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IN THE SUPREME COURT OF THE UNITED STATES

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SCHINDLER ELEVATOR CORPORATION, :

Petitioner : No. 10-188

v. :

UNITED STATES, EX REL. DANIEL KIRK:

- - - - - x

Washington, D.C.

Tuesday, March 1, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

STEVEN ALAN REISS, ESQ., New York, New York; on behalf of Petitioner.

JONATHAN A. WILLENS, ESQ., New York, New York; on behalf of Respondent.

MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-188, Schindler Elevator Corporation v. United States ex rel. Daniel Kirk.

Mr. Reiss.

ORAL ARGUMENT OF STEVEN ALAN REISS

ON BEHALF OF THE PETITIONER

MR. REISS: Mr. Chief Justice, and may it please the Court:

The question in this case is whether a FOIA response is a report or investigation within the meaning of the False Claims Act public disclosure bar. Our position that it is allows the Court to reach the critical question whether a relator has contributed genuinely valuable information. The position taken by Mr. Kirk and the Government would disallow the public disclosure bar before reaching that critical issue, and it would therefore lead to a host of lawsuits by relators with no meaningful information to contribute, and that is precisely the result that the public -- the public disclosure bar is intended to prohibit.

Now --

JUSTICE GINSBURG: But suppose the FOIA information is just to confirm, to back up, to fill out;

1 that the -- the relator suspects there's a fraud going  
2 on, and he thinks that the -- the fraud will be  
3 documented by filings that the alleged fraudulent party  
4 has made in the government.

5 MR. REISS: Justice --

6 JUSTICE GINSBURG: Yes.

7 MR. REISS: Justice Ginsburg, that may well  
8 be a legitimate use of a FOIA request, and the question  
9 then becomes whether the information disclosed in the  
10 FOIA response reveals the allegations and transactions  
11 upon which the qui tam suit is based. But that  
12 question, that use by a relator of the FOIA process,  
13 doesn't go to whether or not a FOIA response is itself a  
14 report or investigation within the statute.

15 A relator can still escape the public  
16 disclosure bar if the relator can demonstrate that his  
17 complaint is not based upon the allegations and  
18 transactions that are disclosed in the FOIA response.

19 JUSTICE GINSBURG: So in each case, we'd  
20 have to tell what was the -- the false claims claim; was  
21 it so heavily dependent on FOIA disclosures, or was the  
22 FOIA disclosures -- say they were a minimal part of  
23 the --

24 MR. REISS: Precisely, Justice Ginsburg. In  
25 fact, what a court should do is precisely what the

1 district court did in this very case in a very thorough  
2 opinion. Judge Stein went through every element  
3 required for the public disclosure bar to be invoked,  
4 including whether the FOIA response was a report or  
5 investigation, including whether Mr. Kirk's complaint  
6 was based on allegations and transactions disclosed in  
7 that FOIA response, and concluded that every prong of  
8 the disclosure -- public disclosure bar was met, and,  
9 therefore, the public disclosure bar prevented  
10 Mr. Kirk's claims. And that is precisely the analysis  
11 that we contend ought to happen.

12 Under the Government's position and  
13 Mr. Kirk's position, you never get to the critical  
14 inquiries about whether the allegations in a relator's  
15 complaint were publicly disclosed in a report or  
16 investigation, because under their view, a FOIA response  
17 itself is rarely going to qualify as a -- as an  
18 administrative report or as an administrative  
19 investigation.

20 We think that view is plainly incorrect  
21 under the ordinary uses of the words "report or  
22 investigation," a position that was obviously found to  
23 be the case by the First, Fifth, and Third Circuits.

24 JUSTICE GINSBURG: If I -- if I submitted,  
25 as we -- all Federal judges do, financial disclosure

1 statements to an administrative office, and then someone  
2 from the press has a Freedom of Information Act request  
3 to see that financial disclosure statement, does it then  
4 become -- does it become the report of the  
5 administrative office, rather than my report to the  
6 administrative office?

7 MR. REISS: Well, Justice Ginsburg, that's  
8 an interesting question, and whether -- and some lower  
9 courts have held that if the Federal -- if the -- if the  
10 report -- even though the report is filled out by a  
11 nongovernmental person, such as yourself in this  
12 instance, it might still qualify as an administrative  
13 report because the information being sought is dictated  
14 by a Federal administrative agency.

15 Now, we don't think you have to reach that  
16 position for -- for Schindler to prevail here, because  
17 the one thing that is clear is that a FOIA response by  
18 the Department of Labor is itself an administrative  
19 report or investigation. It is a Federal --

20 JUSTICE KENNEDY: Suppose that in this case,  
21 the agency has said: Well, we have 10 files where these  
22 documents are, and we'll make them available you to in  
23 the reading room. Go to the reading room.

24 Is that a report?

25 MR. REISS: Justice Kennedy, if the agency

1 has exercised some selectivity in terms of what it's put  
2 in that reading room, we would argue that it is a  
3 report. That's a far cry from what we have here, but  
4 that's a much closer case.

5 But with respect to FOIA responses, the  
6 third way in which information is disclosed by an agency  
7 under FOIA, it is always in response to a specific FOIA  
8 request. The FOIA response constitutes the agency's  
9 official response to that request. It's subject to  
10 appeal, appeals -- even subject to appeal in the Federal  
11 courts, and this Court itself has had --

12 JUSTICE KENNEDY: Well, I don't know if the  
13 files are digitized or not, but if they want this  
14 particular veteran's report, suppose you could just push  
15 a button, and they all come out. Is -- is that a report  
16 when those veteran's documents are just put together in  
17 a rubber band and shipped off?

18 MR. REISS: It certainly is a report. A  
19 report is any officially sanctioned notification.  
20 Common understanding.

21 CHIEF JUSTICE ROBERTS: It doesn't sound  
22 like in normal parlance if you come to an agency and say  
23 I want these documents, and the person comes down and  
24 says here they are, he's not going to say here's my  
25 report. He's going to say here are the documents you

1 asked for; this is our response.

2 MR. REISS: Mr. Chief Justice, it is a  
3 report in the following sense: The agency is saying,  
4 one, we have these documents; two, these documents are  
5 the very documents you're asking for. That is --

6 CHIEF JUSTICE ROBERTS: There's information,  
7 facts, that you can glean from their action, but that  
8 doesn't make what they've done a report.

