No. 19-56367

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES EX REL. INTEGRA MED ANALYTICS LLC,

Plaintiff-Appellee

v.

PROVIDENCE HEALTH & SERVICES, ET AL.,

Defendants-Appellants.

Interlocutory Appeal from the United States District Court
for the Central District of California
Civil Case No. 2:17-cv-01694-PSG-SS (Honorable Philip S. Gutierrez)

AMICUS CURIAE BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND SUPPORTING APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund ("TAFEF") submits this brief in support of plaintiff-appellee Integra Med Analytics LLC ("Integra"), and affirmance. All parties have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

[1] No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This brief makes three points. First, the theme of defendants' presentation—which is that the FCA is intended to benefit insider whistleblowers, and not outsider whistleblowers like Integra—is wrong. In fact, Congress welcomes FCA actions by company outsiders, and such actions have recovered billions of dollars for the Government. Outsiders bring valuable perspective, expertise, and resources to *qui tam* actions, and they can pursue them without the fear of retaliation that often deters insiders from coming forward. Keeping the doors open to such relators, as Congress intended, is critical to fraud detection and enforcement. Defendants' suggestions to the contrary lack any textual, historical, or sound policy basis.

Second, the FCA's public disclosure bar does not preclude claims based on information gathered from non-news websites. Contrary to defendants' argument, the phrase "the news media" does not include all information available online. Instead, it takes its ordinary meaning, which refers to a narrower range of sources, *i.e.*, professionals who disseminate news as their principal focus. The Court can hold in the alternative that Integra qualifies as an original source because it uncovered a hidden fraud by applying its proprietary techniques and expertise to disparate information—some available on the Internet, and some buried in Government databases—thus materially adding to that information.

Third, the use of statistical analysis, coupled with additional facts suggesting fraud, can render allegations of falsity plausible at the pleading stage. The health care system is awash in fraud. Every year, the Government recovers billions of dollars in FCA actions based on health care violations, and such recoveries do not come close to the total amount of fraud. One of the best ways to spot such violations is to mine data to identify outliers—*i.e.*, businesses that are operating and billing in a way that is inconsistent with norms of medical practice. While mere outlier billing patterns are not enough to prove fraud, they are often suggestive of it—and when a relator combines those patterns with documentary evidence indicating a scheme to bill in ways that are not medically reasonable, the ultimate allegation of fraud becomes plausible.

ARGUMENT

I. The False Claims Act contemplates actions by outsider relators, and such actions are very valuable.

The overarching theme of defendants' argument is that Integra is an improper *qui tam* relator because it is not a paradigmatic insider whistleblower, but instead a company dedicated to identifying and pursuing frauds on the Government. Defendants emphasize Integra's outsider status in arguing both that the public disclosure bar precludes its claims, and in contending that Integra has not pled falsity. This theme—that the FCA is meant for insiders, and that outsiders' claims should therefore be viewed with skepticism—is wrong to the core. In fact, outsider relators are vital to effectuating the FCA's purposes, and Congress has welcomed them to file FCA actions.

The text of the FCA establishes this. Congress did not limit private actions to insiders (*e.g.*, defendants' employees). Instead, any "person" can file an action. 31 U.S.C. § 3730(b). The statute includes limited exceptions—for example, members of the armed forces may not sue other members based on conduct that arose during their service. *See id*. § 3730(e)(1). But there are no categorical limitations on who can be a relator, and not even a suggestion that the class is limited to insiders.

This is consistent with the FCA's broad remedial purpose. Congress implemented a suite of amendments in 1986 to reinvigorate the FCA after decades of dormancy. Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 1 (1986). The amendments were designed to "encourage *any individual* knowing of Government fraud to bring that information forward." *Ibid*. (emphasis added). Increased involvement from the citizenry was key both to reveal fraud that the Government could not discover on its own, and to correct a "resource mismatch" that favored defendants over the Government. *Id*. at 7-8.

