No. 13-1444

IN THE

Supreme Court of the United States

October Term 2014

GURUMURTHY KALYANARAM,

Petitioner,

—v.—

NEW YORK INSTITUTE OF TECHNOLOGY,

Respondent.

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

BRIEF FOR *AMICI CURIAE* PROFESSOR JOEL D. HESCH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Joel D. Hesch is a professor at Liberty University School of Law and an expert on the False Claims Act ("FCA"). He is the author of two whistleblower books[2] and several scholarly articles[3] relating to the FCA, including a recent law review article[4] advancing that the FCA creates a *zone of protection* for whistleblowers. Professor Hesch has

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. The only person providing assistance was Professor Hesch's research assistant, Kristie Pierce (class of 2015). The amicus curiae did not receive any remuneration for submitting this brief. However, Petitioner's counsel paid the actual printing costs associated with filing this brief.

[2] Joel D. Hesch, Whistleblowing Rewards for Reporting Fraud Against the Government (Third Ed. April 2013); Joel D. Hesch, Reward: Collecting Millions for Reporting Tax Evasion (A Guide to the IRS Whistleblower Reward Program) (March 15, 2009).

[3] Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. COOLEY L. REV. 217 (2012); Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt,* 6 LIBERTY UNIV. L. REV, 51 (Fall 2011); Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY UNIV. L. REV. 111 (2006)).

[4] Joel D. Hesch, *The False Claims Act Creates a "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361 (2014).

been previously authorized to submit an amicus brief in another FCA case before this Court.[5]

From 1990 to 2006, Professor Hesch worked as a trial attorney in the Civil Fraud Section of the Department of Justice ("DOJ"), where he conducted nationwide FCA investigations affecting twenty different government agencies. While at the DOJ, he facilitated cases recovering more than one billion dollars, including the trial of *Rockwell v. United States*. 127 S. Ct. 1397 (2007). He now teaches issue preclusion as a professor of Civil Procedure and represents whistleblowers as a private attorney. Professor Hesch offers his scholarship and unique experiences with the FCA to aid this Court in establishing a standard for evaluating the *zone of protection* that the FCA provides to address claims against federal whistleblowers who act in conformity with the unique *qui tam* provisions of the FCA.

SUMMARY OF ARGUMENT

The lack of a standard for determining the *zone of protection* afforded by the FCA to whistleblowers who report fraud against the government has resulted in increasing inconsistency in the developing case law. Indeed, there is a widening split in the circuits across numerous areas of the FCA because the lower courts are not following a proper framework for handling competing or conflicting claims or

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[5] Brief for Amicus Curiae Professor Joel D. Hesch in Support of Respondents, dated January 22, 2008, filed in *Allison Engine Comp. v. U.S. ex rel. Sanders* (No. 07-214). Available at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-214_RespondentAmCuProfHesch.pdf.

proceedings against federal whistleblowers.[6] This case highlights the problems that arise without a proper standard. The Second Circuit blindly applied issue preclusion to eliminate a whistleblower's rights based upon a finding in a state arbitration proceeding. The Second Circuit swiftly eliminated the whistleblower's rights regarding a *qui tam* case that was under seal and therefore unknown to the arbitrator at the time of his decision.

It is unclear how an issue could have been fully litigated when all existing facts were judicially unavailable to the arbitrator and the arbitrator could not know the effect his determination would have on the related FCA anti-retaliation claim. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979) (issue preclusion requires a "full and fair opportunity to litigate" and that the issue be "actually and necessarily determined"). In any event, the broader and more pressing issue is whether the

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[6] *See* Petitioner's Brief at Point II, pages 29-38 (discussing split regarding conflicting violations of state duty); *see also* Hesch, *supra* note 4, at 364-65 (addressing other contexts of circuit splits relating to state-based causes of actions against relators). Another conflict has lead to incorrect results regarding public policy exemption for general releases contained in severance agreements operating to dismiss or prevent a whistleblower from filing a *qui tam* suit. *Compare U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) (a pre-filing release signed before the government has any knowledge of the fraud allegations is unenforceable because it violates several public policies underlying the FCA) *with U.S. ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010) (general release contained in severance was enforceable to dismiss later filed *qui tam* case because the government was alerted to the allegations prior to the plaintiff actually filing the *qui tam* case).