9 MR. REISS: Well, with all due respect,  
10 Mr. Chief Justice, I think their response in handing  
11 over the documents, saying these are the documents, is a  
12 report that we have these documents; here are the  
13 documents you've requested. Now, of course --

14 JUSTICE SOTOMAYOR: So that means that if  
15 they tell you go look for it on the Web site of X  
16 agency, then they are incorporating everything that that  
17 other agency has as part of their report?

18 MR. REISS: Well, they are --

19 JUSTICE SOTOMAYOR: That it's not a response  
20 in telling you you've got to find what you're looking  
21 for?

22 MR. REISS: It is a report in the sense  
23 they're reporting where to look for it. It is a far cry  
24 from the FOIA responses at issue in this case and most  
25 FOIA responses. In this case, there are three different



1 FOIA responses at issue. The first two FOIA responses  
2 have two important pieces to them. They say, one, for  
3 certain years we couldn't find any of these VETS-100  
4 reports, we don't have them. We do have them for other  
5 years.

6 Those responses communicated key facts upon  
7 which Mr. Kirk based his qui tam complaint. He alleged  
8 that in 6 of the years -- 6 of the 9 years at issue  
9 here, his allegation is Schindler never filed these  
10 required VETS-100 reports. The communication by the  
11 Department of Labor, we don't have those reports in  
12 those years, was the sole basis on which those  
13 allegations are made and is clearly a report. The  
14 report is: We don't have those reports.

15 CHIEF JUSTICE ROBERTS: Is your position  
16 that sometimes it can't -- a FOIA response can be a  
17 report and other times it's not?

18 MR. REISS: No, Mr. Chief Justice. Our  
19 position is that every FOIA response is itself a  
20 report -- many will require an investigation -- but  
21 every FOIA response is itself a report within the  
22 ordinary meaning of the word "report," which is a  
23 notification. There are news reports, there are weather  
24 reports, there are traffic reports. There are, as in  
25 this case, VETS-100 reports. They are all reports.

1 JUSTICE GINSBURG: So there's no difference  
2 between a report -- the government has an investigating  
3 commission and it works up a report -- as opposed to the  
4 many government agencies that are just repositories?  
5 They accept pieces of paper, reports, filed by other  
6 people, like a tax return, like a financial disclosure.  
7 The agency does nothing, has no input.

8 I mean, there's surely different between  
9 those two kinds -- one, I would say, the natural  
10 understanding would be it's a report by the person who's  
11 filing it to the agency; and the other, where the agency  
12 puts personnel to investigate an issue, is a report of  
13 the agency. And you seem to say, no, they're all  
14 reports of the agency.

15 MR. REISS: Justice Ginsburg, let me be  
16 clear. If -- if the agency simply had an open-door  
17 policy, just filed everything in a room and said in  
18 response to a FOIA request those documents are publicly  
19 available, you can go in and search our files, figure  
20 out if those reports are there or not -- that agency  
21 response would not be a -- a report or investigation. A  
22 response that simply says do the search yourself --

23 JUSTICE GINSBURG: Let's take this very  
24 case --

25 MR. REISS: We may or may not have the

1 document.

2 JUSTICE GINSBURG: I'm asking you isn't  
3 there a difference between saying we want the raw  
4 filings, we want what Schindler filed, we don't want the  
5 government to do any investigations, we want them to do  
6 just the mechanical thing that they do under FOIA, and  
7 an agency saying we're going to investigate and make a  
8 report, we're going to put our people under the  
9 investigators, and we're going to interview witnesses,  
10 they're going to examine documents, and -- and we'll  
11 make a report?

12 That's how I understand a government report.  
13 But it's very hard for me to understand how a report by  
14 Schindler becomes a government report simply because it  
15 is filed with the agency.

16 MR. REISS: Justice Ginsburg, we think that  
17 reports and investigations can certainly vary  
18 drastically in degree and kind. An antitrust  
19 investigation may require millions and millions of  
20 documents and take the Justice Department 4 years.

21 On the other hand, if the Department of  
22 Labor itself had decided to determine or to investigate  
23 whether Schindler itself had filed these VETS-100  
24 reports, it would have done exactly what it did in  
25 response to Mr. Kirk's FOIA request. It would have --

1 it went to -- his request started out with the  
2 Department of Labor Office of Information.

3 It was sent to the Division on Investigation  
4 and Compliance, located in a completely separate  
5 building. The response to his request was delivered by  
6 Mr. Robert Wilson, who is the chief of the  
7 Investigations and Compliance Division. His activity  
8 clearly constitutes an investigation, and the results  
9 that he gives to Mr. Kirk is clearly a report.

10 There may be many other agency activities  
11 that are far more detailed, far more complex, but it  
12 doesn't make what is done in response to a FOIA request  
13 not a report or investigation. They are still reports  
14 and investigations within the ordinary meaning of those  
15 words.

16 JUSTICE ALITO: But is the question whether  
17 the documents that are turned over themselves reports or  
18 whether they are included in a report? I thought what  
19 (e)(4) said was that you -- you determine whether it is  
20 in a congressional administrative or accounting office  
21 report.

22 So that, suppose the Department of Labor  
23 issued what everybody would concede is a report and  
24 appended to that certain documents, wouldn't those  
25 documents be in the report, even though they are not the

1 report themselves?

2 MR. REISS: Absolutely, Justice Alito.

3 When -- when a FOIA response says, as it did in this  
4 case, we didn't -- say it says we didn't find certain  
5 documents; we did find certain documents. Here are the  
6 documents we found. The attachment of the documents  
7 that's found is part of the report, but the report is --  
8 is a complete report. We didn't find some things; we  
9 found these things, here are the things we found; they  
10 meet the description of what you asked for. The  
11 documents being attached are clearly part of the report.

12 Now, we think that the position taken by the  
13 Government and the Respondent also creates fairly  
14 serious dislocations. Under the definition of "report"  
15 advanced by Mr. Kirk and the Government, many things  
16 that are actually called reports by statute are not  
17 reports.

18 The Department of Labor's -- Department of  
19 Labor reports that it is required to file detailing its  
20 oversight and compliance of VEVRRRA, the statute at issue  
21 here, is called a report under section 1354. The -- the  
22 report that every agency must file under the Freedom of  
23 Information Act detailing their activities and their  
24 compliance with FOIA, itself called a report under the  
25 Freedom of Information Act, that is not a report under

1 the definition advanced by the Government and Kirk,  
2 because they require some element that appears nowhere  
3 in the public disclosure bar. They require an element  
4 of some kind of search for wrongdoing or fraud. That  
5 definition appears nowhere in the public disclosure bar.