Over the years, the FCA's architects have confirmed that claims by outsiders play an important role. Senator Charles Grassley and Representative Howard Berman, the sponsors of the 1986 FCA amendments, explained that a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action." 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1547. They emphasized that "[i]f, absent the relator's ability to understand a fraudulent scheme, the fraud would go undetected, then we should reward relators who with their talent and energy come forward with allegations and file a *qui tam* suit." *Ibid*.

Experience has vindicated this view. Outsider relators have helped the Government recover billions. For example, in *United States ex rel. Shea v. Verizon Communications, Inc.*, 844 F. Supp. 2d 78, 80 (D.D.C. 2012), the relator was a telecommunications consultant who sued wireless carriers for overcharging the Government. The Government recovered $93.5 million, and the court recognized the relator's critical contributions. Indeed, "the Government had no recognition, prior to the filing of [the] lawsuit," that it was being overcharged. *Id*. at 83.

Additional examples abound. A data-miner and a cardiac nurse together identified a widespread scheme to install medically unnecessary implantable cardioverter defibrillators—an expensive and potentially dangerous medical device. The relators' investigation and lawsuit led to 70 settlements involving 457 hospitals, and recoveries exceeding $250 million. *See* U.S. Dep't of Justice, *Nearly 500 Hospitals Pay United States More Than $250 Million to Resolve False Claims Act Allegations Related to Implantation of Cardiac Devices* (Oct. 30, 2015), https://www.justice.gov/opa/pr/nearly-500-hospitals-pay-united-states-more-250-million-resolve-false-claims-act-allegations.

In another case, the relator was an outsider businessman who, through independent investigation, determined that the defendant was supplying faulty lab tests to the Government, and filed a *qui tam* action. The case settled for $302 million. *See* Phillips & Cohen, *Businessman Exposed Problems with Quest Subsidiary's Blood Test Kids; Led to $302 Million Settlement* (Apr. 15, 2009), https://www.phillipsandcohen.com/businessman-exposed-problems-quest-subsidiarys-blood-test-kits-led-302-million-settlement/.

In *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, No. 06-cv-2860-DLC (S.D.N.Y.), the relator was a public interest organization alleging that a county had violated its fair housing obligations. The case settled for $62.5 million. It also helped establish the FCA as a tool to address housing discrimination. *See* Relman Colfax, *Case Profiles - Anti-Discrimination Center v. Westchester County*, https://www.relmanlaw.com/cases-westchester (last visited Sept. 8, 2020).

TAFEF has collected additional whistleblower stories—from insiders and outsiders—demonstrating that outsider whistleblowers play a critical role. *See* TAFEF, *Whistleblower Stories*, https://www.taf.org/whistleblower-stories (last visited Sept. 8, 2020). As some examples: James DeVage, a Medicare beneficiary, determined that the Government was being billed for care that was not provided and sued, helping the Government recover \$325 million; Richard West, a Medicaid beneficiary, brought a similar claim, recovering \$150 million for the Government; Chris Riedel, the founder of Hunter Laboratories, discovered that other lab testing companies were defrauding California's Medicaid program and sued, helping the Government recover at least \$300 million; the four partners of Florida infusion company Ven-A-Care discovered kickback schemes by their competitors and recovered \$486 million for the Government, in addition to other FCA cases that have helped return over \$2.5 billion more. *Ibid*. There are many other examples too numerous to list here.

Parallel experience from other whistleblower programs confirms that outside whistleblowers provide valuable assistance to the Government. Perhaps the most famous example is Harry Markopolos, who discovered Bernard Madoff's fraud years before anybody in the Government did when he was asked by a competitor to create a product to rival Madoff's. Despite multiple complaints to the Securities and Exchange Commission ("SEC") warning of Madoff's Ponzi scheme, the agency dismissed Markopolos's observations—relying on the same rationale defendants use to disparage outsider relators. "Enforcement staff claimed that Markopolos was not an insider or an investor, and thus, immediately discounted his evidence. The Enforcement staff also questioned Markopolos' motives, indicating concerns that 'he was a competitor of Madoff's' who 'was looking for a bounty.'" SEC, Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme, Public Version* 36 (2009), https://www.sec.gov/files/oig-509.pdf. But Markopolos's assessment proved true: Madoff was running a Ponzi scheme, and investors lost billions.

