No. _____

In the

Supreme Court of the United States

UNITED STATES EX REL. CAUSE OF ACTION,

Petitioner,

v.

CHICAGO TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether the Seventh Circuit erred in holding that the government disclosure bar, removed from the False Claims Act ("FCA") by Congress in 1986, continues to bar qui tam suits based on false claims that are not publicly disclosed but only revealed to a federal agency — a question over which the Circuits have split.

2. Whether a document can effect a "public disclosure" of false claims for purposes of Section 3730(e)(4)(A) of the FCA when it does not disclose necessary elements of a false claim, such as presentment of a claim for payment to the United States, payment of the claim, or scienter — a question over which the Circuits have split.

3. Whether a public disclosure of past false claims for purposes of Section 3730(e)(4)(A) of the FCA can bar qui tam suits concerning fraud that had not yet occurred — a question over which the Circuits have split.

4. If a public disclosure of false claims occurred, whether a relator is barred from qualifying as an "original source" of FCA allegations when the relator discovers previously undisclosed elements of FCA violations — a question over which the Circuits have split.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Since its enactment during the Civil War, the False Claims Act ("FCA") has protected the federal treasury from fraud by permitting private citizens to file qui tam suits as relators on behalf of the United States. Relators are essential for protecting the public fisc through the FCA. During the last fiscal year, 80 percent of the funds recovered for the government under the FCA derived from lawsuits filed under the qui tam provisions.[1] The decision of the Seventh Circuit, which creates new Circuit splits and deepens pre-existing ones on several issues, threatens the FCA qui tam provisions as an effective protection for federal finances. The Seventh Circuit's holdings contradict the FCA text and congressional purpose — abridging not only the rights of relators to recover money on behalf of the federal government, but also their incentive to try.

Congress recognized that the FCA must provide an incentive for potential relators to identify fraud but without opening the door to "parasitic" relators — those who only seek to profit from discoveries made and publicized by others and who simply copy others' discoveries into their own qui tam complaints. For that reason, the FCA bars qui tam suits derived from publicly disclosed information. 31 U.S.C. § 3730(e)(4). Relators who make their own discoveries or materially add to previous public disclosures, however, remain free to bring qui tam suits as "the public fisc [would]

[1] Press Release Dep't of Justice, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015) *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

only suffer[]" if they were not. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).

Under this congressionally established balance, the question of what constitutes a public disclosure is a fundamental issue of FCA law. The definition of a public disclosure is dispositive in many cases. Federal circuits have struggled with that question and have reached conflicting conclusions.

The Seventh Circuit's holdings exacerbate that pre-existing confusion. First, it held that qui tam suits are barred even if the underlying fraud has not been made available to the general public but is known to federal officials. Second, it held that relators are barred from bringing qui tam suits even when they discover false claims during independent investigation of facially innocuous public information. Third, it held that public disclosure of false claims presented and paid in the past foreclose relators from bringing qui tam suits when they discover additional false claims occurring after the disclosure. Fourth, it held that relators cannot qualify as an "original source" — empowered to bring qui tam suits after public disclosures — even when they reveal essential elements of FCA violations that had never been part of any public disclosure. These holdings split from decisions of other Circuits, and will diminish recovery of fraudulently obtained federal money.

This Court should grant review in order to resolve the splits, vindicate the rights of FCA relators, and restore the FCA as a safeguard for moneys of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 815 F.3d 267, and is reprinted at Pet. App. 1a. The order of the Court of Appeals denying rehearing is unpublished, and is reprinted at Pet. App. 47a. The opinion of the district court is reported at 71 F. Supp. 3d 776, and is reprinted at Pet. App. 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 29, 2016. Pet. App. 1a. Petitioner filed a timely petition for rehearing *en banc* on March 14, 2016, which the Court of Appeals denied on March 29, 2016. Pet. App. 47a. On June 2, 2016, Petitioner filed an application for an extension of time until July 27, 2016. Justice Kagan granted the application on June 6, 2016. *See* Application No. 15A1239. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The 1986 version of the FCA public disclosure bar provided:

> (4) (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 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.
>
> (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) (1986).

The version of the public disclosure bar applicable from July 22, 2010 to the present provides:

> (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed —
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) 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 either (i) [*sic*] prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has

> voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)(4). *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, § 10104(j)(2).

STATEMENT OF THE CASE

I. The False Claims Act

The FCA provides for liability when a person "knowingly" presents to the federal government, or causes to be presented, a claim for payment that is "false" or "fraudulent." 31 U.S.C. § 3729(a). "Knowingly" is defined as reckless disregard, deliberate ignorance, or actual knowledge. *Id.* § 3729(b)(1). The terms "false" and "fraudulent" otherwise incorporate their common-law meanings. *See Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016). Claims under the FCA can be brought by the United States itself or by relators in the name of the United States in "qui tam" actions. 31 U.S.C. § 3730.

The opportunity for private citizens to bring qui tam actions gave rise to the dilemma of so-called "parasitic" relators who do no work or investigation of their own and therefore do not genuinely supplement the ability of the United States to protect its finances from fraud. Congress resolved that dilemma by barring qui tam suits based on information that had already been disclosed through particular channels. Before 1986, the FCA incorporated a "government knowledge" bar that prohibited relators from bringing cases "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (citing Act of Dec. 23, 1943, 57 Stat. 609 (codified at 31 U.S.C. § 232(C) (1946 ed.)); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997).

In 1986, Congress amended the FCA by, *inter alia*, replacing the government knowledge bar with a "public disclosure" bar. The public disclosure bar foreclosed qui tam suits that were "based upon the public disclosure of allegations or transactions" through certain enumerated channels. 31 U.S.C. § 3730(e)(4)(A) (1986). By abandoning the government knowledge bar, Congress "allowed private parties to sue even based on information already in the Government's possession." *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (internal citations omitted). The public disclosure bar included an exception that allowed qui tam suits based on publicly disclosed information where the relator was an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A), (B) (1986) (defining "original source").

Congress again amended the public disclosure bar in 2010. This Court had interpreted the 1986 version as foreclosing qui tam suits based on information publicly disclosed in state as well as federal hearings, reports, and audits. *See Graham Cnty.*, 559 U.S. at 302. The 2010 amendments clarified that state-level disclosures do not trigger the statutory bar. After 2010, only information revealed in federal hearings in which the government "or its agent" is a party or in federal reports, hearings, audits or investigations qualifies as a public disclosure. 31 U.S.C.

§ 3730(e)(4)(A). The 2010 amendments also modified the definition of "original source." *Id.* § 3730(e)(4)(B).

II. Factual Background

The Federal Transit Administration ("FTA") administers grant funding to state and municipal transit programs. Those transit programs, such as the Chicago Transit Authority ("CTA"), submit annual reports to the National Transit Database ("NTD") with information about the vehicle revenue miles ("VRM") traveled by buses. The FTA uses this information to calculate grant funding, among other purposes. *See generally* 49 U.S.C. § 5307; 49 C.F.R. § 630.1 *et seq.*

Between at least reporting years 2001 and 2010, CTA over-reported its VRM by including miles traveled by buses while they were out of service (so-called "deadhead" miles). As a result of that over-reporting, CTA appears to have fraudulently billed and collected from the FTA approximately $2.6 million to $5.5 million per year in federal funds that it was not entitled to receive.

In 2006 and 2007, the Illinois Office of the Auditor General ("IL-OAG"), at the request of the Illinois legislature, conducted a "performance audit" of four northern Illinois mass transit systems, including CTA. Thomas Rubin, one of the auditors hired by the IL-OAG, discovered that CTA had been overstating VRM from 1999 through 2004 — the only years examined. Pet. App. 28a. In March 2007, the IL-OAG released its 450-page audit report ("IL-OAG audit") which stated on page 72:

> Our review raised questions about the accuracy of CTA's reporting of revenue vehicle hours and miles. CTA may be incorrectly reporting some

> deadhead hours/miles as revenue hours/miles (i.e., miles and hours a vehicle travels when out of revenue service). This clearly is suggested by differences in reported hourly values for CTA and the peer group (Exhibit 3-19). The average vehicle revenue hours as a percent of vehicle hours is 87 percent for the peer group and 99 percent for CTA.

Pet. App. 53a. The IL-OAG audit did not connect the reporting to any federal funding program, any claims for payment based on VRM, or any payment by the United States pursuant to those claims. Also, it did not indicate or claim that the CTA knowingly misreported VRM. It mentioned federal funding, but in a different context 200 pages removed from its discussion of deadhead miles. There was no evident connection to CTA reporting of VRM. Pet. App. 53a. There was no other mention in the IL-OAG audit of any potential misreporting of VRM.

III. Proceedings Below

Petitioner, Cause of Action Institute ("CoA Institute"), obtained information about the CTA "deadhead" reporting from Mr. Rubin. CoA Institute commenced an investigation and determined that CTA misreporting of VRM had led to the submission of false claims to FTA and a fraud on the federal government. CoA Institute disclosed the results of its investigation to the United States Department of Justice. It subsequently filed a FCA complaint alleging that CTA knowingly submitted ten false claims to FTA (one each year from 2002 through 2011). Pet. App. 34a.

On April 27, 2012, after CoA Institute advised the government of the fraud but before it filed its complaint, FTA sent CTA a letter (the "FTA Letter"). The FTA advised CTA to change its billing practices; however, it allowed CTA to keep the money to which it was not entitled. Pet. App. 35a, 49a. FTA did not release the letter to the general public. CoA Institute was not, and could not have been, aware of the FTA Letter at the time it was sent or when CoA Institute filed its FCA complaint.

CTA moved the district court to dismiss this case. It argued that the IL-OAG audit and an internal memorandum Mr. Rubin prepared while working on the IL-OAG audit were public disclosures that barred the CoA Institute claim. In opposition, to support its argument that CTA was misclassifying revenue miles, CoA Institute cited to the FTA Letter in a footnote in its opposition brief (and attached the letter as an exhibit). CTA did not mention the FTA Letter in its motion to dismiss or reply brief. The district court found that the IL-OAG audit, the Rubin internal memorandum, and (without argument or suggestion from CTA) the FTA Letter were all public disclosures. It dismissed the action.

The Court of Appeals for the Seventh Circuit affirmed. The Circuit held that the FTA Letter was a public disclosure. Pet. App. 12a–19a. A prior decision of the Circuit, *United States v. Bank of Farmington*, held that a document can effect a public disclosure when it reveals potential false claims to the federal government alone, even when the document is not available to the general public. 166 F.3d 853, 861 (7th Cir. 1999). The Circuit in the decision at issue recognized and commented that it is in the minority in that respect because several other Circuits have taken the contrary position. Pet. App. 16a–19a. It acknowledged that "[t]here is significant force in the positions of the other circuits," but declined to reconsider its past precedent. *Id.*

The Circuit further held that the 2007 IL-OAG audit was a public disclosure covering an entire "continuing practice" of false claims presented by CTA from 2002 through 2011. *Id*. at 17a–21a. The Circuit also held that there was no requirement to connect the VRM reporting to any federal funding program in a way that indicated claims or payments of claims, so long as the United States can "infer that it is being defrauded"; in the Circuit's view, scienter could be inferred as well because the VRM reporting violated a legal standard. Pet. App. 24a, n.17.

The Circuit also held that CoA Institute was not an original source of its FCA allegations. *Id.* at 25a–26a.[2]

CoA Institute sought en banc review, which was denied. Pet. App. 47a. This petition follows.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit decision erred in several critical respects, each of which diverges from decisions of other Circuits.

The Seventh Circuit has taken the position that a public disclosure can occur when information about a potential false claim is never made available to the

[2] The district court and the Circuit applied the FCA in slightly different ways. The district court applied both the 1986 and 2010 versions of the public disclosure bar. It held that "the 1986 version of the statute applies to allegations of fraud that occurred before March 23, 2010, and the 2010 version applies to events thereafter." Pet. App. 37a, n. 2. In contrast, the Circuit held that all false claims were governed by the 1986 version of the public disclosure bar and the 2010 definition of "original source." Pet. App. 20a, n14.

public at all, but only privately made known to federal government officials. *Bank of Farmington,* 166 F.3d at 861. The Fifth Circuit has implied its agreement, but the D.C., First, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits explicitly disagree.

Next, Circuits have split both internally and with each other over what information must enter the public domain in order for the public disclosure bar to apply. Controlling decisions of the D.C., Eighth, Ninth, and Tenth Circuits require that a public disclosure contain all the elements of fraud. The First, Third, and Sixth Circuits, plus at least one other decision of the D.C. Circuit, hold that a public disclosure need only disclose a "true" set of facts plus a "misrepresented" set of facts presented to the government. The Seventh Circuit has taken yet a third approach, joining a decision from the Second Circuit as well as a third decision from the D.C. Circuit and a second decision from the Tenth Circuit, which only requires that a public disclosure contain enough information to put the federal government on notice of potential fraud. The widespread confusion on this issue has resulted in a three different approaches with the D.C. Circuit taking all three approaches; the Tenth Circuit taking two of the three approaches; and the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits each taking one of the three approaches.