6 JUSTICE GINSBURG: We'll find out from them  
7 if that is what they have set their position. I had not  
8 read them to say that. I read them to say only -- to  
9 challenge your position that every FOIA response is  
10 necessarily a report for purposes of the False Claims  
11 Act.

12 MR. REISS: Yes, Justice Ginsburg, but their  
13 response is that certain FOIA responses will constitute  
14 a report or investigation, depending on the underlying  
15 documents that are disclosed.

16 JUSTICE GINSBURG: If you request a report,  
17 then you get a report.

18 MR. REISS: But -- but their -- their test  
19 for the underlying documents is effectively the  
20 resurrection of their on-the-trail notion that this  
21 Court rejected only last term in the Graham County case.  
22 They infused that requirement, the report requirement,  
23 with this notion that the government has to be looking  
24 for something wrong. And if the report that is  
25 disclosed along with, as Justice Alito points out, the

1 FOIA response is a report that indicates the government  
2 was looking for something wrong, well, that's a report.  
3 If it doesn't indicate that, it doesn't qualify as a  
4 report.

5 We think that crabbed definition of report  
6 is not the ordinary definition of report, and this Court  
7 has said innumerable times, including I've heard even  
8 today that the Court looks to the ordinary, regular  
9 meaning of terms. The ordinary meaning of "report"  
10 clearly encompasses every FOIA response.

11 If there are no further questions, Mr. Chief  
12 Justice, I would reserve my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Willens.

15 ORAL ARGUMENT OF JONATHAN A. WILLENS

16 ON BEHALF OF THE RESPONDENT

17 MR. WILLENS: Mr. Chief Justice, and may it  
18 please the Court:

19 Schindler is asking the Court to construe  
20 "administrative report" far too broadly. In its view,  
21 the public disclosure bar would apply to all FOIA  
22 documents, regardless of their content. It would also  
23 apply to nearly all other documents created or disclosed  
24 by the government. This construction of the bar would  
25 seriously undermine the operation of the False Claims

1 Act.

2 Congress amended the Act in 1986 to  
3 encourage whistleblowers specifically to use government  
4 records in their investigations. This Court recognized  
5 that objective in the Hughes Aircraft case.

6 CHIEF JUSTICE ROBERTS: Most of the -- maybe  
7 I'm -- maybe this isn't correct, but many FOIA responses  
8 include more than just turning over the documents.  
9 They've got a privilege log or other things, this  
10 exemption applies, here's a document, but these things  
11 are blacked out, and they tell you why. Is that a  
12 report?

13 MR. WILLENS: No, Your Honor. If it's a  
14 FOIA response, it's not a report. The -- the documents  
15 here are very, very typical of a low-level FOIA  
16 response, and the -- this Court, of course, gets more  
17 complicated FOIA cases with our First Amendment issues  
18 and national security issues, but this is a very, very  
19 standard FOIA response. And the letter, which is in the  
20 record, is a very typical FOIA response. It's a form  
21 letter with three paragraphs: We got your request;  
22 here's what we found, you can appeal if you want to.  
23 They're all the same.

24 So for this purpose, it's useful just to  
25 look at this one. That -- there's always a possibility



1 that a FOIA officer will uncover something else, a sign  
2 of wrongdoing, for example; but that -- at that point,  
3 it becomes not a FOIA case anymore, not a FOIA process  
4 anymore. FOIA is very limited to just the finding and  
5 releasing of documents. And for that reason, we --

6 CHIEF JUSTICE ROBERTS: Well, but it's not  
7 really because it does get into the assertion of  
8 exemptions and privileges, and --

9 MR. WILLENS: That's true.

10 CHIEF JUSTICE ROBERTS: -- things of that  
11 sort. And why isn't that a report of somebody's  
12 evaluation of the particular documents that are being  
13 released?

14 MR. WILLENS: The -- all the work that Your  
15 Honor described goes into whether or not that document  
16 should be released; and under the False Claims Act test  
17 the release of documents is only the first test in the  
18 five-part public disclosure bar test. It -- FOIA just  
19 moves the -- the document from the government files into  
20 the public and satisfies the first prong of the test.  
21 But the Second Circuit said that the second part of the  
22 test requires an examination of the individual documents  
23 that are being released.

24 JUSTICE ALITO: Well, could we talk about  
25 the test that you propose? You say that a report is a

1 usually formal account of the results of an  
2 investigation given by a group or person authorized to  
3 make it, right?

4 MR. WILLENS: That's right.

5 JUSTICE ALITO: And then an investigation is  
6 most reasonably understood as an official probe into  
7 fraudulent conduct.

8 MR. WILLENS: That's correct, Your Honor.  
9 That --

10 JUSTICE ALITO: So if the report does not  
11 investigate fraudulent conduct, then it isn't -- if  
12 something does not involve information about fraudulent  
13 conduct, it's not a report?

14 MR. WILLENS: We -- we wouldn't take that  
15 hard a line, Your Honor. The -- the material you're  
16 quoting comes out of the dictionary, and we were looking  
17 for a good -- it's based on dictionary definitions, I  
18 mean. We were looking for a good, reasonable definition  
19 to come out of Webster's Dictionary. We're asking the  
20 Court to adopt the Second Circuit's definition, which is  
21 broader and doesn't have an explicit requirement of  
22 investigation into fraud. And we certainly aren't  
23 asking the Court to rule that all the standard  
24 administrative reports that agencies issue all the time  
25 are not reports.

1                   But it's very useful in a close case where  
2 the document doesn't say this is the administrative  
3 report or the report of staff on a particular issue --  
4 it's very helpful in a close case to look at the context  
5 of the statute.

6                   JUSTICE ALITO: Well, could I ask you about  
7 a document to which your adversary referred? The  
8 Department of Justice and all of the other departments  
9 are required annually to issue what are termed Freedom  
10 of Information Act reports. Now, is that a report --

11                   MR. WILLENS: Yes.

12                   JUSTICE ALITO: -- under the False Claims  
13 Act?

14                   MR. WILLENS: Yes, it is, Your Honor, and  
15 we've argued that because the FOIA uses the word  
16 "response" for the documents we're talking about today  
17 and uses the word "report" for that document that goes  
18 to Congress, it must have understood those words to mean  
19 different things.