After Markopolos was vindicated, the SEC changed its tune. The Director of the Enforcement Division has commented that "[t]he voluntary submission of high-quality analysis by industry experts can be every bit as valuable as first-hand knowledge of wrongdoing by company insiders." SEC, *SEC Awards Whistleblower More Than $700,000 for Detailed Analysis* (Jan. 15, 2016), https://www.sec.gov/news/pressrelease/2016-10.html. The Director of the Commodity Futures Trading Commission ("CFTC") Whistleblower Office has agreed that "an individual doesn't have to be an insider to receive a whistleblower award," and that an "expert analysis of market data" is valuable. CFTC, *CFTC Announces Whistleblower Award Totaling More Than $2 Million* (Mar. 4, 2019), https://www.cftc.gov/PressRoom/PressReleases/7882-19.

There are good reasons why outsider relators are valuable. First, outsiders cannot be deterred by the challenges that insiders inevitably face. In the best-case scenario, an insider relator is signing up to take on a second full-time job developing a fraud case with her attorneys—and that daunting job will last for years. In the far more common scenario, the insider will face retaliation, including harassment, loss of work, and sabotaging of opportunities. This can be devastating and will frequently deter people who are beholden to their employers and industries from coming forward. Moreover, many potential insider relators will have participated in the fraud, and may be reluctant to come forward for fear of implicating themselves. Indeed, in a smart and successful fraud scheme, the only insiders who know enough to expose the fraud also benefit from it, and therefore have little incentive to report it. Outsiders are not similarly inhibited.

Second, outsider relators may have superior resources and expertise that allow them to spot fraud and pursue meritorious cases. Many insiders will not even know the FCA exists. Even if they did, they may not have the proper vantage point to see the relevant conduct that together constitutes an FCA violation. An outsider with detailed, expert knowledge of ordinary practices in the field, by contrast, can examine data and behavior patterns to determine if a defendant's conduct is anomalous in a way that suggests fraud—and follow up to substantiate those suspicions. It can also find good counsel and learn how to assist the Government in its investigations. That expertise will only grow. A dedicated outsider can, over time, hone its ability to identify, investigate, and pursue fraud, resulting in more effective enforcement prospectively. Outsiders may also be in a better position than individual employees to fund investigations and litigation.

The upshot is that a norm against outsider relators is a norm against more effective fraud detection and enforcement, contrary to Congress's intent in enacting and then strengthening the FCA. By attempting to limit the class of potential relators to insiders only, defendants will make it harder for their own misconduct to come to light—which is, of course, exactly what they want.

In support of their campaign against outsider relators, defendants typically argue that such relators are "opportunistic" because they are motivated by pecuniary gain, and do not bring information the Government could not obtain on its own. This is misguided. To the extent this argument attempts to cast moral aspersions on people who decide to make a living by detecting and redressing fraud, it is puzzling. The fact that people are striving to do well by doing good through FCA enforcement does not make them "opportunists"; it makes them productive members of society. It would be a bizarre anti-fraud statute that gives greater solicitude to "insiders" who participated in a fraud than it gives to honest citizens who speak out when they learn of fraud.

Defendants' argument also ignores that the only way a relator can make any money is by establishing that the defendant defrauded the Government (at least to such a high probability that the defendant is motivated to settle). Moreover, even when the relator does all the work, its recovery will necessarily be small compared to the Government's (at most, the relator receives 30% to the Government's 70%). Thus, whatever the relator's motivations for seeking recoveries, those recoveries always advance the statutory purpose, which is to redress and deter fraud. It would be a *very* bizarre anti-fraud statute that allows a defendant who defrauded the Government to escape liability merely because the relator was not one of the defendant's insiders.