FCA's *zone of protection* creates an exemption to issue preclusion when the prior court ruling was conducted while the pending FCA retaliation claim was under seal. As demonstrated herein, the *zone of protection* conflicts with and overrides this type of application of issue preclusion because of the special circumstances associated with and the strong public interest in encouraging the filing of *qui tam* cases.

Congress included six provisions in the FCA that demonstrate why the unique federal interests in recruiting and protecting relators who file *qui tam* actions create a *zone of protection* that limits competing causes of actions or proceedings against or impacting whistleblowers. In short, Congress intended to protect whistleblowers from causes of actions or proceedings arising from reasonable activities during the process of investigating or pursuing a *qui tam* action. Thus, the Second Circuit ignored the protections in the FCA and failed to follow the correct framework when it applied issue preclusion based upon a state proceeding and dismissed the FCA retaliation suit without allowing the claim to be heard on the merits. Had the Second Circuit recognized the FCA's *zone of protection*, as advanced and more fully explained in my law review article,[7] it would not have applied issue preclusion to bar the FCA anti-retaliation suit. Rather, the *zone of protection* would have satisfied one or more of the Restatement's exemptions to issue preclusion.

The problem with this case is not one of misunderstanding issue preclusion, but rather of failing

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[7] *See* Hesch, *supra* note 4, at 393-95.

to apply a proper framework for determining the *zone of protection* granted to the whistleblower by the FCA. In fact, the problem extends far beyond this case. The lack of a framework affects all areas of the FCA in which a whistleblower faces counterclaims or other legal proceedings related to the employee reporting fraud by his employer. In short, this Court should accept certiorari not only because the Second Circuit failed to follow a proper framework but also because the *zone of protection* is necessary to ensure proper deference is given to the rights and protections afforded to whistleblowers by the FCA.

In response to a rise in employees who file *qui tam* actions, employers are engaging in aggressive legal maneuvers. They are routinely asking courts to force the return of documents provided to the government when reporting fraud, to dismiss *qui tam* complaints, or to grant contract and tort damages based upon non-disclosure agreements in employment contracts or settlement agreements.[8] Therefore, courts are increasingly being asked to balance the interests of the government, the whistleblowing employee, and the company when employees suspect fraud by their employers.[9] The lack of a framework and varying factual circumstances have resulted in conflicting rulings concerning whistleblower rights when counterclaims or ancillary proceedings or claims are present.[10] This results in many incorrect rulings and a weakening of federal protections that will deter future whistleblowers thereby eliminating one of the best tools for

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[8] *See* Hesch, *supra* note 4, at 364-65, 395-404.

[9] *Id.* at 364-65.

[10] *Id.*

detection and prosecution of fraud against the government.[11] Thus, this case presents a good opportunity for this Court to determine the *zone of protection* offered to whistleblowers under the federal FCA statute and to adopt a proper framework for applying the *zone of protection* to federal whistleblowers who face claims, actions, and proceedings flowing from reporting fraud.

ARGUMENT

I. The False Claims Act Creates a Zone of Protection for Whistleblower Employees Facing Claims or Proceeedings Flowing from Reporting Fraud

As much as ten percent of all federal government spending is lost due to fraud.[12] Congress enlisted the help of the public when it included *qui tam* provisions in the False Claims Act (FCA), which authorize private individuals to receive a portion of the amount recovered for reporting fraud against the government. 31 U.S.C. §§ 3729-31. Today, over seventy percent of all fraud recoveries by the government are the result of *qui tam* cases.[13] Thus, it

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[11] Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 229 (2012) ("Whistleblower *qui tam* suits have become the Government's chief anti-fraud tool and account for about 70% of all funds the DOJ recovers from defrauders.").

[12] *See* Hesch, *supra* note 4, at 368-69.

