No. 25-893

IN THE

Supreme Court of the United States

ROBERT V. SMITH,

Petitioner,

v.

JAY A. ODOM, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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ARGUMENT

Petitioner asks this Court to grant certiorari for the purpose of resolving a multi-circuit conflict and to resolve the conflict in a manner that will result in reversal of the lower court decision. The petition should be denied for two reasons:

I. Petitioner materially misstates the position of the Eleventh Circuit, and any conflict among the circuits is irrelevant to the decision below.

II. Petitioner's argument is based upon a single circuit's construction of a statutory subsection that is of little national significance and does not justify this Court's attention.

I. The decision below reasonably construes the original source clause of the False Claims Act and is consistent with decisions of all other circuits.

The essence of Petitioner's argument is that the Seventh Circuit has misconstrued the "original source" clause of the False Claims Act in a manner inconsistent with the construction given the clause by the First, Third, Sixth, Tenth, and D. C. Circuits, and that the Eleventh Circuit has adopted the position of the Seventh Circuit. In support of its argument, Petitioner attributes to the Eleventh Circuit a position not taken by the court in the case below or in any other Eleventh Circuit opinion.

The Federal False Claims Act requires dismissal of a *qui tam* action if substantially the same allegations

alleged in the action had previously been publicly disclosed unless the relator is an "original source" of the information. 31 U.S.C. 3730(e)(4)(A). The Act defines an original source as an individual who has knowledge that is independent of and materially advances the publicly disclosed allegations. 31 U.S.C. 3730(e)(4)(B). Petitioner states that the Seventh Circuit in *Bellevue v. Universal Health Services of Hartgrove Inc.,* 867 F.3d 712 (7th Cir. 2017) diverged from the position of six other circuits and held that if allegations are substantially similar to public disclosures, they cannot materially add to what the public already knows and, therefore, the relator cannot be an original source. Pet 19. The Petition is on track up to this point but derails when it asserts that the Eleventh Circuit has adopted the position of the Seventh Circuit.[1]

The decision of the court below is based upon the particular facts of the case and was both expressly and implicitly consistent with the decisions of other circuits cited by Petitioner. Petitioner alleged that defendants Odom and Okaloosa County violated the False Claims Act by falsely certifying that the County had not granted any fixed–base operator an exclusive right to offer services at a county-owned airport. App 2. The opinion below noted that the same allegations had previously been made in two separate news publications. App 4-5. However, Petitioner claimed that he qualified as an original source because he had provided independent information that materially added to the publicly disclosed information.

1. One would think that if the Eleventh Circuit elected to side with the Seventh Circuit's position articulated in *Bellevue,* and if that position is at odds with all other circuits that have addressed the question, the Eleventh Circuit would have cited *Bellevue* but it did not do so in the opinion below and has not done so in any other case addressing the original source provision.

That information, according to Petitioner, was that defendant Odom used strawmen to acquire one of the only two operators, which were later merged into a single operator. App 3, 90.

The court below engaged in the 3-part analysis set forth in the False Claims Act to determine whether the public disclosure bar prohibits a person from sustaining a *qui tam* action. App 9. First, it found that the fraud claims being alleged by Petitioner had already been disclosed in two separate news articles. Second, it concluded that the fraud allegations in the *qui tam* complaint were substantially the same as the allegations in the news articles. The third part of the analysis asks whether the *qui tam* plaintiff is an original source of the information and thus excepted from the public disclosure bar. The essence of Petitioner's argument is that the court below erroneously merged the third part of the analysis into the first two parts:

> The Eleventh Circuit's approach under which any allegations that follow public disclosures sufficient to support an "inference of fraud" are categorically relegated to "background information and additional details" cannot be reconciled with congressional intent.

Pet. 15. The statement fails to cite any page in the opinion below in which such a position is articulated. In fact, the Eleventh Circuit has not adopted such an interpretation in this or any other case.

Nothing in the opinion below suggests the court was following a categorical policy such as suggested by Petitioner. Rather, the court based its decision on

analysis of the particular facts of the case. The court determined that information regarding alleged strawmen being involved in the acquisition of one of the two airport operators was "background information and additional details" and "not material additions." App 12. That conclusion was reasonable. The fraud was alleged to have occurred when the County certified that it was in full compliance with federal requirements including that it had not granted an exclusive right to a single fixed-base operator. Whether or not strawmen were involved in the earlier acquisition of one of the companies was irrelevant because the county and the FAA were already aware of the common ownership at the times the acquisition was approved and the certification was made. App 2, 4-5. Consequently, information regarding strawmen being involved in an earlier transaction added nothing material to the publicly disclosed information.

