No. 15-96

In the Supreme Court of the United States

CHATTANOOGA-HAMILTON
COUNTY HOSPITAL AUTHORITY,
dba Erlanger Medical Center, dba Erlanger Health System,
Petitioner,

v.

UNITED STATES, ex rel. Robert Whipple,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether confidential information exchanged privately between the government and the target, and disclosed to a consultant hired by the target to assist in responding to the government's allegations during a non-public investigation, triggers the public disclosure bar of the False Claims Act.

CORPORATE DISCLOSURE STATEMENT

The Relator, Robert Whipple, is an individual.

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STATEMENT OF THE CASE

On April 17, 2006, AdvanceMed, the Medicare contractor to which the petitioner, Erlanger Medical Center ("Erlanger"), submitted Medicare claims for payment, received an anonymous hotline complaint reporting that Erlanger was improperly billing observation patients as inpatients. Pet. App. 10a. The United States Department of Health and Human Services ("HHS"), Office of the Inspector General ("OIG") initially received the complaint and referred it to AdvanceMed Corporation, the Medicare Part A Program Safeguard Contractor for Tennessee. Pet. App. 10a. AdvanceMed pursued the allegations by issuing the first of two requests for medical records to Erlanger, initially seeking medical records for ninety (90) inpatient admissions dated July 2005 through May 2006, which AdvanceMed selected for audit. Pet. App. 10a-11a. The AdvanceMed audit of those records revealed a significant error rate. Pet. App. 11a.

Based upon these audit results, in February 2008, OIG Office of Investigations opened an administrative investigation of Erlanger which was coordinated with OIG, Office of Counsel to the Inspector General. Pet. App. 11a. Erlanger's Compliance Officer, Alana Sulllivan, and outside counsel, Sara Kay Wheeler were advised by the OIG that the investigation had been opened in March, 2008. Pet. App. 11a-12a. Erlanger commenced an internal investigation of the allegations, retaining Deloitte Financial Advisory Services ("Deloitte") to review the allegations and conduct an independent audit. Pet. App. 12a. Deloitte also concluded that Erlanger had improperly billed for inpatient services and estimated the overpayments

Erlanger had received as a result. Pet. App. 12a. The OIG and the United States Attorney's Office for the Eastern District of Tennessee declined to pursue the allegations civilly or criminally, and the matter was referred back to AdvanceMed for resolution. Pet. App. 12a-13a. Erlanger repaid $477,140.42 to Medicare, and the investigation was closed in February 2009. Pet. App. 12a-13a.

On or about October 29, 2010, after the conclusion of the audit and investigation for which Mr. Whipple had no knowledge at that time, Mr. Whipple disclosed to the government for the first time the facts and allegations underlying his Complaint. Pet. App. 4a. The United States declined to intervene in April 2012 and Erlanger moved to dismiss the case on jurisdictional grounds. Pet. App. 4a. The parties engaged in jurisdictional discovery, and Erlanger filed its motion for summary judgment as to jurisdiction on June 17, 2013. Pet. App. 4a-5a. On August 26, 2013, the District Court granted Erlanger's motion and dismissed all of the claims in the Complaint at issue herein. Pet. App. 5a.

A timely appeal to the Sixth Circuit followed. Pet. App. 5a. The Sixth Circuit reversed the lower court's dismissal of this action on February 25, 2015, holding that the disclosures to Deloitte and AdvanceMed did not constitute public disclosures under the False Claims Act. Pet. App. 1a-20a. Erlanger had argued that the disclosure of potential fraud to AdvanceMed was a public disclosure under the False Claims Act. But as the Sixth Circuit Court of Appeals held, "there is no question that AdvanceMed received the information in question in its capacity as the Medicare

Part A Program Safeguard contractor for Tennessee and for the purpose of acting on behalf of the government as part of the administrative audit and investigation . . ." Pet. App. 17a. Erlanger had also argued that its own disclosure to Deloitte constituted a public disclosure. But as the Sixth Circuit held, the Deloitte auditors hired by Erlanger were "engaged to assist Erlanger in responding to the government's audit and investigation, and the information was disclosed by Erlanger in order for Deloitte to evaluate the billing issues raised and conduct a broader independent audit to determine the scope of those issues." Pet. App. 19a. The Court of Appeals specifically rejected the Erlanger's argument that the disclosure of the fraud to AdvanceMed and between Erlanger and the Deloitte auditors hired by it to assist in responding to the government's investigation were public, noting that "these disclosures were confidential and remained so until after this action was filed." Pet. App. at 17a. The Court held that "we conclude that Erlanger's disclosure of information to the government in the administrative audit and investigation did not constitute a public disclosure that would trigger the public disclosure bar." Pet. App. 16a.