[13] *See* Hesch, *supra* note 11 ("Whistleblower *qui tam* suits have become the Government's chief anti-fraud tool and account for about 70% of all funds the DOJ recovers from defrauders.").

is vital that the courts give the FCA its full effect by enlisting and protecting whistleblowers who report fraud against the government.

The FCA creates a *zone of protection* that shields a federal whistleblower from actions or proceedings that flow from his reasonable activities during the process of investigating or filing a *qui tam* action. The basis for the *zone of protection* is more fully explained in my recent law review article, which states:

> [T]here are two separate lines of Supreme Court cases which individually would create a federal privilege or *zone of protection* for relators from counterclaims flowing from filing a *qui tam* case. First, in the seminal case of *Town of Newton v. Rumery*, the Supreme Court made it clear that it is a defense to contract enforcement that a term of a contract is against public policy. . . Second, the Supreme Court in *Boyle v. United Technologies Corporation*, ruled that where "uniquely federal interests" exist, it is appropriate to create federal common law that preempts and replaces state law to the point where state tort claims are barred.[14]

Here, the FCA clearly establishes both a significant public policy reason and a uniquely federal interest to protect whistleblowers. Thus, it meets multiple avenues endorsed by this Court. Specifically, as greater explained in my law review article:

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[14] *See* Hesch, *supra* note 4, at 366-67 (citing *Town of Newton v. Rumery*, 480 U.S. 363, 392 (1987); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988)).

There are six key FCA provisions that together demonstrate well-defined, dominant substantial public policy and uniquely federal interests in recruiting and protecting whistleblowers who file *qui tam* actions. First, the FCA requires each relator to supply the government with a statement of material evidence (SME) containing all information and documents they possess that support the FCA allegations, which necessarily includes company documents within their control. Second, the FCA requires that the relator file the *qui tam* complaint with the court under seal and only serve the complaint and SME upon the Attorney General in order to allow the government time to investigate potential crimes and civil violations of the FCA violations without tipping off the defendants. Third, the FCA's public disclosure bar operates to reward information that is not publicly available, such as internal company documents, because it dismisses *qui tam* cases that are based upon public information unless the relator is also an original source of the allegations in the *qui tam action*—and thus in a position to provide useful information to the government. Fourth, the FCA provides relators with monetary incentives by using a sliding scale for their compensation based on two criteria: their contribution in litigating the action and their provision of inside, first-hand knowledge, with higher rewards for inside information. Fifth, the FCA contains an anti-retaliation provision, which allows a relator to recover, in addition to his award for reporting fraud, double damages plus attor-

> ney fees for any acts of retaliation. Sixth, and finally, the FCA dictates when a remedy is available to a defendant relating to the filing of a *qui tam* case and specifically limits it to when defendants can prove that the relator brought an action that was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[15]

In my article, each of these six FCA provisions are discussed at length, including their scope and purpose, as well as the protections afforded to the whistleblower. For instance, with respect to the seal provision, "[t]he purpose of the sealing provisions is to allow the government time to investigate the alleged false claim and to prevent *qui tam* plaintiffs from alerting a putative defendant to possible investigations." *United States ex rel. Grupp v. DHL Express (USA), Inc.*, 742 F.3d 51, 54 (2d Cir. 2014). *Accord United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 292 (6th Cir. 2010) ("the primary purpose of the under-seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator"). The need for secrecy was also explained in an amicus brief by the United States:

> Not only does the FCA contemplate that relators will share evidence with the government, but also that they will do so in secrecy. The FCA requires relators to file their complaints under seal and not to serve the complaint on defendants "until the court so orders." The complaint must remain under seal for a peri-

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[15] *See* Hesch, *supra* note 4, at 369-70.

> od of at least 60 days and the seal is subject to extension for good cause shown by the United States. "The purpose of these provisions is to 'protect the Government's interest in criminal matters,' by enabling the government to investigate the alleged fraud without 'tip[ping] off investigation targets' at 'a sensitive stage.'"[16]

As indicated, when a whistleblower files a *qui tam*, they are also simultaneously reporting potential criminal fraud allegations and thus the Attorney General shares the *qui tam* complaint with both the civil and criminal divisions of the Department of Justice.[17] Thus, the public interest in favor of sealing *qui tam* complaints is even more heightened because of the potential overlapping criminal violations. *See Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (*quoting W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)) ("the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the highest order and is indisputably 'well defined and dominant' in the jurisprudence of contract law.").