20                   JUSTICE ALITO: But this report is --  
21 doesn't seem to involve a process that's any less  
22 mechanical than responding to a FOIA report. It's  
23 basically a compilation of statistics: how many  
24 requests were filed, how long it took to process them,  
25 exemptions that were claimed, and so forth. So what's

1 the difference?

2 MR. WILLENS: Well, FOIA is a special case,  
3 Your Honor; that's the first difference. It only looks  
4 into whether or not documents should move from  
5 government files into the public, and we're suggesting  
6 that because there's such a strong government purpose in  
7 encouraging whistleblowers to bring those documents out,  
8 that in order to give meaning to the list of enumerated  
9 sources here you have to look at what the documents are  
10 there, that are coming out.

11 You can look at this FOIA cover letter, and  
12 I think you'll see that it doesn't have any substantive  
13 content to it. It just refers to the investigation, or  
14 it refers to the FOIA search that was -- that took place  
15 here.

16 JUSTICE SCALIA: Well --

17 MR. WILLENS: In a lot of ways -- sorry.

18 JUSTICE SCALIA: Give us -- give us your  
19 definition. You say you're not standing by the  
20 dictionary definition --

21 MR. WILLENS: Right.

22 JUSTICE SCALIA: -- that was read. You're  
23 -- what is your definition? It's not just reports of  
24 investigations into fraud. What else is it?

25 MR. WILLENS: On the investigation side,

1 it's a definition -- the definition is a focused and  
2 sustained inquiry toward a government end, a substantive  
3 government end that would have to do with the policies  
4 and practices of the -- of the agency; that is,  
5 uncovering noncompliance or assembling information about  
6 a policy program or something like that. We're trying  
7 to distinguish that from --

8 JUSTICE SCALIA: Do you know any -- any  
9 dictionary that gives that definition? I mean, the  
10 advantage of -- of the Petitioners' is they use a -- a  
11 dictionary definition. It may be a very broad one and  
12 you don't like it for that reason, but it is the way the  
13 word is sometimes used.

14 MR. WILLENS: It is, Your Honor.

15 JUSTICE SCALIA: I don't know any dictionary  
16 that would define the word the way you say it.

17 MR. WILLENS: That's the Second Circuit's  
18 holding, Your Honor. That's exactly why we spent a  
19 large part of our brief explaining why there's a better  
20 dictionary definition than the one that Petitioner uses.  
21 One important difference --

22 JUSTICE GINSBURG: Which is -- can you point  
23 us to the page so we can see the Second Circuit's  
24 definition of report and the Second Circuit's definition  
25 of an FCA investigation?

1                   MR. WILLENS: I'm not sure that I can do  
2 that, Your Honor.

3                   JUSTICE GINSBURG: Well, I don't -- I don't  
4 want to eat into your time.

5                   JUSTICE ALITO: Well, I -- I understood the  
6 definition that I read to be the position that you are  
7 advocating, not simply some dictionary -- some  
8 definition that happens to appear in the dictionary. I  
9 understood that to be the test that you were saying we  
10 should adopt. Am I wrong? Did I misread your brief?

11                   MR. WILLENS: We -- we believe that that's a  
12 good definition that could be used, Your Honor, but the  
13 trouble is that there's not going to be any dictionary  
14 definition that covers all the innumerable ways that  
15 "administrative report" can be used. And I wanted to  
16 just -- to answer your earlier question to say that, of  
17 course, there are standard administrative reports that  
18 agencies issue. The -- the courts below have been  
19 resolving this kind of issue outside the FOIA context  
20 for 25 years since this statute was passed without any  
21 serious trouble.

22                   JUSTICE ALITO: But if we adopt your  
23 definition, isn't it true that a lot of things that are  
24 labeled Department of Labor report, Justice Department  
25 Freedom of Information Act report, are not reports?

1 MR. WILLENS: Yes, Your Honor, and that's  
2 why I told you that the Second Circuit's definition, if  
3 you're looking for an overarching definition, is a  
4 better one. The trouble there --

5 JUSTICE ALITO: So you're withdrawing from  
6 the definition that you proposed in your brief?

7 MR. WILLENS: I -- I believe they are both  
8 helpful, Your Honor, and I also believe that the -- the  
9 Second Circuit's definition covers all of these kinds of  
10 reports, but there's no need for this Court to issue its  
11 own definition. There's another way of resolving this  
12 case, which is simply to answer the question of whether  
13 FOIA responses, which are unique in many respects, and  
14 have their own statutory and regulatory structure, are  
15 administrative reports or investigations on their own  
16 terms. And --

17 JUSTICE SCALIA: Don't we have to say why?  
18 Don't we have to say why they are they are that?

19 MR. WILLENS: Of course, you have --

20 JUSTICE SCALIA: And once we have to say  
21 why, we're -- we're getting into the need for defining  
22 what a report is.

23 MR. WILLENS: Well, I -- it would be  
24 possible --

25 JUSTICE SCALIA: We don't usually just say

1 yes, no; you know, we usually give reasons.

2 MR. WILLENS: I agree with that, Your Honor,  
3 but point two of our brief is an explanation of why it  
4 makes sense not to have a categorical rule that every  
5 FOIA response and all of its attachments are always  
6 administrative reports and investigations. And I submit  
7 you don't have to, to find administrative report an  
8 investigation for all purposes in order just to answer  
9 that narrow question.

10 For example, the word "investigation" is  
11 used in the False Claims Act for a very specific kind of  
12 investigation: a law enforcement investigation. And a  
13 FOIA search, which is defined in that statute as a  
14 review, is not an investigation.

15 JUSTICE SCALIA: Let's talk about the  
16 purpose of the statute. Surely, that should bear upon  
17 how you read the -- what you read the words to mean. I  
18 had thought that the purpose was as -- as Petitioner's  
19 counsel said, the purpose was to allow people to bring  
20 qui tam actions who have their own information and who  
21 are not just relying on information that they -- that is  
22 not personal to them. Is that accurate or not?

23 MR. WILLENS: No, Your Honor. The -- the  
24 statute has always encouraged both insiders and people  
25 who are dealing with secondhand information, what we



1 used to call private attorney generals, to go out and do  
2 their own investigation. And Congress amended the  
3 statute in 1986 to encourage those people and insiders  
4 like Mr. Kirk to get documents out of the government  
5 files that they need as evidence to support their case.