Circuits, as well, have split over whether a public disclosure of false claims submitted to the federal government in the past forecloses qui tam suits when a relator discovers additional false claims submitted and paid afterward. Here, the Seventh Circuit held that an alleged disclosure published in 2007, mentioning conduct from reporting years 1999 through 2004, also disclosed CTA presenting false claims after both 1) the period examined in the audit (*i.e.*, claims presented after 2004) and 2) the period after the audit itself was published (*i.e.*, claims presented from 2007 through 2011). Pet. App. 20a–25a. The Ninth Circuit has taken the opposite position. It held that even when a public disclosure occurs, the disclosure does not bar qui tam suits as to false claims submitted after the date of the disclosure. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006).

Last, Circuits have split over the test for determining whether a relator is an "original source" of information about false claims. The Seventh Circuit has held, contrary to the Third Circuit, that a relator must have direct, personal knowledge of the alleged false claims in order to qualify. Pet. App. 27a. It also held, contrary to the D.C. Circuit, that after public disclosure of some but not all elements of a false claim, independent discovery of the undisclosed elements is not enough to confer "original source" status. *Id.*

Review by this Court is necessary to resolve these inter- and intra-Circuit splits and resulting issues.

I. The Circuits Are Split As To Whether Federal Agency Knowledge Of Information Unavailable To The Public Constitutes A "Public Disclosure"

The Seventh Circuit held that the FTA Letter was a public disclosure. The FTA Letter was not made public; it was only mailed to CTA from a federal agency. In its prior *Bank of Farmington* decision, however, the Seventh Circuit held that false claims are publicly disclosed if a federal official with "managerial responsibility" for the claims receives information about them, even if such information is not made available to the general public. 166 F.3d at 861. Applying that rule, the Seventh Circuit panel below reasoned that the FTA Letter brought the public disclosure bar into effect because it evidenced FTA awareness of the facts. That holding is an error. It conflicts with the decisions of this Court, seven other Circuits, and explicit congressional intent of removing the government knowledge bar.

In discerning the meaning of a statute "we start, as always, with the language of the statute." *Universal Health Servs.,* 136 S. Ct. at 1999 (quoting *Allison Engine Co. v. United States ex rel. Sanders,* 553 U.S. 662, 668 (2008)).

The *Bank of Farmington* rule has no basis in the statutory text. Both the 1986 and 2010 versions of the public disclosure bar enumerate specific channels of disclosure — such as through the news media or a criminal, civil, or administrative hearing in which the Government or its agent is a party — that bring the bar into effect. 31 U.S.C. § 3730(e)(4). The statute does not provide for a bar based on non-public disclosure to federal officials. The Seventh Circuit's rule is an atextual judicial reading. *Cf. Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (invalidating a "judge-made procedural" rule that contradicted a statute's text).

As mentioned, the pre-1986 text of the FCA included a "government knowledge" bar on qui tam suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *Graham Cnty.*, 559 U.S. at 294; *Hughes*

Aircraft, 520 U.S. at 946. Congress amended the FCA in 1986 in order to replace that bar with the modern public disclosure bar, and so "allowed private parties to sue even based on information already in the Government's possession." *Cook Cnty.*, 538 U.S. at 133 (internal citations omitted). Under the public disclosure bar, "[t]he statutory touchstone . . . is whether the allegations of fraud have been 'publicly disclosed,' not whether they have landed on the desk of a DOJ lawyer." *Graham Cnty.*, 559 U.S. at 299. In effect, the Seventh Circuit has rejected this Court's instruction and used an FCA bar that Congress eliminated thirty years ago.

No other court has adopted the Seventh Circuit rule. Rather, a deep Circuit split has developed, with the D.C., First, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits reaching the contrary conclusion. *United States ex rel. Oliver v. Philip Morris USA, Inc.*, 763 F.3d 36 (D.C. Cir. 2014); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007); *United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 777 F.3d 691 (4th Cir. 2015); *United States ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 782 F.3d 260 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 218 (2015); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195 (9th Cir. 2009), *overruled on other grounds en banc sub nom. by United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015); *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180 (10th Cir. 2008); and *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). Only the Fifth Circuit has indicated that it may be aligned with the Seventh Circuit. *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l*

Healthcare Sys., 384 F.3d 168, 174–75 (2004) (finding that disclosures by a Medicare fiscal intermediary during an audit could constitute a public disclosure but not addressing whether the disclosures extended outside of the government).

The Seventh Circuit's adherence to the *Bank of Farmington* rule presents a regularly recurring conflict among the Circuits. Although the Seventh Circuit has reaffirmed *Bank of Farmington* on several other occasions,[3] it acknowledged the "significant force in the position of the other circuits," and that "in-depth reconsideration" of *Bank of Farmington* would be called for. Pet. App. 19a.[4] This case presents the opportunity for this Court to resolve the Circuit split.

[3] *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707–708 (7th Cir. 2014); *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009).

[4] The Supreme Court ruled on other aspects of the False Claim Act public disclosure bar in several other cases. *Graham Cnty.*, 559 U.S. 280; *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). Following a split between the Second, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992), and Ninth Circuits, *United States ex rel. Schumer v. Hughes Aircraft Co.,* 63 F.3d 1512, 1518–19 (9th Cir. 1995), over government knowledge of a potential fraud and its subsequent disclosure to innocent employees of the defendant this Court granted certiorari to resolve this conflict, *Hughes Aircraft Co. v. United States ex rel. Schumer,* 519 U.S. 926 (1996), but ultimately decided the case on other grounds. *See Hughes Aircraft,* 520 U.S. 939.

II. The Circuits Are Split As To Whether A Document Can Be A Public Disclosure Under the FCA If It Does Not Disclose All Of The Necessary Elements Of A False Claim

Beside its treatment of the FTA Letter, the Seventh Circuit also held that the IL-OAG audit was a public disclosure. As the court below acknowledged, a "public disclosure" for purposes of Section 3730(e)(4) must reveal the "essential elements" of a FCA violation. Pet. App. 21a. Elements of a FCA claim include presentment of a false claim to the United States, payment of the false claim, and scienter. *Allison Engine Co.*, 553 U.S. at 668; 31 U.S.C. § 3729(a)(1)(A); *see generally Universal Health Servs.*, 136 S. Ct. 1989.[5] The IL-OAG audit does not disclose all of those elements. It stated only that its review "raised question about the accuracy of CTA's reporting of revenue vehicle hours and miles." Pet. App. 53a. The Seventh Circuit below nonetheless held that the IL-OAG audit was a public disclosure because even though not all elements had been disclosed, the missing elements could be "infer[red]." Pet. App. 24a. In so doing, the court joined a three-way, twenty-year old Circuit split concerning the standard to be applied in evaluating the sufficiency of an alleged public disclosure. This has exacerbated the confusion among

[5] The Supreme Court in *Allison Engine* held that specific intent was required for proof of a false claim. 553 U.S. at 665–71. In 2009, Congress amended the FCA to require only general intent, but did not make the amendment retroactive. *See United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1302–03 & n.14 (10th Cir. 2010). Both standards therefore apply to claims at issue in this case.

federal courts about how to evaluate public disclosures.

Most federal courts derive their tests for public disclosure from interpretations — or misinterpretations — of the seminal D.C. Circuit decision *Springfield Terminal*, 14 F.3d 645. That case held a public disclosure that does not specifically allege fraud must identify fraudulent "transactions" — *i.e.*, "exchange[s] between two parties or things that reciprocally affect or influence one another" — and reveal the "essential elements" that render the transaction fraudulent. *Id.* at 653–54. When disclosure of a transaction omits essential elements showing fraud, there has been no public disclosure within the meaning of the FCA. In this circumstance, "the public fisc . . . suffers when the whistle-blower's suit is banned" and the fraud is therefore not remedied. *Id.* at 654; *see also id.* at 655 ("[W]here only one element of the fraudulent transaction is in the public domain . . . the qui tam plaintiff may mount a case by coming forward with . . . the additional elements necessary to state a case of fraud[.]").

The controlling decisions of at least three Circuits follow the *Springfield Terminal* approach. Under this approach, to permit dismissal of a qui tam suit, a purported disclosure must indicate all necessary elements of a false claim. *United States ex rel. Found. Aiding The Elderly v. Horizon W.*, 265 F.3d 1011, 1015 (9th Cir. 2001), *opinion amended on denial of reh'g*, 275 F.3d 1189 (9th Cir. 2001); *United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1410 (9th Cir. 1995); *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1188 (8th Cir. 2010); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004). Pursuant to these decisions, fraud on the government can be inferred — and qui tam suits barred — when the essential elements of fraud are publicly disclosed. But when the elements are not disclosed, the fact that they could possibly be inferred is not enough. Under this standard, public disclosure in the instant case did not occur given the facts set forth in the proceedings below. The Seventh Circuit approach is thus inconsistent with the decisions of these Circuits.

Other Circuits have derived a second test from *Springfield Terminal*. The *Springfield Terminal* court stated that disclosure of the essential elements of fraud requires public awareness of "a misrepresented state of facts and a true state of facts." 14 F.3d at 655 (emphasis omitted). Some courts have taken that language out of context. They misread *Springfield Terminal* to mean that disclosure of only those two factors is sufficient for a public disclosure under Section 3730(e)(4). Recent D.C. Circuit authority has also so interpreted *Springfield Terminal*. *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 86 (D.C. Cir. 2014) ("[W]e explained [in *Springfield Terminal*] that the government has 'enough information to investigate the case' either when the allegation of fraud itself has been publicly disclosed, or when both of its underlying factual elements–the misrepresentation and the truth of the matter–are already in the public domain."); *see also Oliver v. Philip Morris USA Inc.*, __ F.3d. __, 2016 WL 3408023 at *3 (D.C. Cir. June 21, 2016) (describing its application of the *Springfield Terminal* test).

Three Circuits now hold that as long as both a true state of facts and a false state of facts are publicly disclosed, the public disclosure bar applies. *United States ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104, 110 (1st Cir. 2010); *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009); *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 (3d Cir. 2013); *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 389 (6th Cir. 2005). The Seventh Circuit acknowledged that standard, but explicitly declined to apply it. Pet. App. 25a, n.18.

Other Circuits have taken a third approach, which also derives from misinterpretations of *Springfield Terminal*. The *Springfield Terminal* court commented — citing case law from before Congress abolished the government knowledge bar in 1986 — that the importance of the public disclosure bar lay in preventing qui tam suits where publicly disclosed information is adequate to make federal enforcement possible. 14 F.3d at 654. Some following decisions from other Circuits, including at least one decision from the D.C. Circuit, have mistaken that reasoning for the test itself. They held that a court should "inquire only as to whether the publicly disclosed information could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 918 (D.C. Cir. 1999) (quoting *Springfield Terminal*, 14 F.3d at 654 (itself quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981))). *See United States ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996) (public disclosure by a document that presented defendant's claims "in a questioning light"); *see also United States ex rel. Kirk v. Schindler Elevator Corp.*, 437 F. App'x 13, 17 (2d Cir. 2011) ("While Kirk is correct that the FOIA responses do not definitively state that the reports were not in fact filed and do not address Schindler's state of mind in respect of any such non-filing, it is sufficient for the public disclosure bar that the disclosed transaction 'creates an inference of impropriety'") (quoting *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 724 (6th Cir. 1999)).

Although the court below acknowledged the *Springfield Terminal* rule that a disclosure has to include all elements, in reality it applied this third approach. It reasoned that because disclosure of a false statement to the government is enough to lead to an inference of scienter and of the existence and payment of false claims, it is enough to trigger the public disclosure bar. Pet. App. 24a.

The result of the mentioned decisions is a three-way Circuit split that this Court should resolve. The qui tam provisions of the False Claims Act provide a vital tool for protecting the federal fisc from fraud. Congress chose the public disclosure bar as the means of separating purely opportunistic relators from ones with potential to protect the public fisc. Carrying out that policy decision requires close attention to what constitutes a public disclosure.

Review is particularly appropriate because many Circuits apply standards that preclude more qui tam suits than barred by the FCA. The proper test for the public disclosure bar is the one identified by *Springfield Terminal*: In order to preclude subsequent qui tam suits, a public disclosure must identify all the elements of a fraud. 14 F.3d at 653–54. As the D.C. Circuit explained, when essential elements are not disclosed, "the public fisc only suffers when the whistle-blower's suit is banned." *Id.* at 654. Furthermore, to apply the public disclosure bar simply because the government is on notice of potential fraud effectively works the government knowledge bar back into the FCA despite the Congressional decision to abandon it. *Cook Cnty.*, 538 U.S. at 133. Identifying one element (such as a misrepresentation), or putting the government on notice that a state audit on another topic "raised questions about the accuracy of" a defendant's reporting to an unidentified entity, Pet. App. 53a, should not be enough.

The fact that several Circuits treat qui tam suits as barred when essential elements remain undisclosed translates into missed opportunities to bring falsely claimed funds back into the federal treasury. This Court should grant review, resolve the conflict among the Circuits, and confirm Congress's high standard for barring qui tam suits.