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[16] Submission of the United States as Amicus Curiae in Support of Relator's Motion to Dismiss the Counterclaims of Defendant Midwestern Regional Medical Center, Inc. at 7–9, *United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765 (N.D. Ill. 2004) (No. 99 C 8287), available at: http://www.bostonwhistleblowerlawyerblog.com/images/US ex rel Grandeau v. Cancer Treatment Centers of America.pdf.

[17] *See* Hesch, *supra* note 4, at 370.

Although space does not permit a discussion of the other five provisions, taken together, these FCA provisions create a clear *zone of protection*. With respect to the scope of the protection, the following definition and parameters apply:

> [The] *zone of protection* immunizes or exempts a whistleblower from all contract or tort claims by an employer that are bound up with or flow from an act of reporting of suspected fraud against the government as long as the employee possesses a reasonable belief that suspected fraud or violations of the FCA occurred and regardless of whether fraud or violations of the FCA are ultimately established.
>
> The *zone of protection*, which bars all contract and tort claims against the relator, extends to all related activities of an employee while they investigate the possibility of reporting suspected fraud or violations of the FCA to the government and continues throughout the entire process of filing and pursuing a *qui tam* action. Specifically, it includes gathering and producing to the government potentially relevant internal company documents or confidential company information—provided the employee had reasonable access to the documents as part of their duties.[18]

[18] *See* Hesch, *supra* note 4, at 393-94.

Once accepting that the FCA creates such a *zone of protection*, there are two steps courts should follow to determine whether the *zone of protection* applies to particular conduct of a whistleblower. First, a court must determine whether the action or proceeding conflicts with the broader policy goals of the FCA and the unique federal interest of protecting whistleblowers. If so, the second step is to determine if the relator was acting in conformity with the *zone of protection*. If yes, the state-based action or claim must give way. If no, the state-based action or claim can move forward.

The framework begins with a recognition of the FCA's *zone of protection*, as defined and advanced in this brief. For instance, if this Court adopts the *zone of protection*, including its definition, then lower courts would begin by determining whether a cause of action or related proceeding is in conflict with the *zone of protection*. If so, then it must give way provided that the whistleblower's activities were within the *zone of protection*.

The problem is that no court has yet to establish a framework for evaluating competing actions, let alone fully considered or defined the scope of the FCA's *zone of protection*. Thus, the ad hoc approach used by the lower courts has resulted in inconsistent rulings and a failure to give effect to the statutory goals of enlisting and protecting whistleblowers who report fraud against the government. Accordingly, there is a critical need for this Court to define the *zone of protection* and to instruct the lower courts, including the Second Circuit in this case, to apply the proposed two-step framework for determining the effect the FCA has on a conflicting or corollary claim or proceeding.

Although this framework will be applied more frequently when an employer brings a state-based cause of action against a whistleblower, such as a counterclaim for conversion of internal company documents, it applies across the entire FCA, including here where the Second Circuit relied upon the effect of a state-based legal proceeding to apply issue preclusion to an FCA retaliation case. The next section applies the *zone of protection* to the instant case.

II. Applying The *Zone of Protection* to Issue Preclusion of a Retaliation Claim Regarding a Sealed Qui Tam Case as a Result of a Prior State Proceeding

The prior section established that the FCA provides a *zone of protection*. This section applies the framework to this case.

