cv-00095 (D. Vt. May 1, 2015).

government employee relator or his ability to obtain a relator share, the DOJ paid relator Delaney a $30 million relator share.[110]

6. Government Case Clerks as Relators in 2018: *United States* ex rel. *Jennifer Griffith and Sarah Carver v. Conn et al*., 11-CV-00157 (E.D. Ky.)

Jennifer Griffith and Sarah Carver were employees of the U.S. Social Security Administration ("SSA")'s Office of Disability Adjudication and Review ("ODAR").[111] In the course of their employment, Griffith and Carver discovered an alleged fraudulent scheme whereby a private practice attorney (defendant Conn) who practiced before the ODAR conspired with Administrative Law Judge David Daugherty to fraudulently approve Conn's clients for social security benefits.[112] Griffith and Carver reported their allegations through proper government channels, but no action was taken to stop the scheme.[113] In October 2011, Griffith and Carver filed a qui tam complaint against defendants Conn and Eric Conn, P.S.C. ("Conn defendants") and defendant Daugherty, and in August 2013, the DOJ declined to intervene. In November 2014, the defendants moved to dismiss the complaint for lack of subject matter jurisdiction, in part based on the public disclosure bar.[114] Because the relators had referenced a news article and a congressional investigation in their complaint,[115] the court found they conceded public disclosures.[116] The court held that only one of the relators qualified as an original source during the period

110. Press Release, *supra* note 11.

111. *Griffith I*, No. 11-cv-157, 2015 WL 779047, at *1 (E.D. Ky. Feb. 24, 2015).

112. *Id.*

113. *See* Emma Cueto, *Ex-Judge Found Liable in FCA Suit Over Social Security Docs*, LAW360 (Mar. 21, 2018), https://www.law360.com/articles/1024327/ex-judge-found-liable-in-fca-suit-over-social-security-docs; Brad Myers, *Whistleblowers Speak Out in SSA Fraud Case*, WSAZ (Apr. 6, 2016), https://www.wsaz.com/content/news/Whistleblowers-speak-out-in-SSA-fraud-case-374831971.html [https://perma.cc/7JAT-ERTP].

114. Defendant Daugherty adopted by reference the language and arguments of the Conn defendants' motion to dismiss. *See* Motion to Dismiss, *Griffith I*, 2015 WL 779047 (E.D. Ky. Feb. 24, 2015) (No. 11-cv-00157).

115. *Griffith I*, 2015 WL 779047, at *4 (citing paragraphs 118 and 120 of relators' complaint). Paragraph 118 of the relators' complaint stated: "On May 19, 2011, the Wall Street Journal published an article, "Disability-Claim Judge Has Trouble Saying 'No'," written by reporter Damian Paletta, describing Daugherty's high claim approval rate, and linking him to the Conn Claims. As described in that article, Ms. Griffith was an original source of information to Mr. Paletta." Paragraph 120 of the relators' complaint stated: "Following the Wall Street Journal's publication of the Paletta article, the Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Government Affairs commenced an investigation into the conduct of Daugherty and the operations of the Huntington ODAR. Both Ms. Griffith and Ms. Carver cooperated fully in the Subcommittee's investigation. (The investigation was subsequently conducted under the aegis of the Committee itself.)."

116. *Id.*

after she left SSA employment.[117] The DOJ exercised its right to oppose dismissal of the relators' claims on the basis of public disclosure under then-new provision 31 U.S.C. § 3730(e)(4)(A).[118] In support of its position, the DOJ argued that "[d]ismissal here would essentially operate as a windfall to the defendants and contrary to the purpose of the public disclosure bar, which is to protect the government from parasitic *qui tam* actions, not to shield from liability defendants who may have violated the FCA." The DOJ further noted that the exercise of its right to oppose dismissal was "entirely rational . . . where the allegations in [r]elators' complaint, if proven true, would make out an FCA case that would entitle the [g]overnment to recover funds."[119] Further, FCA judgments were entered against defendants based on criminal convictions of the same underlying facts and defendants' concessions of liability in the qui tam case.[120] In February 2018, the DOJ notified the courts that relators would receive a 25% relator share.[121]

117. *Id.* at *11.

118. *See* United States' Brief Regarding the "Voluntary Disclosure" Requirement and Notice of Its Opposition to Dismissal of Certain Claims on the Basis of the Public Disclosure Bar, United States *ex rel.* Griffith v. Conn, No.11-cv-157 (E.D. Ky. Mar. 12, 2014), 2014 WL 11394547. In 2010, 31 U.S.C. § 3730(e)(4)(A) was amended to add that a court shall dismiss an action on public disclosure grounds "unless opposed by the [g]overnment." Under this provision, the DOJ objected to dismissal of relators Griffith's and Carver's claims on public disclosure grounds for those claims post-dating March 23, 2010, when the provision was amended to allow the DOJ this authority. *Griffith I*, 2015 WL 779047, at *11. For pre-March 23, 2010, claims, the court held that only one of the relators qualified as an original source. *Id.* at *10-*11. After filing at least two statements of interests on matters relating to the SSA, in April 2016, the DOJ partially intervened for good cause against only defendant Conn. *See* Griffith v. Conn, No. 11-cv-157, 2016 WL 3156497, at *4 (E.D. Ky. Apr. 22, 2016).

119. United States Reply Brief at 11, United States *ex rel.* Griffith v. Conn, No. 11-cv-00157 (E.D. Ky. Apr. 15, 2014).

120. In March 2017, the Conn defendants pled guilty to criminal charges that defendant Conn fraudulent deprived the SSA of money and paid illegal gratuities to SSA officials, and in April 2017, the court entered an FCA judgment against the Conn defendants based on Conn's guilty plea, admission of liability, and stipulation of a civil penalties amount, as and after briefing on qui tam damages. *See* Judgment, Griffith v. Conn, No. 11-cv-00157 (E.D. Ky. Apr. 5, 2017). In May 2017, defendant Daugherty also pled guilty to two criminal counts of receiving unlawful gratuities, and the court held defendant Daugherty jointly and severally liable for the judgment. *See* Griffith v. Conn, No. 11-CV-157, 2018 WL 1402374, at *1, *3 (E.D. Ky. Mar. 20, 2018); Judgment, Griffith v. Conn, No. 11-CV-157 (E.D. Ky. Apr. 26, 2018).

