No. 04-165

In the Supreme Court of the United States

COMSTOCK RESOURCES, INC., ET AL., PETITIONERS

v.

DON C. KENNARD, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the respondents in this case, whose allegations of False Claims Act violations were based partly on the personal royalty records of one respondent and partly on respondents' scrutiny of publicly-available records in a state land office, had the requisite "direct and independent knowledge of the information on which the allegations [were] based" to qualify as "original source[s]" under 31 U.S.C. 3730(e)(4)(B).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, this case does not merit further review at the current stage of the proceedings.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Those provisions state, *inter alia*, that any person who "knowingly

makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government," is subject to liability under the Act. 31 U.S.C. 3729(a)(7). A person who violates the FCA "is liable to the United States Government for a civil penalty * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (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 [General] 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.

31 U.S.C. 3730(e)(4); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

2. Relators Don Kennard and Harrold E. Wright, the respondents in this Court, filed this *qui tam* action against petitioners Comstock Oil and Gas and related companies. Respondents' complaint alleged that petitioners had used false records to avoid paying the United States royalties due on natural gas removed from certain Indian lands, in violation of 31 U.S.C. 3729(a)(7). See Pet. App. 2a-3a.

In the district court, respondents submitted affidavits describing how they had acquired the information on which their suit was based. See Pet. App. 37a-48a (Kennard Affidavit), 62a-67a (Wright Affidavit). Respondent Kennard explained that in late 1997 he had reviewed a federal agency report on royalties paid for natural gas from federal and Indian leases. *Id.* at 37a-38a. Kennard observed that the report identified no payments for natural gas liquids, a valuable component of natural gas, for a particular area of Texas. *Id.* at 38a. Based on his knowledge of the natural gas industry, his discussions with respondent Wright, and his investigation of state records, Kennard determined that petitioners were operating the subject Indian leases in the relevant part of Texas. *Id.* at 38a-40a. Kennard also visited the state land office to examine petitioners' leases for the relevant Indian lands. *Id.* at 41a. He noted that the leases for the Indian lands were marked "expired," and he learned that petitioners had not contested that designation for their leases. *Id.* at 41a-42a.

Respondent Wright held royalty interests in property, including lands operated by petitioners, that was located near the Indian lands at issue in this case. Pet. App. 66a. After Kennard informed Wright of the information that Kennard had acquired concerning petitioners' operations in the relevant area of Texas, Wright compared the royalty payments and settlement sheets he had received from petitioners with royalty payments he had received from other companies in the same region. *Ibid.* Wright concluded that petitioners were underpaying royalties to him for gas, natural gas liquids, and condensate. *Ibid.* Based on that conclusion and on his industry experience, Wright inferred that petitioners might also be underpaying royalties for gas they removed from the nearby Indian lands. *Ibid.*

Respondents concluded that petitioners were operating under expired mineral leases for the relevant Indian lands and were therefore obligated to remit the full value of the gas, rather than simply a royalty percentage, to the federal agency charged with collecting royalties for the Indian Tribe. Pet. App. 44a-45a. Respondents further concluded that, even if the leases had not expired, petitioners were underpaying royalties on natural gas liquids from the Indian lands. *Ibid.*

3. On October 21, 1998, respondents informed the federal government of their intention to file suit under the FCA's *qui tam* provisions. Pet. App. 2a. Respondents' submission to the government included an unfiled copy of their *qui tam* complaint. *Ibid.* On October 26, 1998, one of the attorneys with whom respondents had consulted filed suit on behalf of the Indian Tribe that was the beneficiary of the amounts that allegedly had been underpaid to the Interior Department, raising essentially the same allegations that were contained in respondents' then-unfiled complaint. *Id.* at 2a, 20a-21a.