6 The case doesn't lack merit simply because  
7 the whistleblower needs additional evidence to prove his  
8 case in court, and FOIA is a critical aspect of that  
9 because relators frequently don't have one piece of  
10 information, which is what their corporation said to  
11 government contracting officers. That is, Mr. Kirk, for  
12 example, knows operationally -- he knows that every  
13 contract Schindler had for 15 years was breached because  
14 they were not following the key contractual provision to  
15 abide by the --

16 JUSTICE SCALIA: He only knows that because  
17 of the FOIA response.

18 MR. WILLENS: No, Your Honor.

19 JUSTICE SCALIA: Because -- because the  
20 agency said we don't have any reports for those 5 years.  
21 Why isn't that information from the agency a report by  
22 the agency that we don't have any documents from those 5  
23 years, and, therefore, your client says they didn't file  
24 documents for those 5 years?

25 MR. WILLENS: There were a few statements

1 wrapped up in that -- in that question, Your Honor. But  
2 the point I'm trying to make is that Mr. Kirk has a vast  
3 amount of inside knowledge about this breach of contract  
4 that was going on for so many years, and it's different  
5 from the notification requirement. That's what triggers  
6 the False Claims Act liability.

7 But it's different from saying that there  
8 was a fraudulent scheme going on for 10 or 15 years that  
9 damaged the government, damaged the veterans employed by  
10 the company, and -- and undermined the whole purpose of  
11 VEVRRRA that requires it to be in these contracts.

12 JUSTICE SOTOMAYOR: Counsel, the -- I think  
13 you've just divided up two issues. The first is, the  
14 FOIA letter does tell you that there weren't reports for  
15 certain years.

16 MR. WILLENS: It said -- the word is that  
17 reports were not found.

18 JUSTICE SOTOMAYOR: Found. Now, the issue  
19 is different from whether the ones that were found were  
20 false or not; is that correct?

21 MR. WILLENS: That's true, and I would say  
22 it's also different from the issue of whether they were  
23 filed, because the fact that the agency didn't find them  
24 during a cursory review of its records, which is -- a  
25 reasonable review of the records is all it's required to

1 do. In a compliance investigation, of course, they  
2 would go on much further. They would look to see if the  
3 documents were filed somewhere else. If they --

4 JUSTICE SCALIA: But your client would  
5 search if they weren't filed, and on the basis of no  
6 other information except this FOIA response.

7 MR. WILLENS: It's not no other information,  
8 Your Honor. It's a pattern of --

9 JUSTICE SCALIA: How else does your client  
10 know that there were no reports filed for these years,  
11 which is part of the -- part of the claim here?

12 MR. WILLENS: He knows that Schindler did  
13 not collect the information that it would have needed in  
14 order to file accurate reports.

15 JUSTICE SCALIA: He wasn't there during  
16 those years, was he?

17 MR. WILLENS: He was only not there during  
18 the very tail end of our period, which runs from 1999 to  
19 2005. He was there and he was fired or let go in the  
20 middle of 2003, so he has personal knowledge of all of  
21 that failure to collect the information. The question,  
22 then, is whether Schindler filed false reports or failed  
23 to file them at all, and he alleged, without reference  
24 to the FOIA response, that it had to be one or the  
25 other. And either way, it's going to be a violation,

1 and that's sufficient at this stage of the case.

2 We're the 12(b)(1) motion, Your Honor. I  
3 haven't had an opportunity for discovery and we don't  
4 know anything else about Schindler's conduct, but  
5 it's -- it's not correct to say that -- well, I think  
6 I've answered the question.

7 JUSTICE ALITO: Well, may I ask you why a  
8 FOIA response doesn't satisfy the Second Circuit's test?  
9 An investigation, the Court says, quote, "implies a more  
10 focused and sustained inquiry toward a government end."

11 Now, the government end in responding to a  
12 FOIA request is compliance with FOIA, and somebody has  
13 to search for these records and determine whether any  
14 exemptions apply, and that would seem to be focused and  
15 sustained. So what element is missing?

16 MR. WILLENS: The -- there's a missing  
17 government end here because all that's happening is the  
18 transmission of documents from inside the agency to the  
19 outside the agency.

20 JUSTICE KENNEDY: But that's the way the  
21 Second Circuit defined its own, or limited its own  
22 definition. But why isn't it -- why isn't the Ninth  
23 Circuit incorrect -- pardon me, the Second Circuit  
24 incorrect when it says that this is not a governmental  
25 end? It is a governmental end.

1                   MR. WILLENS: Obviously, satisfying the  
2 requirements of FOIA and its regulations is a government  
3 end to that extent, but the Second Circuit was trying to  
4 distinguish between the substantive work of an agency  
5 and the more ministerial but still important act of  
6 taking documents out of files and sending them out to  
7 the public. A FOIA officer is -- is separate and apart  
8 in most cases from other programmatic officers in an  
9 agency, because we want to keep that act of taking  
10 documents out of the files and making them public  
11 separate from people who might not want those documents  
12 to go out into the files into the public.

13                   CHIEF JUSTICE ROBERTS: The person is -- the  
14 person is separate but is often dealing on a regular  
15 basis with people who have line responsibilities and  
16 something else.

17                   MR. WILLENS: Of course.

18                   CHIEF JUSTICE ROBERTS: He sees something --  
19 well, that looks like it might be a problem -- he gets  
20 on the phone or goes down there and says: Is this  
21 covered by the exemption or not?

22                   MR. WILLENS: Of course. I didn't mean to  
23 say that they don't speak to them. It's just that  
24 there's a different line of authority in most cases, and  
25 it's a different kind of mission. So I -- I hear the

1 question, and I understand the problem, but at some  
2 point you need to distinguish between what FOIA's trying  
3 to do, which is to make documents public, and what the  
4 government agency's work is, which is to implement its  
5 policies, procedures, sign contracts, build roads and  
6 whatever else it does.

7           There's such a strong government purpose in  
8 getting these documents out to the public, and  
9 specifically in this case to relators and whistleblowers  
10 that this Court has held, 15 -- has held, almost 15  
11 years ago, that that is why Congress amended the statute  
12 in 1986, and to tell the Congress now 25 years later  
13 that they made a mistake when they used the word  
14 "administrative report" and they accidentally covered a  
15 vast number of documents, they could have used the word  
16 "agency records," which they used in FOIA to cover  
17 everything. But instead, Congress chose a very narrow  
18 set of enumerated sources, specifically so that other  
19 documents would be available to relators.

20           As I tried to say before, getting those FOIA  
21 documents out to a relator is particularly important,  
22 because it has the correspondence between Schindler or  
23 other contractor and the government.