Of the five circuit cases cited favorably by Petitioner on the original source issue, four of the cases found that the *qui tam* plaintiffs did not meet the definition of original sources. Language in the opinions echoed portions of the opinion below. *See United States ex rel. Winkelman the CVS Caremark Corp.* 827 F.3d 201, 213 (1st Cir. 2016) ("a relator who merely adds detail or color to previously disclosed elements of an alleged scheme is not materially adding to the public disclosures."); *United States ex rel. Reed v. KeyPoint Government Solutions*, 923 F.3d 729, 758 (10th Cir. 2019) ("Allegations do not materially add to public disclosures when they provide only background information and the details relating to the alleged fraud they must add value to what the government already knew."); *United States ex rel. Maur v. Hage-Korban,* 981 F.3d 516, 526 (6th Cir. 2020) ("Because those prior

disclosures put the government on notice of the fraud alleged, adding new details to describe essentially the same scheme was insufficient even to survive the more lenient post-amendment public-disclosure bar.") (internal quotation marks and brackets omitted); *United States ex rel. O'Connor v. U.S. Cellular Corp.*, 153 F.4th 1272, 1281 (D.C. Cir. 2025) ("merely adding 'detail or color to previously disclosed elements of an alleged scheme' is not enough. [Citation omitted.] Nor is merely providing 'background information' or additional 'specific examples' of a disclosed fraud.")

Petitioner's "categorical policy" argument would have applied as well to all the above cases and to any other case in which a court finds that the new information provided by a *qui tam* plaintiff is nothing more than detail or background information that provides no meaningful addition to what is already known. Whether or not such information is sufficient to qualify the *qui tam* plaintiff as an original source depends upon the nature of the new information and whether it materially adds information necessary for a fraud case. Petitioner fails to even to attempt to explain why the strawmen information did so.

The one case cited by Petitioner that found the *qui tam* plaintiff to be an original source was factually distinguishable from the case at bar. In *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F. 3d 294 (3d Cir. 2016), the plaintiff alleged that the defendants had fraudulently certified that their fishing vessels were controlled and commanded by United States citizens as required by an international treaty. The fact that the vessels were not owned or commanded by United States citizens had previously been disclosed in two publications.

The plaintiff uncovered and disclosed to the government the details of who perpetrated the fraud and how it was done. The court found that the information materially added to the fraud case because proof of fraud under the False Claims Act must be alleged with particularity pursuant to Rule 9(b), including "the who, why, when, where and how" the fraud was perpetrated. The key distinction between the *Moore* case and the case-at-bar is that in *Moore,* the details regarding the identity and nationality of the owners and captains of the vessels which had not been publicly disclosed and how they perpetrated the fraud, were essential to proving the fraud. In the case-at-bar, both Okaloosa County and the FAA knew the two airport operators were under common ownership at the time the County approved the joint operation and at the time the County certified compliance, and the use of so-called strawmen in the earlier acquisition was unrelated to the fraud itself and did not materially add to the government's ability to prove fraud.[2]

Nothing in the opinion below requires a court to disregard newly disclosed information that, as in *Moore,* materially adds to the public information and the Government's ability to make a case of fraud. That was not the record with which the lower court was confronted. If Petitioner prevails, courts would be forced

2. Respondents do not concede that the approval was a violation of federal requirements. The airport director was reported to have stated that that fuel sales data suggested the airport could not sustain two operators and the FAA told the County "the acquisition of a competing [fixed-base] operator, even if it results in a single [fixed-base] operator," is a "prevalent practice" that "does not in itself constitute" a violation of grant assurances. App 3-4.

to sustain a *qui tam* complaint if a relator provided any new information to the government, regardless of how tangential to the claimed fraud. The public disclosure bar would be significantly weakened and Congress' intent that the public disclosure bar discourage *qui tam* suits by exploitive plaintiffs would be frustrated.

II. Petitioner's argument is based upon a single circuit's construction of a statutory subsection that is of little national significance and does not justify this Court's attention.

Petitioner asks the Court to grant certiorari to resolve an apparent conflict between the position of a single circuit and several other circuits regarding a minor nuance in the interpretation of a sub-sub-subsection of the False Claims Act. The issue never even arises until the Justice Department has reviewed a case and determined that it does not justify the Department's involvement, which is what occurred here.[3] The primary distinction between the two positions involves the frequency with which individual private plaintiffs are able to enjoy a financial windfall. Only a handful of *qui tam* plaintiffs are ever affected, and they have no vested interest at stake. The matter has no national breadth and is of little or no national importance.

3. In this case, which was pending before the District Court for several years, the Government never intervened at any level of the proceedings, including after Defendants filed a Motion to Dismiss based on public disclosure. At no time, including through two separate appeals, has the Government chose to intervene or oppose any of Defendants' filings or positions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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