121. Exhibit A to United States' Notice of Relator Share Agreement at 2, United States *ex rel.* Griffith v. Conn, No. 11-CV-157 (E.D. Ky. Feb. 26, 2018) (Settlement Agreement). After the FCA relator share agreement was filed, the relators and the government disputed how to interpret the agreement, and specifically whether the civil judgment would be offset by costs paid in association with the criminal proceedings. *See* United States *ex rel.* Griffith v. Conn, No. 11-157, 2020 WL 2300235, at *2 (E.D. Ky. May 8, 2020) (relators entitled to 25% of net proceeds actually recovered by government).

B. Government Employment is Relevant Only if There is a Public Disclosure

While no court has imposed a categorical ban on government employee relators, as discussed,[122] some courts have dismissed qui tam actions brought by government employee relators based on the public disclosure bar. In those circumstances, courts have relied upon an analysis of relator's specific job responsibilities in concluding dismissal was warranted.[123]

The public disclosure bar entails two separate but related inquiries: (1) whether there was a public disclosure within the meaning of the FCA through one of the enumerated forms; and (2) if so, whether the relator was an original source of the information.[124] Although the DOJ has argued at times that government employee relators categorically trigger the two-step public disclosure analysis,[125] courts have rejected the notion that there is a per se public disclosure when a government employee brings a qui tam case.[126]

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122. *See, e.g.*, *LeBlanc II*, 913 F.2d 17, 20 (1st Cir. 1990), *aff'g* 729 F. Supp. 170 (D. Mass. 1990) (rejecting district court's holding that there is a per se public disclosure when government employees disclose information to themselves).

123. United States *ex rel.* Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ., 161 F.3d 533, 543 (9th Cir. 1998) (relator not original source); United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1548 (10th Cir. 1996) (relator not original source); United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740 (9th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996) (relator not original source); United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995) (relator conceded he was not original source of publicly disclosed information); *Griffith I*, No. 11-CV-157, 2015 WL 779047, at *8 (E.D. Ky. Feb. 24, 2015) (relator not original source as to certain claims); United States *ex rel.* Schwedt v. Plan. Rsch. Corp., 39 F. Supp. 2d 28, 36–37 (D.D.C. 1999) (relator not original source); United States *ex rel.* Foust v. Blue Cross and Blue Shield, 26 F. Supp. 2d 60, 74 (D.D.C. 1998) (relators not original sources); Wercinski v. Int'l Bus. Machines Corp., 982 F. Supp. 449, 462 (S.D. Tex. 1997) (relators not original sources). *See also* Hargrove, *supra* note 17, at 15 (compiling cases).

124. 31 U.S.C. § 3730(e)(4).

125. *See* United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1419 (9th Cir. 1991) ("The United States further argues that the 'public disclosure' required by the statute occurred when Hagood as a government employee 'disclosed' to himself as a member of the public the information on which he based his suit."); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991) ("The United States' argument that Williams's *qui tam* suit was based on the 'public disclosure' of information under section 3730(e)(4)(A), relies on a characterization of government employees as occupying a dual status."); United States v. CAC-Ramsey, Inc., 744 F. Supp. 1158, 1160 (S.D. Fla. 1990) ("The United States argues that the court should hold, once a present or former government employee expropriates the government's work product, the information becomes 'disclosed' to a member of the 'public,' because the person in the character or capacity of a private relator is a part of the public."); *see also* Hanifin, *supra* note 19, at 590 ("However, when the federal employee uses federal information to file a qui tam suit, he acts outside his official capacity and thereby makes use of the information as a private person. The public disclosure occurs when he files the qui tam action in his private capacity based on that government information.").

126. *Hagood*, 929 F.2d at 1419-20; *Williams*, 931 F.2d at 1499; *CAC-Ramsey*, 744 F. Supp. at 1160; *see also LeBlanc II*, 913 F.2d at 20 (rejecting notion "that government employees . . . can publicly disclose information to themselves" or that filing a qui tam is itself a public disclosure).

Instead, under step one of the analysis, information must be publicly disclosed "(i) in a [f]ederal criminal, civil, or administrative hearing in which the [g]overnment or its agent is a party; (ii) in a congressional, Government Accountability Office, or other [f]ederal report, hearing, audit, or investigation; or (iii) from the news media," and that publicly disclosed information must be "substantially the same allegations or transactions as alleged in the action or claim."[127]

Step two of the analysis, the original source inquiry, is only necessary once a court factually determines that a public disclosure has occurred within the meaning of the FCA.[128] An "original source" is defined under the FCA as "an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the [g]overnment the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the [g]overnment before filing an action under this section."[129] This original source inquiry may involve an analysis into the government employee's specific job responsibilities to determine whether they qualify as an original source.[130] Government employment status is irrelevant until then.

In *United States* ex rel. *Fine v. Chevron, U.S.A., Inc.*,[131] a former government auditor with the U.S. Department of Energy ("DOE")-Office of Inspector General ("OIG") was responsible for supervising and conducting audits of private contractors that administered DOE facilities and operations.[132] After his supervisors failed to act on certain perceived violations, Fine filed a total of seven qui tam actions related to fraud in the administration of DOE facilities, including against Chevron, U.S.A. and the University of California and its Board of Regents.[133] The DOJ declined to intervene, defendants subsequently

127. 31 U.S.C. § 3730(e)(4)(A).

128. *Williams*, 931 F.2d at 1500 (citation omitted); *see also* United States v. A.D. Roe Co., 186 F.3d 717, 725 (6th Cir. 1999) ("[O]nly if the district court determines that all four elements of the first prong of the jurisdictional bar have been satisfied—*i.e.*, the information upon which the relator based the allegations of his *qui tam* action was publicly disclosed as defined in the FCA—must it reach the second prong of the jurisdictional bar, and inquire whether the relator was the 'original source' of the information." (footnote omitted)).

129. 31 U.S.C. § 3730(e)(4)(B).

130. *Id.* § 3730(e)(4). *See* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc) (analyzing federal auditor for Office of Inspector General's job responsibilities to hold relator not original source because disclosures not "voluntary"); *LeBlanc II*, 913 F.2d at 20 (analyzing Quality Assurance Specialist's job responsibilities to hold relator not original source because knowledge not "independent").

131. 72 F.3d 740 (9th Cir. 1995) (en banc).

132. *Id.* at 741-42.

