No. 25-___

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,

Petitioners,

v.

USCC WIRELESS INVESTMENT, INC.; TELEPHONE AND DATA SYSTEMS, INC.; KING STREET WIRELESS, LP; ALLISON CRYOR DINARDO; UNITED STATES CELLULAR CORPORATION; KING STREET WIRELESS, INC.; CARROLL WIRELESS, LP; CARROLL PCS, INC.; BARAT WIRELESS, LP; BARAT WIRELESS, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit erred by requiring plaintiffs to anticipate and negate in their complaint a False Claims Act affirmative defense, in direct conflict with *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025), and basic principles of civil procedure.

2. Whether a False Claims Act plaintiff's independent knowledge that prompts a multi-year fraud investigation "materially adds" to what is publicly disclosed under 31 U.S.C. § 3730(e)(4)(B), or whether it must be so substantial it is likely to prompt the government to intervene and prosecute the fraud, as the D.C. Circuit held, deepening a conflict among the federal courts of appeals.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

1. Petitioners Mark J. O'Connor and Sara F. Leibman, who were the plaintiffs in the District Court and appellants in the Court of Appeals.

2. Respondents are USCC Wireless Investment, Inc.; Telephone and Data Systems, Inc.; King Street Wireless, LP; Allison Cryor DiNardo, United States Cellular Corporation; King Street Wireless, Inc.; Carroll Wireless, LP; Carroll PCS, Inc.; Barat Wireless, LP; and Barat Wireless, Inc., who were the defendants in the District Court and appellees in the Court of Appeals.

RELATED PROCEEDINGS

This case was designated as a related proceeding in the Court of Appeals to the following case:

United States ex rel. O'Connor v. U.S. Cellular Corp., No. 20-cv-2070 (D.D.C.), judgment entered March 9, 2023; No. 23-7041 (D.C. Cir.), pending (oral argument held April 1, 2024).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit. In the alternative, petitioners respectfully request that the Court grant the petition, vacate the judgment, and remand for further consideration of the first Question Presented in light of *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025).

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 128 F.4th 276 (D.C. Cir. 2025). The District Court's opinion (Pet. App. B) is unpublished but available at 2023 WL 2598678.

JURISDICTION

The Court of Appeals issued its opinion on February 11, 2025. Pet. App. A. The court denied timely petitions for panel rehearing and rehearing en banc on April 8, 2025. Pet. App. D & E. The Chief Justice granted a timely application extending the time to file this petition to and including September 5, 2025. *See* No. 25A9. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory provisions and regulations are reproduced in Appendix G to this Petition.

INTRODUCTION

The False Claims Act's *qui tam* provisions harness private enforcement to protect the public fisc. Recognizing that the government cannot detect every fraud, Congress empowers whistleblowers to sue on the government's behalf, sharing recoveries with those who expose schemes to steal taxpayer dollars. This case involves a brazen fraud that cost taxpayers more than $163 million through sham small businesses created to exploit Federal Communications Commission programs designed to promote legitimate competition in wireless communications.

The D.C. Circuit's decision eviscerates the statutory scheme Congress carefully calibrated in 2010 to encourage more whistleblowers to come forward. In amendments designed to lower barriers for relators, Congress transformed the "public-disclosure bar" from a jurisdictional requirement that plaintiffs had to overcome into an affirmative defense that defendants must plead and prove. Congress simultaneously expanded the exception included in the newly affirmative defense for "an original source" to whom the defense cannot apply, ensuring that relators with valuable information could proceed even when substantially similar frauds had been disclosed.

The panel acknowledged these amendments but then imposed requirements that nullify them. First, despite recognizing that what was once a jurisdictional bar is now an affirmative defense, the panel held that False Claims Act (FCA) plaintiffs must negate this affirmative defense in their complaint. When the panel invented this novel burden-shifting framework respondents didn't even ask for, it did not have the benefit of this Court's decision in *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025), which directly contradicts the panel's reasoning and conclusions and was decided one day after the mandate issued. For reasons that equally apply to the structure and text of the FCA, this Court held that ERISA plaintiffs need not anticipate and negate affirmative defenses at the pleading stage. Second, the panel adopted an impossibly restrictive interpretation of the "materially adds" standard, requiring that a relator's information be so significant it would prompt government prosecution. This standard ensures no relator will ever qualify in a declined case, rendering the "materially adds" original-source exception meaningless.

These errors warrant immediate review. The Court of Appeals' answers to the Questions Presented conflict with this Court's decisions and those of several other circuits, creating inconsistent enforcement of a critical anti-fraud statute. The D.C. Circuit hears a disproportionate share of FCA cases—indeed, respondents elected to transfer this District of Oklahoma case to the District of Columbia—making its atextual holdings particularly harmful. And the decision's timing—with *Cunningham* decided immediately after the mandate issued and after petitions for panel and en banc rehearing had already been denied—calls for intervention. At minimum, the Court should grant, vacate, and remand for further consideration in light of *Cunningham*. It is nigh indisputable that a GVR is warranted given the peculiar timing, before the panel's published and fundamentally flawed authority metastasizes.

STATEMENT OF THE CASE

I. Legal Background

A. The False Claims Act

The False Claims Act creates civil liability for "any person" who, e.g., "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government." 31 U.S.C. §§ 3729(a)(1)(A), (B), (G). Congress "wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quoting *United States v. Neifert–White Co.*, 390 U.S. 228, 232 (1968)); *see also* S. Rep. No. 99-345, at 2 (1986) (financial recovery provisions introduced by the False Claims Reform Act designed to "encourage any individual knowing of Government fraud to bring that information forward").

The statute's most distinctive feature authorizes private persons known as *qui tam* relators to sue on the government's behalf. 31 U.S.C. § 3730(b)(1). After a relator files suit under seal, the government investigates and decides whether to intervene. *Id.* § 3730(b)(4). Successful relators can receive up to 30% of the recovery in declined suits, and up to 25% if the government intervenes and secures a recovery itself. *Id.* § 3730(d).

From 1986 until 2010, the FCA included a "public disclosure bar" that operated as a jurisdictional limitation on *qui tam* suits. The statute provided that "[n]o court shall have jurisdiction" over a *qui tam* action based on publicly disclosed allegations unless the relator was an "original source" of the information. 31 U.S.C. §§ 3730(e)(1), (e)(4)(A) (2006). To qualify as an original source, a relator had to possess "direct and independent knowledge of the information on which the allegations are based" and voluntarily provide that information to the government before filing suit. *Id.* § 3730(e)(4)(B) (2006).

Previously, the statute included a "government knowledge bar," which precluded *qui tam* suits "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 agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609 (repealed 1968). Congress replaced the government knowledge bar with the "public disclosure bar" in 1986 because the government knowledge bar "so 'significantly limited the number of FCA cases that were filed' that 'by the 1980s, the FCA was no longer a viable tool for combating fraud against the Government.'" *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 754 (3d Cir. 2017) (cleaned up) (quoting S. Rep. No. 110-507, at 3 (2008)).

The public disclosure bar sought "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559

U.S. 280, 294-95 (2010)). But that balance favors enforcement. "In creating both the public disclosure bar and the original source exception," Congress sought "to only bar truly 'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government." S. Rep. No. 110-507, at 22 (2008); (quoting S. Rep. No. 99-345, at 5275-78 (1986)). On the other hand, Congress sought "to ensure that any individual *qui tam* relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case." *Id.* at 5.

Unfortunately, courts still misapplied the public disclosure bar to dismiss meritorious cases. This prompted the sponsors of the 1986 Amendments to explain that the public disclosure bar, "which was drafted to deter so-called 'parasitic' cases, has been converted by several circuit courts into a powerful sword by which defendants are able to defeat worthy relators and their claims," in a manner that threatened to undermine "the very purpose" of the 1986 Amendments. 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Howard L. Berman and Sen. Charles E. Grassley). In particular, the legislators "disagree[d] with cases holding that *qui tam* suits are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents." *Id.* E1547. In their view, a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action." *Ibid.* "This is especially true where a relator must piece together facts exposing a fraud from separate documents." *Ibid.*

Congress thus substantially revised these provisions in 2010 to encourage more private enforcement suits. *See United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298-99 (3d Cir. 2016) (Congress "overhauled" and "radically changed" the statute to "lower the bar for relators"). The 2010 amendments made two relevant critical changes. First, Congress eliminated the jurisdictional language, transforming the public-disclosure bar into an affirmative defense. Separately from the FCA's prohibitions in 31 U.S.C. § 3729(a), the current statute provides that a court "shall dismiss" an action "if substantially the same allegations or transactions" were publicly disclosed through specific public channels, "unless" the relator is "an original source," *id.* § 3730(e)(4)(A). As the panel acknowledged, the "public disclosure bar now operates as an affirmative defense." Pet. App. 9a (footnote omitted). Second, Congress expanded the definition of the original source exception in the affirmative defense to create two independent paths. The defense does not apply if: (i) "prior to a public disclosure," the relator "has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based," or (ii) the relator "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and voluntarily provided that information to the government before filing suit. 31 U.S.C. § 3730(e)(4)(B).

The change to the first path removed the requirement that the relator's knowledge be "direct and independent" (i.e., entirely firsthand). And Congress added the new "materially adds" second pathway to the original-source exception to ensure that relators who have independent, materially valuable knowledge may proceed if they provide their information to the government before suing—even though the material elements of the fraud were already publicly disclosed. *See, e.g.*, *Moore*, 812 F.3d at 299. This provision recognizes that even when some aspects of a fraud are known, insiders and specialists may possess critical information that exposes the full scope of the scheme or reveals continuing violations.

B. FCC Wireless Spectrum Licensing

Wireless spectrum is a finite public resource with extraordinary commercial value. To allocate spectrum licenses fairly while promoting competition, Congress authorized the FCC to conduct auctions. 47 U.S.C. § 309(j)(1). Recognizing that auctions would favor large incumbents with deep pockets, Congress directed the FCC to "ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services." *Id.* § 309(j)(4)(D). But to ensure the legitimacy of the small business program and the recovery of funds for the taxpayers, Congress directed the FCC to design auction rules that prevent "unjust enrichment." *Id.* § 308(j)(3)(C) & (4)(E).

The FCC implements this mandate through its "Designated entities" program, which provides substantial bidding credits—25% discounts in this case—to qualifying "very small" businesses. *See* 47 C.F.R. §§ 1.2110(b)(1)(i), (f)(2) (2014). To prevent large companies from gaming the system through sham small businesses, the FCC imposes strict eligibility requirements. Designated entities must have average gross revenues, including the revenues of all affiliates and controlling interests, under specified thresholds. *Id.* §§ 1.2110(b)(1), (f)(2). And designated entities must maintain actual control over their licenses during a five-year "[u]njust enrichment" period. *Id.* §§ 1.2111(b), (b)(1). Under the regulations relevant here, if a designated entity were to transfer more than 25% of its spectrum capacity in any single license area to a non-qualifying entity during this period through leasing or resale arrangements, it would create an "attributable material relationship" disqualifying it from retaining *any* bid credits for *all* licenses acquired by the designated entity with the valuable discounts—not just the bid credits for the affected licenses. *Id.* § 1.2110(b)(3)(iv)(A).

Throughout the unjust enrichment period, designated entities must file annual reports certifying continued compliance with all eligibility requirements. 47 C.F.R. § 1.2110(n) (2014). They must also report within 30 days any event affecting their eligibility, including spectrum leases creating attributable material relationships. *Id.* § 1.2114(a).

II. Factual Background[1]

A. The Fraudulent Scheme

Respondent U.S. Cellular Corporation is one of the nation's largest wireless providers, with billions in

[1] The case was dismissed with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The facts are thus derived from the operative Second Amended Complaint, located in the Court of Appeals' Joint Appendix ("JA") at JA23-114.

annual revenues—far exceeding the thresholds to be a "very small" designated entity. *See* Pet. App. 4a. Between 2005 and 2008, U.S. Cellular orchestrated an elaborate scheme to circumvent the FCC's small-business preferences through sham entities that appeared independent but were secretly controlled by U.S. Cellular from inception. *See id.* 4a-5a.

The scheme followed a consistent pattern across three FCC spectrum auctions. *See* JA23-114. U.S. Cellular identified spectrum adjacent to or overlapping with its existing service areas. It then recruited respondent Allison Cryor DiNardo, who had no experience operating wireless services, to serve as the nominal head of purportedly independent small businesses. U.S. Cellular provided all financing for these entities' auction bids, directed their bidding strategy, and planned from the start to incorporate the spectrum into its own network. In Auction 58 (2005), the sham entity Carroll Wireless obtained 16 licenses with $22.1 million in bid credits. *See* JA80-85. In Auction 66 (2006), respondent Barat Wireless obtained 17 licenses with $42.4 million in bid credits. *See* JA95. In Auction 73 (2008), respondent King Street Wireless obtained 152 licenses with $100.2 million in bid credits. *See* JA54.

In their FCC applications, these entities certified that DiNardo held both de jure and de facto control, that they had no additional affiliates, and that their revenues fell within designated entity thresholds. *See* JA78; JA86; JA94. In reality, U.S. Cellular controlled every aspect of their operations. The entities never built networks, never had customers, never marketed services, and never operated as legitimate wireless providers. *See* JA68-72; JA90-92; JA100-01.