Respondents "allege that [the attorney] essentially stole their information in preparing the Tribe's complaint." *Id.* at 2a. Respondents filed their FCA complaint the following day. *Ibid.*

4. The United States declined to intervene to take over the litigation of respondents' FCA claims. Petitioners then moved to dismiss the suit. They argued, *inter alia*, that respondents' suit was "based upon" the same allegations that had been publicly disclosed in the Tribe's complaint, and that the suit was therefore barred by 31 U.S.C. 3730(e)(4)(A).[1]

The district court granted petitioners' motion to dismiss. Pet. App. 18a-33a. The court held that the "public disclosure" bar applied because the FCA complaint filed by respondents "contain[ed] allegations that were disclosed in a previously filed civil complaint." *Id.* at 26a; see *id.* at 24a-27a. The court also held that neither of the respondents was an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B). Pet. App. 27a-33a. The court explained that respondents "never had any intimate knowledge of the inner-working of" petitioners' operations and "merely provided [the district

[1] In contending that respondents fail to qualify as "original source[s]" within the meaning of 31 U.S.C. 3730(e)(4)(B), petitioners rely heavily on the fact that respondents examined publicly available records in the state land office in formulating their allegations. Petitioners do not contend, however, that those state records were themselves the "public disclosure" that triggered the application of 31 U.S.C. 3730(e)(4)(A). By its terms, Section 3730(e)(4)(A) applies only to "the public disclosure of allegations or transactions *in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media.*" 31 U.S.C. 3730(e)(4)(A) (emphasis added). The relevant land office records, although publicly available, do not fall within any of those categories.

court] a compilation of information that is a matter of public record." *Id.* at 30a-31a.

5. The court of appeals reversed. Pet. App. 1a-17a.

a. The court of appeals agreed with the district court that respondents' allegations were "based upon" a "public disclosure" and were therefore covered by 31 U.S.C. 3730(e)(4)(A). Pet. App. 4a-8a. The court explained that the submission of the Tribe's complaint to a filing clerk in the clerk's office of the federal district court was a "public disclosure," *id.* at 5a-7a, and that respondents' complaint was "based upon the public disclosure" because "the complaints at issue are substantially similar," *id.* at 7a-8a.

b. The court of appeals held, however, that respondents fell within the "original source" exception (31 U.S.C. 3730(e)(4)(B)) to the FCA's public disclosure bar. Relying on its prior decision in *United States ex rel. Stone* v. *Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002), the court held that "[k]nowledge of the actual fraudulent conduct is not necessary" for a relator to qualify as an "original source." Pet. App. 9a. In *Stone*, the Tenth Circuit had explained that the original source exception, by its plain terms, does not require that a relator have direct and independent knowledge of "the actual act of fraud, i.e. the actual submission of inaccurate claims," but rather requires such knowledge only of "the facts underlying or which gave rise to the fraud"—in that case, the environmental, health, and safety violations that rendered the submissions false. 282 F.3d at 802. The court of appeals in the instant case also found no support in the applicable precedents for petitioners' suggestion that a *qui tam* relator must be a "corporate insider" in order to qualify as an "original source." Pet. App. 10a.

The court of appeals held that respondents' consideration of public records in the course of developing their allegations did not prevent respondents from qualifying as "original source[s]." Pet. App. 10a-14a. While agreeing that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source," the court of appeals noted that a complete investigation of possible fraud against the United States will generally require review of some public documents. *Id.* at 10a. The court therefore examined the "character of [respondents'] discovery and investigation" to determine whether respondents' knowledge of the information upon which their allegations were based was "direct" within the meaning of 31 U.S.C. 3730(e)(4)(B). Pet. App. 10a.

The court of appeals observed that respondent Wright "did not refer to, examine, or rely on any public records," but instead "relied exclusively on his own personal, private royalty records and statements from [petitioner] Comstock and other oil companies." Pet. App. 12a. The court acknowledged that respondent Kennard had examined public records, *ibid.*, but noted that Kennard "did not merely compile statistics; he did his own research and investigation," *id.* at 13a. The court of appeals summarized respondents' contributions as follows:

> [Respondents] sorted through relatively obscure public documents, and together with personal royalty records, used these documents to discover and support their claim of the alleged fraud. It is important to note that none of the public documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that [respondents] discovered the alleged fraud. [Re-

> spondents] had direct and independent knowledge of the fraud allegedly committed since they are the people responsible for ferreting it out in the first place.

Id. at 13a-14a (brackets and internal quotation marks omitted).[2]

DISCUSSION

The court of appeals' interlocutory ruling in this case is correct and does not conflict with any decision of this Court or of another court of appeals. Although the line between "direct" and "indirect" knowledge of information giving rise to a *qui tam* suit is not always a bright one, petitioners overstate matters in contending (Pet. 21) that the lower courts' application of the "original source" provision has been marked by "widespread confusion." Neither that larger body of precedent, nor the court of appeals' decision in the instant case, is adverse to the interests of the United States. The petition for a writ of certiorari should be denied.