133. *Id.* at 742.

moved to dismiss the cases against Chevron and the University of California, and the United States District Court for the Northern District of Cal-ifornia dismissed both qui tam actions.[134] On appeal of both motion to dismiss rulings, the Ninth Circuit panel initially reversed and remanded on the grounds that Fine voluntarily disclosed his concerns about fraud and thus qualified as an original source under the FCA.[135] However, the Ninth Circuit voted to rehear the appeal en banc to consider whether Fine could qualify as an original source.[136]

Relator Fine acknowledged that his qui tam actions were based upon information disclosed through publicly available federal reports.[137] At step two of the analysis, the Ninth Circuit sitting en banc held that Fine did not qualify as an original source.[138] Specifically, Fine's disclosures to the government were not "voluntary" under 31 U.S.C. § 3730(e)(4)(B) because, as a federal OIG auditor, "disclosing fraud was 'the paramount responsibility of [Fine's] position,'" and Fine was "compelled to disclose fraud by the very [written] terms of his employment."[139] The en banc opinion noted the Ninth Circuit had "implicitly accepted the proposition that a federal employee may bring a qui tam action" and thus declined to address whether government employees may be categorically excluded from qualifying as original sources.[140]

In his concurrence, Judge Kozinski noted that OIG employees, unlike non-OIG government employees, have unique job responsibilities to discover and report fraud and "are not subject to the types of pressures to withhold information that might burden . . . other government employees. These other employees might well be risking their careers by coming forward with information."[141]

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134. *Id.*; United States *ex rel.* Fine v. Univ. of Cal., 821 F. Supp. 1356 (N.D. Cal. 1993) (dismissing case against University of California because Fine was not original source of information on which complaint was based).

135. United States *ex rel.* Fine v. Chevron, U.S.A. Inc., 39 F.3d 957, 962 (9th Cir. 1994), *opinion vacated on reh'g,* 72 F.3d 740 (9th Cir. 1995).

136. *Chevron, U.S.A.*, 72 F.3d at 741.

137. *Id.* at 743; *see also* Brief of Appellant at 2, United States *ex rel.* Fine v. Univ. of Cal. (9th Cir. Aug. 17, 1993) (No. 93-15728), 1993 WL 13103212 ("[A]s a result of Plaintiffs efforts, this same information has now been publicly disclosed in government reports. Because the information has been publicly disclosed, Plaintiff is required by the terms of the FCA to demonstrate that he is an original source of the information." (citations omitted)).

138. *Chevron, U.S.A.*, 72 F.3d at 743.

139. *Id.* (quoting *Univ. of Cal.*, 821 F. Supp. at 1360); *see also id.* at 744 ("[Fine] no more voluntarily provided information to the government than we, as federal judges, voluntarily hear arguments and draft dispositions."). Specifically, relator Fine's job requirements entailed supervising audits and editing audit reports, and he held a supervisory role for 84% to 97% of all audit reports from the Western Region Audit Office over the last four years of his employment. *Id.* at 742.

140. *Id.* at 744 n.5.

141. *Id.* at 746-47 (Kozinski, J., concurring).

However, in a first attempt by a circuit court to interpret the post-1986 public disclosure bar in the context of government employee relators, the First Circuit's decision in *United States* ex rel. *LeBlanc v. Raytheon Co., Inc.* ("*LeBlanc II*")[142] has catalyzed confusion on the public disclosure inquiry and obfuscated this two-step analysis under the public disclosure bar. Relator LeBlanc was employed as a Quality Assurance Specialist for the United States Government Defense Contract Administrative Service when he observed Raytheon's alleged fraudulent mishandling of government contracts.[143] The government declined to intervene.[144] The district court then granted the defendant's motion to dismiss on the "overly broad" grounds that the FCA bars qui tam suits by government employees based upon information they acquired in the course of their employment.[145] On appeal, the First Circuit rejected the district court's broad holding and instead focused on the public disclosure inquiry as applied in the case.[146] Although the First Circuit held there was no public disclosure,[147] the First Circuit did not end its inquiry at the first step of the public disclosure two-step analysis. Instead, the First Circuit held that LeBlanc was not an original source because he was responsible for exposing fraud as a condition of his employment.[148] The First Circuit affirmed dismissal on these grounds but cabined its holding to the facts of the case: "This conclusion, however, does not mean that there is no government employee who could qualify to bring a *qui tam* action under the original source exception. We decline to draft a litigation manual full of scenarios that would fall under the exception."[149]

The Eleventh Circuit in *United States* ex rel. *Williams v. NEC Corp.* concluded that the First Circuit went "one step too far."[150] According to the court, leaping to step two of the two-step analysis—whether the relator was an original source—was improper in the absence of a

142. 913 F.2d 17 (1st Cir. 1990).

143. *Id.* at 18.

144. *Id.*

145. *LeBlanc I*, 729 F. Supp. 170, 174 (D. Mass.), *aff'd*, 913 F.2d 17 (1st Cir. 1990); *see LeBlanc II*, 913 F.2d 17, 18 (1st Cir. 1990) (affirming on different grounds because district court's reasoning was "overly broad and conclusive"). Specifically, the U.S. District Court for the District of Massachusetts held that a public disclosure "necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* in his private capacity" and that a former government employee like relator LeBlanc could not qualify as an original source. *LeBlanc I*, 729 F. Supp. at 175.

146. *LeBlanc II*, 913 F.2d at 20 ("The district court need not have gone so far. For this reason we take this opportunity to clarify and limit the district court's holding and analysis.").

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1500-01 n.13 (11th Cir. 1991).

finding on the threshold determination that relator's allegations were publicly disclosed.[151] *LeBlanc II*'s first attempt at interpreting the post-1986 public disclosure bar in the context of government employee relators has prompted misunderstandings about whether, and under what circumstances, government employees can serve as relators in the First Circuit by putting the cart before the horse in reaching its conclusion.[152]

The authors of this article leave an analysis of the original source exception outside the context of government employee relators for another time.[153] While case-specific facts may warrant an original source analysis in certain cases, the threshold determination to trigger step one of the analysis—whether there is a public disclosure within the meaning of the FCA—is not met in every instance. Further, the DOJ may exercise its option to oppose dismissal of a qui tam case brought by a government employee relator on public disclosure grounds, as it did in *United States* ex rel. *Griffith v. Conn.*[154]

III. POLICY ARGUMENTS AGAINST GOVERNMENT EMPLOYEE RELATORS HAVE NOT PREVAILED

In addition to statutory construction arguments,[155] the DOJ on occasion has called government employee qui tam suits "parasitical"[156] and raised policy concerns that it argues warrant prohibiting government employee relators. The DOJ has raised concerns that allowing government employees to bring qui tam cases (1) creates perverse incentives for government employees; (2) creates unintended consequences for government agencies; and (3) creates conflicts of interests. However, these policy concerns have not carried the day.[157]

151. Some have argued the First Circuit must have implicitly held there was a public disclosure despite its rejection of the district court's finding of public disclosure because it otherwise would not have reached the original source analysis. *See* Hanifin, *supra* note 19, at 576-77. While that conclusion is unsupported, it underscores the confusion in the aftermath of the *LeBlanc II* First Circuit decision.