B. Petitioner O'Connor's 2007 Lawsuit

Petitioner Mark O'Connor, an experienced telecommunications attorney, suspected that Carroll and Barat were fronts for U.S. Cellular. His investigation revealed that these entities had obtained licenses precisely matching U.S. Cellular's coverage gaps, using U.S. Cellular's financing, and with no apparent ability to operate independently. So in 2007, O'Connor filed a *qui tam* complaint under seal on behalf of his titular law firm, alleging that defendants conspired to register sham designated entities to obtain fraudulent bid credits. *See* Pet. App. 5a (discussing *Lampert & O'Connor, P.C. v. Carroll Wireless, LP*, No. 1:07-cv-00800-JDB (D.D.C.) (suit filed May 2, 2007)).[2] The complaint detailed how U.S. Cellular formed and controlled Carroll and Barat, made material misstatements in FCC applications, and concealed that U.S. Cellular was the real party in interest. JA637-41. In April 2008, O'Connor amended the complaint to add King Street as a defendant. *See* JA636-70 (amended complaint).

The government conducted at most a cursory investigation of O'Connor's allegations, and the FCC asked defendants to respond to O'Connor's complaint as part of the agency's review of King Street's license application. Defendants argued that the King Street licenses had not yet been granted, and therefore, O'Connor had no evidence that U.S. Cellular would take de facto control of King Street. The FCC, relying on U.S. Cellular's implicit pledge that King Street would operate independently, awarded the licenses to

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[2] The Court of Appeals wrote that the suit was filed in 2008, Pet. App. 5a, but it was in fact filed in 2007.

King Street at a $100.2 million "very small business" discount. JA54. Faced with the theoretical possibility that King Street might operate legitimately—which would disprove the fraud allegations—O'Connor voluntarily dismissed the case without prejudice in January 2010. *See* Pet. App. 5a.

C. The Current Lawsuit

After dismissing the original action, O'Connor partnered with telecommunications attorney and fellow petitioner Sara Leibman to investigate whether the entities had fulfilled their promise to operate independently. *See* Pet. App. 6a-7a. Their multi-year investigation uncovered extensive evidence of a new post-licensing fraud that went far beyond the original allegations. In particular, the relators demonstrated that King Street had never provided wireless telecommunications services (to the public or anyone else) and instead had relinquished its spectrum licenses to U.S. Cellular, which used them to build a broadband network and offer 4G LTE services to its own customers without any involvement by King Street. *See id.* 17a-18a. In April 2015, petitioners filed this action under seal, realleging both the original fraud to obtain license discounts and asserting for the first time independent knowledge of a subsequent fraud to retain the hundreds of millions of taxpayer dollars in bid credits through false certifications. *See id.* 6a-7a; JA8. Their complaint triggered what became a nearly five-year DOJ reinvestigation.

Petitioners commissioned sophisticated engineering analyses that revealed continuous radio signals across both King Street's and U.S. Cellular's adjacent spectrum bands, proving technical spectrum integration invisible to casual observation. *See* JA62-63. This integration meant U.S. Cellular had incorporated King Street's entire spectrum into its own network, violating the 25% leasing limitation many times over. This spectrum analysis led petitioners to discover that respondents had fabricated a network sharing agreement that U.S. Cellular submitted to the FCC in 2012.

Petitioners' discovery of the fabricated 2012 lease came through methodical detective work. Their engineering analyses had revealed that U.S. Cellular was using far more of King Street's spectrum than any disclosed agreements would permit. Searching for an explanation, they discovered that in 2012, U.S. Cellular had participated in "Auction 901," which served as the FCC's vehicle to distribute more than $40 million in "Mobility Fund" subsidies[3] to wireless providers willing to deploy broadband networks in underserved rural areas. *See* JA76-78; JA306. To qualify, applicants had to prove they controlled spectrum in the areas in which they bid. U.S. Cellular faced a dilemma: It needed to show the FCC it had access to King Street's spectrum to win the subsidies, but King Street was still in its unjust enrichment period and could not transfer or lease substantial spectrum without triggering bidding credit repayment obligations. Petitioners found U.S. Cellular's solution buried in its Auction 901 application: A summary of a purported 2012 lease

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[3] The Mobility Fund was part of the FCC's Universal Service Fund program. *See* Universal Serv. Admin. Co., *Mobility Funds*, https://www.usac.org/high-cost/funds/mobility-funds/ (last visited Sept. 3, 2025).

showing King Street had transferred spectrum covering only tiny census tracts—just 1.03% of one license area. JA77-78; JA325-29.

This made no commercial sense given petitioners' technical evidence of widespread spectrum integration. As discussed below, their suspicions proved correct when DOJ investigators, armed with petitioners' analysis, forced production of the real agreement—the 2011 Network Sharing Agreement—showing that respondents had violated the attributable material relationships rule many times over and intentionally concealed it from the government. *See* JA77. Meanwhile, the fabricated 2012 lease submitted to the FCC had been carefully crafted to give U.S. Cellular just enough documented spectrum access to qualify for Mobility Fund subsidies while concealing the massive regulatory violations that would have required repaying over $100 million in bid credits. *See* JA76-78; JA325-29.

Petitioners' investigation further revealed that King Street never operated as a legitimate wireless company. *See* Pet. App. 17a. It had no retail stores, no customers, never obtained telephone numbers essential for providing service, never filed required FCC service reports, and never marketed in its licensed areas. *See* JA66-72. Some antenna structures King Street claimed to operate were actually built by and registered to U.S. Cellular—facts petitioners verified by cross-referencing building permits with FCC registration databases that no one had previously connected. *See* JA67.

Petitioners also hired investigators to obtain wireless service using King Street's spectrum. They discovered that U.S. Cellular, not King Street, controlled all aspects of service provisioning, rates, terms, and conditions. *See* JA63-65. Meanwhile, King Street filed annual reports with the FCC falsely certifying that it maintained "continuing oversight, review, supervision and control" of its licenses. JA74.

Respondents never disputed that petitioners' "voluntary disclosures" to the DOJ of their discoveries "prior to filing the 2015 complaint, led to the Government's lengthy second investigation." *See* Petr. C.A. Reply Br. 16 (comparing Resp. C.A. Br. 12, 30, with Petr. C.A. Br. 54-55). And although none of this was relevant to sufficiently pleading their claims, respondents have never disputed that petitioners worked closely with DOJ attorneys and investigators throughout this investigation. Petitioners provided their engineering analyses, investigative reports, and regulatory expertise. They helped investigators understand the technical aspects of spectrum integration and the significance of various FCC filings. They identified discrepancies between what defendants told the FCC and what the technical evidence revealed.

This collaboration bore fruit. Armed with petitioners' evidence and analysis, DOJ investigators ultimately forced defendants to produce documents they had concealed from the FCC. Most significantly, investigators obtained the actual spectrum sharing agreement between King Street and U.S. Cellular—not the fabricated 2012 version submitted to the FCC in an unrelated proceeding to further defraud the government, but the real agreement signed in 2011—ceding control of virtually all of King Street's licensed spectrum to U.S. Cellular during the unjust enrichment period. *See* Pet. App. 17a-18a. The 2011 Network Sharing Agreement revealed the fraud's full scope. King Street had leased to U.S. Cellular not 1% of the spectrum capacity of a couple dozen licenses, as U.S. Cellular publicly claimed, but 100% of the spectrum capacity across 90 license areas. *See* JA77. Under the governing FCC regulations, violating the rule in any single license area disqualified King Street from retaining the $100 million in bid credits for any of the 152 license areas it had won in Auction 73. *See* 47 C.F.R. § 1.2110(b)(3)(iv)(A) (2014). King Street had violated the regulation 90 times over. The contrast between the real 2011 agreement and the fake 2012 version submitted to the FCC demonstrated deliberate deception. This was not mere nondisclosure but affirmative fabrication of documents to conceal regulatory violations.

While this case remained under seal, DOJ investigators shared the 2011 agreement with petitioners, recognizing their crucial role in exposing the fraud. Using the additional evidence of fraud the government shared while the case was under seal, petitioners amended their complaint to allege the concealed 2011 agreement and the false 2012 agreement submitted to the FCC. The government ultimately declined to intervene in December 2019 and the complaint was unsealed. *See* Pet. App. 7a.

III. Procedural History

A. District Court

Defendants moved to dismiss on multiple grounds, including failure to state a claim and the public-disclosure defense. The District Court granted the motion based solely on the public-disclosure defense, finding that petitioners' allegations were "substantially the same" as those in O'Connor's 2008 complaint and that petitioners failed to prove they are original sources. *See* Pet. App. 32a-39a. The court held that petitioners' extensive post-dismissal investigation did not "materially add" to the allegations that were disclosed when the 2008 complaint in *Lampert & O'Connor* was unsealed to the public, Pet. App. 36a, because the "core" fraud remained the same, *id.* 33a.[4]

B. Court of Appeals

The Court of Appeals affirmed in a published opinion addressing two questions of first impression for the D.C. Circuit. Pet. App. A.[5]

First, the panel created a novel burden-shifting framework for the public-disclosure defense. While acknowledging that Congress had transformed the bar from a jurisdictional limitation into "an affirmative defense" on the merits, Pet. App. 9a, the

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[4] Adding insult to injury, the District Court dismissed with prejudice, denying petitioners any opportunity to amend their complaint to address the court's concerns. *See* Pet. App. C. This was defendants' first motion to dismiss, and the court was interpreting statutory provisions never previously addressed by the D.C. Circuit. Even so, petitioners' express request that "any dismissal should be without prejudice" to allow them to "correct any defects" was rejected. *See* JA900.

[5] Adding further insult to injury, the panel held that the District Court did not abuse its discretion in dismissing the complaint with prejudice despite petitioners' express request that, at a minimum, petitioners be allowed to replead to allege O'Connor's personal involvement in the 2007 case that indisputably makes him an original source of the current suit. Pet. App. 22a n.9.

panel held that relators must nonetheless "demonstrat[e]" they qualify as an original source to avoid pre-answer dismissal, *id.* 15a. The panel reasoned that because original-source status "benefits relators" and because relators are "best situated to know the facts" of their status, they should bear the burden at the pleading stage of establishing that the affirmative public-disclosure defense does not apply. *Id.* 15a (citing only *Smith v. United States*, 568 U.S. 106, 112 (2013), which addresses the ultimate burden of proof in criminal conspiracy cases, and affirmed and applied "the common-law rule" that "affirmative defenses were matters for the defendant to prove" (cleaned up)).

Second, the panel adopted an exceptionally restrictive interpretation of the "materially adds" original-source condition in the public-disclosure defense. Acknowledging that the second Question Presented was a matter of first impression for the D.C. Circuit, Pet. App. 18a, the panel held that a relator's information materially adds to what the government already knows from public disclosures only if it is "'sufficiently significant or essential'" to influence the government "to prosecute fraud," *id.* 19a-20a (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016)). Applying this new "materially adds" standard, the panel dismissed petitioners' contributions to the government's investigation as immaterial despite acknowledging that their information prompted DOJ to conduct a comprehensive reinvestigation lasting nearly five years. *See id.* 21a. The panel recognized that "the government has broad discretion in deciding how to respond to allegations in a *qui tam* suit" and that "such decision may be based on a range of factors independent of the relators' specific disclosures." *Ibid.* Yet because the government ultimately declined to intervene, it was not even plausible to the court that petitioners' information was material. *See id.* 21a-22a.

The Court of Appeals denied petitioners' timely rehearing petitions on April 8, 2025. Pet. App. D & E. The mandate issued April 16, 2025. Pet. App. F. This Court decided *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025), on April 17—the very next day.

REASONS TO GRANT THE PETITION

I. The Court of Appeals' Answer to the First Question Presented Directly Conflicts With This Court's Recent Decision in *Cunningham.*

The timing alone compels intervention. *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025), was decided April 17, 2025—after petitions for rehearing had been denied, indeed just one day after the mandate issued. The D.C. Circuit had no opportunity to consider *Cunningham*'s holding that plaintiffs need not anticipate and negate affirmative defenses in their complaints. *See id.* at 1024. At minimum, this Court should grant, vacate, and remand for reconsideration in light of *Cunningham*.

But the conflict runs deeper than timing. The D.C. Circuit correctly recognized that the public-disclosure bar "now operates as an affirmative defense" on the merits. Pet. App. 9a. And respondents never disputed petitioners' express and repeated argument that plaintiffs need not anticipate and negate an affirmative defense. *Compare* Petr. C.A.

Br. 32 (explaining standard of review for affirmative defenses), Petr. C.A. Reply Br. 1 ("Defendants do not dispute that the post-2010 public disclosure bar is an affirmative defense on which they have the burden of proof. Nor do they contest that plaintiffs are 'not required to negate an affirmative defense in their complaint.'" (citation omitted)), *and* Petr. C.A. Reply Br. 5-6, 9-10 (explaining same), *with* Resp. C.A. Br. 39 (arguing only that under the pre-amended jurisdictional bar, a relator must "allege specific facts" to "establish original source status" (citation omitted)). Yet the panel departed from this black letter law for two reasons: Relators benefit when the affirmative defense does not apply and probably possess the relevant original-source evidence. *See* Pet. App. 15a. That analysis cannot be reconciled with *Cunningham*'s reasoning or this Court's consistent approach to affirmative defenses.