24           JUSTICE ALITO: How do you determine which  
25 government ends count and which government ends don't

1 count?

2 MR. WILLENS: My only argument is that FOIA  
3 is a different kind of mission.

4 JUSTICE ALITO: That's the only  
5 government -- compliance with FOIA is the only  
6 government end that doesn't count?

7 MR. WILLENS: I believe FOIA is a special  
8 case, Your Honor, and there are many reasons why that --  
9 that would be the case. We've argued that the -- the  
10 plain language of FOIA indicates that a response is not  
11 a report; a search is not an investigation.

12 JUSTICE ALITO: So a report that goes to a  
13 department or agency's compliance with some law that is  
14 not directly related to the mission of that department,  
15 that would qualify as a -- as a government end for these  
16 purposes, but FOIA's the only thing that doesn't count?

17 MR. WILLENS: FOIA is the only thing that --  
18 that doesn't count. It's like a publishing house or a  
19 little clearing house inside each agency whose job is to  
20 take manuscripts, or in this case, reports or audits or  
21 hearings or whatever, and take them out into the public.  
22 I think it's fair to distinguish between that function,  
23 the publication function, and the substantive work of  
24 the agency. If you don't do that, then you're heading  
25 down a slippery slope which Schindler eloquently

1 articulated in its reply brief. You end up at a point  
2 where not only FOIA documents are covered, but non-FOIA  
3 documents, in one case, even SEC filings, private SEC  
4 filings that are automatically posted to the  
5 commission's computer, Schindler seems to think that  
6 those are administrative reports.

7 And you've, of course, transformed every  
8 private document, like these VETS-100 reports, into  
9 public documents simply by the process of corporate  
10 filing and then release by the government. There's  
11 simply no basis for that in the statute, and it would  
12 cause enormous harm to the operation of the statute.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15 Ms. Sherry.

16 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,  
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
18 SUPPORTING RESPONDENT

19 MS. SHERRY: Mr. Chief Justice, and may it  
20 please the Court:

21 I want to start with one thing that hasn't  
22 yet been brought up this morning, and that is the  
23 context. We are not talking about words in isolation.  
24 We're not talking about the abstract meaning of the word  
25 "report." What we're talking about is public



1 disclosures of allegations or transactions in a  
2 congressional, administrative, or GAO report hearing,  
3 audit or investigation. And in that context, the word,  
4 the phrase "administrative report," the phrase  
5 "administrative investigation," has some meaning.

6           When you speak of a congressional  
7 investigation, when you speak of a GAO report, and when  
8 you speak of an administrative audit, that conjures up a  
9 certain image that goes beyond the simple search for  
10 responsive records in response to a --

11           JUSTICE ALITO: Your test, am I right --  
12 this is page 21 of your brief -- that it has to go to  
13 the uncovering of the truth of the matter or inquiring  
14 into wrongdoing. Is that your test?

15           MS. SHERRY: I don't think it has to go just  
16 to the inquiring into wrongdoing. I think the way to  
17 think about it is whether or not the agency or the  
18 governmental entity is engaging in a substantive inquiry  
19 into and a substantive analysis of information of data,  
20 of facts, and that's the distinction between what an  
21 agency does in response to FOIA.

22           FOIA is a means of public disclosure. It's  
23 a method by which an agency grants the public access to  
24 preexisting records that are in its possession. It is  
25 essentially the public disclosure component of the

1 public disclosure bar --

2 JUSTICE ALITO: Isn't the test whether --  
3 the test is whether there's a substantive analysis of  
4 facts?

5 MS. SHERRY: There's a substantive analysis  
6 of the facts. For example, in the FOIA context, while  
7 the agency is certainly pulling responsive records and  
8 is engaging in some sort of inquiry into whether  
9 exemptions apply and whether the information can be  
10 released or should be released, it's not looking at the  
11 data. It's not looking at the information that's in  
12 that document for its substantive content.

13 JUSTICE ALITO: So -- but when the -- when  
14 the DOJ pulls together at the end of the fiscal year the  
15 number of FOIA requests that it received and calculates  
16 the length of time they were pending and discloses that  
17 in the annual freedom of act -- Freedom of Information  
18 Act report, that is a report?

19 MS. SHERRY: I think that would be a report  
20 under our definition because the Department of Justice  
21 is actually engaging with the data, engaging in the  
22 analysis. And if I'm remembering correctly, I think it  
23 also requires, for example, the Attorney General to  
24 report on how it's encouraging compliance with FOIA by  
25 the different agencies.

1           And so I think in most of the circumstances  
2 that it would still qualify as a report, and I think  
3 FOIA is quite distinct from that.

4           And if you look at the facts of this case in  
5 particular, it demonstrates what the substance of the  
6 agency's action is in a FOIA case. It's -- again, it's  
7 a means of public disclosure. Congress could have  
8 enacted a very different public disclosure bar. In 1943  
9 to 1986, there was what was called the government  
10 knowledge bar.

11           JUSTICE ALITO: Every report is a mean --  
12 means of public disclosure. Does -- the Freedom of  
13 Information Act report is a means of public disclosure,  
14 that's the reason that Congress required it.

15           MS. SHERRY: That's -- that's certainly  
16 true, but the public disclosure bar requires more than  
17 just the public disclosure. Congress made the extra  
18 effort and included only particular enumerated  
19 governmental sources. Whatever the line is, we know  
20 that it cannot be any dissemination of information from  
21 a governmental entity.

22           JUSTICE ALITO: But I'm -- I'm still  
23 struggling to find out what the definition is of -- of a  
24 report or an investigation. You say it's a substantive  
25 analysis of facts. Does not the person who processes a

1 FOIA request have to engage in a substantive analysis of  
2 facts to determine whether particular documents fall  
3 within the scope of the request, whether certain  
4 materials are covered by exemptions?

5 MS. SHERRY: I don't think the -- two  
6 answers to that question. One is I don't think the  
7 officer engaging in any substantive analysis of the  
8 facts that are in the records that it's disclosing, but  
9 the second answer to that question is if that's all  
10 that's required, then I think we're back to a position  
11 where every disclosure of information by the government  
12 would qualify as a public disclosure.

13 And we not -- we know that's not the choice  
14 that Congress made. It included only specifically  
15 enumerated sources, and it chose particular words. It  
16 chose report, hearing, audit or investigation. It is  
17 hard to think of what other words Congress could have  
18 used to describe the type of report we are talking about  
19 or the type of investigation besides those words.