152. *See, e.g.,* Virginia C. Theis, *Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 PUB. CONT. L.J. 225, 235 (1999) ("[T]he First Circuit held that a *qui tam* plaintiff must be an original source of the information on which the suit is based, regardless of whether there had been a prior public disclosure of the information.").

153. For more information about the original source exception, *see generally* Joel D. Hesch, *Restating the Original Source Exception to the False Claims Act's Public Disclosure Bar in Light of the 2010 Amendments*, 51 U. RICH. L. REV. 991 (2017).

154. *See* United States' Brief Regarding the "Voluntary Disclosure" Requirement and Notice of Its Opposition to Dismissal of Certain Claims on the Basis of the Public Disclosure Bar, United States *ex rel.* Griffith v. Conn, No. 11-CV-157 (Mar. 12, 2014), 2014 WL 11394547.

155. *See supra* notes 51-53.

156. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1503 (11th Cir. 1991).

157. *See id.* at 1504 ("[W]e are charged only with interpreting the statute before us and not with amending it to eliminate administrative difficulties.").

Perverse Incentives.[158] One policy concern is that government employees will have perverse incentives to focus on the qui tam case rather than perform their assigned work. The idea is that government employees will be incentivized to conceal or minimize information from superiors to use that information solely for use in a qui tam case and race to the courthouse before internal investigations have been sufficiently underway or completed. Additionally, the argument goes, allowing government employees to capitalize on information they learn while working for the government, which the government can be deemed to already know, violates the purpose of the qui tam provisions because it offers financial incentives for doing their job. Further, there are internal channels for government employees to report misconduct, so these additional incentives are unnecessary and avoidable.

Unintended Consequences.[159] A second policy concern is that government employees will create unintended consequences for their employer—the government agency being defrauded—and other government entities investigating fraud. Government employees may interfere with active or potential investigations in order to prosecute their own case which may create general mistrust among government employees, as well as decreased public confidence in the integrity of government investigations. Additionally, contractors may be deterred from cooperating in government investigations due to concern a government employee relator will use the information against them, and that government employee relators will undermine the government-contractor relationship. Lastly, allowing government em-

158. *See* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 745 (9th Cir. 1995) (en banc) (quoting the DOJ's policy arguments that government employee relators face "perverse incentives" to act contrary to official duties); *Williams*, 931 F.2d at 1503 (describing the DOJ policy argument that government employees would race to the courthouse); United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1212 (10th Cir. 2003) (en banc) (discussing the DOJ policy argument that permitting government employee qui tam suits creates perverse incentives); Reply Brief for Plaintiff-Relator, Appellant Roland A. Leblanc at 5-6, *LeBlanc II*, 913 F.2d 17 (1st Cir. 1990) (No. 90-1246), 1990 WL 10533417 (replying to DOJ policy argument that government employee actions create perverse incentives for personal profit); *see also* Theis, *supra* note 152, at 244 (arguing government employee relators have incentives to conceal knowledge of fraud and not report it to employer); David Wallace, *Government Employees as Qui Tam Relators*, 1996 ARMY LAW. 14, 20 (1996) (expressing concern over government employee relators "rush[ing] to the courthouse").

159. *See Chevron, U.S.A.*, 72 F.3d at 745 (quoting the DOJ amicus brief that OIG employee relators would affect government-contractor relationship and compromise criminal prosecutions, among others); *Williams*, 931 F.2d at 1503 (describing the DOJ's policy argument that government employee relators would prematurely disclose information to defendant or impact government investigations); Reply Brief for Plaintiff-Relator, Appellant Roland A. Leblanc at 11-14, *LeBlanc II*, 913 F.2d 17 (1st Cir. 1990) (No. 90-1246), 1990 WL 10533417 (responding to the DOJ's policy arguments that government employee actions would "cripple" government's fraud enforcement efforts). *See also* Hanifin, *supra* note 19, at 606-08 (arguing qui tam actions by government employee relators would "supplant" government law enforcement); Theis, *supra* note 152, at 245 (arguing government employee relators "would disrupt the Justice Department's overall management of the war against fraud").

ployee relators may disrupt the DOJ's management of fraud cases by undermining prosecutorial discretion and potentially disrupting active criminal or fraud investigations.

Conflicts of Interests.[160] A third policy concern holds that conflicts of interests arise when government employee relators are potential recipients of a relator share based on information learned during the course of their job duties. The government has argued that several conflict-of-interest provisions are implicated by a government employee's pursuit of a qui tam case such as the criminal conflict-of-interest statute and Standards of Ethical Conduct for Employees of the Executive Branch regulations.[161] These may come into play where a government employee relator spends official time or government resources searching for potential qui tam defendants, receives their salary and a relator share for a successful qui tam case (double pay), or chooses to work on assignments to improve their potential for a relator share or otherwise affect their financial interest.

Judge Trott, in concurrence to the *Chevron, U.S.A.* en banc decision, summed up the "parade of horribles" this way:

> One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr.* Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.[162]

While such concerns warrant consideration on a case-by-case basis by a fact finder, every appellate court to have considered them has

160. *Holmes*, 318 F.3d at 1212 (quoting the DOJ policy arguments that government employee relators conflict with legal duties); Reply Brief for Plaintiff-Relator, Appellant Roland A. Leblanc at 15-21, *LeBlanc II*, 913 F.2d 17 (1st Cir. 1990) (No. 90-1246), 1990 WL 10533417 (responding to the DOJ argument that ethical rules and Executive Orders prohibit government employees from serving as relators); Brief for Amicus Curiae the United States of America in Support of Appellees at 27-30, Little v. Shell Expl. & Prod. Corp., 690 F.3d 282 (5th Cir. 2012) (No. 11-20320), 2011 WL 5834291 (arguing conflict-of-interest rules create "compelling, independent reasons" to preclude government employees from bringing qui tam actions). *See* Hanifin, *supra* note 19, at 608-15 (arguing government employee relators face conflict-of-interest concerns for receiving personal profit from government information, are incentivized to act contrary to official duties, and receive double compensation from unofficial sources); William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1834-36 (1996) (arguing government employee relators may jeopardize relationship between government and contractor).