III. The Circuits Are Split on The Ability of A Public Disclosure to Bar FCA Claims Presented After The Date of Disclosure

There is also a Circuit split over whether a disclosure such as the 2007 public disclosure of past false claims in a state audit also bars qui tam suits that allege false claims presented after that disclosure. This case presents an appropriate opportunity to resolve this split.

The IL-OAG audit was issued in 2007 and briefly referenced CTA practice from 1999 through 2004.[6] Pet. App. 53a–54a. It did not mention any conduct after 2004, and could not have discussed events occurring after its publication. Nonetheless, the Seventh Circuit held that the IL-OAG audit was also

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[6] This audit did not qualify as a public disclosure because it lacked the essential elements of a fraud. *See* Section II *supra*.

a public disclosure of false claims by CTA that were presented to the FTA from 2005 through 2011. Pet. App. 20a–25a. This approach conflicts with rulings from other Circuits.

In *Bly-Magee*, the Ninth Circuit held that even if examples of an ongoing fraud have been publicly disclosed, that does not bar a relator from bringing suit alleging false claims presented to the United States after the disclosure. 470 F.3d 914. The *Bly-Magee* relator alleged a continuing practice of fraud by California state agencies and officials from the early 1990s through 2000. Defendants moved to dismiss based on a California state audit report which discussed the state's practices "until June 30, 1999." *Id.* at 919. The district court agreed and dismissed the suit in its entirety. The Ninth Circuit affirmed in part, and held that the audit report disclosed claims "relating to events occurring on or before June 30, 1999." *Id.* at 920. However, as to alleged false claims that occurred after that date, the court held that there had been no public disclosure. *Id.* It therefore "reverse[d] the dismissal of those portions of the complaint alleging the making of false claims after June 30, 1999." *Id.*

This case and *Bly-Magee* are factually similar. In both cases, a court held that a state audit report publicly disclosed past false claims. In the Ninth Circuit, however, the public disclosure bar has only the same time period as the conduct revealed in the disclosure itself. In the Seventh Circuit, the bar extends forward in perpetuity as long as later false claims are part of the same "continuing practice." The Circuit split is unmistakable.

At least two Circuits appear to align with the Seventh Circuit view. The D.C. Circuit recently held that a public disclosure of past conduct can also "disclose" later conduct in the same "general practice." *See Oliver*, 2016 WL 3408023 at *5 (citing *Settlemire*, 198 F.3d at 919). The First Circuit, relying on the Seventh Circuit decision, employed similar reasoning in a different FCA context only weeks ago. *See United States ex rel. Winkelman v. CVS Caremark Corp.*, No. 15-1991, 2016 WL 3568145, at *9 (1st Cir. June 30, 2016) (holding that allegations of post-disclosure conduct did not "materially add" to a disclosure for purposes of a relator's original source status).

The Ninth Circuit approach in *Bly-Magee* is more consistent with the FCA. Presentment of a false or fraudulent claim for payment is the *sine qua non* of a FCA violation. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039 (11th Cir. 2015); *United States ex rel. Clausen v. Lab. Corp. of Am.,* 290 F.3d 1301, 1311 (11th Cir. 2002). Under the FCA, each false claim submitted to the United States is a discrete event, is separately actionable, and is subject to damages and civil penalties. 31 U.S.C. § 3729(a); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786, 792–794 (4th Cir. 1999). Until a person presents a false claim, or causes a false claim to be presented, there is no false claim to disclose. It follows that only past conduct and past claims can be disclosed.

The Ninth Circuit approach also better fulfills the purpose of the FCA. "Otherwise, the public disclosure of a certain type of fraudulent conduct by a defendant would effectively immunize that defendant from *qui tam* liability in perpetuity." *United States ex rel. Kester v. Novartis Pharm. Corp.*, 43 F. Supp. 3d 332, 353 (S.D.N.Y. 2014); *see also United States ex rel.*

Kester v. Novartis Pharm. Corp., No. 11-8196, 2015 WL 109934, at *9 (S.D.N.Y. Jan. 6, 2015); *United States ex rel. Booker v. Pfizer, Inc.*, 9 F. Supp. 3d 34, 45 (D. Mass. 2014). Similarly, the purpose behind the public disclosure bar is to prevent parasitic litigation by relators who have not contributed to unearthing fraud against the government. *Schindler Elevator*, 563 U.S. at 412–13. A relator who discovers that previously disclosed fraud is still ongoing cannot be parasitic because that relator has at a minimum unearthed new instances of fraud.[7] Barring such a relator's suit serves no public purpose. It strains logic to reason, as the Seventh Circuit did, that the FCA public disclosure bar could prevent relators from vindicating the United States' interests as to conduct that had not yet occurred at the time of the public disclosure.

This Court should grant review to resolve the conflict among the Circuits and hold that public disclosures of past conduct do not immunize wrongdoers from future liability.

[7] There is little risk that a relator would successfully circumvent the public disclosure bar by alleging post-disclosure fraud without adding substantive facts, for such claims should be dismissed under Federal Rule of Civil Procedure 9(b). *See United States ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) (Relator's "allegations that the fraud continues to the present day [were insufficient on Rule 9(b) grounds], because those allegations [we]re 'on information and belief.'").

IV. The Circuits Are Split Over Whether A Relator Is An "Original Source" If The Relator Discovers Previously Undisclosed Elements Of A FCA Violation

Assuming, contrary to cited authorities, the Seventh Circuit correctly determined that the IL-OAG audit or the FTA Letter publicly disclosed the false claims the CTA presented to the FTA, CoA Institute would still be entitled to pursue its claims as a relator if it were an "original source" of the information the disclosure contained. 31 U.S.C. § 3730(e)(4)(B). The Seventh Circuit, diverging from at least one other Circuit, erroneously held that CoA Institute was not an original source of its allegations. This holding alone is grounds for this Court's review.

Prior to the 2010 amendments, "original source" was defined as a person "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) (B) (1986). The 2010 amendments removed the requirement that the relator's knowledge be "direct." *Compare United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (explaining that under the 1986 version of the FCA, "a person who learns secondhand of allegations of fraud does not have 'direct' knowledge"), *with United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 299 (3d Cir. 2016) (commenting that under the 2010 amendments, a relator can be the original source of knowledge acquired '"through . . . intermediaries"') (quoting from and distinguishing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v.*

Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991)). Currently, the FCA defines "original source" as, in relevant part, "an individual . . . who has knowledge that is [1] independent of and [2] materially adds to the publicly disclosed allegations or transactions, and who has [3] voluntarily provided the information to the Government before filing an action under this section." 31 U.S.C. § 3730(e)(4)(B).

Courts have held that relator knowledge is "independent" if it goes beyond what was in publicly disclosed material, and it "materially adds" to the publicly disclosed material. *See Moore*, 812 F.3d at 299. Relator knowledge materially adds "when it contributes information — distinct from what was publicly disclosed — that adds in a significant way to the essential factual background: 'the who, what, when, where and how of the events at issue.'" *Id.* The "original source" standard is thus satisfied when a relator "start[s] with innocuous public information" and "complete[s] the equation with information" that was not in the disclosure. *Springfield Terminal*, 14 F.3d at 657. All the relator must do is to contribute independent knowledge of "any essential element" of a false claim. *Id.*; *see also Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1046 (10th Cir. 2004).

CoA Institute meets that standard. Assuming the IL-OAG audit was a public disclosure, even the court below reasoned that its four corners do not show facts establishing all elements of a false claim, which thus have to be inferred. Pet. App. 24a. That is what CoA Institute did; it "complet[ed] the equation" with the missing factual material. *Springfield Terminal*, 14 F.3d at 657. Its knowledge is therefore "independent" of the disclosure and "materially adds" facts to what the IL-OAG audit contained. It is also undisputed that CoA Institute provided its knowledge to the United States, through its required pre-filing disclosure, before filing suit. 31 U.S.C. § 3730(b)(2), (e)(4)(B).

The Seventh Circuit, however, employed a different analysis. It supplied two reasons for rejecting CoA Institute as an original source, both of which diverge from decisions of other federal courts.

First, the court below held that "there is no reason to believe that [CoA Institute] would have ever learned of the wrongdoing it now alleges" if not for information provided by Mr. Rubin. Pet. App. 31a. In so doing, the court erroneously imported the pre-2010 "direct knowledge" requirement into the post-2010 FCA, contrary to the 2010 amendment. The result is a Circuit split as to the type of knowledge required of an original source. While relators "no longer must possess 'direct . . . knowledge' of the fraud to qualify as an original source" in other Circuits, *Moore*, 812 F.3d at 299, in the Seventh Circuit they must.

Second, the court held that "because [CoA Institute] allegations are substantially similar to those contained in the [IL-OAG audit], its information has not 'materially added' to the public disclosure." Pet. App. 31a (alteration omitted). In so doing, the court failed to engage in the precise, element-by-element analysis that other Circuits require. The IL-OAG audit contained a statement that CTA may have misreported VRM; CoA Institute derived the elements of an FCA complaint from that "innocuous information." *Springfield Terminal*, 14 F.3d at 657. In other Circuits, that is sufficient; in the Seventh Circuit, it is not.

The Seventh Circuit approach is not only inconsistent with the statutory text as well as the decisions of other Circuits, but inequitable. If a partial disclosure of information (such as the IL-OAG audit) is enough to trigger the public disclosure bar because the remaining elements can be inferred, there must be an incentive for potential relators to make that inference. If the Seventh Circuit, in other words, is going to lower the threshold for the public disclosure bar it must also allow for a similarly lower threshold for being considered an original source. The Seventh Circuit analysis can only lead to more public disclosures, fewer relators — and less protection for federal funds.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 27, 2016

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-1143
CAUSE OF ACTION,

Plaintiff-Appellant,

v.

CHICAGO TRANSIT AUTHORITY, an Illinois municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:12-cv-09673 — **Robert M. Dow, Jr.**, *Judge*.

ARGUED SEPTEMBER 10, 2015 — DECIDED FEBRUARY 29, 2016

Before FLAUM, RIPPLE, and SYKES, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Cause of Action, a nonprofit government watchdog organization, brought this action against the Chicago Transit Authority ("CTA") under the *qui tam* provision of the False Claims Act ("FCA" or "Act"), 31 U.S.C. § 3730. Cause of Action alleged that, for several decades, the CTA had been misreporting fraudulently transit data to the Federal Transit Administration ("FTA") in order to secure inflated federal grant allocations. The district court dismissed the action, holding that it lacked subject matter jurisdiction over Cause of Action's FCA claims because its allegations of wrongdoing had been publicly disclosed at the time the action was filed. We agree that the allegations had been publicly disclosed and therefore affirm the judgment of the district court.

I

BACKGROUND

A.

Under the Urbanized Area Formula Program ("UAFP"), 49 U.S.C. § 5307, the FTA administers grant funding to large urban transit programs for "operating costs of equipment and facilities for use in public transportation." *Id.* § 5307(a)(1)(D). The statute requires grant recipients to submit "financial, operating, and asset condition information" about their transit systems to the National Transit Database ("NTD"). *Id.* § 5335(a)–(c). The agency then apportions grants based, in part, on the number of Vehicle Revenue Miles ("VRM") reported to the NTD by the transit program. *Id.* § 5336(c)(1)(A)(i). According to the NTD, VRM accrue while a vehicle is "in revenue service," those miles for which a "vehicle is available to the general public and there is an expectation of carrying passengers." Nat'l Transit Database, 2006 Urbanized Area Reporting Manual, Glossary 384, 396 (2006), *available at* http://www.ntdprogram.gov/ntdprogram/pubs/ARM/2006/pdf/2006_Reporting_Manual_Glossary.pdf. So-called "deadhead miles"—miles accumulated while a vehicle is out of revenue service—specifically are excluded from the VRM calculation. *Id.* at 352, 396.

The CTA is a municipal corporation providing public transportation services in the greater Chicago area; it receives federal grant funding through the UAFP. In 2005, the Illinois House of Representatives adopted Resolution Numbers 479 and 650, which, among other matters, directed the Illinois Auditor General ("IL-AG") to conduct a performance audit of the CTA. During the course of this audit, Thomas Rubin, a subcontractor on the IL-AG audit team, helped prepare a twenty-five page report titled "Chicago Transit Authority Overreporting of Motor Bus Vehicle Revenue Miles," which examined in detail the CTA's VRM reporting practices ("Technical Report").[1] Mr. Rubin's Technical Report concluded that the CTA, from possibly as early as 1986, had been overstating its VRM when making its annual certifications to the NTD and, consequently, had received higher than justified UAFP grant disbursements. The Technical Report recommended that the CTA inform the FTA of the situation and become compliant by revising its reporting methodology.