Cunningham involved a foundational question of civil procedure: When Congress creates statutory exemptions or exceptions to liability, must plaintiffs anticipate and negate those exceptions in their complaints? The Court's unanimous answer was no. *See Cunningham*, 145 S. Ct. at 1024-28; *id.* at 1032-34 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring). The case arose under ERISA, which prohibits certain transactions between retirement plans and parties in interest. 29 U.S.C. § 1106(a)(1)(C). The statute separately provides twenty-one exemptions for transactions that would otherwise be prohibited, such as those involving "services necessary for the establishment or operation of the plan" with "reasonable compensation." *Id.* § 1108(b)(2)(A). Cornell University argued that plaintiffs suing for prohibited transactions must plead facts showing that none of these exemptions apply—essentially requiring plaintiffs to prove a negative before defendants even answer the complaint. This Court rejected that approach, holding that the exemptions constitute affirmative defenses that defendants must plead and prove. *Cunningham*, 145 S. Ct. at 1028. The Court's analysis turned on statutory structure and the established principles governing affirmative defenses that apply here.

First, *Cunningham* examined how Congress organized the statute, an analysis that applies with equal force to the FCA. When exemptions are "laid out apart from the prohibitions" and "expressly refer to the prohibited conduct as such," they operate as affirmative defenses rather than elements of a plaintiff's claim. 145 S. Ct. at 1027 (cleaned up) (quoting *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008)). In ERISA, the prohibitions creating liability appear in one section (29 U.S.C. § 1106), while the exemptions appear separately (29 U.S.C. § 1108). *Ibid.* The FCA follows the identical pattern: The provisions creating liability for false claims appear in 31 U.S.C. § 3729(a), while the public-disclosure defense and original-source condition appear in § 3730(e)(4)(A). It then defines the original-source condition in § 3730(e)(4)(B)—an original source is either the source of the public disclosure or has independent information that materially adds to it.

This structural separation matters. The Court in *Cunningham* analogized to the Age Discrimination in Employment Act at issue in *Meacham*, where Congress similarly placed prohibitions in one provision and exemptions including a "reasonableness" defense in another. *Cunningham*, 145 S. Ct. at 1028. The *Meacham* Court held that this structure created affirmative defenses that defendants must both plead and prove. 554 U.S. at 95. *Cunningham* applied the same principle to ERISA: "Like the exemptions at issue in *Meacham*, the § 1108 exemptions are 'written in the orthodox format of an affirmative defense.'" 145 S. Ct. at 1028 (cleaned up) (quoting *Meacham*, 554 U.S. at 102). The FCA's public-disclosure defense follows this same "orthodox format." *See Meacham*, 554 U.S. at 102. Just as ERISA's prohibitions apply "[e]xcept as provided in section 1108," *Cunningham*, 145 S. Ct. at 1029, the FCA's public-disclosure defense creates a conditional exception to otherwise valid claims separate from the FCA's liability provisions.

Second, the Court emphasized a fundamental principle of civil litigation: "an 'affirmative defense' is 'not something the plaintiff must anticipate and negate in her pleading.'" *Cunningham*, 145 S. Ct. at 1028 (quoting *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420 (2017)). Federal Rule of Civil Procedure 8(c) codifies this principle, requiring defendants—not plaintiffs—to "affirmatively state any . . . affirmative defense" in their responsive pleadings. *See* Fed. R. Civ. P. 8(c)(1). This principle applies equally to FCA plaintiffs, who should not be required to anticipate and negate potential public disclosures before defendants even identify what disclosures they claim bar the action. Yet respondents never asserted the defense in an answer; they raised it in their first and only pre-answer motion to dismiss, which the courts granted with prejudice.

Cunningham acknowledged practical concerns about meritless litigation but found them insufficient to override clear statutory text. *See* 145 S. Ct. at 1029 ("These are serious concerns but they cannot overcome the statutory text and structure."); *id.* at 1033 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring) ("[T]he Second Circuit tried to formulate a rule that would weed out plainly unmeritorious suits at the pleading stage. The court attempted to achieve an admirable goal, but established pleading rules do not allow that workaround."). When Congress writes exemptions "in the orthodox format of an affirmative defense," courts must "read [them] the way Congress wrote [them]," regardless of perceived practical benefits of a different approach. *Id.* at 1031 (quoting *Meacham*, 554 U.S. at 102).

Cunningham also rejected the notion that practical considerations about who possesses relevant information should determine burden allocation. Cornell argued that because plaintiffs possess the information necessary to plead that the exceptions to ERISA's liability provisions do not apply, they should have to do so at the pleading stage. *See* Resp. Br. 39-44, *Cunningham*, No. 23-1007 (Dec. 27, 2024). The D.C. Circuit raised similar policy concerns here, arguing that relators "benefit" when they are an original source to whom the affirmative defense expressly does not apply and are "best situated to know the facts" of their status. Pet. App. 15a. But that is universally the case for a conditional affirmative defense like this one, which applies "unless" the plaintiff is an original source, 31 U.S.C. § 3730(e)(4)(A), and nothing particular to ERISA or the FCA warrants a different result. *See*

Cunningham, 145 S. Ct. at 1030 (applying its holding to all of ERISA's affirmative defenses in 29 U.S.C. § 1108(a) whether "conditional or unconditional"). Congress's structural choices control, not practical considerations. *Compare Cunningham*, 145 S. Ct. at 1033 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring) (agreeing with majority that prudential considerations could not shift pleading burden to plaintiffs); *ibid.* (highlighting Solicitor General's "promising" proposed "alternative safeguards," by which "a district court may insist that a plaintiff file a reply to an answer that raises one of the § 1108 exemptions as an affirmative defense" (citation omitted)).

This Court's earlier decision in *Smith v. United States*, 568 U.S. 106 (2013)—the only case the Court of Appeals relied on for its contrary conclusion, Pet. App. 15a (citing *Smith*, 568 U.S. at 112)—only reinforces that petitioners are right and the panel was wrong. *Smith* addressed whether defendants bear the ultimate burden of proving withdrawal from a criminal conspiracy—a question about the burden of proof at trial. 568 U.S. at 112-13. The Court *reaffirmed* and *applied* "the common-law rule" that "affirmative defenses were matters for the defendant to prove." *Id.* at 112 (cleaned up). Nothing in *Smith* suggests plaintiffs must anticipate and negate affirmative defenses in their complaints. To the contrary, *Smith* reinforces the traditional allocation of burdens: Defendants must prove their affirmative defenses. The Court emphasized that when Congress leaves "the traditional burden of proof undisturbed," courts must apply common-law principles. *Ibid.* It is equally clear that nothing in *Smith* supports the notion that at the pleading stage, it should matter whether plaintiffs "benefit" from negating an affirmative defense and are "best situated to know the facts." *Contra* Pet. App. 15a.

Petitioners do not dispute that they at least bear the burden of production regarding their original-source status. And although it is not conceded nor at issue, they might even have the ultimate burden to prove their original-source status at the appropriate stage. They indisputably could, given petitioner O'Connor's personal involvement in drafting and filing the 2007 suit that forms the entire basis of respondents' public-disclosure defense. *Cf.* Pet. App. 22a n.9 (affirming dismissal with prejudice over petitioners' express request for leave to replead, holding that the District Court did not abuse its discretion in denying leave to amend). But requiring petitioners to establish this status in their complaint, before any defendant pleads the defense and before any factual development, contradicts this Court's teachings and basic principles of civil litigation.

II. The Court of Appeals' Answer to the Second Question Presented Deepens an Intractable Circuit Conflict Over the Original-Source "Materially Adds" Standard in the FCA.

The circuits have adopted three divergent interpretations of what it means for information to "materially add" to public disclosures for purposes of the original-source exception in the affirmative public-disclosure defense. This division has persisted for nearly a decade since the 2010 amendments, and only this Court can resolve it.

As discussed below, the First, Third, Sixth, and Tenth Circuits apply a text-based standard focused on whether information "adds value" to the government's enforcement efforts. These courts recognize that the "materially adds" original-source condition in the public-disclosure defense must mean something different than the "substantially the same" standard that triggers the defense to begin with. In contrast, the Seventh and now D.C. Circuits have effectively erased the "materially adds" definition of an original source from the provision. The Seventh Circuit has expressly held that if information is "substantially the same" as that which has been publicly disclosed, then it cannot "materially add" to what was public, rendering the exception a nullity. *See, e.g.*, *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 757-58 (10th Cir. 2019) (criticizing Seventh Circuit's approach because it "has the effect of collapsing the materially-adds inquiry into the substantially-the-same inquiry," which "renders nugatory" Congress's decision to create a separate path for relators with valuable additional information (citation omitted)); *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211-12 (1st Cir. 2016) (same). In this case, the D.C. Circuit further fractured and deepened the split; by holding that information materially adds to what is publicly known only if it would likely prompt the government to intervene, a situation in which the original-source exception would not apply, the panel similarly "rendered nugatory" the materially adds exception to the affirmative public-disclosure defense. *See Reed*, 923 F.3d at 757-58 (quoting *Winkelman*, 827 F.3d at 211-12).

A. The First, Third, Sixth, and Tenth Circuits Interpret the Original-Source “Materially Adds” Exception in the Public-Disclosure Defense Such That Whistleblowers Can Proceed With Declined *Qui Tam* Cases Even When the Affirmative Defense Is Triggered.

In the Third Circuit, relators need only “contribute significant additional information to that which has been publicly disclosed so as to improve its quality” to be an original source. *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016). As the Third Circuit explained, Congress “expanded the definition of ‘original source’” to “lower the bar for relators.” *Id.* at 299. Applying the materially adds standard, the Third Circuit refused to dismiss a relator’s new details as immaterial merely because the general fraud had been publicly reported. *Id.* at 306-08. Holding otherwise “cannot be” correct, the court reasoned, “for that would read out of the statute the original source exception,” which “comes into play only when some facts regarding the allegation or transaction have been publicly disclosed.” *Id.* at 306.

Like the Third Circuit, the Sixth Circuit asks whether the relator’s information “might actually affect the government’s decision-making,” defined as anything that “would add value for the government.” *United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 525, 527 (6th Cir. 2020) (cleaned up; citations omitted). This standard recognizes that even “allegations that a substantially similar scheme has continued or restarted could provide the government with 'knowledge that is independent of and materially adds' to the public disclosures." *Id.* at 525 (citation omitted). So too the Tenth Circuit's standard, which requires only that the allegations be "capable of 'influencing the behavior of the recipient'—i.e., the government." *Reed*, 923 F.3d at 757 (cleaned up) (quoting *Winkelman*, 827 F.3d at 211); *id.* at 759-63 (concluding that plaintiff could proceed as an original source in a declined case based on independent information that materially added to publicly disclosed frauds).

The First Circuit's standard, while sometimes quoted selectively, *e.g.*, Pet. App. 19a (quoting *Winkelman*, 827 F.3d at 211), aligns with this approach. Information must be "sufficiently significant or essential so as" to "influence the behavior of the recipient." *Winkelman*, 827 F.3d at 211 (citing *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 195-96 (2016)). The First Circuit has never suggested the information must prompt prosecution—only that it could influence government behavior. *See, e.g.*, *Maur*, 981 F.3d at 527 (agreeing with *Winkelman* and *Reed* that to be an original source, relator's independent information need only "add value for the government").

Under any of these standards, petitioners easily qualify. Their engineering analyses revealed technical spectrum integration invisible without sophisticated testing. Their investigation proved King Street never operated as a legitimate provider. Their persistence led DOJ to uncover the concealed 2011 agreement showing 100% spectrum transfer rather than the 1.03% falsely claimed to the FCC. This information fundamentally changed the government's understanding of the fraud's scope and methods—or the DOJ wouldn't have reopened the fraud investigation and wasted resources rigorously pursuing a new inquiry for half a decade.

B. In Contrast, the Seventh and Now D.C. Circuits Hold That the "Materially Adds" Original-Source Standard Cannot Be Met in the Only Cases It Applies.

The Seventh Circuit takes a fundamentally different approach that effectively eliminates the "materially adds" provision altogether, as other circuits have recognized.

In *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, the Seventh Circuit held that if allegations are "substantially similar to" public disclosures such that the public-disclosure defense is triggered, the allegations cannot materially add to what the public knows. 867 F.3d 712, 721 (7th Cir. 2017) (citing *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 283 (7th Cir. 2016)). Under this interpretation, the two statutory inquiries collapse into one: If a court finds the allegations "substantially the same" as public disclosures (triggering the defense), it necessarily follows that the relator's information does not "materially add" (defeating the exception). *Ibid.* The Seventh Circuit reached this conclusion by focusing on the word "allegations" in both statutory phrases, reasoning that because § 3730(e)(4)(A) bars suits based on "substantially the same allegations or transactions" as publicly disclosed, and § 3730(e)(4)(B) requires knowledge that "materially adds to the publicly disclosed allegations or transactions," the two standards must be measuring the same thing. *Id.* at 717; *see id.* at 717-21.

This interpretation has been widely criticized by other circuits. As the Tenth Circuit explained in *Reed*, the Seventh Circuit's approach "has the effect of collapsing the materially-adds inquiry into the substantially-the-same inquiry," which "renders nugatory" Congress's decision to create a separate path for relators with valuable additional information. 923 F.3d at 757 (quoting *Winkelman*, 827 F.3d at 211-12). The First Circuit similarly rejected the Seventh Circuit's reasoning, because it would mean a relator could never qualify as an original source in any case where the public-disclosure defense applies. *Winkelman*, 827 F.3d at 211-12.