161. *See supra* notes 74-75 and accompanying text; *see also supra* note 77 and accompanying text (discussing the DOJ's arguments that conflict-of-interest provisions warrant narrow statutory interpretation of FCA).

162. *Chevron, U.S.A.*, 72 F.3d at 748 (Trott, J., concurring); *see also id.* at 740 (Leavy, J., dissenting) (disagreeing with "parade of horribles that some would portray" because government employees do not have "unfettered freedom to file qui tam actions under any and all circumstances").

concluded that government employee relators have a role under the FCA with enumerated exceptions. Notwithstanding the DOJ's policy arguments, "the fact is that nothing in the FCA expressly precludes federal employees from filing qui tam suits," and courts "are charged only with interpreting the statute before us and not with amending it to eliminate administrative difficulties."[163] To the extent that such concerns have been raised in the context of the public disclosure bar, they have also not posed a per se impediment. Further, since the enactment of the modern FCA, this "parade of horribles" has not been realized. A minuscule percentage of filed qui tam cases have been brought by government employees which is unsurprising because whistleblowing is not for the faint of heart. Most individuals who engage in whistleblowing are faced with valid concerns of job security and retaliation.

The alternative is unchecked fraud. Government employees are often in unique positions to witness fraud schemes, and the government's checks and balances to combat fraud are imperfect. More eyes and ears are desirable to keep those who do business with the government honest brokers. On balance, the inclusion of government employees in FCA's qui tam provisions align public and private interests in pursuit of recouping misspent federal funds and deterring future misconduct, among other important objectives.

IV. POLICY CONSIDERATIONS WEIGH IN FAVOR OF PERMITTING GOVERNMENT EMPLOYEE RELATORS

There has been no evidence that the concerns raised by the DOJ or defendants have come to fruition. Government employee relators have not run to the courthouse in droves, hindered government investigations to file a qui tam, or withheld government information to maximize a qui tam recovery. "During [a nearly twenty year] period, about twenty government employee *qui tam* cases have been reported (about one opinion per year)."[164] These concerns are often belied by the realities of qui tam litigation[165] which face procedural hurdles on

163. *Holmes*, 318 F.3d at 1212, 1214.

164. Hargrove, *supra* note 17, at 68-69, 69 tbl 4 (compiling cases brought by government employee relators between 1986 and 2004). *See supra* notes 83 & 123 (compiling cases brought by government employee relators); *supra* notes 102-103 (discussing case against SAIC); *see also* Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908 (E.D. Va. 1989).

165. Callahan, *supra* note 29, at 125.

the path to resolution;[166] can take many years to resolve, if at all;[167] and require time and resources on behalf of the relator.[168] Notably, government employees may take even greater risks in the pursuit of a qui tam action than their peers in the private sector.[169] The FCA's incentive structure is intended to mitigate these barriers that a relator may face by stepping forward to report fraud.[170]

Further, most of the counterarguments against government employee relators are not specific to government employees, but rather present general "administrative difficulties" that arise with any relator.[171] These administrative difficulties are mitigated by many of the FCA's procedural safeguards.[172] While federal conflict-of-interest provisions do apply specifically to federal government employees, those concerns are misplaced and no court has found them to pose a bar to a qui tam case.[173] Government employee relators serve an important public function, and the qui tam provisions should be made readily available for these relators who may be in the best positions to successfully pursue qui tam suits on behalf of the government.

166. For example, the FCA's first-to-file rule and public disclosure bar disincentivize a relator from sitting on information longer than necessary or they may risk losing the opportunity to bring a qui tam, 31 U.S.C. § 3730(b)(5), (e)(4)(A).

167. *See* Ralph Mayrell, *Digging Into FCA Stats: A Decade of Litigation Trends*, LAW360 (July 14, 2021), https://www.law360.com/articles/1402597/digging-into-fca-stats-a-decade-of-litigation-trends.

168. Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 TENN. L. REV. 365, 387 (1993) (recognizing relator awards compensate government employees for "taking risks and 'going the distance' in their investigative efforts").

169. *Id.* at 384-85 (discussing examples of government employee relators who experienced retaliation).

170. Callahan, *supra* note 29, at 117-19.

171. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1503 n.16 (11th Cir. 1991) (concerns "describe administrative difficulties that might arise when any private *qui tam* plaintiff files suit prior to the completion of a government investigation into the subject of the action"); *see* Callahan, *supra* note 29, at 125-26 (noting most concerns against government employee relators "are not dependent on the identity of the relator's employer" and "are equally valid with reference to a *qui tam* lawsuit filed by a private citizen").

172. *Williams*, 931 F.2d at 1503 n.16; *see also* United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1225 n.14 (10th Cir. 2003) (Tacha, J., dissenting) ("[T]hese concerns do not require excluding government employees . . . . The statute demonstrates that Congress considered these concerns (though not specifically with respect to government employees) and chose to mitigate them by other means.")

173. For an argument that "these principles apply equally to employees in the public sector as in the private sector," *see* Hargrove, *supra* note 17, at 92 (arguing private sector employees are bound by similar restraints as federal employees, including noncompete and nondisclosure agreements).

A. Theoretical Policy Concerns Have Not Materialized to Bar Government Employee Relators

1. No Perverse Incentives

The modern FCA incentivizes government employee relators to come forward with information about fraud that would otherwise go unabated. Rather than *create* perverse incentives, as some argue, the 1986 amendments sought to do away with the perverse incentives that were inherent under the 1943 version of the FCA.[174] The 1943 FCA, with its prohibition against filing a qui tam if the government had knowledge of the fraud, disincentivized persons from reporting fraud through government channels: "persons who knew of evidence of fraud were better off keeping it to themselves, because if they told the government they could not file a profitable qui tam suit," which "weakened law enforcement by denying the government information that its citizens would otherwise have provided."[175]

The modern FCA permits government employee relators to first report their concerns internally before filing a qui tam, and the real examples of government employee relators who have brought qui tams demonstrate that they do so in nearly all instances, often experiencing retaliation in return. Further, practical adjustments such as the use of government leave policies, ethical walls which are not uncommon for government employees in other contexts, as well as ordinary management tools can effectively address such concerns.

