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Who Needs to Know? The Seventh Circuit Accepts Information Sent to Government as Publicly Disclosed in *Cause of Action v. Chicago Transit Authority*

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WHO NEEDS TO KNOW? THE SEVENTH CIRCUIT ACCEPTS INFORMATION SENT TO GOVERNMENT AS PUBLICLY DISCLOSED IN *CAUSE OF ACTION v. CHICAGO TRANSIT AUTHORITY*

Abstract: On February 29, 2016, the United States Court of Appeals for the Seventh Circuit in *Cause of Action v. Chicago Transit Authority* held that information disclosed to a government official and acted upon by that official has been publicly disclosed, barring a *qui tam* action from being brought under the False Claims Act. Several other circuits, including the First, Fourth, and Sixth, in contrast, have all interpreted the public disclosure bar within the False Claims Act to require a disclosure of information beyond the government. This Comment argues that the majority of circuit courts have correctly interpreted the False Claims Act. Barring *qui tam* actions when the government is in possession of information is in line with the now abolished government knowledge bar. Congress's 1986 amendment to the False Claims Act intended to allow meritorious *qui tam* actions and allow citizens to ensure the government holds those who commit fraud against it accountable.

INTRODUCTION

Watchdog agencies and individual whistleblowers rely on the False Claims Act ("FCA" or "the Act") and its *qui tam* provisions to expose fraud against the United States government.[1] The potential for financial windfall through a private action brought under the FCA carries with it the specter of parasitic lawsuits.[2] An important tool for ensuring that only legitimate individ-

[1] *See* 31 U.S.C. § 3730 (2012) (permitting private citizens to prosecute instances of fraud through the filing of civil actions as representatives of the government); Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 23–28 (1998) (discussing the evolution of the False Claims Act). The False Claims Act *qui tam* provisions incentivize whistleblowing on behalf of the federal government by entitling whistleblowers to a portion of the damages the government recovers from successful actions against fraud. *See* 31 U.S.C. § 3730(b) (allowing whistleblowers to initiate lawsuits for fraud on behalf of both themselves and the United States government); *id.* § 3730(c) (outlining the various responsibilities and rights of the parties once an action is brought by a citizen); *id.* § 3730(d) (awarding a percentage of recovered funds from successful *qui tam* actions to the private citizen who brought the action). *See generally* Valerie R. Park, Note, *The False Claims Act,* Qui Tam *Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061 (1991) (discussing the FCA *qui tam* provisions and the FCA's overall structural design).

[2] *See* United States *ex rel.* Kinney v. Stoltz, 327 F.3d 671, 674 (8th Cir. 2003) (indicating that the False Claims Act was not intended to allow those without valuable firsthand knowledge to profit by bringing an action); *see also* Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d

uals are rewarded for bringing *qui tam* actions is the public disclosure bar.[3] The public disclosure bar prohibits *qui tam* actions from being brought once evidence or an allegation of fraud is widely circulated.[4]

In February 2016, in *Cause of Action v. Chicago Transit Authority*, the U.S. Court of Appeals for the Seventh Circuit held that information disclosed to and acted upon by a responsible public employee had effectively entered the public domain, triggering the public disclosure bar.[5] The Seventh Circuit reasoned that the primary goal of publicly disclosing instances of fraud is to alert authority figures, so they may take the necessary steps to investigate and rectify the situation.[6] In contrast, the U.S. Court of Appeals for the First Circuit, among other circuits, has determined that informing only government officials

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1032, 1048 (8th Cir. 2002) (noting a policy of barring parasitic claims). *Qui tam* claims are considered parasitic if they do not contribute new knowledge or information of claims of fraud to the government, but rather are founded on information of fraud already within the government's possession. *See* United States *ex rel*. S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 324–25 (1st Cir. 1994) (characterizing a parasitic *qui tam* suit as one where a relator relies exclusively on information ascertained from a previously litigated case to sustain an allegation of fraud). A lawsuit is considered to be founded on government information when the pertinent facts or revelations are taken entirely from either documents created by or an investigation conducted by the government. *See* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 241–42 (1995) (discussing the history of the False Claims Act and the prominence of parasitic *qui tam* claims, which led to a 1943 amendment designed to curtail those suits). The potential for individuals to bring causes of action under the False Claims Act solely to obtain an undeserved windfall has significantly shaped the evolution and amendment of the legislation in Congress. *See generally id.* (detailing the various amendments to the False Claims Act as well as the floor debates, judicial interpretations, and conference reports which accompanied them).

[3] *See* 31 U.S.C. § 3730(e)(4)(A) (directing courts to dismiss a *qui tam* suit if the alleged transgressions have previously been publicly disclosed); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) (noting that the 1986 amendment to the False Claims Act was intended to strike a balance between incentivizing private citizens to bring more *qui tam* actions, which had been stymied by the 1943 amendment, while simultaneously restricting the parasitic lawsuits which necessitated the amendment in 1943).

[4] *See* U.S.C. § 3730(e)(4)(A) (barring suits which rely on information disseminated to the public through a news outlet); *see also* United States *ex rel.* Jones v. Collegiate Funding Servs., Inc., 469 F. App'x 244, 255–57 (4th Cir. 2012) (dismissing a *qui tam* action brought under the False Claims Act where SEC filings by the allegedly dishonest company were considered administrative reports, due in part to their public availability, and therefore triggered the public disclosure bar).

[5] *See* 815 F.3d 267, 276–80 (7th Cir. 2016) (discussing the appellant's concession that the audit report containing the pertinent information to its claim was in the public domain and subsequently determining that the information had been publicly disclosed).

[6] *See Cause of Action*, 815 F.3d at 275–76 (determining that the responsible government agency had not only obtained information concerning a possible instance of fraud, but had investigated it, achieving the principal objective of a public disclosure); *see also* Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 913–14 (7th Cir. 2009) (reasoning that the public disclosure bar is in place to prevent lawsuits that would serve no purpose because the relevant government agency or official has already been made aware of the fraud).

of fraudulent activity does not constitute a public disclosure barring an action, thus affirming the FCA's deliberate structuring to incentivize whistleblowing.[7]

This Comment argues that the Seventh Circuit has erred in allowing mere government knowledge and preliminary action on alleged fraudulent activity to constitute a public disclosure.[8] Though bringing instances of deception to the attention of individuals or agencies with the power to prosecute offenders and rectify the situation accomplishes one major purpose of the False Claims Act, which is to combat fraud, it simultaneously falls short of addressing another, which is to prompt action.[9] Congress enacted the False Claims Act to help ensure honesty and transparency not only in private companies, but also in the government's interactions with those companies accused of fraud.[10] Without true public disclosure of alleged incidents, taxpayers have no way of knowing if their public representatives are honestly working to combat fraud, or sweeping deceit under the rug.[11] Barring *qui tam* actions only when information ex-

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[7] *See* United States *ex rel.* Wilson v. Graham Cty. Soil & Water Conservation Dist., 777 F.3d 691, 696–97 (4th Cir. 2015) (stating that a disclosure must be made outside the confines of the government to be considered public); United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 729 (1st Cir. 2007), *overruled on other grounds by* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008) (noting that Congress has made an explicit distinction between the government and the public, from which it follows that for information to be publicly disclosed, it must have been circulated beyond government officials); Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1043 (10th Cir. 2004) (distinguishing clearly between the government and the public domain when determining if information has been publicly disclosed).

[8] *See infra* notes 75–83 and accompanying text.

