NO. 15-96

In the
Supreme Court of the United States

CHATTANOOGA-HAMILTON
COUNTY HOSPITAL AUTHORITY,
PETITIONER,

v.

UNITED STATES OF AMERICA
EX REL. ROBERT WHIPPLE,
RESPONDENT.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondent asks the Court to deny certiorari, but the most notable feature of respondent's brief in opposition is how little it marshals by way of argument that certiorari is unwarranted.

The petition presented two entrenched circuit splits concerning what constitutes a "public" disclosure for purposes of the jurisdictional bar under the False Claims Act: (1) do disclosures in an investigation to individuals with no involvement in the alleged fraud trigger the bar if those individuals are "insiders" such as employees or consultants of the defendant?; and (2) do disclosures in an investigation to a responsible public official trigger the bar? The answer to the first question—the *Doe* split—is yes in the Second Circuit and no in the Sixth and Ninth Circuits. *Compare United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322–23 (2d Cir. 1992), *with* App. 18a–19a; *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518–19 (9th Cir. 1995); *see* Pet. 13–17. The answer to the second question—the *Bank of Farmington* split—is yes in the Seventh Circuit and no in the First, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits. *Compare United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999), *with, e.g.*, App. 14a–16a; *see* Pet. 18–19.

Respondent does not dispute the existence of either of these circuit splits or that both splits are explicit and longstanding. Nor does respondent dispute that the question presented is recurring and important enough to warrant certiorari or, indeed, that the Court previously granted certiorari to

resolve the *Doe* split even when the split was shallower. Instead, respondent can muster only two arguments against certiorari. First, he contends that certiorari is not needed because the Seventh Circuit may overrule its own precedent and eliminate the *Bank of Farmington* split. Second, he contends that this case is a bad vehicle to resolve the *Doe* split because that split does not affect the outcome. Neither contention bears scrutiny.

1. *Bank of Farmington split*. Respondent devotes most of his brief in opposition to attacking the need for certiorari to resolve the split between the Seventh Circuit, on the one hand, and the Sixth Circuit below and other circuits, on the other, concerning whether disclosure to a responsible public official constitutes "public" disclosure. BIO 4–7. According to respondent, the Seventh Circuit will overrule its *Bank of Farmington* precedent and align itself with the court below and the other circuits that have rejected *Bank of Farmington*.

Respondent's prediction ignores that the Seventh Circuit has reaffirmed its precedent despite contrary holdings by other circuits. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 914 (7th Cir. 2009) (finding public disclosure where the "appropriate entity responsible for investigating claims of Medicare abuse had knowledge of possible improprieties with [defendant]'s billing practices and was actively investigating those allegations and recovering funds"); *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 736 (7th Cir. 2007) ("Caremark's disclosure of information to the U.S. Attorney's Office during the government's

investigation of Caremark's business practices qualifies as a public disclosure of the Relators' allegations."), *overruled on other grounds by Glaser*, 570 F.3d 907. The Seventh Circuit's reaffirmance of *Bank of Farmington*'s holding regarding the meaning of "public disclosure" came after three circuits had held, contrary to *Bank of Farmington*, that disclosures must be made outside of the government to trigger the bar.[1] Moreover, the Seventh Circuit reaffirmed that holding even as it overruled a separate holding from *Bank of Farmington*. *See Glaser*, 570 F.3d at 910, 920. It is unclear why respondent is confident that the Seventh Circuit will belatedly change course now.

More fundamentally, however, even if the Seventh Circuit overrules its precedent and eliminates (or narrows or recasts) the *Bank of Farmington* split, that will leave the *Doe* split unaffected. Not even respondent suggests that this split concerning how broadly a disclosure must be disseminated outside the government in order to qualify as "public" will go away on its own. That is not surprising, given that this split has persisted for nearly 20 years since the Court granted certiorari to resolve it after the Ninth Circuit in *Hughes Aircraft* explicitly rejected the Second Circuit's *Doe* holding. *See* Pet. 11–15.

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[1] *See United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1200–01 (9th Cir. 2009); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728–31 (1st Cir. 2007), *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499–1500 (11th Cir. 1991).

As explained in the petition and below, reversal of the Sixth Circuit on either of the two splits would be independently dispositive in this case. Erlanger respectfully submits that the Court should grant certiorari on the entire question presented by the petition, encompassing both splits, to ensure that the Court has the entire picture in front of it. But the Court could opt to grant certiorari limited to the *Doe* split if it believes that the *Bank of Farmington* split may be resolved without the need for its intervention.