A. Step One: Is there an Action or Proceeding in Conflict with the Zone of Protection?

The first step is to determine whether a competing action or proceeding is in conflict with the *zone of protection*. Here, the Second Circuit upheld the use of issue preclusion, formerly known as collateral estoppel, from a state action that was pending at the time of a sealed *qui tam* and FCA retaliation suit. (Petitioner's Brief 19-20.) It is noteworthy that the lower courts in this case did not rule that the prior state proceeding acted as claim preclusion, formerly known as *res judicata*, with respect to the FCA retaliation claim. (*Id.* at 17.) In other words, the lower courts did not rule that the prior state court proceeding extinguished the whistleblower's federal cause of action for retaliation pursuant to the FCA. Thus, at the time of the ruling by the fed-

eral court, there still existed a federal cause of action, but the court barred the claim under issue preclusion. (*Id.* at 19-20). Thus, it must be determined whether the instant application of issue preclusion conflicts with the public policy goals of the FCA and the unique federal interest in protecting whistleblowers that creates the *zone of protection*.

This Court has outlined the purpose and goals of issue preclusion, stating that "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–154 (1979). However, this Court has recognized that issue preclusion is not absolute and that there are exceptions, such as those contained in Restatement (Second) of Judgments. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). Specifically, "even where the core requirements of issue preclusion are met, an exception to the general rule may apply," thus making issue preclusion inappropriate. *Id.*

The Restatement outlines the exceptions to issue preclusion as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

> ***
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) **a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws**; or
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> ***
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the **potential adverse impact of the determination on the public interest** or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary **or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action**.

Restatement (Second) of Judgments § 28 (emphasis added).

In short, although this Court has not yet faced each of these exemptions, the Restatement clearly recognizes that issue preclusion should not be applied if there are (1) any "special circumstances," (2) whenever necessary "to avoid inequitable

administration of the laws," or (3) when there exists a "potential adverse impact of the determination on the public interest." *Id.* Here, the *zone of protection* afforded by the FCA conflicts with the application of issue preclusion or at least fall within one of the exemptions. Specifically, the FCA creates special circumstances by mandating that the *qui tam* case remain under seal during the government's investigation. 31 U.S.C. § 3730(b)(2) (2012). A whistleblower is barred by both court order and federal statute from even revealing the existence of the sealed *qui tam* case. The FCA also demonstrates a strong public interest in protecting employees from retaliation for reporting fraud and encouraging future whistleblowers to step forward.

The same analysis for concluding that the FCA creates a *zone of protection* establishes special circumstances and a substantial public interest, which would constitute an exemption to issue preclusion. Thus, the instant application of issue preclusion in this case would conflict with the FCA's *zone of* protection, assuming that the whistleblower was acting in conformity with the zone, which is the second step of the framework.

B. Step Two: Did the Whistleblower act within the Zone of Protection?

The second step in the framework is to determine whether this particular whistleblower was acting in conformity with the *zone of protection*. If yes, the action or claim must give way to the important goals of the FCA. If no, the action or claim can proceed without interference. When determining if the whistleblower was acting within the *zone of pro-*

tection, the court must engage in fact-finding and look to the specific conduct of the whistleblower. However, the fact-finding must occur with the guidance and standards provided by this Court and the *zone of protection* of the FCA.

The author proposes the following standard or definition for determining whether the whistleblower acted within the *zone of protection*:

> If the whistleblower possesses a reasonable belief that suspected fraud or violations of the FCA occurred, the *zone of protection* covers all *reasonable*[19] activities while investigating and reporting suspected violations of the FCA. This protection includes the entire

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[19] As stated in my article, "This proposed reasonable-belief test does not include any additional 'good faith' requirement. Rather, the focus is upon whether a reasonable employee in the same position would have a reasonable suspicion that the company was defrauding the government or violating the FCA. Congress intentionally established an incentive based structure that offers large monetary rewards to insiders for investigating and reporting fraud against the government. *** It is money—not a charitable motive—that moves a whistleblower to risk retaliation and step forward. It takes a rogue to catch a rogue, and the FCA pays rewards regardless of whether the relator's primary goal was to obtain a reward. See 31 U.S.C. § 3730(d) (2012). *** Thus, the reasonable-belief test includes no requirement that the relator act out of altruistic motives. The *zone of protection* has its own limits designed to protect the employer from harm, including the requirement that disclosures must be made to the government, and not to third parties, to remain under the protective umbrella of the public interest aspects of the FCA." *See* Hesch, *supra* note 4, at 393 n. 150.