[9] *See* S. REP. NO. 99-345, at 4 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5271 (discussing the need to amend the False Claims Act to encourage higher levels of government enforcement and increase the recovery of funds lost to fraud); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 91 (1990) (discussing Congress's delegation of the power to initiate civil lawsuits on behalf of the government to private citizens); Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525, 549 (noting the 1986 amendment to the FCA's deliberate insurance that an individual providing information of fraud to the government may bring a *qui tam* action if the government disregards or dismisses the fraud in question). *See generally* 31 U.S.C. § 3730 (including language that allows private citizens to prosecute allegedly fraudulent companies or individuals, should the government decline to do so).

[10] *See United States ex rel. Rost*, 507 F.3d at 730 (interpreting Congress's intent, in replacing the government knowledge bar with the public disclosure bar through the 1986 amendment to the False Claims Act, as prohibiting the government from discretely and possibly unfairly dealing with deceitful companies). Congress explicitly contemplated the many instances of government inaction, either intentional or inadvertent, with regard to the pursuit of fraudulent actors when discussing the 1986 amendment to the FCA. *See* H.R. REP. NO. 99-660, at 22–23 (1986) (expressing the intent to encourage the pursuit of fraudulently lost funds by the government by allowing *qui tam* suits in cases where the government had dormant or concealed information); S. REP. NO. 99-345, at 23–24, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89 (discussing Congress's hope that eliminating language that imposed a bar on *qui tam* suits whenever the government had any knowledge of the information upon which the allegations were based would lead to more actions by private citizens).

[11] *See* United States *ex rel.* Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 684–85 (D.C. Cir. 1997), *abrogated on other grounds by* United States *ex rel.* Davis v. District of Columbia, 679 F.3d 832 (D.C. Cir. 2012) (exploring Congress's motivations for changing the language of the False Claims

posing fraud has been disseminated to the public at large, rather than to a government official alone, allows knowledgeable private citizens to provoke governmental action in instances where, due to administrative secrecy, a constituency could not otherwise hold their representatives accountable or publicly pressure agencies to pursue perpetrators of fraud.[12]

Part I of this Comment develops the historical framework upon which the modern False Claims Act is built, and provides essential background information regarding the Seventh Circuit case at the center of the controversy.[13] Part II of this Comment highlights the discrepancies in the Seventh Circuit's interpretation of the public disclosure bar and considers its interpretation, in addition to the one more widely accepted by other Circuits.[14] Part III of this Comment analyzes the effects each of those interpretations has, and whether those effects align with the policy goals evident from Congress's amendments to the False Claims Act.[15]

I. HISTORY OF THE FALSE CLAIMS ACT AND *CAUSE OF ACTION*

The FCA protects the federal government in instances of fraud.[16] The Act provides the methods through which the government can pursue fraudulent actors in order to reclaim lost funds and impose punishments.[17] Section A of

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Act to allow actions brought based upon information the government may possess, so long as that information hasn't been disseminated to the masses); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992) (determining one goal of the 1986 amendment to the FCA to be encouraging government action rather than complacency when dealing with cases of fraud).

[12] *See United States ex rel. Doe*, 960 F.2d at 323 (expressing the desirability of the potential for *qui tam* actions from private citizens as a deterrent to government concealment or non-pursuance of fraud); Erickson *ex rel*. United States v. Am. Inst. of Biological Sci., 716 F. Supp. 908, 917 (E.D. Va. 1989) (chronicling the legislative history of the FCA and determining that in 1986, Congress plainly intended to bolster the government's insufficient pursuit of instances of fraud by emboldening private citizens to bring more *qui tam* suits); S. REP. NO. 99-345, at 23–24, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89 (expressing Congress's desire to encourage citizens' enforcement of the FCA in hopes of recovering a greater percentage of funds lost to fraud).

[13] *See infra* notes 16–49 and accompanying text.

[14] *See infra* notes 50–74 and accompanying text.

[15] *See infra* notes 75–83 and accompanying text.

[16] See Joel D. Hesch, *The False Claims Act Creates a "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 363–64 (2014) (examining the effectiveness of the FCA at its main objective of preventing and punishing fraud against the government); Oparil, supra note 9, at 526 (discussing the overall purpose of the FCA as a tool against corruption and fraud associated with the government).

[17] *See* Hesch, *supra* note 16, at 364 (highlighting the *qui tam* provisions within the FCA that have allowed private persons to sue fraudulent actors on behalf of the government and subsequently recover large sums); Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 462–66 (1998) (discussing the FCA's provisions for the government to recover treble damages from offenders who knowingly made a false claim for funding to the government). From October 1, 1987, through September 30, 2016, the total amount recovered through both *qui tam* and non-*qui tam* fraud action judgments and settlements exceeded fifty-

this Part develops the history of the False Claims Act, dissecting several amendments and the reasons Congress chose to make them.[18] Section B of this Part explores the factual and procedural history of *Cause of Action*.[19]

A. History of the False Claims Act

The United States government relies on the False Claims Act to recover losses that result from fraud committed against it.[20] The modern False Claims Act is derived primarily from the Act of March 2, 1863 that was enacted as a means of combatting the widespread and increasingly commonplace instances of fraud being committed against the military.[21] The FCA allows the United States Attorney General to bring an action against any person who commits fraud against the government by imposing liability on individuals who consciously attempt to defraud the government in the forms of both a significant civil penalty and treble damages.[22] The FCA also includes *qui tam* provisions that allow private citizens to bring actions on the government's behalf to remedy instances of fraud against the government.[23]

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three billion dollars. *See* CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—OVERVIEW (2016) (providing a statistical breakdown of funds recovered through the FCA).

[18] *See infra* notes 20–36 and accompanying text.

[19] *See infra* notes 37–49 and accompanying text.

[20] *See* 31 U.S.C. § 3729(a)(1) (2012) (providing the government with the authority to pursue those who commit fraud against it and potentially recover treble damages). The FCA is one of the more robust legal instruments in the federal government's repertoire for combatting corruption. *See* S. REP. NO. 99-345, at 4, *as reprinted in* 1986 U.S.C.C.A.N. 5269 (discussing the FCA's high usage frequency due to its successfulness in both deterrence and recovering funds).

[21] *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 547 (1943) (emphasizing the original FCA's primary objective of curtailing rampant wartime fraud against the government); Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining* Qui Tam *Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 224 (2012) (discussing the Act's origin, including President Abraham Lincoln's involvement, and enactment to punish those taking advantage of the government by defrauding the military during wartime); *see also Cause of Action*, 815 F.3d at 272 (noting that the False Claims Act was first enacted in 1863 as a means of stymying widespread fraud and corrupt business practices in Civil War defense contracts). *See generally* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. §§ 3729–3733 (2012)) (deterring and prosecuting instances of fraud against the government with a *qui tam* provision that allowed any citizen to bring a privately sponsored action, much like the modern statute, but which entitling those relators to half of any recovered funds as well as half of any damages assessed).

[22] 31 U.S.C. §§ 3729–3730(a); *see* Meador & Warren, *supra* note 17, at 462–66 (discussing the FCA's provisions allowing the United States Attorney General to recover damages and impart penalties on offenders who knowingly made false claims to receive payments).