On March 11, 2015 Erlanger filed a Suggestion for Rehearing En Banc. Pet. App. 45a. That Motion was denied on April 20, 2015 with a line order indicating that none of the sixteen members of the Sixth Circuit Court of Appeals believed rehearing was necessary. Pet. App. 45a. The timely Petition for Certiorari in this matter was filed on July 20, 2015.

REASONS FOR DENYING THE WRIT

I. There Is No Division Between the Seventh Circuit on the Public Disclosure Bar That Needs This Court's Resolution As The Seventh Circuit Has a Pending Appeal That Will Allow It to Correct Its Outlier Status With the Other Seven Circuits.

The question before the Court, properly framed, is whether disclosures made to or by the government in the course of a confidential, non-public government investigation qualify as public disclosures for purposes of the False Claims Act's public disclosure bar. While Erlanger argues that a grant of *certiorari* is necessary to resolve a "division" among the Courts of Appeal on this issue, Erlanger ignores the clear body of law that has developed over the course of the last almost two and a half decades. There is no circuit "division" on the question whether confidential disclosures during a government investigation trigger the public disclosure bar. Every Court of Appeal -- save the Seventh -- that has been squarely presented with this question has rejected Erlanger's view that disclosures made to or by the government during a confidential investigation constitute a public disclosure under the False Claims Act.

An appeal now pending in the Seventh Circuit in *United States ex rel. Cause of Action v. Chicago Transit Authority*, 71 F.Supp.3d 776, 783 (N.D.Ill. 2014) (granting motion to dismiss because "a disclosure to a public official with direct responsibility for the allegations at issue qualifies [as a public disclosure] under § 3730(a)(4)(e)") (citing *United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 861

(7th Cir. 1999)), *appeal docketed*, No. 15-1143 (7th Cir. Jan. 23, 2015), squarely addresses the issue Erlanger wishes to bring to this Court. The Seventh Circuit's policies make it unlikely that the circuit "split" proffered by Erlanger will persist after that case is decided. The Seventh Circuit's stated policy is to examine its prior precedents in light of the uniformity of decisions in other circuits, the need to avoid unnecessary inter-circuit conflict and the goal of preserving the resources of this Court. *See Owens v. U.S.*, 387 F.3d 607, 611 (7th Cir. 2004) ("'when a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse. . . . [I]f upon conscientious reexamination we are persuaded that the other circuits have the better of the argument, we should abandon our position in order to spare the Supreme Court extra work'") (ellipse in original) (quoting *U.S. v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995)). There is every likelihood that the *Cause of Action* panel will do exactly this and reverse *Matthews*. This Court should allow the Seventh Circuit the opportunity to self-correct in *Cause of Action* and come in line with the other seven circuits[1]

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[1] *U.S. v. Chattanooga-Hamilton County Hosp. Authority*, 782 F.3d 260, 268 (6th Cir. 2015) ("§ 3730(e)(4) requires some affirmative act of disclosure to the public outside the government"), *reh'g en banc denied* (6th Cir. Apr. 20, 2015); *U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 777 F.3d 691, 697 (4th Cir. 2015) ("a 'public disclosure' requires that there be some act of disclosure *outside of the government*") (emphasis in original) (citation omitted); *U.S. ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014) ("The mere fact . . . that the

and deny this petition before using its own limited resources. *Hill*, 48 F.3d at 232.

II. The Seventh Circuit Has Already Questioned the Precedential Value of *Matthews*, Making It Likely That It Will Overrule *Matthews* Completely in the Pending Seventh Circuit Appeal, Thus Eradicating Any Alleged Need For This Court's Resolution.

Notably, the precedential value of *Matthews* has already been eroded. In *Glaser v. Wound Care Consultants, Inc*., 570 F.3d 907, 909-910 (7th Cir. 2009), the Seventh Circuit acknowledged that its interpretation of when a qui tam case was "based upon" a public disclosure was erroneous. The Seventh Circuit explained that *Matthews* represented a "minority interpretation" of the phrase "based upon," noting that its interpretation had been rejected by eight other