20 If Congress had wanted to have a broader  
21 meaning, it had a number of other types of words at its  
22 disposal. It could have said document, it could have  
23 said communication, it could have said record, and then  
24 it would map quite well on to what FOIA is, which is the  
25 public disclosure of agency records. It didn't do any

1 of that, and so I think we have to give some credence to  
2 the choice of words and to the fact that Congress --

3 JUSTICE BREYER: So what -- why -- imagine  
4 everything here is the same. That is, what I imagine  
5 happened here is that an individual wrote and asked for  
6 a FOIA request. Did Schindler Elevator file a certain  
7 kind of statement. And you say that's not a report.

8 Now, imagine everything the same except the  
9 person who asks is called Joe Smith, fraud officer for  
10 the agency. Everything else is the same. Now is it a  
11 report?

12 MS. SHERRY: No, and -- I'm sorry. The  
13 second circumstance it is, but let me -- I answered that  
14 incorrectly. The second circumstance it would be, but  
15 let me explain the distinction.

16 JUSTICE BREYER: All right.

17 JUSTICE SCALIA: You don't understand the  
18 circumstance.

19 JUSTICE BREYER: That is exactly what  
20 happened here.

21 MS. SHERRY: Let me -- that is not -- that's  
22 what I want to explain, that's not -- that's not what  
23 happened here. If I submitted a FOIA request and said  
24 did so-and-so company file a report, I wouldn't get a  
25 response, that's not a proper FOIA request.

1 JUSTICE BREYER: No, no, it says, please  
2 tell me any documents that they filed that says da, da,  
3 da, something like that, okay? Now, we have the same  
4 thing, word for word, except the person who makes the  
5 request is not Mrs. Mary Jones from the public, the  
6 person who makes the request is the fraud officer for  
7 the agency that's worried about being defrauded. And  
8 all I'm interested in is, are they both not reports? Is  
9 one a report and not the other? Or are they both  
10 reports?

11 MS. SHERRY: The second one would be a  
12 report if there was an investigation going on.

13 JUSTICE BREYER: I'm just telling you the  
14 facts. The facts are just what I said.

15 MS. SHERRY: If -- if --

16 JUSTICE BREYER: Everything the same except  
17 he signs his name, "fraud officer."

18 MS. SHERRY: Then -- then I misunderstood  
19 the hypothetical. No, it doesn't matter who signing the  
20 piece of paper. What matters is the substance of the --

21 JUSTICE BREYER: All right. So, then, if a  
22 person who is an outside person gets a hold of two  
23 documents, one, the request, and two the response, which  
24 is to say, yes, I found 15 reports, they're all signed  
25 by Mickey Mouse, okay? And he bases a complaint, there

1 is no such person as Mickey Mouse, it's a fraud, okay?  
2 Then you go right ahead and bring the qui tam because it  
3 wasn't falling within the exception.

4 Is that right, in the Government's view?

5 MS. SHERRY: In the Government's view the  
6 fact that the information was obtained through a FOIA  
7 request doesn't answer the question as to whether the  
8 underlying document is an administrative report or an  
9 administrative audit or anything else of the sort. The  
10 FOIA -- the agency's response to a FOIA request, again,  
11 is nothing more than the first --

12 JUSTICE BREYER: No, no, you're repeating --  
13 I'm trying to show you what the problem is in my mind.  
14 I -- I can't quite work out the right definition, and  
15 that's what I'm trying to get enlightened on.

16 MS. SHERRY: And -- and the definition --  
17 and -- and I would be the first to acknowledge that  
18 there may be difficult questions at the margin.

19 JUSTICE BREYER: I'm not trying to make a  
20 difficult question. All I want is your enlightenment  
21 about how when I write these two cases down, should I  
22 distinguish them? Should I say they're both the same or  
23 what?

24 MS. SHERRY: I think based on your  
25 hypothetical in both circumstances, all that is done is

1 the agency has looked in its files to see if it has  
2 responsive records and disclose them, then in both  
3 circumstances that's not a report and there was no --

4 JUSTICE BREYER: You say in most. In my  
5 circumstance --

6 MS. SHERRY: Oh, sorry. In both  
7 circumstances.

8 JUSTICE BREYER: In both circumstances.

9 MS. SHERRY: Then it's not -- it's not a  
10 report and there's been no investigation. And I think  
11 words have meaning, and it's significant that FOIA does  
12 not refer to what an agency does as an investigation.  
13 It refers to it as a reasonable search for responsive  
14 records, and this Court has never referred to it as an  
15 investigation, no court ever has. And that's because  
16 there's a substantive distinction between an  
17 investigation, certainly between a GAO investigation,  
18 between a congressional investigation and what an agency  
19 does in response to a FOIA request.

20 To give an example, the GAO is not subject  
21 to FOIA, but it does in its regulation respond to  
22 requests from the public much the same way that an  
23 agency does in response to a FOIA request. I think it  
24 would be a rather strange use of the language to think  
25 of that as a GAO investigation and to think of the



1 response as a GAO report.

2 Another example, and again, we're talking  
3 about ordinary usage, not any possible usage.

4 JUSTICE SCALIA: I don't -- I don't want to  
5 have to play these games every time there's --  
6 there's -- there's one of these qui tam actions. I  
7 mean, the advantage of Petitioner's solution is that  
8 it -- it's easy -- it's easy to apply. I don't find  
9 yours easy to apply at all.

10 MS. SHERRY: It may be easy to apply, but  
11 it's easy to apply and it reads out an entire subset  
12 enumerated sources that Congress thought important to  
13 include.

14 JUSTICE GINSBURG: Did the FCA, the  
15 amendments in 2009, which are not retroactive, do they  
16 have any bearing on this problem prospectively?

17 MS. SHERRY: On a prospective -- not -- not  
18 directly in that the words "report," "hearing," "audit"  
19 or "investigation" are still included, but it did  
20 narrowly and further define what that means. It added a  
21 Federal context, and so this Court had decided in Graham  
22 County that there was no Federal nexus required for the  
23 second category of documents and going forward with the  
24 2010 amendments there now is.

25 And so, on a prospective basis -- may I

1 finish? On a prospective basis, State audits, State  
2 reports would not be subject -- would not bar a qui tam  
3 case, unless if this Court holds otherwise they're  
4 produced in response to a FOIA request.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Reiss, you have 14 minutes remaining.