The D.C. Circuit has now staked out the most extreme position, requiring that information be so "significant or essential" that it would push the government "to prosecute" the fraud. Pet. App. 19a-20a. This standard is impossible to meet in declined cases—the only context where the "materially adds" standard matters. The panel's standard thus creates a Catch-22. If the government intervenes, the public-disclosure defense is inapplicable. 31 U.S.C. § 3730(e)(4)(A) (defense does not apply if "the action is brought by the Attorney General"). If the government declines even after an extensive fraud investigation in tandem with relators while the case is under seal, the D.C. Circuit holds that it is not even plausible the information was material to the government. Under this logic, no relator in a declined case can ever establish materiality.

Citing nothing, the panel attempted to justify its restrictive interpretation by claiming it "comports with Congress's *narrowing* of the original source exception in 2010." Pet. App. 20a (emphasis added). But as the Third Circuit has explained, Congress "*expanded* the definition of 'original source'" in 2010, thus narrowing the applicability of the newly affirmative defense to "*lower* the bar for relators." *Moore*, 812 F.3d at 297-99 (emphases added)).

C. The Multi-Split Circuit Conflict Produces Divergent Outcomes in Practice.

The competing standards are not merely academic distinctions—they determine whether meritorious cases proceed or are dismissed. Decisions from the First, Third, and Tenth Circuits all would have come out the other way under the standards imposed in the Seventh and D.C. Circuits.

In *United States ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134 (1st Cir. 2020), the First Circuit found the public-disclosure defense triggered because prior *qui tam* suits and government reports had disclosed the same fraudulent scheme—indeed, the court found the schemes "*indistinguishable* in all material respects." *Id.* at 144 (emphasis added). The government declined to intervene. *Id.* at 141-42. Yet the court held the relator could proceed because his specific insider knowledge about how his company executed the kickback scheme "materially added" to what was publicly known. *Id.* at 147. In *Moore*, the Third Circuit found the public-disclosure defense triggered because news articles and FOIA documents had revealed "substantially the same allegations or transactions" regarding foreign entities using sham U.S. companies to obtain fishing licenses. 812 F.3d at 301, 304. The government had declined to intervene. Even so, the court held the relator could proceed because his independent information revealing how the defendants specifically structured and controlled the sham companies "materially added" to the public disclosures. *Id.* at 297, 308. And in *Reed*, the Tenth Circuit found the public-disclosure defense triggered because news reports and government audits had revealed fraud allegations that were "substantially the same" as those in Reed's complaint regarding the background-investigation industry. 923 F.3d at 747-53. The government declined to intervene. *Id.* at 741. But the court held the relator could proceed because her specific allegations about fraud in KeyPoint's Telephone Testimony Program, combined with evidence of management cover-ups, "added material information" to the public disclosures. *Id.* at 761-63.[6]

Under the D.C. Circuit's standard, none of these relators could have proceeded. As the Rule 12(b)(6) dismissal in this case makes evident, the court

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[6] The Sixth Circuit's decision in *Maur* reached a different result, but not because it applied the wrong standard. *See Maur*, 981 F.3d at 527 (agreeing with *Winkelman* and *Reed* that to be an original source, relator's independent information need only "add value for the government"). *Maur* found no material addition when the same doctor's fraud continued during active government monitoring through an integrity agreement with quarterly reporting. *Id.* at 528-29. Here, there was no government monitoring—no one disputes that petitioners' information prompted the government to open an entirely new investigation after closing the previous one based on O'Connor's 2007 lawsuit.

requires information so significant it would prompt the government "to prosecute fraud"—petitioners' prompting a five-year DOJ fraud *re*investigation could not in the court's view even plausibly show that their independent information materially added to what the government already knew. *See* Pet. App. 19a-20a. Since the government declined to intervene in *Banigan*, *Moore*, and *Reed* after considering the relators' independent information, those relators would not meet the D.C. Circuit's standard either.

Under the Seventh Circuit's standard, *Banigan*, *Moore*, and *Reed* would have come out the other way as well. The Seventh Circuit holds that if allegations are "substantially similar to" public disclosures—which all three courts found—they cannot "materially add" under the second original-source exception to the defense. *See Bellevue*, 867 F.3d at 721. In other words, once the public-disclosure defense is triggered under the Seventh Circuit's approach, only the first original-source exception is available and the second is surplusage.

The intolerable result is that relators like petitioners in declined cases can proceed in the First, Third, and Tenth Circuits (and probably the Sixth Circuit too), even when the public-disclosure defense is triggered, but are automatically barred in the D.C. and Seventh Circuits.

III. The Questions Presented Are Important and Squarely Presented.

The False Claims Act is the government's "primary litigative tool" for combating fraud. *See* S. Rep. No. 99-345, at 2 (1986). Since 1986, FCA cases have recovered "more than $78 billion" for taxpayers, with the vast majority coming from *qui tam* actions. *See* U.S. DOJ, *False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024* (Jan. 15, 2025).[7] In fiscal year 2024 alone, *qui tam* cases accounted for $2.4 billion of the $2.9 billion recovered under the FCA—over 80% of the recuperated taxpayer dollars. *See ibid.* These recoveries represent only a fraction of the fraud prevented through the statute's deterrent effect. *See ibid.* Potential fraudsters know that insiders might expose their schemes, making fraud a riskier proposition. This deterrent effect depends on maintaining viable paths for whistleblowers to bring suit.

The D.C. Circuit's restrictions undermine both recovery and deterrence. By requiring relators to negate affirmative defenses in their complaints and setting an impossible standard for original-source materiality, the court has created artificial barriers to private enforcement. Fraudsters can operate with greater confidence that even if insiders detect their schemes, procedural hurdles will prevent successful challenges.

And the D.C. Circuit's decision deepens a circuit conflict that has profound practical implications. The same fraudulent scheme dismissed out of hand in this case would be remediable in the Third, Sixth, or Tenth Circuits, for example, but not in the D.C. Circuit or Seventh Circuit. Potential whistleblowers must therefore evaluate whether to risk their careers and relationships to expose fraud depending on which circuit they are in. In circuits applying the majority "materially adds" standard, they know that valuable

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[7] Available at https://tinyurl.com/35yaudx9.

information—even if it doesn't prompt immediate prosecution—can support a viable claim. In the D.C. Circuit, they know that unless their information would cause the government to intervene, their efforts are futile. And given that many government contracts are performed in multiple jurisdictions, fraudsters can exploit these inconsistencies by structuring operations to take advantage of circuits with restrictive standards—or, as here, simply by moving to transfer the case to D.D.C. over plaintiffs' objection. *See* Pet. App. 23a; *see also* 31 U.S.C. § 3732(a). So it is particularly important to intervene and correct the D.C. Circuit's published, novel decision.

This case demonstrates why Congress relies on private parties to supplement government enforcement. Petitioners—each a telecommunications attorney with special expertise—understood the FCC's complex regulatory scheme and recognized irregularities that might escape generalist investigators. They invested years and significant resources investigating the fraud, hiring engineers and investigators, and analyzing technical data. Their efforts paid off. Working with petitioners, DOJ investigators uncovered the concealed 2011 lease that proved the fraud's full scope. Without petitioners' expertise and persistence, defendants would have successfully concealed their scheme to steal over $163 million in taxpayer funds. Yet under the D.C. Circuit's standards, petitioners' contributions mean nothing. Despite prompting a five-year reinvestigation and uncovering crucial evidence, they cannot proceed with their case. This result sends a chilling message to potential whistleblowers.

This case presents an ideal vehicle for resolving both questions. The only disputes concern the legal standards governing the public-disclosure defense. Either question independently requires reversal. First, if plaintiffs need not negate affirmative defenses in their complaints—as *Cunningham* holds—the dismissal cannot stand. Petitioners never had the opportunity to develop evidence of their original-source status through discovery or to respond in the pleadings to defendants' specific contentions about public disclosures. *See, e.g.*, *Cunningham*, 145 S. Ct. at 1033 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring) (suggesting that in circumstances like these, "a district court may insist that a plaintiff file a reply to an answer that raises . . . an affirmative defense"). Second, if the majority circuits' interpretation of "materially adds" is correct, petitioners qualify as original sources under the second exception to the defense. The relevant facts are undisputed: Petitioner "O'Connor was a partner at the law firm and involved in filing" the original 2007 action on which respondents founded their public-disclosure defense; petitioners conducted extensive investigation yielding new evidence of fraud; the government reopened a closed investigation and then reinvestigated for nearly five years; and the government ultimately declined intervention. *See* Pet. App. 4a-7a, 15a-16a, 20a-21a. Under any standard that gives meaning to the FCA's text, this information materially added to what was publicly known.

The case's procedural posture underscores the need for review. This was defendants' first motion to dismiss, addressing statutory provisions the D.C. Circuit had never interpreted. Yet the District Court dismissed with prejudice, denying petitioners any opportunity to address its concerns, and the Court of Appeals affirmed that choice—in a published decision announcing novel legal standards that conflict with this Court's decisions and those of several other circuits. The Court should intervene.

CONCLUSION

The petition should be granted. In the alternative, the Court should grant the petition, vacate the judgment, and remand for further consideration of the first Question Presented in light of *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025).

Respectfully submitted,

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September 5, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED FEBRUARY 11, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7044

UNITED STATES OF AMERICA, EX REL. MARK J. O'CONNOR AND SARA F. LEIBMAN, AND MARK J. O'CONNOR AND SARA F. LEIBMAN,

APPELLANTS,

v.

USCC WIRELESS INVESTMENT, INC., ET AL.,

APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-02071)

Argued April 1, 2024 Decided February 11, 2025

Before: Wilkins, Katsas and Rao, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge Rao.

Rao, *Circuit Judge*: This False Claims Act suit alleges that U.S. Cellular and other entities committed fraud in Federal Communications Commission wireless spectrum auctions. The alleged fraud involved using sham small businesses to obtain and retain bidding discounts worth millions of dollars. The district court dismissed the *qui tam* action because a previous lawsuit had raised substantially the same allegations, triggering the Act's public disclosure bar, and the relators bringing the action were not original sources of the information. Although relators have provided some new details about the fraud, they have not overcome the stringent requirements of the public disclosure bar. We therefore affirm.

I.

The False Claims Act ("FCA") imposes liability on persons who defraud the federal government. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. § 3729 *et seq.*). While the government has primary responsibility for enforcing the FCA, if the government declines to proceed with a claim, individuals, referred to as relators, may act as "*ad hoc* deputies" to pursue the fraud on behalf of the government in exchange for a share of any recovery. *United States ex rel. Cimino v. IBM Corp.*, 3 F.4th 412, 415, 453 U.S. App. D.C. 112 (D.C. Cir. 2021) (cleaned up); *see also* 31 U.S.C. § 3730(b)(2), (b)(4)(B). The bounty for a prevailing relator, which can be up to 30 percent of the proceeds of the action or settlement, provides an incentive for individuals to come forward with allegations of fraud against the government. *See* 31 U.S.C. § 3730(d).

Congress, however, limited the circumstances in which a relator may bring suit and share in the government's recovery. The FCA's public disclosure bar provides that a relator whose allegations are "substantially the same" as information that has already been publicly disclosed cannot maintain a *qui tam* action unless he "is an original source of the information." *Id.* § 3730(e)(4)(A). The public disclosure bar helps protect against the risk that *qui tam* suits will lead to "parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649, 304 U.S. App. D.C. 347 (D.C. Cir. 1994). The bar helps achieve "the golden mean" reflected in the FCA, which provides "adequate incentives for whistle-blowing insiders with genuinely valuable information" but blocks "opportunistic plaintiffs who have no significant information to contribute of their own." *Id.*

A.

This *qui tam* action involves alleged fraud in FCC spectrum auctions. The FCC licenses and administers the wireless spectrum for commercial use and distributes spectrum licenses through public auctions. As relevant here, Congress requires the FCC to promote "disseminati[on] [of] licenses among a wide variety of applicants, including small businesses." 47 U.S.C. § 309(j)(3)(B). To implement this statutory goal, the FCC established a program that provides qualifying small businesses, i.e., designated entities, with bidding credits that effectively discount the cost of their licenses. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report & Order, 9 FCC Rcd. 2348, 2388-91 (1994). Eligibility for bidding credits turns on an entity's revenue. 47 C.F.R. § 1.2110(b), (c), (f).

Given the high barriers to entry in the telecommunications market, the FCC also encourages larger companies to invest in and support designated entities. Large firms may not bid on licenses for designated entities, but they can "become partners with or make investments in designated entities so as to gain an interest in" designated entities' licenses. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report & Order, 9 FCC Rcd. 5532, 5547 (1994). Nevertheless, "bidding credits can only be used by genuine small businesses—not by small sham companies that are managed by or affiliated with big businesses." *SNR Wireless Licenseco, LLC v. FCC*, 868 F.3d 1021, 1026, 432 U.S. App. D.C. 353 (D.C. Cir. 2017). The FCC scrutinizes designated entities to ensure that large companies are not improperly benefitting from bidding credits by exercising *de facto* control over small businesses. *See* 47 C.F.R. § 1.2110(b)(1), (c)(2)(i), (c)(5).

B.