[23] *See* 31 U.S.C. § 3730(b)–(h) (providing for private individuals to bring actions under the FCA); Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1703–04 (2015) (providing a succinct and detailed summary of the *qui tam* provisions of the FCA); Hesch, *supra* note 16, at 364 (describing the high percentage of FCA actions initially brought by private persons); Meador & Warren, *supra* note 17, at 466–67 (detailing the process by which a private individual can assert a claim under the Act). *Qui tam* is a shortened phrase, derived from the longer Latin expression "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which translates to "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency

The FCA incentivizes whistleblowers to come forward and expose instances of fraud, either within or against the government, through a provision entitling the relator in a successful case to some percentage of the recovered funds.[24] The ultimate goal of the False Claims Act's *qui tam* provision is to encourage persons with knowledge of fraud committed against the United States to come forward with their information so that the government can address and end the fraud.[25]

Because the False Claims Act directs the government to shoulder the primary responsibility for prosecuting the action, relators could theoretically take advantage of the law by bringing a lawsuit based entirely on the government's own information.[26] This exploitation of the *qui tam* provision led Congress to

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of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000) (providing the extended Latin phrase and English translation). *Qui tam* action is defined as "an action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY (10th ed. 2014). Private citizens bringing a civil action under the False Claims Act must first serve the government with a copy of their complaint, along with some representation of their evidence of fraud. 31 U.S.C. § 3730(b)(2). The documents are kept sealed for a time period of at least sixty days, during which the government may choose to intervene and pursue the action before the defendant is served the complaint. *Id.* Should the government choose to proceed with the case, it assumes the title of primary prosecutor, with the relator being allowed to remain involved as a party, but with a reduced role subject to restrictions and any potential settlement agreed by the government. *Id.* § 3730(c)(1)–(2). If the government refuses to move forward with an action, the relator may still continue alone, and the government retains the right to both receive updates on court proceedings and interject itself into the case later, provided it can show good reason for doing so. *Id.* § 3730(c)(3). A private party who brings a *qui tam* suit is known as a relator. *See Vt. Agency of Nat. Res.*, 529 U.S. at 768 (indicating that the use of the phrases private person and relator are interchangeable); *Relator*, BLACK'S LAW DICTIONARY, *supra*.

[24] *See* 31 U.S.C. § 3130(d) (providing for an award to be assessed to successful *qui tam* relators, and further providing guidance on the assessment of awards based on factors including whether or not the government intervenes, how significant the relator's contributions of information were, and whether or not the relator was previously conspiring to commit a fraudulent act); *Cause of Action*, 815 F.3d at 272 (discussing the potential for successful whistleblowers to collect a percentage of recovered funds); Hesch, *supra* note 21, at 219–20 (discussing the percentage range of relator awards, with relators receiving between fifteen and twenty-five percent for cases in which the Department of Justice assumed control). Relators who blow the whistle in particularly lucrative instances of fraud may find themselves in line for seven figure payouts. *See* United States *ex rel.* Johnson-Pochardt v. Rapid City Reg'l Hosp., 252 F. Supp. 2d 892, 905 (D.S.D. 2003) (determining the relator's assistance to the Attorney General to be immensely valuable, and accordingly awarding the relator twenty-four percent of the recovered funds, equivalent to $1,566,000).

[25] *See* Hesch, *supra* note 21, at 221 (discussing the overall purpose of the False Claims Act and the need for whistleblowers to shed light on instances of fraud); Oparil, *supra* note 9, at 526–27 (lamenting the reduced effectiveness of the FCA towards the second half of the twentieth century at its main objective of uncovering and prosecuting those who defraud the government). The offering of a share of any funds recovered by a *qui tam* action effectively serves as a bounty on fraudulent actors and illustrates the government's strong desire to induce whistleblowing and end the fraud. *See* Hesch, *supra* note 21, at 230 (detailing Congress's desire to persuade private persons to bring actions under the FCA).

[26] *See United States ex rel. Marcus*, 317 U.S. at 545–47 (discussing at length the language of the statute that did not place any restrictions on what classes of people may or may not bring an action); Meador & Warren, *supra* note 17, at 459 (discussing the effect of the Supreme Court's interpretation

amend the False Claims Act in 1943, precluding *qui tam* actions that relied on facts or evidence already known to the government at the time the action was brought.[27] This correction had the effect of severely limiting the rights of parties beyond the federal government to sue under the False Claims Act, and so Congress re-amended the Act in 1986 to allow meritorious suits to proceed without issue.[28] Courts and legal scholars know the major result of the 1986 amendment to the Act as the public disclosure bar.[29] The False Claims Act was amended once again in 2010, significantly modifying the public disclosure bar,

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of the original False Claims Act that led to rampant parasitic claims and undeserved windfalls until Congress amended the Act in 1943). The Supreme Court in 1943 in *United States ex rel. Marcus v. Hess* did not expressly condone the exclusive use of information obtained from the government to bring a *qui tam* action, but did note that the current statutory language intentionally failed to require the relator to be an original source of knowledge. 317 U.S. at 546 (emphasizing the words "any person," present in the statute without any qualifiers). The Court stated that even a government employee involved in criminal fraud proceedings could bring a parallel civil action under the False Claims Act, bearing the risk of paying for the civil litigation, and collect a handsome reward as a result. *See id.* (stating that even a district attorney could file a claim under the FCA, after learning about fraud through the course of his official work).

[27] *See* False Claims Act, ch. 377, 57 Stat. 608–09 (1943) (codified as amended at 31 U.S.C. § 232(C) (1946)) (barring suits where the knowledge or evidence of fraud relies upon information in the government's possession); Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 294 (2010) (discussing Congress's decision to amend the FCA in an attempt to curtail parasitic lawsuits, especially those where the relator has simply taken information from the government to bring a civil claim); Meador & Warren, *supra* note 17, at 459–60 (chronicling Congress's amendment to the FCA in 1943 and the resultant bar to suits brought based on government knowledge).

[28] *See* 31 U.S.C. § 232(C) (including restrictive language that prevented any FCA suit based upon information in the government's possession); S. REP. NO. 99-345, at 4–5, *as reprinted in* 1986 U.S.C.C.A.N. 5269–70 (highlighting Congress's concerns that the previous amendments, made in 1943, were stifling meritorious *qui tam* actions in addition to parasitic suits); *see also* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1106–07 (7th Cir. 1984) (discussing the 1943 bar as an almost immediate response to the Supreme Court's allowance of parasitic lawsuits); Meador & Warren, *supra* note 17, at 460 (detailing Congress's 1986 amendment to the FCA in the wake of an instance where an original source who provided the government with information was barred from bringing an action).

[29] *See* 31 U.S.C. § 3730(e)(4)(A) (1994) (public disclosure bar); *Graham Cty.*, 559 U.S. *passim* (referring repeatedly to the "public disclosure bar" in the FCA); Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY U. L. REV. 111, 117 (2006) (discussing Congress's replacement of the government knowledge bar with the public disclosure bar). The public disclosure bar provides:

> 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.

31 U.S.C. § 3730(e)(4)(A). The public disclosure bar has been implemented to dissuade individuals from filing parasitic *qui tam* actions. *See* United States *ex rel.* Gear v. Emergency Med. Assocs. of Ill., Inc., 436 F.3d 726, 727–28 (7th Cir. 2006) (analyzing the text as well as intention behind the implementation of the public disclosure bar).

but that amendment is not applicable to this dispute.[30] The public disclosure bar prevents any court from having jurisdiction over an action brought under the False Claims Act if the information relied upon to bring the action has been previously disseminated to the masses.[31] The government does not offer a reward for information spread to the public at large but instead aims FCA incentives at individuals with personal knowledge of fraud against the government, so they may come forward and help end it.[32]

The Seventh Circuit uses a three-step analysis in determining whether an action is barred due to public disclosure.[33] Fist, the court determines whether the facts or information used in the formulation of the complaint have been publicly disclosed through an enumerated channel.[34] If the allegations in the complaint are found to have been publicly disclosed, it must be determined whether the relator's lawsuit is based upon those publicly disclosed facts.[35]

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[30] *See* 31 U.S.C. § 3730(e)(4)(A) (2012) (containing the amended language of "substantially the same" within the public disclosure bar); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (amending the FCA to remove the phrase "based upon" and replace it with the phrase "substantially the same"). The Supreme Court has declined to retroactively apply amended statutes, specifically with regard to the False Claims Act, unless Congress has expressed a clear desire for a change to apply prior to its formal adoption. *See Graham Cty.*, 559 U.S. at 283 n.1 (mentioning the enactment of the 2010 amendment to the FCA, and noting that, due to an omission of any intent for the amendment to apply retroactively, the statute version in place at the time the case was argued is applied); *see also* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (discussing the potential retroactive application of the 1986 amendment to the False Claims Act and strongly deciding against any retroactive application, due to an abundance of previous precedent and no indication that Congress desired the amended statute be applied as such).