A. In Light Of The Current Interlocutory Posture Of This Case, The Court Should Not Grant Certiorari

As an initial matter, the current interlocutory posture of this case counsels against a grant of certiorari. Based on its interpretation of the "original source" provision, the court of appeals reversed the district court's dismissal of respondents' suit and remanded the case

[2] The court of appeals also held that respondents' allegations stated a claim for relief under 31 U.S.C. 3729(a)(7), even assuming that the financial harm occasioned by any underpayment of royalties that may have occurred in this case would ultimately fall upon an Indian Tribe rather than upon the federal fisc. See Pet. App. 14a-17a. Petitioners do not challenge that holding in this Court.

for further proceedings. No court has yet addressed the question whether petitioners have committed any violation of the FCA. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari and explaining that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257-258 (1916). There is nothing about the "original source" rule that counsels against adherence to this Court's usual practice. A district court decision to the same effect as the ruling of the Tenth Circuit here would not be appealable as of right.

B. There Is No Clear Conflict In Authority

1. The Tenth Circuit's construction of the term "original source" is substantially similar to the approaches taken by other courts of appeals. Contrary to petitioners' contention (Pet. 14), the Tenth Circuit did not hold that "direct knowledge under the original source provisions of the FCA need not be personal, firsthand knowledge." Nor did the court "squarely adopt a 'sweat of the brow test'" (Pet. 21) under which a relator can qualify as an "original source" simply through diligent research into wholly public information.

The court of appeals essentially agreed with petitioners that "direct" knowledge must be firsthand knowledge. See Pet. App. 9a ("Direct and independent knowledge is knowledge marked by the absence of an intervening agency and unmediated by anything but the relator's own labor.") (brackets, ellipses, and cita-

tion omitted). The court also recognized that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source." *Id.* at 10a. The court was unwilling, however, to adopt "a bright-line rule disqualifying a relator as an original source when the relator examines public records." *Ibid.*

Rather, the Tenth Circuit evaluated the "character of the [respondents'] discovery and investigation" (Pet. App. 10a) to determine whether respondents possessed the requisite "direct and independent knowledge" of the information on which their allegations were based. The court of appeals noted that respondent Wright "did not refer to, examine, or rely on any public records," but "relied exclusively on his own personal, private royalty records and statements from Comstock and other oil companies." *Id.* at 12a. While acknowledging that respondent Kennard did "examine public records in the course of his independent investigation," the court stressed that Kennard "did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document exists"; that respondent did not exploit "a third party's research and investigation" but instead "sorted through relatively obscure public documents"; and that "none of the public documents disclosed the alleged fraud." *Id.* at 12a-14a. In this way, Kennard's diligence and pre-existing industry expertise allowed him to infer possible fraud from raw materials, including private materials available from Wright, whose significance was not otherwise apparent. The court thus found that respondents had the requisite firsthand knowledge of the information on which their claims were based, both because their suit was based in part on nonpublic information (Wright's own

royalty records under his leases with petitioners) and because their allegations were not derivative of any third party's investigation or observation of identifiable fraud.[3]

2. Petitioners assert (Pet. 26) that "[i]nterpreting 'direct' to mean 'firsthand' provides a clear standard to apply in making the original source determination: either the relator observed the fraud (or some part of the fraud) with his own eyes, or he did not." That assertion is substantially flawed.

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[3] The Tenth Circuit's recent decision in *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038 (2004), petition for cert. pending, No. 04-1363 (filed Apr. 4, 2005), confirms the fact-specific character of the court's ruling in the instant case. The court in *Grynberg* gave the following explanation for its prior determination in this case that respondents Wright and Kennard qualified as "original source[s]":

> In concluding [respondents] qualified as an original source, even though part of their investigation included information in the public domain, we focused on two significant factors. First, [respondent] Wright did not refer to, examine, or rely on any public records. Instead, he relied exclusively on his own personal, private royalty records and statements from Comstock and other oil companies in forming his suspicions regarding Comstock's royalty payments. Second, while [respondent] Kennard did examine public records in the course of his independent investigation, he did more than compile statistics. Most importantly to Grynberg's case, Kennard did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such documents existed. *No public documents disclosed the alleged fraud.* As a result, we held that [respondents] ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id. at 1053-1054 (brackets, citations, and internal quotation marks omitted).