The argument that government employee relators are rewarded for merely alerting the government to what it already knows is misplaced. Congress itself has recognized that, absent whistleblowers—and especially government whistleblowers—government investigations are often unsuccessful in their internal efforts to combat fraud.[176] There are several reasons why internal channels to report and investigate fraud are unsuccessful: for example, "bureaucratic corruption, inertia, incompetence, or lack of adequate resources; the potential for political embarrassment; and the perception that exposure of wrongdoing may undercut overall support for the program that is involved."[177]

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174. *See* Hanifin, *supra* note 19, at 569.

175. *Id.*

176. *See* S. REP. NO. 99-345, at 3 (1986) (noting top two reasons why government employees do not report fraud are (1) belief that nothing would be done to correct fraudulent activity even if reported (53%), and (2) fear of reprisal (37%) (citation omitted)).

177. Callahan, *supra* note 29, at 120 (quoting House Comm. on the Judiciary, False Claims Amendments Act of 1992, H.R. REP. NO. 837, 102d Cong., 2d Sess., 4 (1992), at 5); *see also* Hargrove, *supra* note 17, at 88 (arguing government agencies may not act on reports of fraud because of concerns about contractor relationship); Bullock, *supra* note 168, at 386 (arguing government agencies cannot

Further, government employees often take significant risks and experience retaliation by reporting fraud, and their courage in stepping forward should not be dismissed.[178] Studies by the United States Merit Systems Protection Board have consistently found that significant percentages of government employees experience actual or threatened retaliation for reporting fraud: 36.9% in 1992,[179] 44% in 2000,[180] and 36.2% in 2010.[181] Government employees took these personal risks to serve the public.[182]

The modern FCA does not create perverse incentives for government employee relators. Government employees who have or will step forward to report fraud do so at significant risk of retaliation.[183] In nearly every example, government employees only filed qui tam actions as a last resort after unsuccessfully attempting to report allegations of fraud to their superiors or up the chain of command.[184] For example, in 2013, the DOJ awarded a relator share to Lieutenant Colonel Timothy Ferner, who discovered a defense contractor's fraudulent contract procurement scheme, tried unsuccessfully to report his concerns up the chain of command, and then filed a qui tam complaint.[185] In 2012 and 2017, the DOJ also awarded relator shares to federal auditors Randall Little, Joel Arnold, and Bobby Maxwell who discovered contractors' fraudulent schemes to underpay royalties

pursue all allegations of fraud because of resource and budgetary constraints); Landy, *supra* note 42, at 1253 (arguing government employee relators should be permitted because "government lacks resources to properly combat fraud"); Miro Kovacevic, *The False Claims Act: Government Employees as Qui Tam Plaintiffs in the Tenth Circuit*, 80 DEN. U. L. REV. 625, 652 (2003) ("[M]any fraudulent actions are never discovered because of budgetary problems").

178. Callahan, *supra* note 29, at 117-19 (discussing high rates of retaliation against government employee whistleblowers and noting "the [FCA's] substantial financial incentives may be necessary to overcome potential government whistleblowers' fears of retaliation"); Hargrove, *supra* note 17, at 90-91 (noting Congress enacted 1986 amendments after considering government employees' fears of reprisal, which may be more pronounced for military servicemembers).

179. U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES, at 10 (2011), https://www.mspb.gov/studies/studies/Blowing_The_Whistle_Barriers_to_Federal_Employees_Making_Disclosures_662503.pdf [https://perma.cc/5RV3-CBQS].

180. U.S. MERIT SYS. PROT. BD., THE FEDERAL WORKFORCE FOR THE 21ST CENTURY: RESULTS OF THE MERIT PRINCIPLES SURVEY 2000, at 35 (2003), https://mspbpublic.azurewebsites.net/studies/studies/The_Federal_Workforce_for_the_21st_Century_Results_of_the_Merit_Principles_Survey_2000_253631.pdf [https://perma.cc/T2CU-SE7M].

181. U.S. MERIT SYS. PROT. BD., *supra* note 179, at 10-11.

182. *Id.* at i ("The survey data also indicate that the most important factors for employees when deciding whether to report wrongdoing are not about the personal consequences for the employee. Saving lives is more important to respondents than whether they will experience punishment or a reward.").

183. *See* Hargrove, *supra* note 17, at 89-90 (describing retaliation experienced by government employee relators James Hagood and Leon Weinstein).

184. *See* Landy, *supra* note 42, at 1261 (between 1986 and 2010, all government employee relators who discovered fraud in course of government employment filed qui tam only after attempting to report internally).

185. *Supra* notes 102-103 and accompanying text.

to the federal government, tried unsuccessfully to report their concerns internally, and then filed qui tam complaints.[186] And in 2018, the DOJ agreed to share 25% of proceeds with Jennifer Griffith and Sarah Carver, former employees of the SSA, who discovered a fraudulent social security benefits scheme by a lawyer and administrative law judge, tried unsuccessfully to report their concerns internally, and then filed a qui tam complaint.[187]

In each of these instances and others involving government employee relators, qui tam actions became the only avenue to hold fraudsters accountable once it became clear that the government would not investigate or act on government employees' allegations. The FCA's incentive structure serves to further promote the FCA's fraud-fighting objectives.

2. No Unintended Consequences

Government employee relators do not create unintended consequences for the government agencies or the DOJ. To the contrary, qui tam actions preserve government resources while aligning public and private interests; because whistleblowers may prosecute on behalf of the government,[188] the resource-intensive task of prosecuting a case may shift from the government to relators.[189] If the government takes the case on as its own, relators and relators' counsel remain valuable resources to assist the government's investigation. And under the FCA, the government stands to recover up to three times the damages incurred, plus penalties; thus, the government can still recoup its full losses or more even after rewarding a relator share.[190]

Any concerns that government employees will jeopardize government-contractor relationships or generate mistrust within the government should not justify turning a blind eye to fraud. To the contrary, contractors may be deterred from continuing fraudulent practices if they know they can no longer skirt by undetected by relying on close relationships with government officials or insufficient government resources, effectuating a greater culture of compliance.[191]

The existence of a whistleblower does not harm the government. To the contrary, absent a whistleblower, most fraud would go unreported, and the government's abilities to detect fraud and recoup misspent

186. *Supra* notes 93-101 & 104-106 and accompanying text.