[31] *See* 31 U.S.C. § 3730(e)(4)(A) (text of public disclosure bar); *see also* David M. Nadler & Justin A. Chiarodo, *The Public Disclosure Bar: New Answers and Open Questions*, PROCUREMENT LAW., Fall 2011, at 1 (discussing the origination and subsequent evolution of the public disclosure bar as it sought to strike a balance between dissuading parasitic *qui tam* actions and encouraging legitimate whistleblowing). The 1986 amendment to the FCA has resulted in confusion among courts as to whether the bar is or is not one of subject matter jurisdiction. *See infra* note 47 and accompanying text.

[32] *See* Hesch, *supra* note 21, at 221 (discussing the overall goal of the False Claims Act, especially the need to provide incentives for whistleblowers who can shed light on instances of fraud against the United States).

[33] *Cause of Action*, 815 F.3d at 274; *Glaser*, 570 F.3d at 913. This three-step analysis ensures that a particular *qui tam* claim does not violate the public disclosure bar by first considering if the information has been publicly disclosed, then moving on to consider potential exceptions a relator may prove to sustain the action despite the information being publicly disclosed. *See Glaser*, 570 F.3d at 913 (chronicling the methodology courts must go through in considering whether a *qui tam* sued is barred due to public disclosure).

[34] *See Glaser*, 570 F.3d at 913 (holding that allegations of wrongdoing need not be widely disseminated to be publicly disclosed, but rather simply need to be brought to the attention of the relevant authority and that authority must actively investigate or issue documents substantiating the fraud); United States *ex rel.* Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003) (determining that a public disclosure alerts the responsible authority to the possibility of a fraudulent claim).

[35] *See Glaser*, 570 F.3d at 913, 920 (reinterpreting the phrase "based upon" to mean substantially similar so as to be in line with the majority of circuit courts, and using that standard to consider

Finally, if the action is based upon those publicly disclosed allegations, the public disclosure bar precludes the action unless the relator is an original source of the information.[36]

B. The Factual and Procedural History of Cause of Action

In order to receive funding grants from the Federal Transit Administration ("FTA") for the operating costs, equipment, and facilities used in public transportation, the Chicago Transit Authority ("CTA") is required to submit information regarding its transit system's operations, finances, and asset conditions to the National Transit Database ("NTD").[37] The monetary value of grants that the FTA awards is partially determined by the number of vehicle revenue miles a transit program reports to the NTD.[38] In 2005, the Illinois Auditor General determined, during the course of a performance audit of the Chicago Transit

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whether the allegations in the case triggered the public disclosure bar); *see also* United States v. Bank of Farmington, 166 F.3d 853, 864 (7th Cir. 1999), *overruled by Glaser*, 570 F.3d 907 (holding that a *qui tam* suit is based upon the public disclosure of information when it depends essentially upon that information and is actually derived from it).

[36] *See Glaser*, 570 F.3d at 913, 921 (discussing the original source exemption to the public disclosure bar and providing the criteria a person must meet to be considered an original source). A person may be considered an original source if he or she "has knowledge that is independent of and materially adds to the publicly disclosed allegations" and "has voluntarily provided the information to the Government before filing" a complaint based on her information. 31 U.S.C. § 3730(e)(4)(B).

[37] *See* 49 U.S.C. §§ 5307, 5335(a)–(c) (2012) (authorizing the Secretary of Transportation to provide federal grants to urban areas to be put toward operating expenses incurred while servicing the public, and further requiring local transportation agencies to uniformly report information to a National Transit Database to be considered eligible for funding). The Federal Transit Administration ("FTA") is the agency within the United States Department of Transportation that disperses federal grant and loan funding, as well as regulates and enforces safety standards for the nation's public transit systems. U.S. DEP'T OF TRANSP., *About FTA,* https://www.transit.dot.gov/about-fta [https://perma.cc/H9T7-KA79]. The Chicago Transit Authority ("CTA") is a state governmental agency that operates the various methods of public transportation in the Chicago area. CHI. TRANSIT AUTH., *CTA Overview*, http://www.transitchicago.com/about/overview.aspx [https://perma.cc/TD5S-QH7H]. The FTA provides the CTA with billions of dollars through grants for project finance and development, and additionally reviews the CTA's safety and efficiency practices. *See generally* CHI. TRANSIT AUTH., CHICAGO TRANSIT AUTHORITY: BUILDING ON 70 YEARS OF SERVICE: PRESIDENT'S 2017 BUDGET RECOMMENDATIONS (breaking down aspects of the CTA budget, discussing the CTA's scores on the FTA's review of their governance procedures, and discussing programs supported in part by FTA grant money).

[38] *See* 49 U.S.C. § 5336(c)(1)(A)(i) (providing guidance on the appropriate calculation of funding, based partially on vehicle revenue miles). Vehicle revenue miles are accumulated while a vehicle is available for use by the general public and carrying passengers. FED. TRANSIT ADMIN., NAT'L TRANSIT DATABASE: GLOSSARY 7 (2017). Miles accumulated by transit vehicles when they are not in revenue service do not count towards the calculation of vehicle revenue miles. *Id.* The program requiring vehicle revenue miles to be reported in order to calculate the appropriate value of federal funding to grant is titled the Urbanized Area Formula Program. FED. TRANSIT ADMIN., NAT'L TRANSIT DATABASE: POLICY MANUAL 6 (2017). The FTA has utilized the Urbanized Area Formula Program and vehicle revenue miles reported by local transit agencies through it to provide funding to urban centers across the United States since 1984. *Id.*

Authority, that the CTA was over-reporting the vehicle revenue miles of its buses.[39] The Illinois Auditor General's team alerted the United States Department of Transportation Office of Inspector General in 2009 to fraud in the form of CTA's misreporting.[40] The Illinois Auditor General's team also provided this information to Cause of Action, a nonprofit organization dedicated to monitoring government agencies.[41] In March 2012, the Department of Justice received a letter from Cause of Action asking it to investigate the CTA's vehicle revenue miles reporting practices.[42] The Federal Transit Administration later contacted the Chicago Transit Authority by letter on April 27, 2012, to inform them that the FTA had reviewed the CTA's vehicle revenue miles data and subsequently directed the CTA to revise its data for 2011 and going forward.[43] The CTA's misreporting was revealed to the public in an article written in the Chicago Tribune on October 18, 2012.[44]

In May 2012, Cause of Action brought a *qui tam* FCA action in the United States District Court for the District of Maryland, alleging that the CTA had misreported vehicle revenue miles to the FTA.[45] The case was transferred to the Northern District of Illinois.[46] In October 2014, in *United States ex rel. Cause of Action v. Chicago Transit Authority*, the United States District Court for the Northern District of Illinois granted the defendant's motion to dismiss the relator's complaint.[47] The court accepted the CTA's defense that the rela-

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[39] *Cause of Action*, 815 F.3d at 269–70. A member of the Illinois Auditor General's subcontractor team found the over-reporting of the CTA bus vehicle revenue miles that resulted in higher-than-justified grant disbursements from the Urbanized Area Formula Program. *Id.*

[40] *Id.* at 270. The Illinois Auditor General team completed the final performance audit report in March 2007. *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 270–71. It is unclear exactly when the FTA review of the CTA's vehicle revenue miles data took place, because no start date is indicated in the FTA's letter to the CTA stemming from the investigation, but Cause of Action indicated its belief that the federal government may have been complicit by allowing inaccurate mileage reporting. *See* Jon Hilkevitch, *Report: CTA Reaped Millions by Over-reporting Bus Mileage*, CHI. TRIB. (Oct. 18, 2012), http://articles.chicagotribune.com/2012-10-18/news/ct-met-cta-mileage-report-1018-20121018_1_cta-spokesman-cta-officials-action-report [https://perma.cc/BP48-CEAL] (discussing the concerns that officials at Cause of Action voiced over the lack of investigation into over-reported miles). *See generally* Letter from Peter Rogoff, Adm'r, Fed. Transit Admin., to Kevin O'Malley, Gen. Manager, Chi. Transit Auth. (Apr. 27, 2012) (failing to indicate a timeline for the investigation executed by the FTA).