Contrary to petitioners' contention, substituting the word "firsthand" for the statutory term "direct" does not eliminate potential uncertainties in the application of the "original source" definition to particular circumstances, or even provide a straightforward basis for resolving the instant case. The conduct specifically prohibited by 31 U.S.C. 3729(a)(1) is the knowing "present[ation]" to the United States government of a "false or fraudulent claim for payment or approval." Similarly under 31 U.S.C. 3729(a)(7), the prohibited conduct is the "mak[ing]" or "us[e]" of a "false record or statement" to evade a financial obligation to the government. The court of appeals recognized (Pet. App. 9a-10a), however, and petitioners appear to accept, that a relator need not actually witness the defendant's *submission* of a claim (or of a false record or statement) to the government in order to qualify as an "original source."[4]

Because violations of the FCA are frequently committed through the use of false or misleading documents, and because the investigation and litigation of FCA cases often focus on examination of written records, a relator's firsthand examination of relevant documentary materials will often be a sufficient means of acquiring the requisite "direct" knowledge of the information on which his suit is based. In other cases, a relator's scrutiny of documents (either public or private) may shed light on the relator's observation of the

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[4] Section 3730(e)(4)(B) requires that, to be an "original source," a relator must have "direct and independent knowledge of the *information* on which the *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It does not require that the relator have direct and independent knowledge of the fraud itself. The text of Section 3730(e)(4)(B) therefore does not require that an "original source" must personally observe the fraud, in whole or in part, as it is occurring.

defendant's primary conduct (*e.g.*, by revealing a discrepancy between the defendant's actual practices and its representations to the government). Petitioners' insistence that an "original source" must have "firsthand knowledge" does not resolve the issue of *what* the relator must know firsthand.

In another respect as well, application of the "original source" provision does not lend itself to pure bright-line rules. The statutory definition of the term "original source" requires "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It is not unusual, however, for a relator's knowledge of different categories of information to be acquired through different means. The text of the "original source" provision provides no formula for determining *how much* of the relevant information the relator must perceive "directly" in order to qualify as an "original source." Respondents, for example, unquestionably had firsthand knowledge of Wright's own royalty statements, which were integral to identifying the alleged fraud. Petitioners' contention that the term "direct" should be construed to mean "firsthand" is therefore largely unhelpful in deciding this case.

A sensible application of the "original source" requirement in Section 3730(e)(4)(B) must take into account the foregoing considerations. No single bright-line test will be adequate to resolve all cases in light of the widely varying fraudulent schemes that may give rise to *qui tam* actions.

3. a. Largely for the reasons stated in Part B.2, *supra*, the prevailing standards for determining whether a particular relator qualifies as an "original source" may be imprecise at the margins, and it therefore is possible that different appellate panels might occasionally reach

inconsistent conclusions in applying law to fact in close cases. Contrary to petitioners' contention, however, the approaches used by other courts of appeals to resolve "original source" issues are not materially different from the approach employed by the Tenth Circuit here. The courts of appeals all effectively define "direct" knowledge as knowledge that is firsthand, while looking to the totality of the circumstances to determine whether the necessary firsthand knowledge exists.

The most fundamental and consistent principle to have emerged in the courts of appeals in the application of the "original source" provision is the established rule that knowledge derived from an identifiable third party is not "direct" knowledge within the meaning of Section 3730(e)(4)(B). See, *e.g.*, *United States ex rel. Kreindler & Kreindler* v. *United Tech. Corp.*, 985 F.2d 1148, 1159 (2d Cir.) (where attorney derived information from defendant through discovery in another case, knowledge was not direct), cert. denied, 508 U.S. 973 (1993); *United States* v. *New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (following holding in *Kreindler* that a relator lacks direct knowledge "if a third party is 'the source of the core information' upon which the *qui tam* complaint is based"); *United States ex rel. Kinney* v. *Stoltz*, 327 F.3d 671, 672-673 (8th Cir. 2003) (relator who acquired relevant information from depositions of defendants' employees lacked direct knowledge), cert. denied, 540 U.S. 1105 (2004); *United States ex rel. Devlin* v. *California*, 84 F.3d 358, 361 (9th Cir.) (relators lacked direct knowledge of information obtained from an employee who had participated in the fraudulent scheme), cert. denied, 519 U.S. 949 (1996); see also *United States ex rel. Reagan* v. *East Texas Med. Ctr. Regional Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004) ("The