In this *qui tam* action, the relators maintain the government was defrauded because the FCC awarded millions of dollars in bidding credits to designated entities that in fact were controlled by U.S. Cellular, a large mobile phone service provider with annual revenues in the billions. Relators sued U.S. Cellular, several of its related entities, three designated entities, and Allison DiNardo, the owner of the designated entities.[1] Between

1. The *qui tam* action was brought against United States Cellular Corporation, USCC Wireless Investment, Inc., and Telephone and Data Systems, Inc. (together, "U.S. Cellular"); King

2006 and 2008, DiNardo registered three entities, Carroll, Barat, and King Street, as "very small businesses" in FCC auctions and applied for the corresponding 25 percent bidding credit. According to the complaint, these designated entities obtained discounted licenses and received nearly $165 million in bidding credits.

In 2008, the law firm Lampert, O'Connor & Johnston, P.C., filed a *qui tam* action alleging that the same defendants here conspired to register sham designated entities to obtain and hold discounted spectrum licenses for U.S. Cellular's use—thereby allowing U.S. Cellular to exploit bidding credits intended for small businesses. According to the law firm, defendants represented that Carroll and Barat were organized to develop and operate spectrum licenses and provide telecommunications services, yet the designated entities engaged in no business activity, had no assets, and generated no revenue. The law firm further alleged that U.S. Cellular controlled the discounted licenses for Carroll and Barat from the moment they were issued but failed to return the bidding credits as required by federal law. At the time the suit was filed, King Street had not obtained its spectrum licenses. The government investigated the allegations against King Street and declined to intervene in the suit. The FCC eventually granted the King Street licenses. The law firm then voluntarily dismissed the *qui tam* action.

Street Wireless, L.P., and King Street Wireless, Inc. (together, "King Street"); Carroll Wireless, L.P., and Carroll PCS, Inc. (together, "Carroll"); Barat Wireless, L.P., and Barat Wireless, Inc. (together, "Barat"); and DiNardo. We refer to these entities collectively as "Defendants."

This case originated in 2015, when Sara Leibman and Mark O'Connor—the latter of whom was a named partner at Lampert, O'Connor & Johnston, P.C., and represented the firm in the 2008 *qui tam* action—filed a complaint in federal court in Oklahoma, asserting FCA claims against the same defendants as in the 2008 action. In particular, relators alleged Defendants conspired to use sham designated entities to obtain and retain discounted spectrum licenses and made false statements and representations to the government in this effort. The relators further claimed that U.S. Cellular exercised *de facto* control over these entities, disqualifying them from receiving bidding credits, and that King Street unlawfully transferred its licensed spectrum to U.S. Cellular while concealing the transfer from the government.

Relators primarily focused on fraudulent activity involving King Street. They discovered that King Street never provided wireless services to the public. It did not apply for or receive telephone numbers, had no retail stores or customers, and lacked the network capabilities necessary to offer telecommunications services. Instead, according to relators, U.S. Cellular used King Street's licenses to provide U.S. Cellular branded service to customers. King Street, meanwhile, filed false annual reports and construction notices with the FCC to conceal that it was holding its discounted licenses for U.S. Cellular.

Relators also conducted field tests that supposedly revealed U.S. Cellular had incorporated King Street's spectrum into its network. They learned of a network sharing agreement (the "2011 NSA") that, relators say, effectively transferred King Street's spectrum rights for many of its licenses to U.S. Cellular. Relators alleged the agreement established an "attributable material relationship" between King Street and U.S. Cellular, violating FCC rules and disqualifying King Street as a designated entity. The government declined to intervene in relators' suit.

The case was transferred to the District of Columbia,[2] and the district court found relators' complaint asserted "substantially the same" allegations as the 2008 *qui tam* action. This triggered the FCA's public disclosure bar, and because relators did not meet the criteria for the original source exception, the district court dismissed the action. *United States ex rel. O'Connor v. U.S. Cellular Corp.*, 2023 U.S. Dist. LEXIS 48810, 2023 WL 2598678, at *4-7 (D.D.C. Mar. 22, 2023).

Relators timely appealed, and this court has jurisdiction. 28 U.S.C. § 1291. We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259, 363 U.S. App. D.C. 419 (D.C. Cir. 2004). When determining whether a complaint fails to state a claim, "we accept the operative complaint's well-pleaded factual allegations as

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2. Relators filed a second, related action in the Western District of Oklahoma, which was similarly transferred to the District of Columbia. *United States ex rel. O'Connor v. U.S. Cellular Corp.*, No. 20-cv-2070, Dkt. No. 128 (D.D.C. July 30, 2020). We heard oral argument in both cases on the same day. *United States ex rel. O'Connor v. U.S. Cellular Corp.*, No. 23-7041 (D.C. Cir. Apr. 1, 2024).

true and draw all reasonable inferences in the [relators'] favor."[3] *North American Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249, 450 U.S. App. D.C. 20 (D.C. Cir. 2020).

II.

Relators attempt to save their *qui tam* action by arguing that the public disclosure bar does not apply, either because their allegations were not "substantially the same" as those in the 2008 *qui tam* action or because they qualify for the original source exception. We reject both arguments.

A.

We begin by considering whether relators' allegations are "substantially the same" as those disclosed in the 2008 *qui tam* action and thus trigger the public disclosure bar. The claims here turn on alleged transactions that postdate 2010, and so are governed by the public disclosure bar as amended in 2010, which provides:

> The court shall dismiss an action or claim ... unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... [in

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3. Although the FCA is an anti-fraud statute and requires relators to meet the heightened "particularity" pleading standard of Federal Rule of Civil Procedure 9(b), *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-52, 351 U.S. App. D.C. 30 (D.C. Cir. 2002), that standard is not at issue in this case because Defendants do not challenge the sufficiency of relators' substantive allegations on appeal.

> the enumerated channels], unless ... the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

The 2010 amendments included two changes relevant to this case. First, the public disclosure bar was previously a jurisdictional limit but is now an affirmative defense. When the bar applies, a court must "dismiss [the] action." *Id.; compare* 31 U.S.C. § 3730(e)(4)(A) (1986) (providing that "[n]o court [would] have jurisdiction over an action" for which there had already been a public disclosure). Unless Congress "clearly states" that a statutory limitation is jurisdictional, "courts should treat the restriction as nonjurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). In the 2010 amendments, Congress removed the jurisdictional language in the public disclosure bar. *United States ex rel. Shea v. Cellco Partnership*, 863 F.3d 923, 933, 430 U.S. App. D.C. 353 (D.C. Cir. 2017). Moreover, the government may oppose a court's dismissal, which reinforces that the bar is no longer jurisdictional. Otherwise, "the government [could] cure a jurisdictional defect simply by opposing a motion to dismiss." *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 (11th Cir. 2015). The public disclosure bar now operates as an affirmative defense.[4]

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4. We note this is the unanimous view of our sister circuits that have considered the issue. *See, e.g., United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 737 n.1 (10th Cir. 2019) (collecting cases).

Second, Congress clarified the standard for applying the public disclosure bar. Prior to the amendment, the public disclosure bar deprived courts of jurisdiction over actions "*based upon* the public disclosure of allegations or transactions." 31 U.S.C. § 3730(e)(4)(A) (1986) (emphasis added). Interpreting the pre-2010 language, this circuit held that a suit was "*based upon* publicly disclosed allegations or transactions when the allegations in the complaint [were] *substantially similar* to those in the public domain." *United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 472, 423 U.S. App. D.C. 302 (D.C. Cir. 2016) (cleaned up) (emphasis added). Other circuits used terms such as "substantially similar," "substantially the same," and "substantial identity" when applying the public disclosure bar. *See United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 849-50 & nn.8-9 (6th Cir. 2020) (collecting and discussing cases). In the 2010 amendments, Congress mirrored these judicial formulations, requiring dismissal of a *qui tam* action "if *substantially the same* allegations or transactions ... were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).

Congress's amendment of the public disclosure bar is best understood as codifying the interpretation of this circuit and others that focused on whether the allegations of fraud in a *qui tam* action were "substantially similar" to or "substantially the same" as publicly disclosed allegations and transactions. *See United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 917 (4th Cir. 2013) ("[T]he amended version [of the public disclosure bar] ... focuses on the similarity of the allegations of fraud."); *see also United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 743 (10th Cir. 2019) ("That the substantially-the-same standard adopted in the 2010 amendment resembles the standard we already used is no accident; the amendment expressly incorporates the 'substantially similar' standard in accordance with the interpretation of this circuit and most other circuits.") (cleaned up). Because the FCA amendments incorporate judicial interpretations, we can reasonably continue to rely on our pre-2010 cases applying the public disclosure bar.[5]

B.

Under the "substantially the same" standard, the critical inquiry is whether "the government ... ha[d] enough information to investigate the case ... or [whether] the information could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 836,

5. Other circuits have also concluded that "pre-2010-amendment cases guide [the] substantially-the-same inquiry." *Reed*, 923 F.3d at 744; *see also Silbersher v. Valeant Pharms. Int'l, Inc.*, 89 F.4th 1154, 1167 (9th Cir. 2024) ("Congress re-enacted its prior law in clearer terms by replacing 'based upon' with 'substantially the same as,' leaving our precedent interpreting that phrase undisturbed."); *United States ex rel. Silver v. Omnicare, Inc.*, 903 F.3d 78, 83-84 n.6 (3d Cir. 2018); *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 718 (7th Cir. 2017). By contrast, the Sixth Circuit has held that "substantially the same" requires a higher degree of similarity than "based upon." *Holloway*, 960 F.3d at 850-51. We need not resolve whether or how the two standards differ because relators conceded in the proceedings below that our cases interpreting the public disclosure bar before the 2010 amendments remain instructive.

400 U.S. App. D.C. 351 (D.C. Cir. 2012) (cleaned up). "[T]he government has enough information to investigate the case" when either "the allegation of fraud" or "its underlying factual elements" have been publicly disclosed. *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 86, 413 U.S. App. D.C. 208 (D.C. Cir. 2014) (cleaned up). The public disclosure bar applies if the fraud was publicly disclosed, or if both the misrepresentation and the truth were in the public domain. *Id.*

Because the public disclosure bar is an affirmative defense and Defendants have raised it in a pre-answer motion under Federal Rule of Civil Procedure 12(b), Defendants must show that "the facts that give rise to the defense are clear from the face of the complaint." *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 608, 404 U.S. App. D.C. 358 (D.C. Cir. 2013) (cleaned up). Defendants argue the public disclosure bar applies to this case because the 2008 *qui tam* action publicly disclosed "substantially the same" allegations, namely the same fraudulent scheme (obtaining discounted bidding credits) at the same FCC auctions, perpetrated by the same defendants.

In response, relators claim that their current allegations are not "substantially the same" as the disclosures from 2008, because this suit alleges post-licensing fraud focused on the retention of bidding credits and the incorporation of the designated entities' spectrum into the U.S. Cellular network. Relators also insist they have marshalled new evidence, including an engineering study, employee interviews, and the 2011 NSA, that exposes this fraudulent scheme. Furthermore, relators argue that they have advanced a new allegation that U.S. Cellular's control over King Street's spectrum violates the FCC's attributable material relationship rule, an allegation that is not substantially the same as the pre-licensing fraud involving U.S. Cellular's control over the designated entities during the spectrum auctions.

Relators' complaint includes some additional facts, but ultimately describes a fraud that is merely a continuation of, and therefore substantially the same as, the scheme disclosed in the 2008 *qui tam* action. In the 2008 action, relators alleged that Carroll, Barat, and King Street served as fronts for U.S. Cellular to obtain spectrum licenses at a discount and that the designated entities were under the *de facto* control of U.S. Cellular. In their present complaint, relators reiterate these same allegations, adding only some details about how Defendants have continued the fraud since the spectrum auctions. But the pertinent elements of the fraud were all alleged in the 2008 *qui tam* action: the misrepresentation that Carroll, Barat, and King Street were genuine designated entities; the truth that they were fronts for U.S. Cellular; and the allegation that Defendants committed fraud in the FCC auctions to benefit from valuable bidding credits. The 2008 *qui tam* action alerted the government to the same fraud alleged in this action.

This *qui tam* action simply elaborates on how Defendants attempted to conceal the fraud and maintain its benefits. But "a qui tam action cannot be sustained where both elements of the fraudulent transaction ... are already public, even if the relator comes forward with additional evidence incriminating the defendant." *Doe*, 773 F.3d at 86 (cleaned up). Filling in details about an already disclosed fraud is not enough to overcome the public disclosure bar. *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 919, 339 U.S. App. D.C. 166 (D.C. Cir. 1999). We agree with the district court that the 2008 *qui tam* action publicly disclosed that the "same defendants intended to acquire the same discounts at the same auctions via the same scheme of using front companies to fraudulently pose as small businesses." *O'Connor*, 2023 U.S. Dist. LEXIS 48810, 2023 WL 2598678, at *5 (cleaned up).

Although relators offer some additional details about actions Defendants took to preserve their bidding credits and spectrum, the underlying fraud is "substantially the same" as that alleged in the 2008 *qui tam* action. Therefore, the public disclosure bar applies.

III.

Relators also argue they qualify as "original sources" and therefore fit within the exception to the public disclosure bar. Even if relators' claims were previously publicly disclosed, they may bring a *qui tam* action if they were "original source[s]" identifying the alleged fraud. 31 U.S.C. § 3730(e)(4)(A). In the 2010 amendments to the FCA, Congress narrowed the definition of original source. Before the amendments, a relator qualified as an original source by simply possessing "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B) (1986). The timing of the relator's claim was immaterial. Now, a relator can be an original source only if: (1) "prior to a public disclosure ... [he] has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based"; or (2) he "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and ... has voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B). Relators here are not original sources under either definition.