[44] *See* Hilkevitch, *supra* note 43 (reporting on the CTA's alleged fraudulent activity).

[45] *Cause of Action*, 815 F.3d at 271.The action was brought under seal and served upon the government, in compliance with 31 U.S.C. § 3730(b)(2). 31 U.S.C. § 3730(b)(2); *see* United States *ex rel.* Cause of Action v. Chi. Transit Auth. (*Cause of Action I*), 71 F. Supp. 3d 776, 778 (N.D. Ill. 2014) (discussing the United States' decision not to intervene, and the subsequent unsealing of the complaint).

[46] *Cause of Action*, 815 F.3d at 271.

[47] *Cause of Action I*, 71 F. Supp. 3d at 777. The United States declined to intervene in the action, which led to the commencement of the court proceedings and the defendant filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* at 778–79. The court acknowledged confu-

tor's action was barred under the public disclosure bar, because the allegations in the complaint were already publicly disclosed at the time the complaint was filed and the relator was not an original source of the information.[48] The relator appealed the decision to the U.S. Court of Appeals for the Seventh Circuit.[49]

II. The Seventh Circuit Stands Alone in Its Interpretation of the Public Disclosure Bar Within the False Claims Act of 1986

For fraud occurring between 1986 and 2010, courts interpret the language of the False Claims Act to require that the allegations in a complaint are publicly disclosed when the crucial information indicating fraudulent activity has occurred is in the public domain.[50] Revelation to the general public at large is

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sion as to whether the applicable Rule of Civil Procedure should have been 12(b)(1) or 12(b)(6), as the 1986 version of 31 U.S.C. § 3730(e)(4)(A) contained the phrase "no court shall have jurisdiction," whereas the 2010 version of the same statute was amended to "the court shall dismiss." *Id.* at 779. *Compare* 31 U.S.C. § 3730(e)(4)(A) (1986) ("No court shall have jurisdiction . . . ."), *with* 31 U.S.C. § 3730(e)(4)(A) (2010) ("The court shall dismiss . . . ."). The court determined that its disposition of the defendant's motion would be the same regardless. *Cause of Action I*, 71 F. Supp. 3d at 779.

[48] *Cause of Action I*, 71 F. Supp. 3d at 783–84. The court determined that Cause of Action's allegations were publicly disclosed in the FTA's letter to the CTA, which outlined the correct method of reporting revenue miles and implored the CTA to appropriately edit their calculated miles for 2011 and moving forward in accordance with the correct method. *Id.* at 782; *see Glaser*, 570 F.3d at 913–14 (determining that a letter sent in an attempt to recoup improperly allocated Medicaid funds constitutes a public disclosure). The district court interpreted a publicly disclosed instance of fraud to be one the government is both aware of and actively investigating in some capacity. *Cause of Action I*, 71 F. Supp. 3d at 782; *see Glaser*, 570 F.3d at 914 (indicating the benefit of public disclosures to be alerting government officials or agencies to potential acts of fraud, and determining that if government officials are both aware of potential fraud and taking action on it, the public disclosure bar is satisfied). The district court measured the FTA's letter sent in April 2012 and constituting a public disclosure against the date on which Cause of Action filed its complaint in May of that same year. *Cause of Action I*, 71 F. Supp. 3d at 782. The suit might have survived the public disclosure bar had Cause of Action been considered an original source, but despite the organization's claim to that effect, the court determined that there were no facts to support the claim and did not consider the exception further. *Cause of Action I*, 71 F. Supp. 3d at 781; *see* 31 U.S.C. § 3730(e)(4)(B) (providing an original source exception to the public disclosure bar).

[49] *See Cause of Action,* 815 F.3d at 269 (affirming the decision of the U.S. District Court of the Northern District of Illinois).

[50] *See* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 283 n. 1 (2010) (mentioning the enactment of the 2010 amendment to the FCA, and noting that, due to an omission of any intent to apply the amendment retroactively, the statute version in place at the time the case was argued is applied); *see also* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (discussing the potential retroactive application of the 1986 amendment to the False Claims Act and strongly deciding against any retroactive application, due to an abundance of previous precedent and no indication that Congress desired the amended statute be applied). The FCA may be interpreted differently when applied in its post-2010 form, as a 2010 amendment replaced the controversial phrase "based upon" in the public disclosure bar with the phrase "substantially the same." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 901 (2010) (codified as amended at 31 U.S.C. § 3730(e)(4)(A) (2012)); *see* Timothy P. Ribelin, Note, *The False Claims Act: A Circuit Split Based upon the Interpretation of "Based upon,"* 68 Baylor L. Rev. 599, 608–13 (2016) (providing an in-depth discussion of how the 2010 amendments to the False

widely treated as the placing of information into the public domain, but the U.S. Court of Appeals for the Seventh Circuit has adopted an additional, alternate definition.[51] The Seventh Circuit additionally understands allegations to be in the public domain when facts disclosing the fraud are in the government's possession.[52] It is under this alternative interpretation of public domain that the Seventh Circuit determined that the allegations in Cause of Action's complaint before the U.S. District Court for the Northern District of Illinois were publicly disclosed, and thus the reason they affirmed the decision to dismiss Cause of Action's *qui tam* claim.[53] The suit might have been maintained in the Seventh Circuit, despite the determination of a public disclosure, had the relator qualified as an original source of the information in the allegations.[54]

Claims Act changed the language and very likely the future implementation of the public disclosure bar); *see also* United States *ex rel.* Advocates for Basic Legal Equal., Inc. v. U.S. Bank, N.A., 816 F.3d 428, 430 (6th Cir. 2016) (discussing the applicability of the 2010 amendments to the FCA in an instance where some of the allegedly fraudulent acts happened after 2010, but only agreeing to apply the amendments because it was clear the claims would still fail, despite the increased leniency), *petition for cert. filed*, No. 16-130 (July 25, 2016). The 2010 amendments to the FCA bring the language of the statute closer in line with the majority interpretation of "based upon," which examines whether the allegations in a complaint are substantially similar to the publicly disclosed information. *See* Ribelin, *supra*, at 613 (discussing the "substantially similar to" test that the majority of courts in public disclosure bar cases use); *see also* Oparil, *supra* note 9, at 548 (discussing the 1986 amendments to the False Claims Act and their effect of barring *qui tam* suits based on materials in the public domain, unless the relator is the original source of those materials). *Compare* Cause of Action v. Chi. Transit Auth., 815 F.3d 267, 274 (7th Cir. 2016) (indicating that materials should be considered in the public domain when they are available to the public at large), *with* United States *ex rel.* Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 496 (7th Cir. 2003) (observing that critical elements of a case are publicly disclosed when they are published in a newspaper, fraud alerts, or papers from a previous litigation), *and* United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990) (determining that information found to be in the public domain cannot pass the public disclosure bar, unless the *qui tam* relator is an original source of the information).