plain meaning of the term 'direct' requires 'knowledge derived from the source without interruption or gained by relator's own efforts rather than learned second-hand through the efforts of others.'") (citation omitted). The Tenth Circuit's decision here is consistent with that rule, since the court of appeals relied in part on the fact that respondents' claims "did not derive from a third party's research and investigation." Pet. App. 13a.

The central focus on whether the information on which the allegations are based was obtained from another person is supported by the text of the False Claims Act in several respects. First, Congress evidently referred in Section 3730(e)(4)(B) to an "individual" who is an "*original* source" primarily in contradistinction to one who is a *secondary* source or *derivative* source—*i.e.*, a person who derived the information from another *individual*. Second, the statute requires "direct" (as opposed to indirect) knowledge, which, as dictionary definitions make clear, involves the absence of intervening third parties. See *Webster's Third New International Dictionary* 640 (1993) ([2]direct def. 4: "marked by absence of an intervening agency, instrumentality, or influence: immediate"); *ibid.* ([3]direct def. b: "from the source or the original without interruption or diversion"; def. d: "without any intervening agency or step"). Here, respondents did not rely on reports of others about alleged fraud. The information on which the allegations were based was the product of their own investigation from a variety of sources, including publicly available but relatively obscure public documents, cf. *United States Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-764 (1989).

b. Petitioners' claim of a circuit conflict (see Pet. 16-18) is unfounded. For the most part, the cases on which petitioners rely involved relators who were found to lack the requisite "direct" knowledge because they had obtained their information from identifiable third parties. Thus, in *Kinney*, the Eighth Circuit held that a relator was not an "original source" when he learned of the relevant information in depositions of two employees in prior litigation. See 327 F.3d at 673, 674-675. As just noted, the Tenth Circuit in this case agreed with the uniform rule in other circuits that relators whose claims depend on such information do not qualify as "original source[s]." And in an earlier case, *United States ex rel. Barth* v. *Ridgedale Electric, Inc.*, 44 F.3d 699 (1995), the Eighth Circuit stated that "a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]," *id.* at 703, and it relied in part on the fact that one relator (Priem) had obtained relevant information through "his interviews with [the defendant's] employees," *id.* at 704; see *id.* at 702. Accord *Hays* v. *Hoffman*, 325 F.3d 982, 990-991 (8th Cir.), cert. denied, 540 U.S. 877 (2003).

The Ninth Circuit decisions on which petitioners rely are also readily distinguishable. In *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999), the relator claimed to have "learned of [the defendant's] alleged fraudulent activities *by speaking with patients who had previously received medical services from [the defendant]*, and by reviewing their medical records," *id.* at 525 (emphasis added), and yet even then could not recall the name of a single Medicare patient who had allegedly been charged for unnecessary procedures, see *id.* at 526. In *Devlin*, the

Ninth Circuit held that "the relators' knowledge was not direct and independent because they did not discover firsthand the information underlying their allegations of fraud * * *, but derived it secondhand from [an employee of the defendant], who had firsthand knowledge of the alleged fraud as a result of his employment." 84 F.3d at 361. In *United States* v. *Alcan Electrical & Engineering, Inc.*, 197 F.3d 1014, 1021 (9th Cir. 1999), the court relied in part on the district court's finding that "most everyone in [the local union] knew of the work recovery program" through which the alleged fraud was perpetrated—a finding that has no analog here—and the relator did not identify any other specific basis on which he learned of the alleged fraud.