In March 2007, the IL-AG released its final performance audit report ("Audit Report"). On page seventy-two of the Audit Report, the IL-AG explained that its review, which included the Technical Report, had "raised questions about the accuracy of [the] CTA's reporting of revenue vehicle hours and miles" and concluded, based on the "clear[]...differences in reported hourly values for [the] CTA and the peer group," that the "CTA may [have been] incorrectly

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[1] R.3-3.

reporting some deadhead hours/miles as revenue hours/miles."[2]

In 2009, Mr. Rubin notified the Department of Transportation Office of Inspector General ("DOT-OIG") of the CTA's misreporting and provided it with a copy of his Technical Report. Mr. Rubin also provided copies of the Technical Report, the Audit Report, and a sworn affidavit to Cause of Action. On March 28, 2012, Cause of Action sent a letter to the Department of Justice requesting an investigation into the CTA's reporting practices.

Approximately one month later, on April 27, 2012, the FTA sent a letter to the CTA explaining that the FTA had conducted an "in-depth review" of the CTA's reporting of VRM data ("FTA Letter").[3] The FTA

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[2] R.3-4 at 126.

[3] The FTA Letter to the CTA states in full:

> The Federal Transit Administration (FTA) has conducted an in-depth review regarding the way in which Vehicle Revenue Miles (VRM) and Vehicle Revenue Hours (VRH) are reported to the National Transit Database (NTD) by the Chicago Transit Authority (CTA). As a result of our review, CTA should revise its data for the 2011 Report Year to reflect the definition of "revenue service" in the NTD Reporting Manual and should continue to follow the definition of "revenue service" from the NTD Reporting Manual for future report years. The FTA will not, however, require CTA to revise its annual NTD Reports from prior years.
>
> The initial inquiry was made regarding CTA's relatively low percentage of "deadhead" mileage compared to other large transit agencies. In your October 2011 memorandum you stated that efficient scheduling practices, the convenient location of CTA bus garages, and frequent midday bus service explained the high VRM reported to the NTD. You

also noted that CTA cannot speak for the scheduling or reporting practices of other transit agencies.

To further study this situation, we asked you to send FTA detailed data on the patterns and blocks used by CTA to schedule its buses. FTA selected 10 bus trip blocks from this data for analysis. Upon selecting the data set, FTA mapped each trip from the pull-out from the bus garage, through the revenue service trip, and then to the return pull-in to the bus garage. In 7 of the 10 bus blocks analyzed, FTA found that the bus left the garage, traveled a short distance on one bus route (recorded as "revenue service"), and then moved to the primary bus route, which the bus served for the bulk of the block.

FTA appreciates CTA's efforts to operate transit service as efficiently as possible and to minimize "deadhead" time in favor of revenue service. However, FTA's funding formulas rely upon applying a consistent definition of "revenue service" across all transit systems in the country in order to ensure a fair and equitable distribution of formula funds.

As such, FTA established the following three-part definition of revenue service in its 2011 NTD Urbanized Area Reporting Manual (page 212): (1) that the service must be advertised as being available to the general public; (2) there must be a marked stop that is advertised in the schedule; and; (3) there must be an indication on the bus (e.g., head sign, window board) that the bus is in revenue service.

Using the data you provided (see enclosure), FTA examined CTA's published schedules and found that each bus that arrived at the primary route was reflected on the schedules. FTA did not, however, find the bus routing between the garage and the primary route to be included on the published schedules. Therefore, although buses traveling on this secondary route between the garage and the primary route may stop at marked bus stops and may indicate "revenue service" on their head signs, this travel does not meet the NTD definition of "revenue service."

R.55-1 at 2–3.

Letter indicated that the CTA had cooperated in the review by providing detailed data on the patterns and blocks it used to schedule its buses. It then directed the CTA to revise its VRM data for reporting year 2011 and for future years but did not require the CTA to revise any VRM data for prior years.

B.

Cause of Action brought this *qui tam* action under the FCA in the United States District Court for the District of Maryland in May 2012. In its complaint, Cause of Action alleged two counts of fraudulent conduct by the CTA based on its inaccurate VRM reporting and sought damages, a declaratory judgment, and injunctive relief. Cause of Action attached to its complaint the Technical Report, the Audit Report, and Mr. Rubin's affidavit. The federal court in Maryland transferred the case to the Northern District of Illinois. The United States then declined to intervene, and the complaint was unsealed.

The CTA then moved for dismissal on the ground that Cause of Action had failed to establish subject matter jurisdiction under the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). That section withdraws jurisdiction over *qui tam* actions based on allegations that already have been disclosed publicly through certain enumerated sources unless the relator is an original source of the information. In opposing the motion to dismiss, Cause of Action contended that the public-disclosure bar had not been triggered and that, in any case, § 3730(e)(4) no longer constitutes a jurisdictional hurdle because a 2010 amendment had replaced the phrase "no court shall have jurisdiction" with the phrase "[t]he court shall dismiss."[4] In reply, the CTA conceded that, in light of the 2010 amendments, the correct approach would be for the court to treat its motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim.

The district court did not decide whether the 2010 version of § 3730(e)(4) was jurisdictional or substantive. It held that, under either standard, dismissal was appropriate. Turning to the applicability of the public-disclosure bar, the court first noted that the sole issue in dispute was whether the allegations in the complaint had been publicly disclosed; Cause of Action had waived any argument under the statute that its allegations were not substantially similar to the disclosures or that it qualified as an original source. The court then concluded that Cause of Action's allegations had been publicly disclosed in the FTA Letter as well as in the Technical and Audit Reports, and that, consequently, its *qui tam* suit was precluded by the public-disclosure bar.[5]

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[4] R.55 at 14–15.

[5] As we note later, in this case, we must apply the earlier version of § 3730(e)(4)(A). *See infra* note 14. We therefore need not determine whether the new language of the 2010 amendment is jurisdictional. We note that the circuits that have had to determine whether the new statutory language is jurisdictional have held that the language of the 2010 amendment is not jurisdictional. *See United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, No. 14-4292, 2016 WL 386087, at *5 (3d Cir. Feb. 2, 2016) ("[W]e conclude that the amended bar is not jurisdictional".); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 810 (11th Cir. 2015) (same); *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 916 (4th Cir. 2013) (same).

II
DISCUSSION

The applicable standard of review is not in dispute. Although the district court did not specify whether it dismissed Cause of Action's complaint under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), in either case, "[w]e review *de novo* challenges made pursuant to the FCA's bars." *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707 (7th Cir. 2014).

A.

First enacted in 1863 to combat rampant fraud and price-gouging in Civil War defense contracts, the FCA enables the United States Government to recover losses sustained as the result of fraud committed against it. The Act imposes liability upon any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government. 31 U.S.C. § 3729(a)(1). The statute makes civil penalties and treble damages available as remedies. *See id.* The FCA further contemplates that "[t]he Attorney General diligently shall investigate a violation under section 3729," and, if substantiated, "may bring a civil action...against the person" directly in the name of the United States. *Id.* § 3730(a). From its inception, however, the FCA also has contained a so-called *qui tam* provision, which permits a private party, known as a "relator," to bring a civil action alleging fraud against the Government on its own behalf as well as on behalf of the United States. *See id.* § 3730(b)(1). If the claim is proven, the relator receives a percentage of the recovery. *See id.* § 3730(d).

In its initial form, the FCA "did not limit the sources from which a relator could acquire the information to bring a *qui tam* action." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 293–94 (2010). Consequently, relators were not obligated to supply any new information before filing a complaint under the FCA. Yet, "[d]espite this invitation for abuse, the *qui tam* provisions were used sparingly during their first half-century." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). With the proliferation of New Deal and World War II government contracts, however, came both an increase in fraud and a corresponding surge in *qui tam* litigation. *Id.* And due to the liberality of the provisions then in effect, individuals who had played no part in uncovering a fraud were free to bring "parasitic" lawsuits based on information that was entirely the product of the Government's own investigation. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545–46 (1943) (upholding relator's recovery in *qui tam* suit based solely on information contained in a criminal indictment to which it had not contributed). Such purely duplicative litigation "not only diminished the government's ultimate recovery without contributing any new information," but also "put pressure on the government to make hasty decisions regarding whether to prosecute civil actions." *United States ex rel. Findley v. FPC-Boron Emps.' Club*, 105 F.3d 675, 680 (D.C. Cir. 1997).

Responding to this opportunism, Congress amended the *qui tam* provisions in 1943 "to preclude *qui tam* actions 'based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.'" *Graham Cty.*, 559 U.S. at 294 (quoting Act of Dec. 23, 1943, Pub. L. No. 213, 57 Stat. 608, 609 (codified at 31 U.S.C. § 232(C) (1946))). This broadly worded "government-knowledge" bar, however, overcorrected for its predecessor, stymying the *qui tam* provision's enforcement by depriving courts of jurisdiction over otherwise meritorious suits. *See, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1106–07 (7th Cir. 1984) (precluding State of Wisconsin from bringing *qui tam* action because the state already had reported the alleged fraud to the federal government, as required by statute). "[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (internal quotation marks omitted). As a result, "the volume and efficacy of *qui tam* litigation dwindled." *Graham Cty.*, 559 U.S. at 294.

In 1986, Congress again overhauled the Act in order "to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67. On the whole, the 1986 reforms were meant to broaden the *qui tam* provisions in order to encourage private individuals to disclose fraudulent conduct. *See id.* at 6–8. As the legislative history indicates, however, this time Congress also "sought to resolve a tension between...encouraging people to come forward with information and preventing 'parasitic' lawsuits." *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 101st Cong. 5 (1990) (statement of co-sponsor Sen. Grassley); *accord Springfield Terminal*, 14 F.3d at 649 (noting that Congress sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own"). Accordingly, the 1986 amendments repealed the government-knowledge bar and replaced it with the more circumscribed public-disclosure bar to *qui tam* jurisdiction:

> 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) (1994) (footnote omitted). The 1986 statute defined an "original source" as someone possessing "direct and independent knowledge" of the alleged wrongdoing who "voluntarily provided the information to the Government before filing an action." *Id.* § 3730(e)(4)(B).[6]

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[6] Congress revised the public-disclosure bar again in 2010 as a part of the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010). Our cases hold that the 2010 changes to § 3730(e)(4)(A) are not retroactive and therefore the applicable version of subsection (A) is the one that was "in force when the events underlying th[e] suit took place." *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 934 (7th Cir. 2012) (citing *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010)). However, Congress's modification of the "original source" definition in subsection (B) "is a clarifying rather than a substantive amendment" and thus is "not subject to a retroactivity bar." *United States ex rel. Bogina v. Medline*

B.

To determine if an action is barred under § 3730(e)(4), we engage in a three-step analysis. *See, e.g.*, *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009). We first examine whether the allegations in the complaint have been "publicly disclosed" through one of the enumerated channels. *Id.* If so, we then determine whether the relator's lawsuit is "based upon," *i.e.*, "substantially similar to," those publicly disclosed allegations. *Id.* at 913, 920. If it is, the public-disclosure bar precludes the action unless "the relator is an 'original source' of the information upon which [the] lawsuit is based." *Id.* at 913. The relator bears the burden of proof at each step of the analysis. *Id.*

1.

Under the first step of the § 3730(e)(4) framework, the allegations in a complaint are publicly disclosed "when the critical elements exposing the transaction as fraudulent are placed in the public domain." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). This definition presents two distinct issues: whether the relevant information was "placed in the public domain," and, if so, whether it contained the "critical elements exposing the transaction as fraudulent." *Id.*

a.

We turn first to the language "in the public domain." In construing this phrase, we have recognized the uncontroversial proposition that

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Indus., Inc., 809 F.3d 365, 369 (7th Cir. 2016). We discuss the specific applications of these amendments as they arise in our analysis.

material is in the public domain when the information is open or manifest to the public at large. *Id.* (defining "public" as "accessible to or shared by all members of the community" (quoting Webster's Ninth New Collegiate Dictionary 952 (1987))); *see United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) ("A plain and ordinary meaning of 'public' is 'open to general observation, sight, or cognition,...manifest, not concealed'; that of 'disclosure' is 'opening up to view, revelation, discovery, exposure.'" (citation omitted) (quoting 12 Oxford English Dictionary 780 (2d ed. 1989); 4 *id.* at 738)). For instance, the critical elements of a fraud "[c]learly" entered the public domain through a series of government audits that were covered by the news media, *United States ex rel. Gear v. Emergency Med. Assocs. of Ill., Inc.*, 436 F.3d 726, 728–29 (7th Cir. 2006), but not through unfiled discovery materials that were merely "potentially accessible to the public," *Bank of Farmington*, 166 F.3d at 860.