[51] *See* United States v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999) (holding that the point of a public disclosure of a false claim against the government is to bring it to the attention of the relevant authorities, not merely to shine a light to the public at large on the fraudulent use of their federal tax dollars); *see also* United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 209 (1st Cir. 2016) (indicating that a press release and the media coverage that followed placed the information at question into the public domain); *Cause of Action*, 815 F.3d at 274 (acknowledging the universal interpretation of public domain as accessible to the masses and indicating an alternative but equally acceptable interpretation to be when the government possesses and acts on information); Hesch, *supra* note 29, at 116 (highlighting the flaw in the original False Claims Act that allowed individuals to take information from the newspaper and file a claim with it, and discussing Congress's extensive efforts to curtail that through first the government knowledge, and later the public disclosure bar).

[52] *Cause of Action*, 815 F.3d at 274. The Seventh Circuit's alternative interpretation of public stems from the common use of the word to refer to an agency, official, or entity associated with the government. *See id.* (citing the dictionary to explain their alternative interpretation of the phrase "public domain").

[53] *See id.* at 275–76 (affirming the district court's holding that information is publicly disclosed so long as it is known by a public official or agency and that entity has looked into the claim).

[54] *See* 31 U.S.C. § 3730(e)(4)(B) (providing an original source exception to the public disclosure bar); *Cause of Action*, 815 F.3d at 282–83 (discussing Cause of Action's need to demonstrate addi-

The Seventh Circuit's rule preventing *qui tam* actions under the public disclosure bar when knowledge of fraud has been disclosed and acted upon by a responsible government official or agency is at odds with the prevailing public disclosure rule amongst the other circuits that requires some disclosure of the knowledge at issue to occur beyond the government to trigger the public disclosure bar.[55] Section A of this Part explores the Seventh Circuit's understanding of the critical phrase "public disclosure," examining the development of the Circuit's current interpretation through case law.[56] Section B discusses the different understanding of "public disclosure" reached by several other United States Courts of Appeals and their stated reasons for their interpretation.[57]

A. The Seventh Circuit's Understanding of "Public Disclosure"

In 2016, the U.S. Court of Appeals for the Seventh Circuit agreed with the district court's determination in 2014, in *United States ex rel. Cause of Action v. Chicago Transit Authority*, that the allegations at issue had been publicly disclosed and accordingly affirmed the dismissal.[58] The Seventh Circuit's decision hinged largely on the first step of the three-step public disclosure bar analysis.[59] In 1999, in *United States ex rel. Mathews v. Bank of Farmington*, the Seventh Circuit held that the conveyance of information concerning allegations of misrepresentation to a government official or agency constituted a public disclosure.[60] The court reasoned that the goal of publicly disclosing fraudulent activity is to alert the necessary government authorities or agencies.[61] Whether or not the public at large becomes informed of the duplicitous

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tional, independent knowledge beyond that available in the public disclosure to qualify as an original source, and noting the failure of the organization to do so).

[55] *See infra* notes 58–74 and accompanying text.

[56] *See infra* notes 58–65 and accompanying text.

[57] *See infra* notes 66–74 and accompanying text.

[58] *See* 815 F.3d at 269 (affirming the decision of the district court to dismiss the claim).

[59] *See id.* at 275 (holding that the relevant information had been publicly disclosed in the meaning of the first prong of the analysis).

[60] *See Bank of Farmington*, 166 F.3d at 861 (interpreting the word "public" to mean a representative of the community, especially an official with the power to address the fraudulent activity being alleged).

[61] *See id.* (indicating that alerting a responsible government authority so that the alleged fraud may be addressed is more desirable that simply informing the public that their taxes could be misallocated). The court noted that there is an inverse relationship between the level of truly public disclosure and the need for a specific public official to be notified. *See id.* (inferring that the more widely spread the information, the less of a need there is for a *qui tam* suit, because the government is more likely to be aware of the fraud). The less directly connected an official is to the agency or organization being defrauded, the more widely spread the information must be to the public at large to meet the jurisdictional bar. *See id.* (emphasizing the importance of an alerted official to have the ability to address the fraud, or else the information may not be sufficiently publicly disclosed to invoke the bar); *see also* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743 (9th Cir. 1995) (deciding that the

activity is irrelevant, because the public cannot directly investigate or prosecute the alleged offenders.[62]

Ten years later, in *Glaser v. Wound Care Consultants, Inc.*, the Seventh Circuit overruled in part its decision in *Bank of Farmington*, attempting to realign its interpretation of the public disclosure bar with the other circuit courts.[63] Despite this reevaluation in part, the Seventh Circuit has not wavered from its interpretation of public disclosure as a conveyance of information indicating fraud to a government official or agency.[64] The culmination of the Seventh Circuit's interpretation of the public disclosure bar is set forth in the *Cause of Action* decision, restating that government awareness of possible fraud can be public disclosure, and further requiring some action on the part of the official or agency to review or investigate the allegations.[65]

Inspector General's semiannual report to Congress constituted a public disclosure because he is a government employee bearing the principle responsibility to investigate falsified claims).

[62] *See Bank of Farmington*, 166 F.3d at 861 (noting that private citizens do not represent the public). The disclosure of information to a public official within the agency or organization directly responsible for the funds falsely claimed effectively skips the intermediate step of alerting the public at large, as their recourse would be to ask their government to investigate and prosecute offenders. *See id.* (stating that private citizens do not represent the public, but rather that is the job of government officials).

[63] *See* 570 F.3d 907, 915–17 (7th Cir. 2009) (discussing the difficulty in applying the *Bank of Farmington* interpretation, as its literal assessment of the statute renders the question of whether the relator is an original source of the information pointless). The point of contention within the court's previous decision in *Bank of Farmington* that it overruled in *Glaser* involved the interpretation of the phrase "based upon" within the public disclosure bar. *See id.* at 914–20 (directly addressing and discussing at length the flaws in the court's interpretation of "based upon" in *Bank of Farmington*, including dismissing as unnecessary the original source exemption and disregarding the weight of the policy goals that Congress considered). The Seventh Circuit interpreted "based upon" in *Bank of Farmington* to mean "actually derived" from. *See* 166 F.3d at 863 (endeavoring to allow *qui tam* suits when an individual uncovers evidence of fraud independently, even if that evidence is identical to that in the public domain). The original source exemption within the FCA, however, was rendered effectively useless by this interpretation, as it specifically protects the claims of individuals who present independent knowledge of fraud. *See Glaser*, 570 F.3d at 917 (discussing the extent to which the court's interpretation renders superfluous the original source exemption within the FCA). The Seventh Circuit reassessed its interpretation in *Glaser* to mean "substantially similar to," which was the interpretation of the majority of courts. *See Glaser*, 570 F.3d at 920 (overruling previous decisions to the extent that they interpreted "based upon" to mean "actually derived" from); *7th Circuit Reverses False-Claims Precedent on Public Disclosure:* United States v. Wound Care Consultants, ANDREWS GOV'T CONT. LITIG. REP., July 27, 2009 at 6 (discussing the effect of the Seventh Circuit's decision in *Glaser*, which brought the court in line with a majority of circuits on the issue).