Because qualifying as an original source is an exception to the public disclosure bar, relators will generally bear the burden of demonstrating it applies. The original source exception benefits relators by permitting their claims to go forward even if the public disclosure bar is triggered. Relators are also best situated to know the facts relevant to whether they qualify as original sources. *See Smith v. United States*, 568 U.S. 106, 112, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) ("Where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.") (cleaned up).

A.

Relators maintain that O'Connor is an original source under the first definition because his law firm shared the 2008 *qui tam* action with the government before its public disclosure.

O'Connor cannot be an original source for the 2008 *qui tam* action, however, because that action was filed by his law firm. The 2008 pleadings stated: "Lampert, O'Connor & Johnston, P.C. brings this action ... on behalf of itself and the Government." It is a fundamental principle of corporate law that a professional corporation is a legal entity distinct from its shareholders. *See* O'Neal, Thompson & Wells, 1 Close Corporations and LLCs: Law and Practice § 2.9 (3d ed. 2024). Although O'Connor was a partner at the law firm and involved in filing the complaint, he cannot attribute the firm's suit to himself. *Cf. United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 554 (10th Cir. 1992) (holding a corporation cannot serve as the original source of information gathered by its shareholders before its formation). The 2008 *qui tam* action was brought by the law firm, and O'Connor cannot step into the firm's shoes to qualify as an original source.

For the first time in their reply brief, relators also claim that O'Connor personally communicated with the government about the allegations of fraud in the 2008 *qui tam* action before its unsealing. This argument, however, has been forfeited because it was not presented in the opening brief. In their opening brief, relators suggested O'Connor was an original source of the 2008 *qui tam* action because he "served" and later "dismissed" the complaint. Defendants naturally responded by focusing on whether the 2008 *qui tam* action, which was filed by O'Connor's law firm and did not mention O'Connor personally, could be attributed to him. Only in their reply brief did relators specifically assert that O'Connor independently communicated with the government about the allegations as early as 2007. This argument comes too late. Relators cannot preserve their claim that O'Connor is an original source by providing a "skeletal" argument in their opening brief and waiting to develop their full argument in reply. *Al-Tamimi v. Adelson*, 916 F.3d 1, 6, 439 U.S. App. D.C. 357 (D.C. Cir. 2019) (cleaned up).

O'Connor cannot claim to be an original source based on the disclosures of his law firm, and any argument that he individually provided information to the government has been forfeited. Relators therefore do not qualify as original sources under the first definition of section 3730(e)(4)(B) by voluntarily disclosing allegations of fraud prior to the unsealing of the 2008 *qui tam* action.

B.

Relators also argue that they qualify as original sources under the second definition by having "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and by voluntarily providing that information to the government. 31 U.S.C. § 3730(e)(4)(B). Relators maintain that their independent investigations materially added to the disclosures in the 2008 *qui tam* action by providing information about post-licensing fraud. For example, relators proved through spectrum analyses that after King Street obtained the licenses referenced in the 2008 *qui tam* action, U.S. Cellular secretly incorporated King Street's licensed spectrum, which contradicted King Street's FCC certifications and exposed unlawful activity. Relators also discovered that King Street never operated as a legitimate telecommunications provider. According to relators, their efforts instigated a government investigation that uncovered the 2011 NSA, further demonstrating

Defendants' post-licensing fraud. Relators argue they influenced the government's decisionmaking and filled gaps in the government's understanding of the fraud.

Even assuming relators provided some new information that is "independent of" the 2008 *qui tam* action, we must consider whether this information "materially adds" to what was publicly disclosed.[6] *Id.*

This circuit has not previously considered what counts as a material addition for the purpose of the original source exception. We begin with the text and structure of the statute. As the Supreme Court has recognized when interpreting other sections of the FCA, the term "material" has a well-established common law meaning: Something is material if it is likely to influence a reasonable person's behavior. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016) (discussing common law definitions of "material" in tort and contract). Information is material if "knowledge of [it] would affect a person's decision-making" or if it is "significant" or "essential." *Material*

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6. Whether the original source exception applies because information "materially adds" to public disclosures must be a separate inquiry from whether relators have brought forward allegations that are "substantially the same," which triggers application of the public disclosure bar. While the precise line between these concepts may be difficult to draw, they "must remain conceptually distinct; otherwise, the original source exception would be rendered nugatory." *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211-12 (1st Cir. 2016); *see also United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 525 (6th Cir. 2020) (endorsing *Winkelman*'s reasoning because the alternative "would leave an exception that excepts nothing").

(adj.), BLACK'S LAW DICTIONARY (10th ed. 2014). This definition comports with the liability section of the FCA, which defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[7] 31 U.S.C. § 3729(b)(4). As the Supreme Court has emphasized, "[t]he materiality standard [in section 3729(b)(4)] is demanding" and is not met "where noncompliance is minor or insubstantial." *Escobar*, 579 U.S. at 194. Interpreting the term "material" consistently across the FCA, we conclude that minor or insubstantial additions to publicly disclosed information will not qualify a relator as an "original source."

A relator therefore "materially adds" to public disclosures by contributing information that "is sufficiently significant or essential" to influence the government's decision to prosecute fraud.[8] *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211

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7. The Supreme Court has interpreted "material" in other federal statutes in a similar way. *See, e.g., Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (construing "material" in an immigration statute to mean information that "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed") (cleaned up); *Neder v. United States*, 527 U.S. 1, 20-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (same for federal mail fraud, bank fraud, and wire fraud statutes); *see also id.* at 22 (explaining "the common law could not have conceived of 'fraud' without proof of materiality").

8. In addition to the cases already cited, this interpretation is consistent with the interpretation of "materially adds" in other circuits. *See, e.g., United States ex rel. Advocates for Basic Legal Equality., Inc. v. U.S. Bank, N.A.*, 816 F.3d 428, 431 (6th Cir. 2016); *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306-07 (3d Cir. 2016).

(1st Cir. 2016); *see also Reed*, 923 F.3d at 757 (holding that "materially adds" requires relators to "disclose[] new information that is sufficiently significant or important that it would be capable of influencing the behavior of the recipient—i.e., the government") (cleaned up). This interpretation is consistent with the careful balance Congress struck in the FCA to ensure that the government remains "in the driver's seat to pursue and punish false claims according to its priorities." *United States v. Honeywell Int'l Inc.*, 47 F.4th 805, 818, 459 U.S. App. D.C. 85 (D.C. Cir. 2022). Reading "material" to require significant or essential additional information also comports with Congress's narrowing of the original source exception in 2010.

Determining whether a relator's contribution materially adds to a public disclosure is a case-dependent inquiry. "[A] relator who merely adds detail or color to previously disclosed elements of an alleged scheme is not materially adding to the public disclosures." *Reed*, 923 F.3d at 757 (cleaned up). Simply elaborating on public disclosures is insufficient to meet the "materially adds" standard because marginal details are not likely to influence the government's decision to prosecute.

Relators do not qualify for the original source exception to the public disclosure bar because their information—which we take as true—does not materially add to the disclosures made in the 2008 *qui tam* action. The 2008 action provided substantial information about U.S. Cellular's alleged control over Carroll, Barat, and King Street. That complaint alleged the designated entities were sham companies under the *de facto* control of U.S. Cellular and existed solely to obtain the 25 percent bidding credit on FCC licenses that were ultimately for U.S. Cellular's use. Relators' allegations in this case merely confirm U.S. Cellular's continued control over the designated entities and its use of their licenses. While some information may be new, it is not so significant or essential that it would influence the government's decision to prosecute, because the 2008 action already disclosed the allegations of Defendants' fraud. Rather than "blaz[ing] a new trail," relators merely "add[ed] a few more breadcrumbs on an existing trail." *Id.* at 763. Providing some additional color about the fraudulent scheme does not make relators an original source.

Relators' contention that they affected the government's decisionmaking by prompting an investigation does not alter our conclusion. Relators say they provided evidence of post-licensing fraud that led the government to conduct a second investigation. This investigation uncovered the 2011 NSA, which relators claim established an attributable material relationship between King Street and U.S. Cellular that violated FCC rules and disqualified King Street from bidding credits. On relators' account, the fact of the government's investigation proves their new information materially added to what the government knew. We disagree.

The government has broad discretion in deciding how to respond to allegations in a *qui tam* suit, and such decisions may be based on a range of factors independent of the relators' specific disclosures. *See Swift v. United States*, 318 F.3d 250, 253, 355 U.S. App. D.C. 59 (D.C. Cir. 2003). The FCA requires relators to serve the government a copy of the complaint and all material evidence, which remains sealed for 60 days. *See* 31 U.S.C. § 3730(b)(2). During this seal period, the government may investigate, or take whatever action it sees fit, to determine whether it wants to proceed with an enforcement action or intervene in the *qui tam* suit. *See id.* The fact that the government undertook some due diligence in response to new information does not necessarily show that relators' information was material. The government has significant latitude in how it exercises its enforcement authority under the FCA, and the mere fact of a government investigation cannot support the conclusion that relators' information was essential or influenced the government.

Because relators' allegations failed to materially add to the public disclosures, relators do not qualify for the original source exception to the public disclosure bar.[9]

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This *qui tam* action must be dismissed because the frauds Leibman and O'Connor allege were publicly disclosed in an earlier lawsuit, and they are not original sources of the information. We therefore affirm the judgment of the district court.

So ordered.

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9. The district court did not abuse its discretion in dismissing with prejudice. Relators did not make a formal motion to amend, and in these circumstances it is not an abuse of discretion for a district court not to grant "such leave *sua sponte*." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1280, 305 U.S. App. D.C. 60 (D.C. Cir. 1994).

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 22, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-cv-2071 (TSC)

UNITED STATES OF AMERICA, EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,

Plaintiffs-Relators,

v.

UNITED STATES CELLULAR CORPORATION, *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiffs-Relators Mark J. O'Connor and Sara F. Leibman filed this False Claims Act (FCA) action in the United States District Court for the Western District of Oklahoma. ECF No. 118. After the United States declined to intervene, ECF No. 47, the case was transferred upon Defendants' motion to this court on July 30, 2020, ECF No. 126. Defendants have filed two motions to dismiss Plaintiffs-Relators' Second Amended Complaint, ECF Nos. 148, 149. For the reasons set forth below, the court will GRANT both motions and dismiss this case.

I. BACKGROUND

A. Designated Entities and Spectrum Auctions

Electromagnetic waves of varying frequencies carry the information necessary for people to enjoy technologies ranging from the radio to Wi-Fi. Second Amended Complaint ¶ 5, ECF No. 118 ("SAC"). Particular sources broadcast on specific electromagnetic frequencies; for example, National Public Radio in Washington, D.C. appears at 88.5 MHz, while C-SPAN is at 90.1 MHz. Those stations do not "own" their frequencies. Instead, the Federal Communications Commission ("FCC") regulates the electromagnetic spectrum, licensing control over certain bands to private parties. 47 U.S.C. § 151, *et seq.* In doing so, the FCC seeks to ensure the distribution of licenses and frequencies provides a "fair, efficient, and equitable distribution" of services. *Id.* § 307(a), (b). Accordingly, it distributes licenses through a competitive auction system. *See id.* § 309(j).

Unsurprisingly, spectrum auction bids are expensive. *See, e.g.*, Press Release, FCC, *FCC Concludes Largest Ever Spectrum Auction* (Mar. 12, 2020), fcc.gov/document/fcc-concludes-largest-ever-spectrum-auction (detailing an auction with over $7 billion in bids). To ensure fairness and access, Congress and the FCC created the Designated Entity ("DE") program, under which women and minority-owned businesses, as well as small businesses below a certain gross revenue threshold, are offered "bidding credits" for license auctions. 47 C.F.R. § 1.2110(f)(1), (2); *see* 47 U.S.C. § 309(j)(4)(D); *In the Matter of Implementation of Section 309(j) of the Commc'ns Act — Competitive*

Bidding, 9 FCC Rcd. 5532 ¶ 15 (1994). Credits are percentage-based—the FCC pledges to credit a certain percentage of a DE's winning bid. 47 C.F.R. § 1.2110(f)(2)(i). For small businesses, the size of a credit varies depending on business revenue (e.g., businesses with less than $4 million in revenue are eligible for bidding credits of 35%). *Id.*

To determine whether a business qualifies as a DE, the FCC calculates the business's gross revenue by aggregating the business's gross revenue, its affiliates, its controlling interests and their affiliates, and the entities with which the business has an attributable material relationship. 47 C.F.R. § 1.2110(b)(1). Affiliates are individuals or entities that directly or indirectly control or are otherwise controlled by the prospective DE business. *Id.* § 1.2110(c)(5). A controlling interest includes any entities that had *de facto* or *de jure* control of the applicant. *Id.* § 1.2110(c)(2)(i). While *de jure* control is defined by the regulations, *de facto* control is assessed on a "case-by-case basis." *Id.*

The FCC reviews a business's DE status twice. First, the business must complete a pre-auction short-form application certifying that it is eligible for DE status. *See* FCC Form 175, *available at* transition.fcc.gov/Forms/Form175/175.pdf. If the business wins a bid for a spectrum license, it then completes a long-form application, which is a significantly longer questionnaire asking for the business's affiliates and controlling interests, as well as their respective assets and gross revenues. *See* FCC Form 601, *available at* transition.fcc.gov/Forms/Form601/601.pdf.