Beyond revelation to the general public, however, we further have recognized that the phrase "in the public domain" has an alternative meaning: where the "facts disclosing the fraud itself are in the government's possession." *Absher*, 764 F.3d at 708. In *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), we explained that "[t]he point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money." *Id.* at 861. This purpose, we noted, was in accord with "a standard meaning of 'public,' which can also be defined as 'authorized by, acting for, or representing the community.'" *Id.* (quoting 12 Oxford English Dictionary 779 (2d ed. 1989)). We therefore held that the "[d]isclosure of information to a competent public official ... [is a] public disclosure within the meaning of § 3730(e)(4)(A) when the disclosure is made to one who has managerial responsibility for the very claims being made" because "disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large." *Id.*

Since *Bank of Farmington*, we have embraced the proposition that because "the purpose of a public disclosure is to alert the responsible authority that fraud may be afoot," the Government's possession of the information exposing a fraud is alone sufficient to trigger the public-disclosure bar. *Glaser*, 570 F.3d at 914 (quoting *Feingold*, 324 F.3d at 496). Building on this rationale, we held in *Feingold* that administrative reports containing the critical elements of fraud, when generated by the responsible authority itself, "are publicly disclosed because, by their very nature, they establish the relevant agency's awareness of the information in those reports." 324 F.3d at 496. Six years after *Feingold*, we invoked *Bank of Farmington* again, this time in the context of an administrative investigation. *Glaser*, 570 F.3d at 913–14. In *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009), the *qui tam* relator alleged that the defendant, a wound-care services provider, had been allowing its nurse practitioner to bill Medicare at a higher rate by representing that the practitioner's services were "incident to" the services of a physician when, in reality, they were provided without supervision. *Id.* at 911. Prior to the filing of the complaint, however, the Centers for Medicare & Medicaid Services ("CMS") had discovered the defendant's billing irregularities during a routine audit and begun "periodically sen[ding] letters asking [the defendant] to repay funds it received at the higher doctor's rate." *Id.* Based on the CMS's letters to the defendant, we determined that the responsible authorities possessed more than "mere...awareness of wrongdoing," which alone would have been insufficient to establish a public disclosure. *Id.* at 913–14 (citing *Bank of Farmington*, 166 F.3d at 860 n.5). Rather, the communications indicated that CMS "had knowledge of possible improprieties...and was actively investigating those allegations and recovering funds." *Id.* at 914. We held therefore that "the critical elements exposing the transaction as fraudulent [had been] placed in the public domain, and therefore the allegations at the heart of [the relator's] lawsuit were publicly disclosed by the time her complaint was filed." *Id.* (first alteration in original) (citation omitted) (internal quotation marks omitted).

With this precedent in mind, we examine first whether the FTA Letter was publicly disclosed within the meaning of the statute.[7] The district court, relying on our decision in *Glaser*, held that the review described in the FTA Letter "amount[s] to precisely the type of active investigation that the Seventh Circuit identified in *Glaser*. Accordingly the CTA's inaccurate reporting was publicly disclosed in the FTA's investigation by the time the complaint was filed in May 2012."[8] Cause of Action attempts to distinguish *Glaser* by asserting that "[i]n this case, by

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[7] The federal administrative investigation described in the FTA Letter qualifies as an eligible source of disclosure under both the 1986 and 2010 versions of the public-disclosure bar. *See Graham Cty.*, 559 U.S. at 283 (interpreting the 1986 version); § 3730(e)(4)(A) (2012) (limiting the public-disclosure bar to federal sources).

[8] R.61 at 10 (citation omitted).

contrast, the government has done nothing to recover the money that [the] CTA should not have received. This fact, and this fact alone, should be enough to prevent the public disclosure bar."[9]

The distinction that Cause of Action identifies is not relevant to our analysis. In *Glaser*, we were clear that "mere governmental awareness of wrongdoing does not mean a public disclosure occurred." 570 F.3d at 913. There, the CMS's letters were significant because they indicated that the responsible authority had proceeded beyond mere "knowledge of possible improprieties" to the point of "actively investigating those allegations," which placed them in the public domain. *Id.* at 914. Here, like in *Glaser*, the FTA, as the responsible authority, was not "simply aware" of the misreporting. *Id.* The FTA Letter specifically references the agency's "in-depth review" of the CTA's reporting practices, facilitated at least in part by the CTA's cooperation, and describes in some detail the results of the inquiry.[10] There is no support in either the FCA or our case law for attaching jurisdictional significance to the outcome of an administrative investigation beyond its undertaking. Thus, under our precedents, the FTA Letter was "placed in the public domain" when it was sent to the CTA. *Feingold*, 324 F.3d at 495.

Some of our sister circuits have criticized our reading of this term. In their view, "a 'public disclosure' requires that there be some act of disclosure to the public *outside of the government*." *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720,

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[9] Appellant's Br. 16 n.20.

[10] R.55-1 at 2–3.

728 (1st Cir. 2007) (emphasis added).[11] These courts rely primarily on the text of § 3730(e)(4)(A). A disclosure, they explain, requires both "an affirmative act" and a "recipient...to whom the information is revealed." *United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 777 F.3d 691, 696 (4th Cir. 2015). That recipient, they maintain, is the public. And because "the Government is not the equivalent of the public," the phrase must be read to mean that "only disclosures made to the public at large or to the public domain ha[ve] jurisdictional

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[11] *See also United States v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d 260, 268 (6th Cir. 2015) (rejecting *Bank of Farmington* and holding that "§ 3730(e)(4) requires some affirmative act of disclosure to the public outside the government"); *United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 777 F.3d 691, 697 (4th Cir. 2015) ("Today we too reject the Seventh Circuit's view, holding instead that a public disclosure requires that there be some act of disclosure *outside of the government*." (emphasis in original) (internal quotation marks omitted)); *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014) ("The plain text of the public disclosure bar delineates three channels through which information can be made public for purposes of invoking the bar....The government's own, internal awareness of the information is not one such channel"); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201 (9th Cir. 2009) (["E]ven when the government has the information, it is not publicly disclosed under the Act until it is actually disclosed to the public."); *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1186 (10th Cir. 2008) ("Interpreting the FCA to establish release of information into the public domain as the trigger to remove subject matter jurisdiction fits with the purposes of the Act and the 1986 amendments."); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496 n.7 (11th Cir. 1991) ("Even if a government investigation was pending at the time [the relator] filed his *qui tam* complaint, such fact would not jurisdictionally bar [the FCA claim].").

significance." *Id.* at 696–97 (internal quotation marks omitted). Otherwise, "[i]f providing information to the government were enough to trigger the bar, the phrase 'public disclosure' would be superfluous." *Rost*, 507 F.3d at 729.[12]

Our sister circuits also emphasize the congressional intent behind replacing the broad Government-knowledge bar with the more precise public-disclosure bar. "As a result of that change, the inquiry shifted from whether the relevant information was known to the government to whether that information was publicly disclosed in one of the channels specified by the statute." *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014). Thus, to credit the Government's internal knowledge alone as sufficient to withdraw jurisdiction, as our case law permits, is to "essentially reinstate a jurisdictional bar Congress expressly eliminated." *Id.*; *accord Rost*, 507 F.3d at 729–30. Moreover, according to these courts, requiring outward disclosure helps to strike the balance sought by Congress between encouraging private citizens with first-hand knowledge to step forward while discouraging opportunistic plaintiffs from capitalizing on public information generated by others. *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1186 (10th Cir. 2008); *Springfield Terminal*, 14 F.3d at 653 ("If [information is] not yet in the public eye, no rational purpose is served—and

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[12] Several of these cases also emphasize the use of the word "Government" elsewhere in the FCA. *See Chattanooga-Hamilton*, 782 F.3d at 268; *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 729 (1st Cir. 2007) ("The statute itself uses the term 'Government' numerous times and does not once equate the government with the public.").

no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on [its] contents."). Finally, several courts have noted that our "interpretation is also contrary to another legislative purpose reflected in the 1986 amendments: it was the Congressional intent, through the requirement of public disclosure, to help keep the government honest in its investigations and settlements with industry. Once allegations are made public, the government can be forced to act by public pressure." *Rost*, 507 F.3d at 730; *accord Maxwell*, 540 F.3d at 1186.

There is significant force in the position of the other circuits. If the FTA letter were the only document before us in this case, respect for the position of the other circuits would warrant in-depth reconsideration of our precedent. However, we need not address squarely the correctness of *Bank of Farmington* today because, as Cause of Action concedes, the Audit Report was "in the public domain" at the time the complaint was filed.[13]

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[13] Appellant's Br. 20 ("The Audit Report was in the public domain."). We note that during oral argument, counsel for the CTA informed us that the Audit Report was made available online. A brief internet search revealed that the Audit Report was posted on the Illinois Auditor General website, which contains a database of reports dating back to 1974. Performance Audit: Mass Transit Agencies of Northeastern Illinois, Illinois Auditor General (March 2007), http://www.auditor.illinois.gov /audit-reports/Performance-Special-Multi/Performance-Audits/07-Mass-Transit-NE-IL-Perf-Main-Report.pdf. Moreover, according to the website, "[c]opies of all audits are made available to members of the Legislature, the Governor, agency management, the media, and the public," and "[a]udit reports are reviewed by the Legislative Audit Commission in a public hearing" during which "[t]estimony is taken from the agency regarding the audit findings and the plans the agency has for corrective action." *Description*, Illinois Auditor General, http://www.auditor.illinois.gov/About/description.asp (last

b.

Because the Audit Report[14] was in the public domain at the time Cause of Action filed its complaint,

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visited Feb. 18, 2016). Although unnecessary in light of Cause of Action's admission, "[w]e may take judicial notice of matters of public record." *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of the ownership of a bank from FDIC website); *accord LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 944 n.3 (7th Cir. 2010) (taking judicial notice of information on Village of Winnetka's website); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of military personnel records from National Personnel Records Center website).

[14] At first glance, relying on the Audit Report (a state document) as the source of disclosure for data submitted after the effective date of the 2010 amendments (here, reporting years 2009 and 2010) might seem problematic because the 2010 iteration limits public disclosure to federal sources. *See* 31 U.S.C. § 3730(e)(4)(A) (2012). Although we apply the version of subsection (A) that was "in force when th[e] events underlying the suit took place," *Goldberg*, 680 F.3d at 934; *accord Bogina*, 809 F.3d at 369; *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (noting that the amendment in question "eliminate[d] a defense to a *qui tam* suit—prior disclosure to the Government—and therefore change[d] the substance of the existing cause of action for *qui tam* defendants by attaching a new disability, in respect to transactions or considerations already past" (alteration omitted) (internal quotation marks omitted)), we do not think that, here, it is necessary or appropriate to characterize the 2009 and 2010 reporting years as discrete events. Rather, they are part of the CTA's continuing practice of counting non-revenue miles. As we explain, the Audit Report provided notice of the CTA's continuing practice prior to the enactment of the 2010 amendments. *Cf. Bogina*, 809 F.3d at 370 (applying public-disclosure bar where "[t]he government was...on notice of the possibility of a broader bribe-kickback scheme before [the relator] sued"); *Glaser*, 570 F.3d at 909 (applying public-disclosure bar where "the government was

we examine whether that document contained "the critical elements exposing the transaction as fraudulent." *Feingold*, 324 F.3d at 495; *see United States ex rel. Found. Aiding the Elderly v. Horizon W. Inc.*, 265 F.3d 1011, 1014 (9th Cir. 2001) ("[W]e...determine whether the content of the disclosure consisted of the allegations or transactions giving rise to the relators' claim, as opposed to mere information." (internal quotation marks omitted)). Section 3730(e)(4) withdraws subject matter jurisdiction "*only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves...already have been publically disclosed." *Absher*, 764 F.3d at 708 (emphasis in original) (internal quotation marks omitted). Thus, in the absence of an explicit allegation of fraud, the public-disclosure bar "may still apply so long as...facts establishing the essential elements of fraud—and, consequently, providing a basis for the inference that fraud has been committed—are in the government's possession or the public domain." *Id.* (internal quotation marks omitted).

Absher is the only case in which we have addressed directly the quantum and quality of factual content necessary to expose a transaction as fraudulent and thus trigger the public-disclosure bar. In that case, two former employees of Momence Meadows Nursing Center, Inc. ("Momence") brought a qui tam action alleging that the nursing facility had "knowingly submitted thousands of false claims to the Medicare and Medicaid programs in violation of the FCA." *Id.* at 704 (internal quotation marks omitted). On appeal, Momence maintained that § 3730(e)(4) deprived the

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already aware of the possible improprieties in [the defendant's] billing practices").

district court of jurisdiction because "the relators' FCA claims were based extensively upon incidents of non-compliant care documented in government survey reports," which, according to Momence, "tend[ed] to establish one of the essential elements of fraud—namely, that Momence provided non-compliant care to its residents." *Id.* at 708. Rejecting Momence's argument, we held that, although the survey reports did disclose that Momence had, on certain occasions, failed to comply with the required standard of patient care, "the surveys did not disclose facts establishing that Momence misrepresented the standard of care in submitting claims for payment to the government." *Id.* at 708–09. It "is not enough," we explained, that "as soon as the government learned that Momence was providing noncompliant care, it necessarily knew that at least some of Momence's claims for payment were for the provision of noncompliant care." *Id.* at 709 n.10. Rather, "[t]he government must also have access to facts disclosing that [the defendant] had the scienter required by the FCA." *Id.* Because the FCA imposes liability upon "any person who...*knowingly* presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A) (emphasis added), the dispositive question is whether the information disclosed in the Audit Report provides a sufficient basis from which to infer that the CTA "knowingly" sought UAFP grant funding from the FTA on a false basis.