187. *Supra* notes 111-121 and accompanying text.

188. 31 U.S.C. § 3730(c)(3).

189. *See* Landy, *supra* note 42, at 1256, 1266 n.83.

190. *See* Kovacevic, *supra* note 177, at 652.

191. Bullock, *supra* note 168, at 387.

funds are impaired. A qui tam action merely offers another, and often more effective, means to hold contractors accountable and deter fraud.[192] Consistent with the original purpose of the FCA, government employee relators have the same motive as any other FCA relator—to stop fraud and protect the public fisc.[193]

Further, some of these same arguments can be made of company employees who blow the whistle on their employers while continuing to be employed at the defendant's place of business during the pendency of the qui tam case. The FCA places limitations on the participation of relators who take any steps to obstruct justice.[194] Both the defendant and the government can avail themselves of these provisions upon a showing that relator's action would "interfere with or unduly delay the [g]overnment's prosecution of the case" or for "harassment" of the defendant or "cause the defendant undue burden or unnecessary expense."[195]

Further, many of these arguments are unremarkable. None of the cases addressed in this article involved declined qui tam cases interfering with other government investigations. Indeed, in all but the two cases brought by Lt. Col. Timothy Ferner and Brendan Delaney, the government declined (and later intervened for good cause to settle the case), leaving the relator to pursue justice exactly as the qui tam provisions intended.

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192. In fiscal year 2022, relators helped the DOJ recoup over $1.9 billion from FCA qui tam actions. *See* Press Release, *supra* note 6.

193. Bullock, *supra* note 168, at 387.

194. 31 U.S.C. § 3730(c)(1) ("Rights of the Parties to Qui Tam Actions") provides:

> If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

31 U.S.C. § 3730(c)(2)(C) provides:

> Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
>
> (i) limiting the number of witnesses the person may call;
> (ii) limiting the length of the testimony of such witnesses;
> (iii) limiting the person's cross-examination of witnesses; or
> (iv) otherwise limiting the participation by the person in the litigation.

31 U.S.C. § 3730(c)(2)(D) provides:

> Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

195. 31 U.S.C. § 3730(c)(2)(C), (D).

3. No Conflicts of Interests

As with all factual allegations in litigation, the devil is in the details. Any potential conflict of interest may be addressed on a case-by-case basis without undermining the purpose or effectiveness of the FCA qui tam provisions. As Senator Grassley said, if "good faith efforts to first work through the system to expose fraud . . . do[n't] work, we should not cut [relators] out of using qui tam. Because if we do then we are losing one of the basic resources to fight fraud in this country."[196]

No court has held that a government employee relator violates conflict-of-interest provisions in their pursuit of a qui tam action, and the DOJ has not filed any criminal conflict-of-interest charges against government employee relators. And for good measure; to do so would create internal divides between the DOJ and relators in their pursuit of a common goal. To the contrary, the DOJ has awarded relator shares to government employees who served as relators in at least over a half dozen qui tam actions.[197]

In one distinguishable case, the DOJ brought a civil penalties action on various counts against a corporate relator and a government employee who had an undisclosed financial stake in consolidated qui tam cases and was not named as a relator.[198] The court found that government employee Berman "declined [relator Project on Government Oversight ("POGO")'s] invitation to serve as a co-relator in the lawsuits, but he did enter into a[n undisclosed] written agreement specifying that he would receive one third of any monetary award POGO received as a result of the *qui tam* litigation."[199] After the DOJ intervened, obtained a $440 million recovery, and awarded a relator share to POGO, POGO issued a check to Berman for $383,600, which the DOJ learned about.[200]

Although the D.C. Circuit ordered the district court to vacate the jury's findings that Berman received an illegal payment,[201] on remand, the district court granted summary judgment for the United States on

196. *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. & Gov'tal Rels.*, 101st Cong., 2d Sess., 7 (1990).

197. *See supra* notes 85-106 & 111-121 (discussing relator shares awarded to relators Oberg, Lt. Col. Timothy Ferner, Randall Little, Joel Arnold, Bobby Maxwell, Jennifer Griffith, and Sarah Carver); United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla.), *opinion vacated in part on reconsideration*, 932 F. Supp. 277 (M.D. Fla. 1993); United States v. CAC-Ramsey, 744 F. Supp. at 1161.

198. POGO's qui tam lawsuits were consolidated with an earlier-filed action and captioned United States *ex rel.* Johnson v. Shell Oil Co. et al., 96-CV-00066 (E.D. Tex.).

199. United States v. Project on Gov't Oversight ("*POGO II*"), 839 F. Supp. 2d 330, 333 (D.D.C. 2012), *aff'd*, 766 F.3d 9 (D.C. Cir. 2014).

200. *Id.*

201. United States v. Project on Gov't Oversight ("*POGO I*"), 616 F.3d 544, 546 (D.C. Cir. 2010) (citing 18 U.S.C. § 209(a)).

claims that Berman violated fiduciary duties premised on ethical obligations to the government:[202] "Berman breached his fiduciary duty to the government by accepting an investment interest in POGO's litigation without any disclosure at all, and eventually accepting a payment from POGO without 'full disclosure.'"[203] The D.C. Circuit affirmed summary judgment on appeal.[204]

This case did not involve a government employee relator. While there may be potential conflict-of-interest concerns that arise for particular government employee relators in certain circumstances, the analysis must be case specific and will likely be resolved in a forum separate from the qui tam action.[205] Further, such concerns are mitigated when a government employee first reports their concerns internally, and files a qui tam only when that is not successful in resolving the allegations.[206]

B. Government Employee Relators Promote Important FCA Objectives

The modern FCA is the government's most effective fraud-fighting tool, with qui tam provisions that "set up incentives to supplement government enforcement of the Act" by encouraging individuals with knowledge of fraud against the government to "blow the whistle on the crime."[207] Government employee relators are often in unique positions to discover information about fraud that would support a meritorious FCA case.[208] They are on the front lines of the interactions between government agencies and government contractors, and they often have the clearest—and perhaps only—insight into discrepancies between material contract and regulatory requirements and the actual services or materials that contractors provide under those contracts. This may even render government employee relators "the most valuable class [of qui tam relators] because of their access to instances of fraud against

202. *POGO II*, 839 F. Supp. 2d at 353.