2. *Doe split*. Unable to dispute that the *Doe* split is certworthy, respondent makes a half-hearted attempt, occupying barely two pages, to argue that this case is a bad vehicle to resolve it. BIO 7–9. Respondent is wrong. The Sixth Circuit's adoption of the Ninth Circuit's holding that "public" disclosure requires disclosure to "outsiders," App. 19a, was decisive to the outcome. Under *Doe*, the bar would assuredly apply, and there would be no subject-matter jurisdiction here, because the allegations were disclosed to many strangers to the alleged fraud, including but not limited to innocent employees of Erlanger. Pet. 16–17. Respondent's efforts to distinguish *Doe* on factual grounds miss the point and distort the record.

a. In *Doe*, the government executed a search warrant and interviewed several employees of the defendant company, including some who were not implicated in the alleged fraud. The Second Circuit agreed with the government that the disclosure of the fraud allegations to those "innocent employees" triggered the bar because they were "strangers to the fraud." 960 F.2d at 322–23; Pet. 14–15. As the

petition explains, the Tenth and Seventh Circuits, as well as the federal government, appear to side with the Second Circuit's approach, while the Ninth Circuit has explicitly rejected it in favor of requiring disclosure to "outsiders" to an investigation, and the decision below adopted the Ninth Circuit's approach. Pet. 13–16. Respondent contends that *Doe* does not apply here because Erlanger supposedly "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." BIO 8.

There is no record support for respondent's startling claim that Erlanger somehow had "complete[] control" over who communicated with the government, and respondent does not purport to cite any. That is no accident: the notion that a subject of a government investigation can control whom the government communicates with is nonsense. The government decides whom to interview; it is not relegated to talking only to individuals whom the subject company hand-picks. Nor can the subject control who—among its employees, consultants, former employees, or the rest of the world—may initiate communication with the government. Here, an anonymous individual, in all likelihood an Erlanger employee, prompted the investigation by calling a government hotline. Pet. 5; *see* Dkt. Nos. 107-13, at 2, 107-12, at 5.

As for respondent's claim that the disclosures to and by Erlanger were "in confidence": If respondent means to suggest that any of the many individuals

who made or received disclosures of the fraud allegations—at AdvanceMed, Deloitte, or Erlanger itself—had a legal duty not to further disclose the information or use it to file a *qui tam* action, that claim, too, has no record support whatsoever. Perhaps, therefore, respondent means instead to suggest only that the government and Erlanger had a generalized expectation, or at least a hope, that the investigation would not be widely publicized.

But the point that government investigations usually are kept closely held while they are in progress—which crops up repeatedly in the brief in opposition and even in respondent's reformulation of the question presented, *see* BIO i, 4—merely reveals the basic error of the Sixth and Ninth Circuits in holding that only disclosures to "outsiders" to an investigation trigger the bar. Congress specifically included "administrative . . . audit[s] [and] investigation[s]" in its enumeration of channels of what it termed "public" disclosure. 31 U.S.C. § 3730(e)(4)(A). Because there generally are not supposed to be disclosures to outsiders to a government audit or investigation while it is in progress, holding that only disclosures to outsiders count reads those channels of "public disclosure" out of the statute. *See* Pet. 22–23.

Moreover, a hope that an ongoing investigation will remain "confidential" in this loose sense is a hope that is often dashed. Most *qui tam* actions, after all, are brought by employees or former employees of the defendant who seek to use information and documents belonging to the employer against the employer. *See* Pet. 28; Stephen M. Payne, *Let's be*

Reasonable: Controlling Self-Help Discovery in False Claims Act Suits, 81 U. Chi. L. Rev. 1297, 1298–99 (2014) (discussing the common use of "confidential" documents by relators and noting that many courts have permitted such use despite confidentiality agreements between relator and employer). Most egregiously, if the court below is correct that the disclosures here were not "public" enough to trigger the bar, then any recipient of those disclosures could have taken a page out of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and turned around and filed a *qui tam* action using the information he or she obtained from the government to reduce the government's recovery even though the government was already actively investigating. The "False Claims Act's *qui tam* provisions present many interpretive challenges," *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015), but this is not one of them—the one thing that should be beyond debate is that Congress did not intend to allow a reprise of *Marcus*, "the high-water mark for parasitic *qui tam* actions," *Doe*, 960 F.2d at 321. Erlanger explained this critical point in the petition, Pet. 30–31, but respondent offers no response.[2]

b. Respondent's other argument for why the public-disclosure bar would not apply here even under *Doe* is that there is "no evidence in the record

[2] In the district court, respondent is pursuing discovery concerning the government's audit, with the evident intention of using the fruits of the government's own work to seek a bounty for himself—all in the name of the government. This anomalous development is a predictable consequence of the Sixth Circuit's narrowing of the public-disclosure bar.

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*." BIO 8. This contention is misplaced on multiple levels.

As an initial matter, it is respondent's burden to establish subject-matter jurisdiction, not Erlanger's burden to negate it. *See, e.g.*, *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009) (recognizing that relator bears the burden of proof in response to a challenge to subject-matter jurisdiction based on the public-disclosure bar). As a result, any gaps in the "evidence in the record" concerning whether any or all of the Erlanger employees who received the disclosures were strangers to the alleged fraud as required by *Doe* are respondent's problem, not Erlanger's. If respondent wanted to distinguish *Doe* on this basis, he was required to present evidence showing that the Erlanger employees were aware of the alleged fraud; he cannot shift the burden to Erlanger to prove that they were "innocent."