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government is conducting an investigation behind the scenes, does not itself constitute public disclosure"); *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 27 (1st Cir. 2009) ("we reject[] an interpretation of 'public disclosure' under § 3730(e)(4)(A) to include self-disclosures made by a private party only to government agencies without further disclosure"); *Kennard v. Comstock Res. Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004) ("the government is not the equivalent of the public domain"); *U.S. ex rel. Schumer*, 63 F.3d 1512, 1518-19 (9th Cir. 1995), *vacated on other grounds,* 520 U.S. 939,117 S.Ct. 1871 (1997) ("[I]nformation that was 'disclosed in private' [between government and defendant] has not been publicly disclosed"); *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496, n. 7 (11th Cir. 1991) ("[e]ven if a government investigation was pending at the time [the relator] filed his qui tam complaint, such fact would not jurisdictionally bar [the False Claims Act claim]").

circuits. *Id.* This clearly demonstrates that the Seventh Circuit is aware of its duty to examine and revise its prior precedent when, among other reasons, "a number of other circuits reject a position that we have taken, and no other circuit accepts it" in order to "avoid[] unnecessary intercircuit conflicts" and to "spare the Supreme Court extra work." *Hill*, 48 F.3d at 232. There is every reason to believe, having done so already once with respect to *Matthews*, that when the Seventh Circuit resolves *Cause of Action*, it will conscientiously examine the cases cited above from the other seven courts of appeals and reverse its holding in *Matthews* that disclosure to the government is a public disclosure under the False Claims Act. In this respect, this matter is not a true circuit split worthy of this Court's resolution, especially at this time, and the petition should be denied.

III. Erlanger is Wrong To Assert That Second Circuit Precedent Causes a Circuit Split With Respect to How It Would Rule on This Matter.

Erlanger attempts to avoid the precedent cited above by suggesting that this case is governed by the holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) and that the Court's intervention is needed to resolve a circuit division between that case and the Ninth Circuit's decision in *Hughes*. Petition at 13-19. *John Doe* and this case, however, present vastly different facts, making this case unworthy of certiorari. In *John Doe*, the Second Circuit held that the disclosure of fraud by government agents to a number of the defendant's employees who were previously unaware of the fraud during the

execution of a search warrant constituted a public disclosure. *John Doe* is factually distinguishable because, among other reasons, it did not involve the confidential exchange of information between a defendant and the government during a non-public investigation. *Id*. To the contrary, the case involved government statements about a public investigation of fraud. In contrast, in this case, Erlanger made and received disclosures in confidence under circumstances where Erlanger was able to completely control who received information from or communicated information to the Government. The parallels between *John Doe* and this case that Erlanger attempts to draw are misplaced.

There are other infirmities in Erlanger's reliance upon *John Doe*. There is absolutely no evidence in the record that any of the Erlanger employees who learned about the AdvanceMed audit and underlying allegations of fraud were previously unaware of the alleged fraud and thus "innocent" employees like those in *John Doe*. And, although Erlanger tries to draw parallels between the disclosure in *John Doe* and its own disclosure to its auditors, Deloitte, there is also no evidence in the record about what Erlanger communicated to Deloitte. There, therefore, is no basis upon which this Court could conclude that Erlanger in fact disclosed fraud to Deloitte. Importantly, Deloitte was similarly subject to confidentiality requirements as a private auditor, meaning that disclosures to it could not be made available to the public at large, *i.e.* this Court cannot "assume . . . that the information disclosed [wa]s potentially accessible to the public." *John Doe Corp.*, 960 F.2d at 322. Erlanger's argument that the disclosure of fraud to AdvanceMed was a

public disclosure of fraud is similarly unsupported, as AdvanceMed is a government contractor operating as the government's agent, not a member of the public. Pet. App. 17a.

But the most fundamental flaw in Erlanger's reliance upon *John Doe* is that under Second Circuit precedent disclosures, by or to the government by a defendant during a confidential investigation could never be "public disclosures" of fraud. *See U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 & n. 4 (2d Cir. 1993) (holding that there must be "public access to, discovery and other litigation documents" for them to be a public disclosure); *U.S. ex rel. Feldman v. Van Gorp*, 674 F.Supp.2d 475, 482 (S.D.N.Y. 2009) ("previously filed complaints with the American Psychological Association and the New York State Department of Education [] were subject to confidentiality rules [so] not a situation where the information was 'publicly disclosed because it was available to anyone who wished to consult [them]'") (quoting *Kreindler*, 985 F.2d at 1158). In this regard, the information in this matter was not "publicly disclosed [and] available to anyone who wished to [see it]. *Kreindler*, 985 F.2d at 1158. As such, to the extent that there is an alleged circuit split between the Second Circuit and others circuits, this case cannot resolve it because the Second Circuit would rule the same way. *Kreindler,* 985 F.2d at 1158 & n. 4; *U.S. ex rel. Feldman*, 674 F.Supp.2d at 482.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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