203. *Id.; see also id.* at 352 ("Berman agreed to accept and did accept a payment from POGO, he did not disclose the payment to his ethics officer or anyone else at the DOI [U.S. Department of the Interior], and he completed two assigned tasks related to oil royalty valuation issues after agreeing to accept a share of the proceeds from POGO's *qui tam* litigation.").

204. United States v. Project on Gov't Oversight ("*POGO III*"), 766 F.3d 9, 9 (D.C. Cir. 2014).

205. Little v. Shell Expl. & Prod. Co., 690 F.3d 282, 289 (5th Cir. 2012).

206. *See* Callahan, *supra* note 29, at 127-28 (arguing government employee relators should only be permitted to pursue qui tam actions when the government is not pursuing or investigating their allegations to mitigate conflict-of-interest concerns).

207. United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995) (internal quotations and citations omitted).

208. *See* Bullock, *supra* note 168, at 384.

the government."[209] Without government employee relators, contractor fraud would go unreported and unabated.[210]

When contractors and others defraud the government, it's the taxpayers who pay the cost. Government employee relators have played crucial roles in bringing to light fraudulent schemes from falsely obtaining lucrative contracts from the Department of Defense to knowingly underpaying royalties to the Department of the Interior. Government employee relators have brought to light fraudulent schemes that financially burden already-strapped agencies and programs, such as Social Security Administration benefits programs. These considerations become even more important where knowing violations by companies that do business with the government jeopardize lives, safety, financial solvency of government programs, and national security.[211]

When amending the FCA in 1986, Congress believed increased enforcement under the FCA would promote these important concerns by enforcing strict compliance with government contracts.[212] The 1986 amendments were driven in large part by congressional concerns that the government is ineffective in detecting and investigating fraud on its own,[213] and that "most fraud goes undetected due to the failure of [g]overnmental agencies to effectively ensure accountability on the part of program recipients and [g]overnment contractors."[214] As the Senate observed, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[215] Sometimes it is the

209. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1503 n.15 (11th Cir. 1991); *see also Griffith I*, No. 11-157, 2015 WL 779047, at *1 (E.D. Ky. Feb. 24, 2015) ("[G]overnment employees are often the individuals best positioned to discover wrongdoing in the public sector. Reducing their incentives to report fraud may mean that egregious wastes of taxpayer dollars go unnoticed.").

210. *See* United States *ex rel.* Maxwell v. Kerr-McGee Chem. Worldwide, *LLC*, No. 04-cv-01224, 2006 WL 1660538, at *7 (D. Colo. June 9, 2006) ("[I]n serving as a relator, [government employee] serves the two principal goals of the FCA: (1) a citizen with first hand knowledge has exposed potential fraud, and (2) parasitic lawsuits have been avoided, as Mr. Maxwell [relator] first attempted to get the government to address the fraud, both through his official job duties and his prefiling disclosure." (citation omitted)), *supplemented*, No. 04-cv-01224, 2006 WL 2869515 (D. Colo. Oct. 6, 2006), *on reconsideration*, *sub nom.* United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 486 F. Supp. 2d 1217 (D. Colo. 2007), *rev'd and remanded*, 540 F.3d 1180 (10th Cir. 2008).

211. *See* Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 51-52 (2011) (discussing instances where fraud resulted in death and injury).

212. Hargrove, *supra* note 17, at 87.

213. *See supra* notes 30-35 and accompanying text.

214. S. REP. NO. 99-345, at 2 (1986) (discussing U.S. GOV'T ACCOUNTABILITY OFF., GAO-AFMD-81-57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? (1981), https://www.gao.gov/assets/afmd-81-57.pdf [https://perma.cc/BGT5-649G]).

215. *Id.* at 3.

government employee who is so situated.

In fact, many states have recognized the public policy considerations in favor of permitting government employee relators and gone the extra step to codify state government employees' rights to bring qui tams, incentivizing those state employees to come forward with allegations of fraud. [216] Federal, state, and local government employees are in unique positions to discover and thwart fraudulent conduct through the law enforcement tools at their disposal, and their contributions to fraud-fighting efforts should be celebrated alongside their peers in the private sector.

CONCLUSION

All three branches of the federal government, including Congress, the courts, and the executive branch, have acted in support of government employee relators. Congress has determined that allowing government employee relators is necessary and outweighs adverse policy considerations. Courts are also clear: government employees are "person[s]" within the meaning of the FCA, and there is no reason to narrowly construe the FCA to prohibit government employee relators. The DOJ has also awarded relator shares to numerous government employee relators.

Where there may be instances of perverse incentives, unintended consequences, or conflicts of interest in specific cases, most concerns are neither specific to government employee relators nor true barriers in light of the FCA's procedural safeguards. At the very least, these counterarguments must be considered on a case-specific basis.

On the other hand, government employee relators can significantly bolster fraud enforcement initiatives and effectuate Congress' goals in enacting the modern FCA. Thus, public policy considerations strongly support recognizing the FCA's qui tam provisions as a viable path forward for government employees seeking to stop and deter fraud. Where courts have already overwhelmingly recognized this path, it is in the best interest of collective fraud-fighting efforts for DOJ and relators to join forces against a common target, rather than sowing internal divide.

Public policy considerations skew even more in favor of permitting government employee relators where the government employee has already tried, unsuccessfully, to report their allegations of fraud internally. Where fraud persists and internal government investigations fail in response to a report by a government employee, the

216. *See supra* note 8 and accompanying text.

FCA may be the one option to seek recovery of misspent government funds and deterrence of future misconduct by companies that do business with the government.[217] Government employees and the DOJ's interests are aligned in preserving the FCA as an effective fraud-fighting tool by permitting government employee relators to bring instances of fraud to light.

217. *See* United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1160 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992), and *aff'd*, 963 F.2d 384 (11th Cir. 1992) ("Ultimately, what appears to have happened in this case is, after seeing no effective action taken by the government, relators filed the suit. This appears to be exactly what Congress intended, regardless of whether the relator is a government employee or not.").