Once a DE is awarded a license, it may not transfer it to a business that would have otherwise been ineligible for a bidding credit for at least five years, or risk having to pay back some or all of its discount. *See* 47 C.F.R. § 1.2111(b)(2)(i). A DE must also submit an annual report certifying its continued eligibility for DE status. *Id.* § 1.2110(n)(1), (2). Despite these requirements, non-qualifying businesses are not barred from interacting with DE entities; in fact, the FCC seeks to promote economic opportunity for DE owners—especially those owned by minorities or women—by encouraging large companies to invest in DEs and avail themselves of the DE-licensed spectrum. *See, e.g., In the Matter of Implementation of Section 309(j) of the Commc'ns Act — Competitive Bidding*, 9 FCC Rcd. 5532 ¶ 15 (1994).

B. Parties

Plaintiffs-Relators Mark J. O'Connor and Sara F. Leibman are attorneys specializing in communications law. SAC ¶¶ 21-22. Their Second Amended Complaint names ten defendants connected by a complex web of ownership and partnership, described below. Figure 1, attached to this opinion, maps out those relationships in a chart.

Defendant (1) Telephone and Data Systems, Inc. ("TDS") is a publicly held corporation that owns approximately 80% of Defendant (2) United States Cellular Corporation ("U.S. Cellular"). *Id.* ¶¶ 23-24. U.S. Cellular wholly owns and controls Defendant (3) USCC Wireless Investment, Inc ("USCC"). *Id.* ¶ 25.

Defendant (4) Carroll Wireless, L.P. was a limited partnership between USCC and Defendant (5) Carroll PCS, Inc. ("Carroll Wireless"), which is wholly owned by Defendant (6) Allison Cryor DiNardo. *Id.* ¶¶ 28-29. Following the December 2012 transfer of control of Carroll Wireless, L.P. to U.S. Cellular, Carroll Wireless, L.P, merged with and was dissolved into USCC in December 2018. *Id.*

Defendant (7) Barat Wireless, L.P. was a similar limited partnership between USCC and Defendant (8) Barat Wireless, Inc. ("Barat Wireless"), which is likewise wholly owned by DiNardo. *Id.* ¶¶ 30-31. Following the September 2012 transfer of control of Barat Wireless, L.P. to U.S. Cellular, Barat Wireless, L.P, merged with USCOS of Rochester, Inc., a wholly owned subsidiary of USCC, in December 2018. *Id.* ¶ 30. In January 2019, USCOC of Rochester, Inc. merged into and with USSC. *Id.* ¶¶ 30-31.

Lastly, Defendant (9) King Street Wireless, L.P. was a limited partnership between USCC and Defendant (10) King Street Wireless, Inc. ("King Street"), which is also wholly owned by DiNardo. *Id.* ¶¶ 26-27.

C. Factual Background

This case involves three FCC spectrum auctions: Auction 58, held on June 18, 2004; Auction 66, held on January 31, 2006; and Auction 73, held on August 17, 2007. In each of those auctions, DiNardo registered Defendant entities—the Carroll, Barat, and King Street entities, respectively—as "very small business[es]" with gross revenues under $15 million, and applied for a 25% bidding credit. *Id.* ¶¶ 154-55, 183-84; 76-77. Each application stated that DiNardo had both *de facto* and *de jure* control of the businesses, and that none had any additional affiliates. *Id.* ¶¶ 78, 155, 184.

The DiNardo-registered businesses won discounted spectrum licenses in all three auctions. Carroll Wireless secured 17 licenses in Auction 58, applying its 25% discount to pay $129.7 million of the $151.8 million that it bid. *Id.* ¶ 158. Barat Wireless also secured 17 licenses in Auction 66, paying $127.1 million for its $169 million bid. *Id.* ¶ 185. And King Street Wireless secured 152 licenses in Auction 73, paying $300.4 million for its $400.6 million bid. *Id.* ¶ 80. In their post-auction long-form applications, all three businesses reaffirmed their eligibility for DE status. *Id.* ¶¶ 84, 159, 187.

In 2007, the law firm of Lampert & O'Connor, P.C., represented by Plaintiff-Relator Mark J. O'Connor, brought an FCA suit in this district. As amended in 2008, the Complaint named as defendants the same ten entities as the ones in this suit. *See* Am. Compl., Case No. 1:07-cv-00800-JDB (D.D.C. Apr. 24, 2008), ECF No. 11 ("2008 Complaint").[1] It also involved the same three FCC spectrum auctions: 58, 66, and 73. *Id.* ¶¶ 2-3.

The 2008 Complaint alleged that the U.S. Cellular entities had "formed sham 'very small business' bidding

1. "A court may take judicial notice of facts contained in public records of other proceedings," *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 84 (D.D.C. 2015) (citing *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059, 378 U.S. App. D.C. 355 (D.C. Cir. 2007)), along with other "government documents available from reliable sources," *id.* at 85 (citations omitted).

entities"—the Barat, Carroll, and King Street entities—"for purposes of obtaining 25 percent credits against their gross winning bids" in the respective auctions. *Id.* ¶ 3. "In furtherance of their fraudulent scheme, the Defendants made material misstatements and omissions in their submissions to the FCC for each of the spectrum auctions"—specifically, concealing that the U.S. Cellular entities were in control of the DEs all along. *Id.* ¶ 4. The fraudulent records "wrongly represented that the sham "very small businesses" were organized to design, construct, develop, operate, manage and maintain spectrum licenses, and otherwise to engage in the business of providing telecommunications services," but in fact they "acted as fronts for the [U.S. Cellular entities] to acquire licenses to complement [their] existing wireless operating footprint and to block new entrants from competing with [them]." *Id.* ¶¶ 7-8.

Because the FCC had not yet finally approved King Street's application for discount, the 2008 Complaint prompted the FCC to investigate the allegations before granting that approval. The government requested that the 2008 Complaint be partially unsealed, then provided a copy to King Street along with an opportunity to respond to the allegations therein. *See* Letter from R. Noel to T. Gutierrez Re: Auction 73 Application of King Street Wireless, L.P., 24 FCC Rcd. 4526, 4527 (Apr. 14, 2009). King Street responded, denying the allegations and asking the FCC to grant its application. Resp. to Bureau Inquiry (Redacted), FCC ULS File No. 0003379814 (May 8, 2009).[2] After completing its review, the FCC granted

2. *See* Telephone and Data Systems, Inc. et al. Motion to Dismiss, Decl. of Frank Volpe, Ex. B, ECF No. 149-4.

King Street's application for discounted licenses in Auction 73. SAC ¶ 89; *see* FCC Public Notice, DA-09-2643, 24 FCC Rcd 14754 (Dec. 30, 2009).[3] The Department of Justice also declined to intervene in the 2008 FCA suit or otherwise take action against the Defendants. *See* Gov't's Notice of Election to Decline Intervention, Case No. 1:07-cv-00800-JDB (D.D.C. Oct. 9, 2009), ECF No. 25. Shortly thereafter, Lampert & O'Connor moved to voluntarily dismiss the action without prejudice. *Id.*, ECF No. 28. The motion was granted. *Id.*, ECF No. 29.

D. Procedural History

Over five years later, in 2015, Plaintiffs-Relators brought this action in Oklahoma, and the matter was subsequently transferred here. In their Second Amended Complaint, Plaintiffs-Relators claim that Barat, Carroll, and King Street were not genuine DEs and in fact were controlled by U.S. Cellular and its affiliates. SAC ¶¶ 84, 105, 147, 157, 162-65, 171, 178, 190, 200. The Complaint alleges five FCA violations: (1) conspiracy to violate the FCA under 31 U.S.C. § 3729(a)(1)(C); (2) falsely and fraudulently presenting claims for payment from the FCC, in violation of 31 U.S.C. § 3729(a)(1)(A); (3) making or using a false record to receive payments from the FCC, in violation of 31 U.S.C. § 3729(a)(1)(B); (4) unlawful possession of FCC licenses, in violation of 31 U.S.C. § 3729(a)(1)(D); and (5) making or using a false record to avoid making payments to the federal government, in violation of 31 U.S.C. § 3729(a)(1)(G).

3. *Available at* https://docs.fcc.gov/public/attachments/DA-09-2643A1.pdf.

Defendants move to dismiss, arguing that Plaintiffs-Relators' claims are barred by the FCA's public disclosure bar, lacking essential pleading elements, and time-barred under the FCA's statute of limitations. Because both motions to dismiss make overlapping substantive arguments, the court will address them jointly.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim under Federal Rule of Procedure 12(b)(6) tests the legal sufficiency of a complaint. *See Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). To survive such a motion, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is plausible when the facts alleged allow the court to reasonably infer the defendant's culpability for the misconduct alleged. *Id.* In drawing such reasonable inferences, the court must grant the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000) (quoting *Schuler v. United States*, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)).

III. ANALYSIS

Defendants' Motions to Dismiss present two Rule 12(b)(6) defenses. First, they argue that dismissal is warranted because of the FCA's public disclosure bar, which requires a court to dismiss an action where a relator's claim is based on allegations and transactions made public by sources other than the relator before the complaint was filed. *See* 31 U.S.C. § 3730(e)(4).

The public disclosure bar applies if "substantially the same allegations or transactions" were publicly disclosed in a hearing in which the Government or its agent was a party, in certain federal reports, hearings, audits, or investigations, or in the news media. *Id.* § 3730(e)(4)(A). However, if the relator was the "original source" of the information on which their allegations are based, and that information "materially adds to the publicly disclosed allegations or transactions," the public disclosure bar does not apply. *Id.* § 3730(e)(4)(B); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007) (defining "original source").

Second, Defendants argue that regardless of the public disclosure bar, Plaintiffs-Relators have failed to plausibly allege an FCA violation, and that the allegations against Carroll and Barat exceed the statute of limitations. The court need not reach those defenses, however, because it finds that the public disclosure bar is an insurmountable defense to Plaintiffs-Relators' claims.

A. The 2008 FCA suit bars this action

Claims involving "allegations or transactions substantially similar to those in the public domain" cannot survive the public disclosure bar. *United States ex rel. Findley v. FPC-Boron Emps.' Club*, 105 F.3d

675, 682, 323 U.S. App. D.C. 61 (D.C. Cir. 1997). The court must determine if "the government already ha[d] enough information to investigate the case and to make a decision whether to prosecute' or [if] the information 'could at least have alerted law-enforcement authorities to the likelihood of wrongdoing.'" *United States ex rel. Davis v. Dist. of Columbia*, 679 F.3d 832, 836, 400 U.S. App. D.C. 351 (D.C. Cir. 2012) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654, 304 U.S. App. D.C. 347 (D.C. Cir. 1994) (internal quotations omitted)). Because the public domain includes information "disclosed . . . in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party," 31 U.S.C. § 3730(e)(4)(A)(i), allegations or transactions involved in prior litigation can trigger the public disclosure bar, *see, e.g., In re Nat. Gas Royalties*, 562 F.3d 1032, 1039-40 (10th Cir. 2009) (recognizing the preclusive effect of "court documents from . . . a *qui tam* action Relator had filed" years earlier).

The 2008 FCA suit triggers the public disclosure bar. That suit alleged that Carroll, Barat, and King Street were fronts for U.S. Cellular to fraudulently obtain the small business discount for the spectrum in Auctions 58, 66, and 73, respectively. 2008 Complaint ¶¶ 2-3, 6; *see supra* Section I.C. Those are the same core allegations—against the same defendants—that Plaintiffs-Relators' Complaint makes here. *See* SAC ¶ 1. As a result, the 2008 FCA suit "could at least have alerted law-enforcement authorities to the likelihood of wrongdoing" that Plaintiffs-Relators allege here—indeed, that was the suit's express purpose. *Davis*, 679 F.3d at 836. The 2008 Complaint not only could have, but actually did, "enable the government to adequately investigate the case and to make a decision whether to prosecute." *Findley*, 105 F.3d at 688. But the government declined to prosecute, and the FCC ultimately decided to grant the licenses. The public disclosure bar precludes Plaintiffs-Relators from raising the same allegations here.[4]

B. The allegations of continued fraud are substantially similar

Plaintiffs-Relators do not meaningfully dispute the preclusive effect of the 2008 FCA suit with respect to the allegations it raised. Instead, they argue that their Complaint here is sufficiently different from the 2008 Complaint to avoid the bar. Principally, they assert that their Complaint "alleges additional fraudulent conduct, as well as additional violations of the FCA, that differ significantly from the fraudulent conduct alleged in the 2008 Complaint." Plaintiffs/Relators' Consolidated Response in Opposition to Defendants' Motions to Dismiss at 16, ECF No. 152 ("Opposition"). What that additional fraud amounts to is Defendants' alleged conduct in maintaining the sham front companies of Carroll, Barat, and King Street—which in fact continued to be under the *de facto* control of U.S. Cellular—while still certifying their DE status so that they could retain their discount on the licenses they had obtained. *Id.* at 16-17 (citing SAC

4. Defendants also argue other public filings in FCC proceedings independently impose the public disclosure bar. Because the 2008 FCA suit is alone sufficient to preclude this action, the court does not reach those arguments.

¶¶ 92-105, 107-14, 118-130, 138-46, 162, 166-70, 173-79, 190-93, 196-97, 199-201).