[64] *See Glaser*, 570 F.3d at 913–14 (determining information to be publicly disclosed if it is conveyed to a government official or agency responsible for investigating and ending such instances of fraud); *see also* United States *ex rel.* Gear v. Emergency Med. Assocs. of Ill., Inc., 436 F.3d 726, 727–29 (7th Cir. 2006) (holding that audits performed by a government agency placed information they uncovered in the public domain, effectively disclosing it); United States *ex rel.* Gross v. AIDS Research All.-Chi., 415 F.3d 601, 606 (7th Cir. 2005) (holding that a warning letter from a government agency to a private organization constituted a public disclosure).

[65] *See Cause of Action*, 815 F.3d at 276 (dismissing Cause of Action's attempt to distinguish their case from previous precedent by stating that the government has not made an attempt to recover the

B. Other Circuits Determine a Narrower Interpretation of "Public Disclosure"

The alternative interpretation of the public disclosure bar is well established among the other United States Courts of Appeals.[66] This interpretation requires the dissemination of any allegations to occur beyond the government for those allegations to be considered publicly disclosed.[67] According to the U.S. Court of Appeals for the First Circuit in 2007 in *United States ex rel. Rost v. Pfizer, Inc.*, not allowing the government's possession of information regarding dishonest financial dealings to trigger the public disclosure bar is in line with Congress's intent in drafting the 1986 amendments to the False Claims Act.[68] In 2015, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Chattanooga-Hamilton County Hospital Authority* echoed the sentiments of the First Circuit, emphasizing the importance of interpreting congressional intent through the plain meaning of the language in the statute.[69] In relying on their understanding of the plain meaning of the term "public disclosure," the Sixth Circuit determined that the disclosure of knowledge to a government

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defrauded funds and holding that awareness coupled with some investigation satisfies the public disclosure bar); *see also Glaser*, 570 F.3d at 914 (observing that a government agency's active investigation of potential improprieties was sufficient to satisfy the public disclosure bar).

[66] *See, e.g.*, United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 268 (6th Cir. 2015) (discussing the need for a wider dispersal of information beyond the government for the knowledge to be considered publicly disclosed); United States *ex rel.* Wilson v. Graham Cty. Soil & Water Conservation Dist., 777 F.3d 691, 696–98 (4th Cir. 2015) (noting that disclosure to the government is considered public by the Seventh Circuit alone); United States *ex rel.* Oliver v. Philip Morris USA, Inc., 763 F.3d 36, 42 (D.C. Cir. 2014) (holding that governmental possession of information concerning fraud is not sufficient to establish the public disclosure bar).

[67] *See* United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 728 (1st Cir. 2007), *overruled on other grounds by* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008) (holding that having information in the hands of the government is not equivalent to having that information in the hands of the public at large).

[68] *See id.* at 730 (discussing Congress's intent that public pressure be used as a mechanism to ensure the government maintains honesty in its investigations of fraud and pursuit of recovery); *see also* United States *ex rel.* Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 683–85 (D.C. Cir. 1997) (holding that Congress's decision to change the language of the statute so that it precluded actions based upon public disclosure rather than precluding actions based upon information in the government's possession indicates a desire to have public opinion on fraudulent cases affect government action). The First Circuit reasoned that if Congress had intended for information provided confidentially to the government to trigger the public disclosure bar, the very phrase "public disclosure" would be rendered superfluous, and further indicated its belief that Congress chose the word public quite consciously, as the False Claims Act refers to the government repeatedly, but never equates it with the public. *United States ex rel. Rost*, 507 F.3d at 729 (cautioning against any conflation of the terms "government" and "public" as inconsistent with the intent of Congress).

[69] *See Chattanooga-Hamilton*, 782 F.3d at 267–68 (acknowledging that the Supreme Court has not weighed in on the circuit courts' various understandings of the term "public disclosure," but emphasizing the Court's insistence on interpreting terms within statutes under their ordinary, broad meanings); *see also* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 409 (2011) (cautioning against restricting terms by the descriptive adjectives preceding them when interpreting statutory intent).

official or agency is not equivalent to a public disclosure and therefore does not trigger the statutory bar.[70] The First, Sixth, and Fourth Courts of Appeals have written decisions directly addressing the alternative interpretation of public disclosure by the Seventh Circuit, with each coming down definitively against expanding the bar's application.[71]

The numerous amendments to the False Claims Act, from 1943 to 1986, all sought to strike a perfect balance between encouraging whistleblowers to expose fraudulent practices and dissuading parasitic individuals from filing frivolous actions in hopes of obtaining a large, undeserved payout.[72] Whistleblowers and the False Claims Act's avenue for private prosecution of fraudulent companies are vital to ensuring continued effective governance in the United States.[73] A majority of the time, an individual alerts the government to some fraudulent activity that the government investigates and eventually prosecutes, resulting in recovery for the government and a handsome reward for the relator.[74]

III. THE FALSE CLAIMS ACT EMPOWERS THE PUBLIC TO COMBAT FRAUD, WITH OR WITHOUT HELP FROM THE GOVERNMENT

The Seventh Circuit is incorrect in holding that governmental possession and preliminary action on information regarding fraud triggers the public disclosure bar in the context of the 1986 amendments.[75] The Seventh Circuit's

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[70] *See Chattanooga-Hamilton*, 782 F.3d at 268–69 (concluding that an administrative audit and subsequent investigation provided to the government was not a sufficient public disclosure to invoke the public disclosure bar after discussing the distinction between the terms "government" and "public" as used within the FCA).

[71] *See, e.g.*, *id.* at 268 (reasoning that if the Seventh Circuit's interpretation were intended, the word public would be unnecessary and therefore not included in the statute); *United States ex rel. Wilson*, 777 F.3d at 697 (rejecting the Seventh Circuit's interpretation of public disclosure to hold instead that a disclosure must be made outside the government); *United States ex rel. Rost*, 507 F.3d at 729–30 (refusing to conflate the government with the public and determining that there was no support to be found for the Seventh Circuit's interpretation).

[72] *See* Raspanti & Laigaie, *supra* note 1, at 25–28 (detailing the circumstances surrounding Congress's 1943 amendment to the False Claims Act that had the effect of severely limiting *qui tam* actions, as well as the 1986 amendment, which was an effort to correct what Congress viewed as the 1943 amendment's overcorrection by allowing more meritorious claims to be brought by private citizens).

[73] *See id.* at 42–43 (discussing the recovery of over 1.8 billion dollars to the United States Treasury through *qui tam* actions brought under the False Claims Act); *see also* David Farber, Note, *Agency Costs and the False Claims Act*, 83 FORDHAM L. REV. 219, 221 (2014) (highlighting an example of a whistleblower resulting in the Department of Justice's multimillion dollar recovery of defrauded funds).

[74] *See* Farber, *supra* note 73, at 225, 231–32 (discussing the percentage of a reward that a relator can claim, sometimes as high as thirty percent).

[75] *See infra* notes 76–83 and accompanying text (illustrating Congress's intent in requiring public disclosure to reach beyond the threshold of government actors and agencies); *see also* Cause of Action v. Chi. Transit Auth., 815 F.3d 267, 275, 277 (7th Cir. 2016) (holding that government possession of information, together with inquiries into possible instances of fraud, satisfies the definition of a public

interpretation of public disclosure renders Congress's 1986 amendment to the False Claims Act effectively redundant.[76] Preventing *qui tam* actions from proceeding when the government has knowledge of alleged fraud, which it has investigated, does not further the goal of preventing parasitic lawsuits.[77] Instead, the Seventh Circuit's alternative definition of public disclosure invites governmental agencies and officials to punish fraudulent offenders behind closed doors, without fear of public backlash or accountability.[78] One im-

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disclosure); United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 268 (6th Cir. 2015) (refuting the Seventh Circuit's interpretation of public disclosure); United States *ex rel.* Wilson v. Graham Cty. Soil & Water Conservation Dist., 777 F.3d 691, 696–97 (4th Cir. 2015) (discrediting the Seventh Circuit's interpretation of public disclosure); United States *ex rel.* Oliver v. Philip Morris USA, Inc., 763 F.3d 36, 42 (D.C. Cir. 2014) (declining to follow the Seventh Circuit's interpretation of public disclosure in favor of the interpretation common to a majority of the circuit courts); United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 729 (1st Cir. 2007), *overruled on other grounds by* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008) (determining that the Seventh Circuit's interpretation of a public disclosure does not align with the intent of the False Claims Act). The 1986 version of the False Claims Act has since been re-amended in 2010, and the potential implications of those more recent amendments can be found above. *See supra* note 50 and accompanying text.