In any event, the existing record makes clear that at least some of the disclosures were to Erlanger employees who were "strangers to the [alleged] fraud," *Doe*, 960 F.2d at 322–23. Disclosures were made to numerous officers and employees across a spectrum of departments at Erlanger. *See* App. 31a; Dkt. No. 107-7, at 5. As to the vast majority of them, there is no suggestion anywhere in the complaint, the record, or even respondent's briefs that they were involved in the billing issues under investigation.

Two examples among many are Erlanger's Chief Financial Officer, who received detailed disclosures directly from AdvanceMed (Dkt. 107-9), and the Director of the Care Management Department, who was hired after respondent left Erlanger (Dkt. 107-7, at 6). Respondent could not seriously contend that these individuals were implicated by his allegations.

Moreover, the alleged fraud was also disclosed to multiple individuals outside of Erlanger, including at least seven Deloitte professionals. *See* Pet. 5–6. Under *Doe*, what matters is whether the fraud allegations were disclosed to a stranger to the alleged fraud; an innocent employee of the defendant qualifies, but so do other individuals not employed by the defendant. *See Doe*, 960 F.2d at 322 ("the allegations of fraud were not just potentially accessible to strangers, they were actually divulged to strangers to the fraud, namely the innocent employees of John Doe Corp."); *see also id*. at 323 (stating that disclosure to defendant's "customers" would also have triggered the bar); Pet. 16 (quoting the Solicitor General's briefs arguing that disclosure to even a single stranger to the fraud outside of the government suffices).

Because not even respondent can dispute that the Deloitte auditors were strangers to the alleged fraud, he contends that the disclosures to Deloitte would fail under *Doe* on the ground that "there is no evidence in the record about what Erlanger communicated to Deloitte" that would support a finding "that Erlanger in fact disclosed fraud to Deloitte." BIO 8. To the extent that respondent means to suggest that the bar applies only where the

defendant "in fact disclosed fraud," he is mistaken. The bar is triggered by disclosure of the "allegations or transactions" that the relator seeks to litigate. 31 U.S.C. § 3730(e)(4)(A). In many cases, including this one, those "allegations" are false because there was no fraud. But the bar nonetheless applies. *See, e.g.*, *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998) (disclosure need not allege fraud explicitly or reveal actual fraud; rather, it is sufficient if it could have alerted the government to the possibility of fraud).

To the extent that respondent means to suggest that the record here is silent on what was disclosed to Deloitte, he is equally mistaken. *See* App. 31a, 34a–35a; Dkt. Nos. 107-15 (OIG report stating Erlanger retained "Experts with specific knowledge of the issues in question"), 107-27, at 35 (presentation of Deloitte audit findings to OIG), 107-7, at 3–4, 8–12 (letter describing specific issues of concern to OIG, agreement to retain independent auditor to evaluate those issues, and Deloitte's audit process and findings), 107-19 (OIG report directing AdvanceMed to review Deloitte's audit), 107-28 (discussion of Deloitte audit with AdvanceMed).[3]

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[3] Respondent's final contention is that the Second Circuit limited *Doe* in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), such that even in the Second Circuit the bar applies only where information is disclosed in a way that makes it "available to anyone who wishe[s] to [see it]." BIO 9 (internal quotation marks omitted). This contention is difficult to understand. *Kreindler* did not involve the "audit" or "investigation" channels of public disclosure and did not purport to address them. Instead, it involved the "hearing" channel separately listed in

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The proper interpretation of the public-disclosure bar is critical to the proper operation of the False Claims Act. The Sixth Circuit's rejection of both the Second Circuit's *Doe* holding and the Seventh Circuit's *Bank of Farmington* holding led it to permit respondent to press his *qui tam* action, in the name of the government, to reopen the government's own resolution of an administrative audit and investigation—and to do so without even needing to possess "direct and independent knowledge," 31 U.S.C. § 3730(e)(4)(B) (1986). That anomalous result highlights the lower courts' struggles with the meaning of "public" disclosure since that issue escaped resolution in *Hughes Aircraft*. The split has only grown deeper and broader since then. The Court should grant certiorari here and resolve this important issue.

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the statute, and its holding that the bar applied where discovery material was available in the court file casts no doubt on *Doe*'s holding about how the bar applies in the context of disclosures to strangers to the alleged fraud in an investigation. *See Kreindler*, 985 F.2d at 1157–58 (citing *Doe* with approval). And, of course, *Kreindler* did not stop this Court from granting certiorari to resolve the conflict between *Doe* and the Ninth Circuit's decision in *Hughes Aircraft*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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