7 REBUTTAL ARGUMENT OF STEVEN ALAN REISS  
8 ON BEHALF OF THE PETITIONER

9 MR. REISS: I don't think I'll use it all,  
10 Mr. Chief Justice.

11 Justice Ginsburg, in response to your  
12 request, the new version of the False Claims Act lets  
13 the government disclaim the public disclosure bar. It  
14 now says the bar can apply unless opposed by the  
15 government. So the government has an automatic ability  
16 to stop the imposition of the public disclosure bar  
17 simply by opposing it. So that is a material change in  
18 the government's favor that the new False Claims Act has  
19 made.

20 Let me just address an underlying premise  
21 that we've heard, I think, somewhat repeatedly from the  
22 Government and Mr. Kirk, and that is this notion that  
23 FOIA is simply an automatic process, that agencies are a  
24 publishing house or clearinghouses. That notion is  
25 utterly belied by the statute and the process itself,

1 and it's utterly belied by the statistics from the  
2 Department of Labor in terms of what their responses are  
3 and how they do them.

4 In 2008, which was the last year we were  
5 able to find statistics for, the Department of Labor,  
6 the department at issue here, processed 17,000 FOIA  
7 responses. Only 28 percent were granted in full.  
8 Thirty-two percent were denied in full, 10 percent,  
9 based on the statutory exemptions, and 22 percent based  
10 on other statutes like the Privacy Act, and 40 percent  
11 of those 17,000 responses were partial responses. So we  
12 can give you some but not all; and in fact the FOIA  
13 responses in this very case not only reported that we  
14 found some of the VETS-100 reports in some years, we  
15 didn't find them in others; but with respect to the  
16 VETS-100 reports that were attached, they actually made  
17 redactions, because those redactions were compelled  
18 according to the Chief of Compliance and Investigations  
19 by the Privacy Act.

20 JUSTICE SOTOMAYOR: Mr. Reiss, assuming that  
21 the government did all of the steps you took, how does  
22 it promote the purposes of FOIA --

23 MR. REISS: Very --

24 JUSTICE SOTOMAYOR: -- to find a document  
25 created by a third party, under duty or not, that is

1 submitted and contains false statements. How does it  
2 promote the government's interests to bar an individual  
3 who has personal knowledge about the falsity from being  
4 a qui tam action?

5 MR. REISS: Well --

6 JUSTICE SOTOMAYOR: Doesn't that seem  
7 illogical, meaning the -- the report filed by the  
8 employer is not screaming out, "I filed a false report."  
9 You need some outside knowledge from that statement by  
10 the employer to prove the falsity. So how is your rule  
11 promoting FOIA's purposes?

12 MR. REISS: Well, Justice Sotomayor, in that  
13 hypothetical the relator actually is bringing  
14 independent information, and the public disclosure bar  
15 would not be invoked -- not because the FOIA response  
16 isn't a report; it wouldn't be invoked because the  
17 allegations and transactions in the qui tam complaint  
18 were not based on; they were not disclosed in the FOIA  
19 response.

20 It furthers the purpose of the statute, our  
21 interpretation furthers the purpose of the statute  
22 because the purpose of the public disclosure bar was to  
23 stop qui tam suits from being brought by members of the  
24 public based on information equally accessible to anyone  
25 in the public.

1 JUSTICE SOTOMAYOR: I'm still not sure I  
2 understand. Here the relator is saying, the statement  
3 says we complied with the military act, and he says they  
4 didn't. I have personal information they didn't because  
5 I know they didn't do X, Y, and Z. Why did we even  
6 reach the questions we did if what he's claiming is that  
7 he was an original -- that he has original knowledge not  
8 -- not reflected in the reports?

9 MR. REISS: And what I'm saying, Justice  
10 Sotomayor is if that's the case, a court can evaluate --  
11 certainly can evaluate whether he is in fact the  
12 original source, which would take him out from under the  
13 public disclosure bar. The court below, the district  
14 court did that, and found that he wasn't. Or even  
15 before reaching that inquiry, if a relator can say my  
16 qui tam complaint is not based upon the public  
17 disclosure of allegations and transactions and reports,  
18 the bar doesn't drop.

19 Our position is the appropriate place for  
20 the inquiry that you're worried about is in determining  
21 whether there is a disclosure of the relator's  
22 allegations or transactions. Whether --

23 JUSTICE SOTOMAYOR: I still don't understand  
24 how it promotes the purposes of a qui tam action --

25 MR. REISS: Because of --

1 JUSTICE SOTOMAYOR: -- to put any kind of  
2 bar on a relator who is challenging the creation of a  
3 document that's submitted by an independent party to the  
4 government.

5 MR. REISS: Well, one of the purposes of the  
6 public disclosure bar was to stop -- and this Court  
7 recognized it in Graham County -- parasitic lawsuits by  
8 relators with no real significant independent or  
9 valuable information to contribute. What we're  
10 suggesting, as I understand the question --

11 JUSTICE SOTOMAYOR: In fact that's not true.  
12 We have -- that -- because the Government's right;  
13 Congress changed the -- the law from anything that was  
14 in the government's possession and narrowed the scope of  
15 the bar.

16 MR. REISS: Exactly, Justice Sotomayor, but  
17 our position does not resurrect the government knowledge  
18 standard that Congress changed in 1986, and it doesn't  
19 do so for some very good reasons. First of all, the  
20 government -- the government knowledge standard that the  
21 Court -- that the Congress changed in 1986 didn't allow  
22 a relator who is actually the original source of the  
23 information to bring suit. That was one of the major  
24 things that prompted the congressional change in 1986.

25 Secondly, and it's clear from the

1 legislative history in the Senate report, one of the  
2 primary concerns of Congress in enacting the statute in  
3 1986 was the fact that there was a sense that government  
4 employees themselves who were knowledgeable about  
5 potential contracting fraud were not coming forward. In  
6 fact, the Senate report cites a 1983 survey in which 73  
7 percent of 5,000 government employees responded they  
8 would not come forward with evidence of contractor  
9 fraud. That was a major concern with Congress under the  
10 old government knowledge standard, the pre-1986  
11 government knowledge standard. Those -- if those  
12 employees came forward, the suit would still be barred  
13 because the government by definition would have known  
14 about the fraud.

15 Under the new statute, not only do you have  
16 the original source exception, but if government  
17 employees come forward, they are not barred from  
18 bringing those qui tam suits. It's a major change and  
19 it's not the resurrection, Justice Sotomayor, of the  
20 government knowledge standard.

21 If there are no further questions.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:12 p.m., the case in the  
25 above-entitled matter was submitted.)

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