Relying on *Absher*, Cause of Action now contends that it would be "unreasonable to infer" from the Audit Report that the CTA possessed the scienter required by the FCA.[15] We disagree. In *Absher*, the facts in the public domain were government survey reports

[15] Appellant's Br. 19 n.21.

detailing instances of Momence's noncompliant care. We rejected the proposition that these regulatory violations necessarily implied that Momence *knowingly misrepresented* the level of care it provided when it submitted claims for reimbursement. *Absher*, 764 F.3d at 709 n.10. We held that the public-disclosure bar removes jurisdiction only where one can infer, as a direct and logical consequence of the disclosed information, that the defendant knowingly—as opposed to negligently—submitted a false set of facts to the Government. However, it does not necessarily withdraw jurisdiction over cases where, in order to infer the presence of scienter, one must disregard an equally plausible inference that the defendant was merely mistaken and thus lacked the knowledge required by the FCA. *See United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 867 (7th Cir. 2011) ("[A]lthough bills for services never performed likely reflect fraud, miscoded bills need not; the errors may have been caused by negligence rather than fraud (which means intentional deceit)."). *Absher* presented the latter scenario; the regulatory scheme required Momence to make qualitative judgments about its "compl[iance] with a wide variety of regulations and standards of care." 764 F.3d at 703. Thus, one could no sooner have inferred from the regulatory violations that Momence *knowingly misrepresented* its level of care in seeking reimbursement than one could have inferred that Momence *mistakenly believed* that it was compliant and then later was found to have violated the standard of care.[16]

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[16] *See United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove Inc.*, No. 11 C 5314, 2015 WL 1915493, at *6-7 (N.D. Ill. Apr. 24, 2015) (distinguishing *Absher* based on the qualitative nature of the judgments involved).

Here, by contrast, the Audit Report provided a sufficient basis to infer directly that the CTA knew it was presenting a false set of facts to the government. Unlike *Absher*, the regulatory scheme here does not involve any qualitative judgments. The CTA is required by statute to submit its transit data to the NTD annually in order to secure grant funding under the UAFP. *See* 49 U.S.C. § 5335(b). The statute and the applicable NTD regulations permit the CTA to receive UAFP grants from the FTA for VRM (vehicle revenue miles). *See id.* § 5336(c)(1)(A)(i). The definition of VRM explicitly excludes deadhead miles. Nat'l Transit Database, 2006 Urbanized Area Reporting Manual, Glossary 384, 396 (2006), *available at* http://www.ntdprogram.gov/ntdprogram/pubs/ARM/2006/pdf/2006_Reporting_Manual_Glossary.pdf. The Audit Report disclosed that the CTA was reporting VRM data to the NTD that was considerably and consistently higher than that of its peer group. The Audit Report disclosed further that the IL-AG suspected that the CTA was incorrectly classifying deadhead miles as VRM, a direct contravention of the NTD definitions that would necessarily increase the CTA's UAFP grant allocations. From this report, one could infer that the CTA was knowingly misrepresenting deadhead miles as VRM in its NTD reporting data and thus committing fraud against the FTA, rendering a *qui tam* suit unnecessary.[17] Because

[17] At oral argument, counsel for Cause of Action also contended that the Audit Report could not have provided a sufficient basis to infer fraud because although it detailed the VRM reporting data it did not reference the relevant FTA funding program. In this context, we do not believe that it is necessary for a disclosure to specifically reference a particular program in order for the federal government to infer that it is being defrauded. *See Bogina*, 809 F.3d at 370 (applying public-disclosure bar to

the NTD regulations specifically proscribe the classification of deadhead miles as VRM, it was not equally plausible to infer from the Audit Report that the CTA mistakenly believed otherwise. Indeed, Cause of Action's theory of the case is that the CTA could not have acted negligently in overstating its VRM because "[w]hen [the] CTA certified its VRM data it included miles that were plainly not allowable."[18]

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allegations of fraud involving government health care programs other than those specifically referenced in the public disclosure). In any event, the Audit Report specifically references the CTA's "grant revenue from the FTA Section 5307 program." R.3-4 at 343.

[18] R.55 at 4. We note that the cases on which *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699 (7th Cir. 2014) relied did not expressly require facts disclosing scienter as an essential element providing for the inference of fraud. Those cases held that the inference of fraud "requires recognition of two elements: a misrepresented state of facts *and* a true state of facts." *Springfield Terminal*, 14 F.3d at 655 (emphasis in original); *accord Horizon W. Inc.*, 265 F.3d at 1015. Moreover, they explained that "[k]nowledge of the allegedly misrepresented state of affairs—which does not necessarily entail knowledge of the fact of misrepresentation—is *always* in the possession of the government." *Springfield Terminal*, 14 F.3d at 656 (emphasis in original). Under this reasoning, the present case remains distinguishable from *Absher*. In *Absher*, the Government had knowledge of the allegedly misrepresented state of affairs, namely the facially valid reimbursement claims. 764 F.3d at 708–09. The Government did not, however, know of the true state of facts, *i.e.*, that the claims were for non-compliant care, nor did the survey reports provide such knowledge. *Id.* at 709. Here, by contrast, the Government had knowledge of both elements. Like *Absher*, it had knowledge of the allegedly misrepresented VRM because the data had already been submitted to the NTD. Unlike *Absher*, the Government also had knowledge of the true state of facts, *i.e.*, that the VRM reporting was improperly inflated, because the Audit Report

2.

Having determined that the allegations in Cause of Action's complaint were publicly disclosed in the Audit Report, we proceed to the second step of the § 3730(e)(4) analysis and ask whether Cause of Action's lawsuit is "based upon" those public disclosures.[19] "[A] relator's FCA complaint is 'based upon' publicly disclosed allegations or transactions when the allegations in the relator's complaint are *substantially similar to* publicly disclosed allegations." *Glaser*, 570 F.3d at 920 (emphasis added).[20] We have cautioned against "viewing FCA

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disclosed that the CTA's data was considerably and consistently higher than its peer group and that the IL-AG suspected that the CTA was incorrectly classifying deadhead miles as VRM.

[19] Although the district court concluded that Cause of Action waived argument under the second and third prongs of the analysis, these are matters of law that have been fully briefed and argued and that we review de novo. We therefore exercise our discretion to address them in order to provide a complete analysis. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749–50 (7th Cir. 1993) (resolving issue not raised in district court where issue was fully briefed and argued and involved a "pure issue of statutory interpretation, as to which the district judge's view...could have no effect on our review").

[20] The 1986 version of the public-disclosure bar precluded qui tam actions that were "based upon the public disclosure" of the allegations. *See* § 3730(e)(4)(A). This court interpreted "based upon" to mean "substantially similar to" the publicly disclosed allegations. *See Glaser*, 570 F.3d at 920. When Congress revised § 3730(e)(4)(A) to its current form in 2010, it "expressly incorporate[d]" our interpretation. *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 n.1 (7th Cir. 2013); *see* 31 U.S.C. § 3730 (e)(4)(A) (2012) (requiring courts to dismiss qui tam actions where "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed"). Our analysis in this step is therefore the same under either version of the statute. *See Bogina*, 809 F.3d at 368 (describing this shift in

claims at the highest level of generality...in order to wipe out *qui tam* suits." *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 831 (7th Cir. 2013) (internal quotation marks omitted). Nevertheless, in order to avoid the public-disclosure bar, it is essential that a relator present "genuinely new and material information" beyond what has been publicly disclosed. *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 935–36 (7th Cir. 2012) (holding that allegations not substantially similar because they "allege[d] a [different] kind of deceit"); *accord United States ex rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 691 (7th Cir. 2014) (holding that allegations not substantially similar because they "required independent investigation and analysis to reveal any fraudulent behavior"); *Leveski*, 719 F.3d at 829–33 (holding that allegations not substantially similar because they covered an entirely different time period, included wrongdoing by a separate department, pertained to a more sophisticated scheme, and named specific individuals); *Baltazar*, 635 F.3d at 867–69 (holding that allegations not substantially similar because relator "supplied vital facts that were not in the public domain").

Cause of Action's allegations are substantially the same as the information disclosed in the Audit Report. Its complaint provides only two additional pieces of information. First, Cause of Action alleges throughout that the CTA *knowingly* misreported its VRM data to the NTD. Importantly, though, this particular claim is not based on Cause of Action's direct knowledge of the CTA's scienter or lack thereof. Rather, it is an

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language as "not a significant change, both formulas being aimed at barring 'me too' private litigation" (internal quotation marks omitted)).

inference drawn from the available facts, and, as discussed above, the Government was in an identical position to infer scienter from the publicly disclosed Audit Report. *See United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove Inc.*, No. 11 C 5314, 2015 WL 1915493, at *7 (N.D. Ill. Apr. 24, 2015). Second, Cause of Action emphasizes that, although the Audit Report analyzed the CTA's transit data for only the years 1999 through 2004, its complaint alleges misreporting that spans a broader timeframe. In this context at least, the allegation of a longer time span does not warrant our characterizing Cause of Action's allegations as not substantially similar to the continuing practice disclosed in the Audit Report.[21] In *Glaser*, we held that the allegations of overbilling in the relator's complaint were "virtually identical" to the wrongdoing that was the subject of the CMS investigation because "they pertain[ed] to the same entity and describe[d] the same fraudulent conduct." 570 F.3d at 920. Although the complaint "add[ed] a few allegations not covered by CMS's investigation," these additions were insufficient to avoid the public-disclosure bar. *Id.* A "*qui tam* action even partly based upon publicly disclosed allegations or transactions," we explained, "is nonetheless 'based upon' such allegations or transactions." *Id.* Here, as in *Glaser*, Cause of Action's allegations pertain to the same entity (the CTA) and describe the same allegedly fraudulent conduct (misreporting deadhead miles as VRM to the NTD) as the publicly disclosed information. Without more, we do not believe Cause of Action has presented "genuinely new and material information." *Goldberg*, 680 F.3d at 936.

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[21] *See supra* note 14.

Cause of Action urges, however, that our decision in *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688 (7th Cir. 2014), requires a different result. In that case, an auditor retained by several Wisconsin school districts to audit telecommunications bills brought a *qui tam* action alleging that defendant Wisconsin Bell was "fraudulently overcharg[ing] school districts, libraries and the United States for telecommunication services." 760 F.3d at 690. These allegations were based on the relator's "extensive review of the charges administered by Wisconsin Bell," and comparisons of the rates paid by the schools to one another and to a publicly available service agreement between Wisconsin Bell and the state. *Id.* at 689, 692. We held that the public-disclosure bar was not triggered because the relator's allegations "required independent investigation and analysis to reveal any fraudulent behavior." *Id.* at 691; *see also United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (1999) (holding public-disclosure bar did not apply where relator "walked the streets" as a "private investigator" observing the school bus operations at issue).

The present case, however, is markedly different from *Heath*. Here, Cause of Action has not conducted any independent investigation or analysis to reveal the fraud it alleges. Mr. Rubin, the author of the Technical Report, provided the details of the CTA's inaccurate reporting to Cause of Action, who in turn styled them as a complaint with references to the statutes and regulations that support its legal theory of fraud. Because that is the extent of Cause of Action's contribution, "the allegations in [its] complaint are substantially similar to publicly disclosed allegations." *Glaser*, 570 F.3d at 920; *see also*

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991) ("[T]he relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.").

3.

Cause of Action could still avoid the public-disclosure bar if it were able to establish that it is "an 'original source' of the information upon which the allegations in [its] complaint were based." *Glaser*, 570 F.3d at 921. To do so, Cause of Action would have to show that it "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and "has voluntarily provided the information to the Government before filing [its] action." 31 U.S.C. § 3730(e)(4)(B) (2012).[22] Cause of Action voluntarily provided the relevant information to the Government when it notified the Department of Justice of the CTA's misreporting in March 2012 before filing suit several months later. However, its knowledge of the CTA's alleged wrongdoing is neither independent of nor materially adds to the publicly disclosed Audit Report.

First, Cause of Action has not established that its knowledge is independent of the publicly disclosed information. To satisfy this requirement, a relator's knowledge of the alleged wrongdoing must not

[22] Because the 2010 amendment to § 3730(e)(4)(B) is "not subject to a retroactivity bar," it applies "regardless of when a person claiming to be an original source acquired his knowledge." *Bogina*, 809 F.3d at 368–69. We therefore use the new statutory language in this step of our analysis.

"derive[] from or depend[] upon" the public disclosure. *Bank of Farmington*, 166 F.3d at 864. Instead, the relator must be "someone who would have learned of the allegation or transactions independently of the public disclosure." *Id.* at 865; *compare Glaser*, 570 F.3d at 921 (holding relator was not an original source where her "only knowledge that [the defendant]'s billing practices were improper came from [her attorney], with whom [she] had no prior relationship and who contacted her out of the blue"), *with Leveski*, 719 F.3d at 837 (holding relator was an original source where knowledge was "personal and specific to her; it [wa]s not second- or third-hand evidence learned from another source"). Here, Cause of Action has maintained throughout that it was not until Mr. Rubin provided his Technical Report, the Audit Report, and an affidavit that Cause of Action learned of the CTA's misreporting. Had it not been for Mr. Rubin's overture, there is no reason to believe that Cause of Action would have ever learned of the wrongdoing it now alleges. Second, because Cause of Action's allegations are substantially similar to those contained in the Audit Report, its information has not "materially add[ed]" to the public disclosure. 31 U.S.C. § 3730(e)(4)(B) (2012).