[76] *See* § 3730(e)(4)(A) (public disclosure bar); *United States ex rel. Oliver*, 763 F.3d at 42 (discussing the significance of Congress replacing the government-knowledge bar with the public disclosure bar, which seemingly intended to require a wider broadcasting of information to bar an action); *United States ex rel. Rost*, 507 F.3d at 729 (discussing the danger of conflating government with the public, which would have the effect of re-imposing the government-knowledge bar that Congress had expressly removed).

[77] *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652–53 (D.C. Cir. 1994) (determining that unfiled discovery materials that are only potentially visible to the public are not likely to invite parasitic lawsuits as they are not readily accessible to all). The original source exemption to the public disclosure bar would effectively only protect those individuals bringing *qui tam* actions who provided the government with the knowledge of fraud. *See Cause of Action*, 815 F.3d at 283 (implying that Mr. Rubin, the member of the Illinois Auditor General team who provided the relator as well as the Department of Transportation Office of Inspector General with the knowledge of fraud, was the original source). If the information that the federal government either keeps confidential or disregards after a brief inquiry qualifies as publicly disclosed information, a potential relator discovering the evidence would not be considered an original source and would be barred from bringing a suit. *See United States ex rel. Wilson*, 77 F.3d at 699 (cautioning that a report briefly entered in an investigative file and only theoretically available to individuals who inquire after it should not be considered publicly disclosed).

[78] *See United States ex rel. Rost*, 507 F.3d at 730 (discussing Congress's intent to keep the government honest in its dealings with fraudulent actors); *see also* United States *ex rel.* Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 684 (D.C. Cir. 1997) (determining that the public disclosure bar was meant in part to ensure evidence of fraud in the government's possession was acted upon, not ignored); United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 327–28 (1st Cir. 1994) (discussing the additional power given to private individuals to enforce the FCA through the 1986 amendments). If the federal government is complicit in acts defrauding taxpayer money, as the relator suspected in *Cause of Action*, the Seventh Circuit's interpretation of government knowledge and an investigative inquiry as constituting public disclosure affords individuals who happen across the government's evidence no method of bringing the fraud to light. *See Cause of Action*, 815 F.3d at 283 (requiring the relator to have knowledge of the fraud separate from that in the government's possession as well as some information that materially adds to the amassed evidence); Hilkevitch, *supra*

portant purpose of publicly disclosing information regarding fraudulent activity is undoubtedly to ensure the necessary agency or official becomes aware.[79] That purpose, however, should not overshadow the other objective, which is to actually recover the funds lost through instances of fraud, or ensure that in scenarios where the government fails to recover lost funds for any reason, the taxpayers are made aware of the misappropriation of their money so that they are informed and can act on that information if they choose.[80]

The singular interpretation of the public disclosure bar, held by circuit courts notwithstanding the Seventh, aligns with the False Claims Act's goal of encouraging whistleblowers and private assistance in combatting fraud.[81] Through its myriad responsibilities and bureaucratic policies, the government is likely to amass a significant amount of information, which, if properly evaluated, could indicate fraudulent activity.[82] Taxpayers are the ultimate losers when fraud occurs against the federal government, and the public disclosure bar as defined by the First Circuit ensures that they can either bring a *qui tam* action to prosecute offenders and recoup their losses or, if the information has been widely publicly disseminated, they can effectively pressure their elected representatives to do so on their behalf.[83]

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note 43 (noting that individuals within the Cause of Action organization believed the federal government to be cooperative in the alleged fraudulent activity).

[79] *See Cause of Action*, 815 F.3d at 275 (stating a key objective of the FCA is to alert authorities to fraudulent activity so they may end it); United States *ex rel.* Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 707–08 (7th Cir. 2014) (holding that the government's possession of the facts disclosing the fraud prohibits the commencement of a *qui tam* action); Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 914 (7th Cir. 2009) (acknowledging the importance of alerting government officials or agencies to fraud); H.R. REP. NO. 99-660, at 22–23 (1986) (expressing Congress's goal to incentivize the pursuit of defrauded taxpayer dollars by the government through the allowance of *qui tam* actions in instances where the government had dormant or concealed information); S. REP. NO. 99-345, at 23–24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89 (discussing Congress's aim to eliminate language imposing a bar on *qui tam* claims whenever the government had any knowledge of the information upon which the allegations were based, and the hope that eliminating such language would increase private citizens' *qui tam* actions).

[80] *See United States ex rel. Wilson*, 777 F.3d at 698 (discussing several instances where information in the hands of the government never reached the public domain); *United States ex rel. Rost*, 507 F.3d at 729–30 (discussing Congress's intent to encourage productive private enforcement suits).

[81] *See* Raspanti & Laigaie, *supra* note 1, at 27–29 (discussing the False Claims Act's objectives of encouraging private individuals to come forward with information concerning fraud and initiating actions to recover lost funds); *see also Cause of Action*, 815 F.3d at 274–75 (expanding the interpretation of the public disclosure bar); *Chattanooga-Hamilton*, 782 F.3d at 268 (discussing the plain meaning of the bar and its intended purpose of allowing meritorious *qui tam* claims while preventing parasitic law suits); *United States ex rel. Rost*, 507 F.3d at 730 (discussing the government's inability to protect against fraud independently).

[82] *See* Farber, *supra* note 73, at 240–41 (discussing the high number of instances of fraudulent activity that go unnoticed due to the sheer amount of information that cannot all be meticulously scrutinized).

[83] *See United States ex rel. Rost*, 507 F.3d at 728 (discussing the need to ensure claims of fraud don't stagnate within government filing cabinets); *see also Chattanooga-Hamilton*, 782 F.3d at 269 (discussing the differences between information disclosed publicly and disclosed to the government);

Conclusion

The Seventh Circuit has incorrectly applied an alternative meaning of public disclosure to bar otherwise meritorious *qui tam* action under the False Claims Act. Conflating the government with the public at large takes the dangerous step of assuming that governmental actors and agencies will unwaveringly act in the public interest. It is clear from the 1986 amendment to the False Claims Act that Congress intended to provide the public with an avenue for combatting deceitful business practices, even where the government is complicit or is satisfied with slapping the offender on the wrist behind closed doors.

It is true that the False Claims Act is most effective when the government is alerted to fraud and works with relators to prosecute the offenders and recover lost funds. Allowing *qui tam* actions to go forward after an initial inquiry from the government has already taken place does not encourage parasitic lawsuits or over-enforce the False Claims Act; it allows private actors at their own risk to prosecute fraudulent persons or corporations and expose their unscrupulous behavior so taxpayers are fully aware of exactly who is trying to appropriate their money.

Kurtis Brown

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United States ex rel. Wilson, 777 F.3d at 696 (discussing the positive balance struck by the majority interpretation of the public disclosure bar); *United States ex rel. Oliver*, 763 F.3d at 42–43 (discussing the majority interpretation of the public disclosure bar).