Defendants also are wrong to suggest that outsider relators do not tell the Government anything it does not already know. Their premise is that the Government hypothetically could review all publicly available information found anywhere on the Internet, in its databases, or elsewhere, and draw the same conclusions as any and all outsiders. Defendants leap from that premise to the conclusion that outside relators are therefore "opportunistic" rather than helpful. But even if it might theoretically be *possible* for the Government to discover a fraud, that does not mean that the Government realistically can do so.[2] The Government has

[2] As this case illustrates, defendants' premise—that outsiders do not add factual information to what the Government can access—is also frequently false. Here,

limited resources, and many demands on them. *See, e.g.*, S. Rep. No. 99-345, at 7 ("[T]he most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies."). The Government's enforcement priorities will also be influenced by resource constraints, political priorities, and prosecutors' expertise, among other factors. If a fraud is happening where the Government is not looking, the fraud will not be discovered unless a relator speaks up—and it may not be pursued at all unless the relator carries the case forward. This is precisely why Congress wanted relators not only to file, but also to litigate, cases on the Government's behalf. *See, e.g.*, *id*. at 24.

To be absolutely clear, none of this is to take away from the critical role of *insider* whistleblowers. Their courage and integrity is laudable, and as explained above they face unique risks and challenges that outsiders do not. But the only way for the FCA to achieve its purpose of stopping fraud against the Government is for outsiders also to help. That is what Congress commanded and intended, and the Court should apply the statute accordingly.

Against that backdrop, defendants' public disclosure and plausibility arguments fail. In addressing these points, we focus on the issues that led to the

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Integra did not only review data available to the Government; it also conducted interviews with defendants' former employees that revealed substantial new information. *See* Integra Br. 13-14.

certification of the interlocutory appeal—but we also agree with Integra's other arguments, including that raw Government data is not a "federal report," and that data divulged to a select audience under strict confidentiality restrictions is not "publicly disclosed." *See* Integra Br. 54-58.

II. The public disclosure bar does not bar all claims based on analysis of information available on the Internet.

As relevant here, the FCA's public disclosure bar can be triggered when "substantially the same allegations or transactions as alleged in the action . . . were publicly disclosed" "from the news media." 31 U.S.C. § 3730(e)(4)(A)(iii). This provision seeks to bar so-called "parasitic" suits, which occur when the relator creates an FCA complaint based on a publicly disclosed fraud—taking a portion of the Government's recovery while adding nothing to its efforts. The bar is not intended to apply where, as here, the relator offers its own insights, analysis, and labor to make valuable contributions to the detection and enforcement effort.

As explained *supra*, Congress in 1986 sought to reinvigorate the FCA after a long period of dormancy. The prior version, beginning in 1943, incorporated a "government knowledge bar," which precluded *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609.

As Congress later recognized, the government knowledge bar so "significantly limited the number of FCA cases that were filed" that "[b]y the 1980s, the FCA was no longer a viable tool for combating fraud against the Government." S. Rep. No. 110-507, at 3 (2008)[3]; *see also Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled."); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 2.9. This was, in part, because courts read the government knowledge bar broadly.

In 1986, after extensive study and hearings, Congress determined that the "growing pervasiveness of fraud necessitate[d] modernization" of the FCA. S. Rep. No. 99-345, at 2. Congress was particularly concerned that "restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute" by dismissing meritorious cases. *Id*. at 4.

As relevant here, Congress replaced the government knowledge bar with the public disclosure bar. This provided that a fraud that had been disclosed in specific, enumerated ways, including "from the news media," could not be the basis for a *qui*

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[3] Senate Report 110-507 accompanied the False Claims Act Correction Act of 2008, S. 2041, 110th Cong., a bill that was introduced by Senator Grassley, but not enacted. We rely on the report only for its concise summary of the goals and purposes of FCA amendments before 2008.

tam case unless the relator was an "original source" of the information underlying its complaint. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157.

This provision sought "to strike *a balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quotation marks omitted). But, consistent with the purpose of the 1986 amendments, that balance favors enforcement. "In creating both the public disclosure bar and the original source exception, the Committee explained that this provision was intended to only bar truly 'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government." S. Rep. No. 110-507, at 22. On the other hand, Congress sought "to ensure that any individual qui tam relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case." *Id*. at 5.