D.C. Circuit precedent forecloses Plaintiffs-Relators' attempt to distinguish their Complaint from the 2008 FCA suit. A "relator's ability to reveal specific instances of fraud where the general practice has already been publicly disclosed is insufficient" to prevent dismissal under the public disclosure bar. *United States ex rel. Settlemire v. Dist. of Columbia*, 198 F.3d 913, 919, 339 U.S. App. D.C. 166 (D.C. Cir. 1999). That Defendants allegedly continued to perpetuate the fraud to retain their discounts simply provides more specific instances of the general fraudulent practice that they allegedly initiated to obtain those discounts in the first place. "Cases may arise where disclosures of a practice are insufficient to be considered public disclosures of later instances of fraud," but "where we have before us publicly disclosed information showing how th[ese] same defendant[s] intended to" acquire the same discounts at the same auctions via the same scheme of using front companies to fraudulently pose as small businesses, "it is clear that public disclosure under § 3730(e)(4)(A) has occurred." *Id.* The Complaint therefore cannot get around the public disclosure bar by alleging that Defendants continued the same fraud that has already been disclosed.

C. Plaintiffs-Relators are not an original source

Because the Amended Complaint is premised on "substantially the same allegations or transactions" that have already been publicly disclosed, Plaintiffs-Relators' suit must be dismissed unless they qualify as an "original source" by obtaining and sharing "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," in which case the public disclosure bar would not apply. 31 U.S.C. § 3730(e)(4)(A)-(B); *see Rockwell Int'l Corp.*, 549 U.S. at 467 (defining "original source"). "Congress did not prescribe by mathematical formulae the quantum or centrality of nonpublic information that must be in the hands of the *qui tam* relator in order for suits to proceed." *Quinn*, 14 F.3d at 653. But Plaintiffs-Relators' allegations do not render them an original source here. What little nonpublic information they allege does not materially add to the publicly disclosed information.

Plaintiffs-Relators rely chiefly on one nonpublic document, but it cannot bear the weight they place on it. They repeatedly cite the U.S. Cellular-King Street 2011 Network Sharing Agreement ("2011 NSA") in which King Street allegedly agreed to share its spectrum with U.S. Cellular for a fee, split profits, and allow U.S. Cellular to do most of the network construction and management. *See* SAC ¶¶ 92-97, 100-06; Opposition at 8, 10, 15, 20-21. Again, however, that alleged relationship between the entities at most supports the claim that Defendants continued the substantially similar, and already disclosed, original fraud. It therefore cannot be a material addition to the publicly disclosed information. *See, e.g., United States ex rel. Paulos v. Stryker Corp.*, 762 F. 3d 688, 694-95 (8th Cir. 2014) (equating the substantial similarity and material addition standards); *Cause of Action v. Chicago Transit Auth.*, 815 F.3d 267, 283 (7th Cir. 2016) (same).

What is more, the 2011 NSA does not even contain significant nonpublic information. While the 2011 NSA was never disclosed, U.S. Cellular did provide a 2012 NSA to the FCC in connection with a later auction. SAC ¶ 142. The 2012 NSA also established that U.S. Cellular would share in King Street's spectrum and manage services provided over that spectrum—the key evidence that Plaintiffs-Relators proffer in the 2011 NSA. *See id.* ¶ 143; U.S. Cellular FCC Form 680 Long-Form Application for FCC Auction 901, Amended Ex. 2 - REDACTED, at 1, FCC Applic. File No. 0005476908 (June 23, 2013) ("Pursuant to [the 2012] Network Sharing Agreement . . . [,] King Street agreed to provide 4G services, to be managed by [U.S. Cellular] . . . via King Street's Spectrum.").[5] And the FCC expressly acknowledged that relationship. *See Promoting Interoperability in the 700 MHz Com. Spectrum*, 27 FCC Rcd. 3521, 3536 (Mar. 21, 2012). The main difference between the 2011 and 2012 NSAs appears to be their geographic scope; the 2012 NSA allegedly covered much less territory. SAC ¶¶ 143-45. But the spectrum-sharing and management relationship between U.S. Cellular and King Street is the same in both, and that is the operative fact here for purposes of whether U.S. Cellular was exercising secret, *de facto* control over King Street. As a result, the 2011 NSA does not "add[] in a significant way to the essential factual background" surrounding this case,

5. Available at https://auctionfiling.fcc.gov/form175/search175/index.htm (select "Auction 901," search in search bar for file number 0005476908, select "Winning Bids" tab, select "Show" in "Attachments" column for any entry, then scroll to and click "Amended Exhibit 2 - REDACTED").

United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 307 (3d Cir. 2016).

Plaintiffs-Relators also claim that they conducted independent "investigation and research" that have revealed Defendants' fraud. Opposition at 11. But "relators [are] not an original source [when] they at best verif[y] . . . information contained in" the public record, *United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 479, 423 U.S. App. D.C. 302 (D.C. Cir. 2016) (quotation omitted), and that is all that Plaintiffs-Relators have done here. First, they claim that they "commission[ed] spectrum analysis studies showing U.S. Cellular's use and control of the King Street spectrum." Opposition at 8; SAC ¶ 98-99. But as already discussed, the fact that U.S. Cellular and King Street shared spectrum was already public and even expressly recognized by the FCC. Second, Plaintiffs-Relators "contact[ed] King Street's alleged sales team to determine whether King Street offered wireless services to customers (it did not)" and "obtain[ed] customer service contracts that identified U.S. Cellular as the sole provider in King Street markets." Opposition at 8; SAC ¶ 101. But King Street's annual, public DE compliance reports repeatedly stated that King Street had no customers. SAC Ex. 4 at 12, 23, 34, 45, ECF No. 118-4. Accordingly, Plaintiffs-Relators' investigations provide no more than "background information or collateral research"—insufficient to make them an original source. *Oliver*, 826 F.3d at 479 (quotation omitted).

Finally, Plaintiffs-Relators point to their "locating permits and other documents naming U.S. Cellular (or its affiliates) in connection with the build out of the purported King Street networks" and their finding that "King Street never applied for telephone numbers to be able to offer services to customers, never filed a Form 499A identifying the jurisdictions where it offered services, and never even filed for a Form 499 number." Opposition at 8-9; SAC ¶¶ 111, 112-13. But those permits, documents, and forms are all public, and "[a]ny member of the public could have" looked them up. *Oliver*, 826 F.3d at 480 (quoting *U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 523 (3d Cir. 2007)). As a result, they cannot qualify Plaintiffs-Relators for original-source status. *Id.*

IV. CONCLUSION

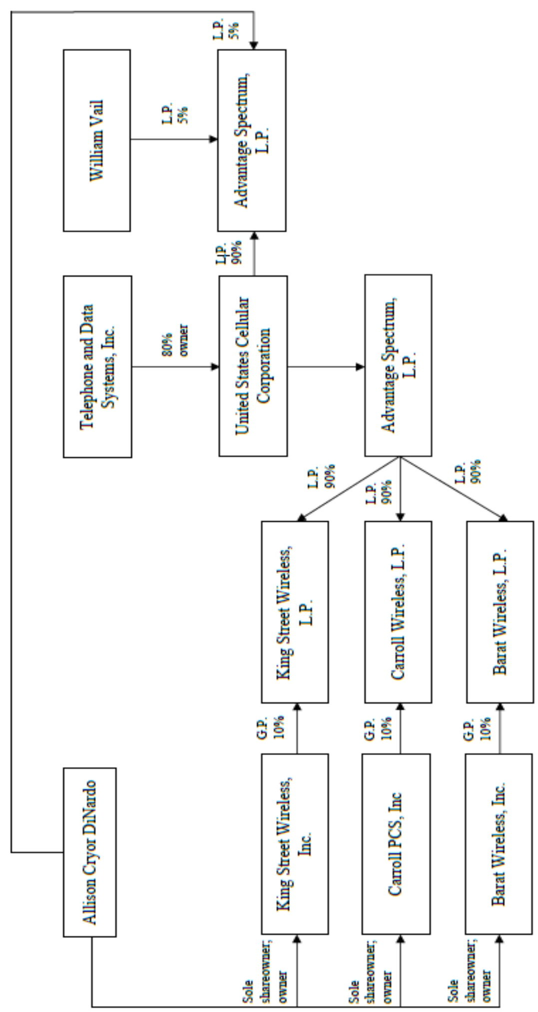
For these reasons, the court will GRANT Defendants' Motions to Dismiss, ECF Nos. 148, 149. A corresponding order will accompany this Memorandum Opinion.

Date: March 22, 2023

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

Appendix B

Figure 1 - Alleged Relationship Between Defendants



Source: Second Amended Complaint ¶¶ 23-32, ECF No. 118. “G.P.” stands for general partner. “L.P.” stands for limited partner.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 22, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-cv-2071 (TSC)

UNITED STATES OF AMERICA, EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,

Plaintiffs-Relators,

v.

UNITED STATES CELLULAR CORPORATION, *et al.*,

Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, ECF No. 165, the Motion to Dismiss of Defendants King Street Wireless, [*20] L.P., King Street Wireless, Inc., and Allison Cryor Dinardo, ECF No. 148, is hereby GRANTED; and Defendants United States Cellular Corporation, USCC Wireless Investment, Inc., and Telephone and Data Systems, Inc.'s Motion to Dismiss, ECF No. 149, is hereby GRANTED. Accordingly, the case is hereby DISMISSED. This is a final appealable order.

Date: March 22, 2023

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED APRIL 8, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7044

September Term, 2024
1:20-cv-02071-TSC
Filed On: April 8, 2025

UNITED STATES OF AMERICA, EX REL. MARK J. O'CONNOR AND SARA F. LEIBMAN,

and

MARK J. O'CONNOR AND SARA F. LEIBMAN,

Appellants,

v.

USCC WIRELESS INVESTMENT, INC., *et al.*,

Appellees.

BEFORE: Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on March 27, 2025, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX E — DENIAL OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED APRIL 8, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7044

September Term, 2024
1:20-cv-02071-TSC
Filed On: April 8, 2025

UNITED STATES OF AMERICA, EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,

and

MARK J. O'CONNOR AND SARA F. LEIBMAN,

Appellants,

v.

USCC WIRELESS INVESTMENT, INC., *et al.*,

Appellees.

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F — MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED APRIL 16, 2025

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7044
September Term, 2024
1:20-cv-02071-TSC

UNITED STATES OF AMERICA, EX REL. MARK J. O'CONNOR AND SARA F. LEIBMAN,

and

MARK J. O'CONNOR AND SARA F. LEIBMAN,

Appellants

v.

USCC WIRELESS INVESTMENT, INC., ET AL.,

Appellees

Appendix F

MANDATE

In accordance with the judgment of February 11, 2025, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX G — RELEVANT STATUTORY AND REGULATORY PROVISIONS

31 U.S.C. § 3729, False Claims

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the

Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages. If the court finds that

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions. For purposes of this section

(1) the terms “knowing” and “knowingly”

(A) mean that a person, with respect to information

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim”

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.

Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.

This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730(b)

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.1 The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

31 U.S.C. § 3730(e)(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) 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.

(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.

Appendix G

The version of 31 U.S.C. § 3730(e)(4), as amended in 1986, read:

(A) 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.

(B) For purposes of this paragraph, "original source" means 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.

47 C.F.R. § 1.2110 (2014), Designated entities

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Eligibility for small business and entrepreneur provisions—

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

(2) Aggregation of affiliate interests. Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1 to paragraph (b)(2): ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in

DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2 to paragraph (b)(2): ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions—

* * *

(iv) Applicants or licensees with material relationships—

* * *

(A) Attributable material relationships. An applicant or licensee must attribute the gross revenues (and, if applicable, the total assets) of any entity, (including the controlling interests, affiliates, and affiliates of the controlling interests of that entity) with which the applicant or licensee has an attributable material relationship. An applicant or licensee has an attributable material relationship when it has one or more arrangements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

* * *

(c) Definitions—

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interests.

(i) For purposes of this section, controlling interest includes individuals or entities with either de jure or de facto control of the applicant. De jure control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) The entity plays an integral role in management decisions.

(ii) Calculation of certain interests.

(A)* Fully diluted requirement.

(1) Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(2) Rights of first refusal and put options shall not be calculated on a fully diluted basis for purposes of determining de jure control; however, rights of first refusal and

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* Note to paragraph (c)(2)(ii)(A): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

put options shall be calculated on a fully diluted basis if such ownership interests, in combination with other terms to an agreement, deprive an otherwise qualified applicant or licensee of de facto control.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of the applicant shall be considered to have a controlling interest in the applicant. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant. The personal net worth, including personal income of the officers and directors of an applicant, is not attributed to the applicant. To the extent that the officers and directors of an applicant are affiliates of other entities, the gross revenues of the other entities are attributed to the applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

* * *

(5) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v)[**] Affiliation arising under stock options, convertible debentures, and agreements to merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

** Note to paragraph (c)(5)(v): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

Example 1 to paragraph (c)(5)(v). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

* * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements, including oral agreements, establishing, as applicable, de facto or de jure control of the entity or the presence or absence of impermissible and attributable material relationships. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates, and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114..

* * *

(n) Annual reports. Each designated entity licensee must file with the Commission an annual report within five business days before the anniversary date of the designated entity's license grant. The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. Annual reports will be filed no later than, and up to five business days before, the anniversary of the designated entity's license grant.