The Second and D.C. Circuit decisions on which petitioners rely (see Pet. 18) are likewise unhelpful to their position. The relators in the Second Circuit cases acquired their information from identifiable third parties. See *New York Med. Coll.*, 252 F.3d at 121 (relators lacked "direct and independent knowledge" of the relevant information when "the source of the core information underlying plaintiffs' allegations of fraud is the two audits conducted by" a state public benefit corporation) (internal quotation marks omitted); *Kreindler & Kreindler*, 985 F.2d at 1158-1159 (relator did not qualify as "original source" when he obtained his information from the defendant and its employees through discovery in a different lawsuit). In *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997), the relator acquired his information concerning the defendant's allegedly fraudulent practices when he attended a conference with federal procurement officials, and those practices had already been publicly disclosed before the relator even became aware of them. See *id.* at 678, 691. And in

United States ex rel. Springfield Terminal Railway v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the relator was held to satisfy the "original source" criteria when it "started with innocuous public information * * * [and] completed the equation with information independent of any preexisting public disclosure." *Id.* at 657.

C. There Is No Pressing Need For Clarification Of The Legal Standard Used To Identify An "Original Source"

The absence of any bright-line test for identifying "original source[s]" has not created significant practical difficulties in the government's enforcement of the FCA, and the court of appeals' decision in the instant case is unlikely to have any such deleterious effect. The Tenth Circuit's analysis reflects a pragmatic effort to distinguish between those relators who provide meaningful assistance in putting the government on the trail of fraud, and those who simply exploit pre-existing knowledge of possible wrongdoing. That approach is consistent with both the text and purposes of 31 U.S.C. 3730(e)(4).

Petitioners suggest (Pet. 29) that a narrow reading of the "original source" provision is an appropriate means of facilitating dismissal of meritless *qui tam* actions. Certainly the interests of the United States are not served when legally or factually deficient suits are brought against those who do business with the government. The purpose of the FCA's "public disclosure" bar, however, is to identify those allegations of fraud on which the United States is already acting or readily capable of acting, not to identify allegations that are lacking in merit. Defendants in *qui tam* cases may invoke the usual mechanisms to achieve dismissal of meritless suits, cf. p. 9, *supra* (noting that no court has

yet ruled on the merits of respondents' allegations here), and the FCA separately affords the United States the unilateral authority to dismiss a *qui tam* suit over a relator's objection if the government deems that course to be in the public interest. See 31 U.S.C. 3730(c)(2)(A); *Swift v. United States*, 318 F.3d 250, 252-254 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003).[5]

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[5] Respondents have noted the possibility that the judgment below might be affirmed on the alternative grounds that (a) the filing of the Tribe's complaint on October 26, 1998, did not constitute a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A), and (b) respondents' *qui tam* suit was not "based upon" the allegations in the Tribe's October 2, 1998, complaint because respondents did not derive their knowledge from the Tribe's filing. See Br. in Opp. 26-27. Those issues present legitimate questions concerning the proper construction of the FCA's "public disclosure" bar. The United States has previously argued in the lower courts that a disclosure in a private civil action to which the federal government is not a party does not constitute a "public disclosure" for purposes of Section 3730(e)(4)(A). The court of appeals' interpretation of the phrase "based upon" in Section 3730(e)(4)(A) implicates an existing circuit conflict (though the court's understanding of that phrase accords with the great weight of appellate authority). Compare, *e.g.*, Pet. App. 7a-8a (respondents' *qui tam* complaint was "based upon" a prior "public disclosure" because respondents' allegations were "substantially similar" to the allegations in the Tribe's complaint); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) (Section 3730(e)(4)(A) applies when the relator's allegations "are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit * * *, regardless of where the relator obtained his information."); *United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376, 385-389 (3d Cir. 1999) (same), cert. denied, 529 U.S. 1018 (2000); *United States ex rel. Biddle* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 147 F.3d 821, 825-828 (9th Cir. 1998) (same), cert. denied, 526 U.S. 1066 (1999); *Findley*, 105 F.3d at 682-685 (same) with, *e.g.*, *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1347-1349 (4th Cir.) (*qui tam* com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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plaint is "based upon" a "public disclosure" only if the relator actually derives his claims from that public disclosure), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Feingold* v. *AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (same).

The existence of those potential alternative grounds for affirmance at this interlocutory stage may provide a further reason for denying the petition, particularly because the various provisions of Section 3730(e)(4) are sufficiently interrelated that it is difficult properly to construe any one of them in isolation from the others.