Cause of Action therefore is not an original source of the allegations in its complaint within the meaning of § 3730(e)(4)(B).

Conclusion

The allegations in this case fall within the public-disclosure bar to the *qui tam* statute, and, therefore, the district court properly dismissed the complaint. The judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA, *ex rel.* CAUSE OF ACTION,	)	
Plaintiff-Relator,	)	
v.	)	Case No 12 CV 9673
CHICAGO TRANSIT AUTHORITY,	)	Judge Robert M. Dow, Jr.
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Chicago Transit Authority's motion to dismiss [42] Plaintiff-Relator's complaint. Relator brings this *qui tam* action under the False Claims Act, 31 U.S.C. § 3729 *et seq*., alleging that Defendant submitted false and fraudulent claims to the Federal Transit Administration. For the following reasons, Defendant's motion is granted. The case is set for status hearing on 11/06/14 at 9:00 a.m.

I. Factual and Procedural Background[1]

To combat fraud against the United State government, the False Claims Act ("FCA") imposes civil liability on a party that presents false or fraudulent claims for payment or that uses a false record or statement material to a false or fraudulent claim. See 31 U.S.C. § 3729(a)(1)(A) & (B). Because it would be impossible for the government alone to investigate and pursue all potential FCA violations, the statute provides a *qui tam* enforcement mechanism and allows a private party (*i.e.*, a relator) to bring suit on behalf of the government. See 31 U.S.C. § 3730(b). In this case, Cause of Action ("Relator"), a nonprofit organization, has brought suit against the Chicago Transit Authority ("CTA" or "Defendant"). Relator alleges that the CTA intentionally caused the government to allocate additional transportation funds to it that were not authorized.

The CTA is a municipal corporation that provides public transportation services in the city of Chicago and its suburbs. Under 49 U.S.C. § 5307, large urban areas, including the greater Chicago area served by the CTA, are eligible for transportation funding from the federal government. Funding is determined by a grant formula that includes the number of "bus revenue vehicle miles" that are reported to the National Transit Database ("NTD"). Compl. ¶ 2, 3. Revenue miles are defined as the miles when a

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[1] The Court's summary of the facts is drawn from Relator's complaint. For purposes of Defendant's motion to dismiss, the Court assumes as true all well-pleaded allegations set forth therein. See *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007); *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009).

"vehicle is available to the general public and there is an expectation of carrying passengers." *Id.* at ¶ 41. In contrast, "deadhead miles" are those in which a vehicle is out of revenue service. See *id.* at ¶ 40. Relator alleges that between reporting years 2001 and 2010, the CTA "knowingly used definitions of bus revenue vehicle miles and deadhead miles that are both different from and noncompliant with the definitions required under the NTD reporting manuals, NTD reporting glossary, and U.S. Department of Transportation, Federal Transit Authority ("FTA") circular guidance and/or regulations." *Id.* at ¶ 6. The CTA's improper classification of deadhead miles as revenue miles resulted in the federal government overpaying the CTA under the § 5307 formula grant program. See *id.* at ¶ 9.

The CTA's overstatement of revenue miles was uncovered during a 2006–07 performance audit for the State of Illinois Auditor General. Two reports discussing the inaccurate reporting were produced as a result. First, Thomas Rubin, a member of the Illinois audit team, prepared a 25-page technical report ("Technical Report") regarding the overstatement of revenue miles. The Technical Report states that the CTA "appears to have been improperly classifying as Vehicle Revenue Miles (VRM) and Vehicle Revenue Hours (VRH) motor bus miles and hours that, under the Federal Transit Administration's (FTA) National Transit Database (NTDB) regulations, are not properly so classed." Tech. Report 1, Compl., Ex. 3. The Report further recommends that the "CTA notify FTA of this condition, including rendering this report to FTA," and "revise its methodologies for reporting VRM and VRH to become compliant with the applicable statute and implementing regulations." *Id.*

Rubin presented his Technical Report to the CTA and Illinois Auditor General, but they failed to inform the FTA of the issue. See Compl. ¶¶ 51–53. In 2009, Rubin went to the Department of Transportation Office of Inspector General to report the issue and provided the office with a copy of his report. See *id.* at ¶ 54; Rubin Aff. ¶ 8, Compl., Ex. 2.

Second, a final audit report discussing the CTA's performance was released in March 2007 by the Illinois Auditor General ("Auditor General's Report"). A short section of this lengthy document indicates that the CTA may have been incorrectly reporting deadhead miles as revenue miles. See Auditor General's Report 72, Compl., Ex. 4 ("Our review raised questions about the accuracy of CTA's reporting of revenue vehicle hours and miles. CTA may be incorrectly reporting some deadhead hours/miles as revenue hours/miles[.]").

Relator filed suit in the District of Maryland in May 2012 and attached the Technical Report, the Auditor General's Report, and Rubin's Affidavit to its complaint. The action was transferred to the Northern District of Illinois in November 2012. After the United States declined to intervene in the action, the complaint was unsealed and Defendant filed its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). Defendant argues that the action is barred under § 3730(e)(4)—the so-called public disclosure bar—because the allegations in the complaint were already disclosed when the complaint was filed, and Relator is not an original source of the information. Relator filed a brief in opposition [55] and attached an April 2012 letter from the FTA to the General Manager of the CTA ("FTA Letter"). The letter states that the FTA conducted an in-depth review of the CTA's reporting of revenue miles and that the CTA "should revise its data for the 2011 Report Year to reflect the definition of 'revenue service' in the NTD Reporting Manual[.]" FTA Letter, Relator's Opp'n, Ex. 1. The letter further states, however, that the FTA will not require the CTA to revise its data for prior years. See *id*.

II. Legal Standards

Defendant styled its motion as one under Federal Rule of Civil Procedure 12(b)(1) and argued that the Court lacks subject matter jurisdiction under the FCA's public disclosure bar. See § 3730(e)(4)(A). Relator contends that the motion should have been brought pursuant to Rule 12(b)(6), for failure to state a claim, because § 3730(e)(4)(A) is not jurisdictional. Defendant apparently agrees, and subsequently requested that the Court treat its motion as one pursuant to Rule 12(b)(6). See Def.'s Reply 11.

The confusion regarding the applicable Rule of Civil Procedure that governs Defendant's motion stems from the fact that two different versions of § 3730(e)(4)(A) are at issue. The 1986 version states: "*No court shall have jurisdiction* over an action under this section based upon the public disclosure of allegations * * * unless * * * the person bringing the action is an original source of the information." § 3730(e)(4)(A) (emphasis added). This is a jurisdictional requirement. See *U.S. ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, -- F.3d --, 2014 WL 4092258, *4 (7th Cir. 2014) (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467–70 (2007)). In 2010, the FCA was amended and the phrase "no court shall have jurisdiction" was replaced with the phrase "*[t]he court shall dismiss* an action or claim under this section[.]" § 3730(e)(4)(A) (emphasis added). Following the amendment, the Seventh

Circuit questioned whether § 3730(e)(4)(A) (2010) should be treated as jurisdictional. See *Absher*, -- F.3d at *4 (explaining that "it is no longer clear that *Rockwell*'s holding is still good law" as the "Supreme Court's reasoning was based on the fact that, at the time, § 3730(e)(4) contained the language '[n]o court shall have jurisdiction over an action under this section[.]' ") (internal quotations omitted). Regardless of whether the 2010 version of the public disclosure bar is deemed substantive or jurisdictional, the Court's disposition of Defendant's motion is the same.[2] The pertinent legal standards under Rules 12(b)(1) and 12(b)(6) are discussed below.

Under Rule 12(b)(6), a motion to dismiss tests the sufficiency of the complaint, not the merits of the case. *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990). In reviewing a motion to dismiss under Rule 12(b)(6), the Court takes as true all factual allegations in a plaintiff's complaint and draws all reasonable inferences in its favor. *Killingsworth*, 507 F.3d at 618. To survive a Rule 12(b)(6) motion to dismiss, the claim first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)(2)), such that the defendant is given "fair notice of what the * * * claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

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[2] Because the 2010 amendments are not retroactive, the applicable version of § 3730(e)(4) is the one that was "in force when the events underlying th[e] suit took place." *Leveski v. ITT Education. Servs.*, 719 F.3d 818, 828 (7th Cir. 2013) (internal quotations omitted). Accordingly, the 1986 version applies to allegedly fraudulent reporting that occurred before March 23, 2010, and the 2010 version applies to fraudulent reporting that occurred thereafter. See *id.*

Second, the factual allegations in the claim must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations in the complaint are true. *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). However, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the * * * claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555) (ellipsis in original). The Court reads the complaint and assesses its plausibility as a whole. See *Atkins v. City of Chi.*, 631 F.3d 823, 832 (7th Cir. 2011).

The standard that the Court applies to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends on the purpose of the motion. See *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (*en banc*), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). If a defendant challenges the sufficiency of the allegations regarding subject matter jurisdiction (as is the case here), the Court accepts all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. See *Apex Digital*, 572 F.3d at 443–44; *United Phosphorus*, 322 F.3d at 946. "Where jurisdiction is in question, the party asserting a right to a federal forum has the burden of proof, regardless of who raised the jurisdictional challenge." *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008); see also *Reed v. Illinois*, 2014 WL 917270, at *2 (N.D. Ill. Mar. 10, 2014).

III. Analysis

Relator's allegations of fraudulent revenue mile reporting are based on the Technical Report and the Auditor General's Report. See Compl. (attaching as exhibits the reports and Rubin's affidavit). Defendant argues that the reports qualify as public disclosures and require dismissal of the complaint because Relator is not an original source of the information. Under § 3730(e)(4)(A), a case is barred "if substantially the same[3] allegations or transactions as alleged in the action or claim were publicly disclosed * * * unless * * * the person bringing the action is an original source of the information." This provision is meant to deter parasitic *qui tam* actions. *Glaser*, 570 F.3d at 913. "[W]here a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." *Id.* at 913 (internal citations and quotations omitted). Accordingly, once information becomes public, only the Attorney General and an original source relator may represent the United States. *Id.* at 913.

The 1986 version of the statute defines an original source as "an individual who has direct and

[3] The 1986 version of this provision deprives the court of jurisdiction over an action that is "*based upon* the public disclosure" of the allegations. See § 3730(e)(4)(A) (1986) (emphasis added). The Seventh Circuit interpreted "based upon" to mean "substantially similar to" the allegations already in the public domain. See *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009). Thus, the 2010 amendments expressly incorporate the Seventh Circuit standard. *Leveski*, 719 F.3d at 828, n.1.

independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action. § 3730(e)(4)(B). Under the amended version, a relator must establish either (1) that prior to a public disclosure he voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based, or (2) that he has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and has voluntarily provided the information to the government before filing an action. § 3730(e)(4)(B).

Courts conduct a three-step inquiry to determine whether a suit may be maintained under § 3730(e)(4). See *Glaser*, 570 F.3d at 913. First, the court asks whether the allegations have been publicly disclosed. *Id*. If so, it next asks whether the lawsuit is based upon (*i.e.* is substantially the same as) those publicly disclosed allegations. See *id*. If it is, the court determines whether the relator is an original source of the information upon which its lawsuit is based. *Id*.

Here, however, the only issue in dispute is whether Relator's allegations were publicly disclosed. Relator did not respond to Defendant's argument that the complaint allegations are substantially the same as the Technical Report and the Auditor General's Report, nor did Relator contest Defendant's assertion that it does not qualify as an original source. See Relator's Opp'n. Relator has accordingly conceded these points. See *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument * * * results in waiver" and a party's "silence" in response to an argument leads to the conclusion that a point is conceded). Additionally, while the complaint alleges in conclusory fashion that Relator is an original source, see Compl. ¶¶ 15, 19, it provides no factual allegations in support and thus fails to sufficiently allege that it qualifies. Accordingly, the Court turns to whether there was a public disclosure by the time that Relator filed its complaint in May 2012.

"[T]he function of a public disclosure is to bring to the attention of the relevant authority that there has been a false claim against the government." *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). The Seventh Circuit has explained that a qui tam action serves no purpose when the relevant authority is already in a position to vindicate society's interest. See, *e.g.*, *Glaser*, 570 F.3d at 913; *Feingold*, 324 F.3d at 495. A public disclosure thus occurs when the "critical elements exposing the transaction as fraudulent are placed in the public domain." *Glaser*, 570 F.3d at 913 (quoting *Feingold*, 324 F.3d at 495).