> process of filing and pursuing a *qui tam* action.[20]

In this case, the Second Circuit failed to apply this, or any other, standard. Rather, without the aid of a framework, the Second Circuit was quick to focus upon what it considered distasteful conduct of the employee, while forgetting that it was actually the employer who was committing fraud against the government and who was part of a larger group of employers cheating the public fisc by billions of dollars each year. (Petitioner's Brief 10-12.) The test for complying with the *zone of protection* is not whether the whistleblower's conduct is tasteful but whether it was part of a *reasonable* process of uncovering and reporting fraud.

Whistleblowers need not be saints to be within the *zone of protection* offered by the FCA. Indeed, their employers have already sought to turn them into rogues by asking them to participate in committing fraud against the government. Moreover, it is Congress that set the public policy of soliciting employees to conduct secret investigations, requiring that *qui tam* cases be filed under seal, and offering employees rewards for setting aside common law duties of loyalty or breaching company confidentiality agreements to help catch the cheating employer. The framers of the FCA and courts recognize that to combat the rising fraud against the government it takes a rouge to catch a rouge. *E.g.*,

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[20] The *zone of protection* includes gathering and producing to the government potentially relevant internal company documents or confidential company information provided the employee had reasonable access to the documents as part of their duties. *See* Hesch, *supra* note 4, at 394.

Mortgages, Inc. v. U.S. Dist. Court for the Dist. of Nevada, 934 F.2d 209, 213 (9th Cir. 1991) ("the framers of the Act recognized that wrongdoers might be rewarded under the Act, acknowledging the *qui tam* provisions are based upon the idea of "setting a rogue to catch a rogue." (citing Cong. Globe, 37th Cong. 3d Sess. 955–56 (1863) (remarks of Sen. Howard)).

Here, the so-called rogue conduct at issue centered around reporting his employer for defrauding the government. Before addressing the subset of activity that triggered the distaste, it is noteworthy that the company is not complaining that the filing of a *qui tam* was improper, that the whistleblower did not satisfy the requirements of the FCA, or that he was not entitled to a reward under the FCA. Indeed, the employee's overall efforts were so successful at rooting out the fraud that the employer agreed to pay back millions of dollars it had allegedly defrauded from the government. (Petitioner's Brief at 11, 12.) The government was so pleased that it determined that the whistleblower employee was entitled to twenty percent of the money the employer repaid to the government. (*Id.* at 17.) Thus, it is hard to comprehend how a fully complying whistleblower that was given a monetary award from the government would not be allowed to have his FCA retaliation claims heard on the merits.

The only issue is whether the *zone of protection* extends to using a pseudonym to pretend to be a prospective student to show the government how the fraud scheme worked and then lying in a state proceeding about it due to the pendency of the seal. Leading up to the state proceeding, the whistle-

blower devised a plan to bolster his already filed *qui tam* case by posing as a prospective student to further show the government the types of false information the company was providing to students. (Petitioner's Brief 15-16.) However, the school apparently suspected or discovered that he was the one sending the emails. (*Id.*) When asked in the arbitration proceedings if he sent the emails, the whistleblower lied, claiming he had not. (*Id.*) The whistleblower explained that he lied because he believed that an existing order by the federal court in the sealed *qui tam* case barred him from stating that he was involved in litigation that is currently under seal and mandated that he not reveal details or provide the arbitrator with the name of the party to such sealed case. (*Id.* at 18-19.) Based upon a narrow order that partially lifted the seal, the whistleblower explained that he felt he could not truthfully answer the questions posed in the state proceeding. (*Id.* at 5-16) Facing a no-win situation where he had to choose between lying to the state arbitrator or violating a federal court order and the FCA, he elected to lie. (*Id.*)