Both versions of § 3730(e)(4) contain three categories of disclosures that preclude a relator from maintaining a claim. (At issue here is the second disclosure category.). The 1986 version provides for dismissal if the action is based upon disclosure of allegations or transactions:

> [1] in a criminal, civil, or administrative hearing,
>
> [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or
>
> [3] from the news media[.].

§ 3730(e)(4)(A) (1986) (Arabic numerals added). Under the 2010 version, a claim must be dismissed if allegations were publicly disclosed:

> (i) in a *Federal* criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other *federal* report, hearing, audit, or investigation; or
>
> (iii) from the news media[.]

§ 3730(e)(4)(A) (emphasis added). In short, whereas the 1986 version of the statute included disclosures made in state and local contexts, see *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 301 (2010), the amended version is limited to disclosures in federal contexts. As discussed earlier, the 1986 version of the statute applies to allegations of fraud that occurred before March 23, 2010, and the 2010 version applies to events thereafter.[4] For the reasons that follow, public disclosures have occurred that bar this action.

First, under both versions of the statute, the allegations in the complaint were publicly disclosed in a federal investigation, see § 3730(e)(4)(A)(ii), when the Federal Transit Administration sent its letter to the CTA discussing the inaccurate reporting of revenue miles and requesting that the CTA revise the reporting of revenue miles for reporting year 2011. See *Glaser*, 570 F.3d at 913–14. In *Glaser*, allegations of improper Medicaid billing were publicly disclosed

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[4] Relator urges the Court to apply the 2010 amendments retroactively for various reasons. Relator's Opp'n at 8. Seventh Circuit and Supreme Court precedent on this very topic preclude the Court from doing so. See *U.S. ex rel. Health v. Wisconsin Bell, Inc.*, 760 F.3d 688, 690, n.1 (7th Cir. 2014) ("[T]he amendment [to the public disclosure provision] was not retroactive.") (citing *Graham Cnty*, 559 U.S. at 283, n.1).

after a federal Medicare and Medicaid agency sent a letter to the defendant requesting repayment for improper use of billings codes. See *id*. Like the letter in *Glaser*, the FTA Letter indicates an active investigation by federal authorities to recover funds that Defendant should not have received. See *id*. This is sufficient to trigger the public disclosure bar because:

> the purpose of a public disclosure is to alert the responsible authority that fraud may be afoot, and that purpose is served where that authority itself issued [documents] containing information that substantiates an allegation of fraud. This is not a case where the government was simply aware of [defendant's] billing practices. Rather, 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.

Id. at 914 (internal quotations and citations omitted).

Here, the complaint alleges that Thomas Rubin, a member of the Illinois audit team, alerted the Department of Transportation to the CTA's inaccurate reporting in 2009. See Rubin Aff., Compl., Ex. 2; Compl. ¶ 54. At some point, the Federal Transit Administration began an "in-depth review," of the CTA's reporting practices. See FTA Letter, Relator's Opp'n, Ex. 1. As part of its investigation, the FTA asked the CTA for various information and received an October 2011 memorandum from the CTA as well as "detailed data on the patterns and blocks used by CTA to schedule its buses," which the FTA studied and analyzed. See *id*. After its review, the FTA determined that the CTA needed to revise its data for the 2011 reporting year to ensure the application of "a consistent definition of 'revenue service' across all transit systems[.]" See *id*. Such actions amount to precisely the type of active investigation that the Seventh Circuit identified in *Glaser*. See 570 F.3d at 914. Accordingly the CTA's inaccurate reporting was publicly disclosed in the FTA's investigation by the time the complaint was filed in May 2012.

As to the Illinois Auditor General's Report and Rubin's Technical Report, Relator does not contest that they qualify as disclosures under the 1986 version of § 3730(e)(4). As discussed earlier, the purpose behind a public disclosure is to bring a false claim to the attention of the relevant authorities. Accordingly, a disclosure to a public official with direct responsibility for the allegations at issue qualifies under § 3730(e)(4). See *U.S. v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999). Likewise, administrative reports that contain information that substantiates allegations of fraud are public disclosures. See *Feingold*, 324 F.3d at 496 ("Administrative reports are publicly disclosed because, by their very nature, they establish the relevant agency's awareness of the information in those reports.").

Here, the complaint alleges that Rubin told the Department of Transportation Office of Inspector General about the inaccurate reporting and presented the office with a copy of the Technical Report. Given that the Inspector General is charged with investigating fraud, see 5 U.S.C. App. 3, § 2, and thus has "responsibility for the claim in question," Rubin's disclosure of his findings during the Illinois performance audit comes within the scope of § 3730(e)(4)(A) (1986). See *Bank of Farmington*, 166 F.3d at 861. The Illinois Auditor General's Report, which discusses the CTA's inaccurate reporting, also qualifies as a public disclosure as it indicates that a "responsible authority" was alerted "that fraud may be afoot." See *Feingold*, 324 F.3d at 496.

Not contesting that the reports in fact qualify, Relator instead contends that the Court should "constru[e] an effectiveness requirement from the disclosure bar" and find that without "*effective* public disclosure * * * the public disclosure bar is rendered inert." Relator's Opp'n at 15. Relator argues that it should be allowed to pursue the case because the government's failure to intervene was unwise and may reflect improprieties or bad faith on the part of government officials. See *id*. at 15–17. Relator cites no case law in support of—what it terms—an "alternative interpretation" of the FCA. See *id*. at 15–19. Relator rather points only to the history of the FCA and the fact that two people who formerly worked for the CTA now work in the White House and for the Department of Transportation. See *id*. at 16–17.

In the face of ample Seventh Circuit precedent interpreting "public disclosure," the Court cannot entertain Relator's argument that it should import an additional requirement that is not present in the statute. See *e.g., Feingold*, 324 F.3d at 495–96 (interpreting § 3730(e)(4)(A) and holding that a public disclosure is effectuated when "the critical elements exposing the transaction as fraudulent are placed in the public domain," which includes "the responsible authority" issuing information that substantiates an allegation of fraud).

Accordingly, Relator's action is barred under both versions of § 3730(e)(4) because the allegations were publicly disclosed when Relator filed its complaint.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is granted. Relator's complaint [3] is dismissed. The case is set for status hearing on 11/06/14 at 9:00 a.m. at which time the Court will discuss with counsel whether entry of a final judgment is appropriate at this time.

Dated: October 20, 2014

/s/Robert M. Dow

Robert M. Dow, Jr.
United States District Judge

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 29, 2016

Before

JOEL M. FLAUM, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 15-1143

CAUSE OF ACTION, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	No. 12-cv-9673
CHICAGO TRANSIT AUTHORITY, *Defendant-Appellee*.	Robert M. Dow, Jr., *Judge*.

O R D E R

Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 14, 2016, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing with suggestion of rehearing en banc is hereby **DENIED**.

US Department of Transportation
Federal Transit Administration

The Administrator

1200 New Jersey Ave., SE
Washington, D.C. 20590

APR 27, 2012

Mr. Kevin O'Malley
General Manager, Strategic Planning
Chicago Transit Authority
567 West Lake Street
Chicago, IL 60661

Dear Mr. O'Malley:

The Federal Transit Administration (FTA) has conducted an in-depth review regarding the way in which Vehicle Revenue Miles (VRM) and Vehicle Revenue Hours (VRH) are reported to the National Transit Database (NTD) by the Chicago Transit Authority (CTA). As a result of our review, CTA should revise its data for the 2011 Report Year to reflect the definition of "revenue service" in the NTD Reporting Manual and should continue to follow the definition of "revenue service" from the NTD Reporting Manual for future report years. The FTA will not, however, require CTA to revise its annual NTD Reports from prior years.

The initial inquiry was made regarding CTA's relatively low percentage of "deadhead" mileage compared to other large transit agencies. In your October 2011 memorandum you stated that efficient scheduling practices, the convenient location of CTA bus garages, and frequent midday bus service explained the high VRM reported to the NTD. You also noted that CTA cannot speak for the scheduling or reporting practices of other transit agencies.

To further study this situation, we asked you to send FTA detailed data on the patterns and blocks used by CTA to schedule its buses. FTA selected 10 bus trip blocks from this data for analysis. Upon selecting the data set, FTA mapped each trip from the bus garage, through the revenue service trip, and then to the return pull-in to the bus garage. In 7 of the 10 bus blocks analyzed, FTA found that the bus left the garage, traveled a short distance on one bus route (recorded as "revenue service"), and then moved to the primary bus route, which the bus served for the bulk of the block.

FTA appreciates CTA's efforts to operate transit service as efficiently as possible and to minimize "deadhead" time in favor of revenue service. However, FTA's funding formulas rely upon applying a consistent definition of "revenue service" across all transit systems in the country in order to ensure a fair and equitable distribution of formula funds.

As such, FTA established the following three-part definition of revenue service in its 2011 NTD Urbanized Area Reporting Manual (page 212): (1) that the service must be advertised as being available to the general public; (2) there must be a marked stop that is advertised in the schedule; and; (3) there must be an indication on the bus (e.g., head sign, window board) that the bus is in revenue service.

Using the data you provided (see enclosure), FTA examined CTA's published schedules and found that each bus that arrived at the primary route was reflected on the schedules. FTA did not, however, find the bus routing between the garage and the primary route to be included on the published schedules.

Therefore, although buses traveling on this secondary route between the garage and the primary route may stop at marked bus stops and may indicate "revenue service" on their head signs, this travel does not meet the NTD definition of "revenue service."

If you have any questions about this, or would like to present any additional information, please contact John Giorgis, NTD Program Manager, at john.girogis@got.gov or 202-366-5430.

Sincerely yours,

/s/ Peter Rogoff

Peter Rogoff

Enclosure

STATE OF ILLINOIS

OFFICE OF THE AUDITOR GENERAL

PERFORMANCE AUDIT

MASS TRANSIT AGENCIES OF

NORTHEASTERN ILLINOIS:

RTA,

CTA, METRA, AND PACE

MARCH, 2007

VOLUME II

WILLIAM G. HOLLAND

AUDITOR GENERAL

[Pages 71-72]

CTA Bus Service Efficiency

Service efficiency examines the amount of public transportation service produced in relation to the resources expended. Service efficiency asks the question "*How much does it cost to produce a unit of public transportation service?*" The measure **total operating expense per revenue vehicle hour** is the starting point for assessing this performance. The lower the expense of a revenue vehicle hour of public transportation service, the greater the service efficiency of the service.

Our review raised questions about the accuracy of CTA's reporting of revenue vehicle hours and miles. CTA may be incorrectly reporting some deadhead hours/miles as revenue hours/miles (i.e., miles and hours a vehicle travels when out of revenue service). This clearly is suggested by differences in reported hourly values for CTA and the peer group (Exhibit 3-19). The average vehicle revenue hours as a percent of vehicle hours is 87 percent for the peer group and 99 percent for CTA.

[Table Omitted]

This is not a significant problem for examining trends in CTA performance since it appears that CTA used a consistent definition when recording mileages. However, it is a potential problem when comparing CTA's performance to the peer group performance since the peer systems probably did not use the same definition of revenue hours/miles. Therefore, total vehicle hours and vehicle miles are used in the assessment of service efficiency.

The total operating expense per vehicle hour of $97.24 for CTA bus service was slightly greater than the peer group average $96.09 in 2004. This suggests that CTA is performing near the average of large bus systems (Exhibit 3-20).

[Table Omitted]

However, CTA's position relative to the peer group average declined between 1999 and 2004. In 1999, CTA's total operating expense per vehicle hour ($73.82) was 13.3 percent lower than the peer average ($85.16). CTA's cost per hour increased at an average annual rate of 5.7 percent during the period more than twice the average rate (2.4 percent) for the peer group.

* * * *

[Page 289]

CTA Operating Subsidy

The CTA's annual operating subsidy increased by $264.9 million between 2001 and 2005, growing to $767.8 million in 2005 from $502.9 million in 2001. Non-operating revenues grew by $84.7 million between 2001 and 2005, a 1.7 percent increase (or 4.1% annually).

- Revenues by the RTA grew by $76.9 million (18.3% total, or 4.3% annually). This includes sales tax revenues allocated by statutory formula, sales tax revenues allocated at the RTA's discretion, and the special 2005 operating assistance appropriation by the State of Illinois.
- Operating grant revenue from the FTA Section 5307 program totaled $26.8 million in 2005. This source was not used for operations in 2001; rather, it was wholly dedicated to capital.

- Reduced-fare subsidies from the State of Illinois remained stable between 2001 and 2005, at about \$32 million on an annual basis.
- Investment income increased by \$7 million (56%) to \$19.7 million.
- Other sources of non-operating revenues (unspecified) declined by \$25.5 million.

CTA accommodated the net subsidy requirement (\$180.2 million) by substantially under-funding its pension obligation (see Exhibit 9-4).

The annual pension obligation, per GAAP, is included in total operating costs, as noted above. CTA reflects this obligation in its financial statements by an increase in its long-term liabilities. Between 2001 and 2005, CTA added \$627 million (159%) in accrued pension cost to its long-term liabilities.