The Second Circuit's opinion implied that the partial lift order was sufficient to allow the whistleblower to alert the arbitrator of the sealed *qui tam* case. (*Id.* at 20.) However, there are two problems with this assumption. First, an individual being subject to a federal district court order has reason to be cautious about risking such a broad interpretation of an order because if he mistakenly violates the order he can be held in contempt or have his *qui tam* case dismissed. (*See id.* at 29-38.) Second, even if some information could have been provided to the

arbitrator regarding the investigation, it still would not have permitted a full evaluation of the whistleblower's actions and role in reporting fraud or litigating the issue of retaliation under the FCA. Although it may have been ideal for the whistleblower to attempt to get the court to fully lift the seal, there is no guarantee that the court would have modified its seal order because the purpose of the FCA seal is to protect the *government's* investigation, not to aid the relator. *E.g., U.S. ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 292 (6th Cir. 2010) ("the primary purpose of the under-seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator"). Moreover, the state arbitration proceeding was not the correct forum to fully litigate the FCA retaliation claim, and therefore, even if the facts were fully presented to the arbitrator, which they were not, it still would not have provided the full and fair resolution of the FCA retaliation claim such that issue preclusion should apply. Again, the lower courts did not rule that arbitration proceeding amounted to claim preclusion nor did they hold that the FCA retaliation claim should have been heard in the state proceeding. (*Id.* at 17.)

The most significant problem with the ad hoc approach used by the Second Circuit, which second-guessed whether the relator was risking violating the seal, is that it and other lower courts are failing to recognize any *zone of protection* afforded by the FCA. Such protection is not limited to where a relator first seeks "court approval" to lift the seal to

allow full disclosure of the whistleblower's role in filing a *qui tam*. Indeed, the seal is designed to protect the government's investigation. In fact, a whistleblower rarely needs, or has authority, to seek court permission or approval. Rather, the FCA authorizes and demands that whistleblowers conduct secret investigations of fraud allegations as part of filing *qui tam* cases and continue to participate and provide information to the government during the life of *qui tam* cases. Any requirement to obtain prior court approval to fall within the *zone of protection* would cripple the FCA and contradict the text and goal of this statute.

In sum, the contentions by the whistleblower point to the fact that the whistleblower was acting in conformity with the *zone of protection* because the emails were a reasonable activity while investigating suspected violations of the FCA as part of the ongoing *qui tam* action. Although this standard does not promote lying, the true question is whether the whistleblower had a reasonable belief that the lie was necessary to avoid disclosing information protected by the seal. Here, the Second Circuit did not follow any standard, let alone fully consider whether lying about the emails falls within the *zone of protection*. Therefore, this case should be remanded for the district court to make findings based upon the proposed standards outlined in this brief.

Regardless of whether this Court believes the activities of the whistleblower were distasteful or even if they fell outside of the FCA's *zone of protection*, any decision in this case, absent following a proper framework, will be flawed regardless of the outcome. Otherwise, a personal decision that a given action is distasteful may become the framework rather than the *zone of protection* afforded by the FCA. This Court should accept this case to firmly establish a *zone of protection* and adopt the two-step framework proposed in this brief and remand the case to the district court to determine whether the whistleblower's conduct fell within the protected zone.

CONCLUSION

The FCA creates a *zone of protection* that applies to claims or proceedings affecting a federal whistleblower who reports fraud against the government. Because no circuit has yet determined whether such a *zone of protection* exists, the lower courts lack a framework for addressing the availability of causes of action or the impact of other proceedings against a whistleblower relating to filing a *qui tam* case or, in this case, the effects from state-based proceedings against federal whistleblowers. As a result, there are varied and inconsistent results in many areas of law under the FCA affecting whistleblowers. Due to a flawed approach, the Second Circuit, like its sister circuits, not only reached a wrong decision but failed to properly protect and provide

guidance to future whistleblowers considering bringing *qui tam* suits under the government's most important anti-fraud tool. Accordingly, this Court should accept certiorari and provide the much needed guidance to the lower courts by pronouncing that the FCA creates a *zone of protection*, adopting the proposed two-step framework for applying the *zone of protection* to particular cases, and remanding the case for the district court to apply the framework.

Respectfully submitted,

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Dated: June 26, 2014