Unfortunately, courts again misapplied the FCA to dismiss meritorious cases. This prompted Senator Charles Grassley and Representative Howard Berman, the sponsors of the 1986 Amendments, to issue a statement into the *Congressional Record* explaining that the public disclosure bar, "which was drafted to deter so-called 'parasitic' cases, has been converted by several circuit courts into a powerful sword by which defendants are able to defeat worthy relators and their claims," in a manner that threatened to undermine "the very purpose" of the 1986 Amendments, which was to encourage more private suits. 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1546. In particular, the legislators "disagree[d] with cases holding that *qui tam* suits are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents." *Id*. at *E1547. In their view, a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action." *Ibid*. They also disagreed with decisions interpreting the original source provision—which at the time required the relator to have "direct and independent" knowledge of the fraud—to "require[] the relator to be an eyewitness to the fraudulent conduct as it occurs." *Ibid*. Instead, they argued:

> [A] relator's knowledge of the fraud is "direct and independent" if it results from his or her own efforts. For example, a relator who learns of false claims by gathering and comparing data could have direct and independent knowledge of the fraud, regardless of his or her status as a precipitant witness.

Ibid.

In 2010, in response to decisions misconstruing the public disclosure bar, Congress amended the statute as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Congress "overhauled" and "radically changed" the statute to "lower the bar for relators." *United States ex* *rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298-99 (3d Cir. 2016). Among other things, the amendments narrowed the triggers for the bar and broadened the definition of an original source. For example, instead of applying whenever allegations of fraud are disclosed in any criminal, civil, or administrative hearing, the bar now applies only if the federal Government is a party to the hearing. *See* 31 U.S.C. § 3730(e)(4)(A)(i). And instead of requiring an original source to have "direct and independent knowledge" of the fraud, which some courts construed as firsthand factual knowledge, the current definition merely requires the relator to have "independent" knowledge that "materially adds to" the public disclosures. *Id.* § 3730(e)(4)(B).

Under the current statute, it is irrelevant whether the Government had actual or constructive knowledge of fraud allegations, whether information can generally be accessed by the public, or whether a relator is a traditional insider whistleblower with direct knowledge of fraud. What matters is whether the fraud was disclosed in one of three specific ways enumerated in the statute—and if it was, whether the relator is an original source.

To assert a public disclosure bar defense in this case, defendants rely on an extraordinarily broad interpretation of the phrase "from the news media." Specifically, defendants read "from the news media" to encompass essentially any information publicly available on the Internet. That is incorrect. Moreover, even if a public disclosure occurred, the Court could hold that Integra is an "original source" entitled to proceed.

A. Information from non-news websites does not come "from the news media."

The phrase "from the news media" is not defined, and so it takes its ordinary meaning unless there is some especially clear or compelling reason for it not to. *See, e.g.*, *Schindler Elevator Corp.*, 563 U.S. at 407 (construing the word "report" in the public disclosure bar according to its "ordinary meaning"); *see also Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (interpreting undefined word "pending" in the FCA "in accordance with its ordinary meaning"). That is what the district court correctly held, and this Court should affirm.

In ordinary parlance, the phrase "the news media" refers to professionals who focus on reporting news to the public. This includes print news, broadcast news, and Internet news. The phrase focuses as much on the type of content ("news," *i.e.*, important current events) as it does on the type of speaker (the professional "media," as opposed to individuals or businesses that might incidentally discuss current events, but not as their focus). For example, everybody would agree that information published in the *New York Times* newspaper—whether in print or online—comes "from the news media" because the New York Times Company is part of "the news media" in ordinary parlance. But nobody would describe the website of the fast food company McDonald's as "the news media," even if it sometimes discusses current events.

Defendants urge the Court to embrace a much broader understanding of "the news media" that includes any mass communication that disseminates any new information. Op. Br. 48. According to defendants, this includes, at a minimum, every "company and industry website[] that provide[s] information to the public"—and likely everything on every publicly accessible website, period. *Id*. at 46. But as the McDonald's example above illustrates, that is not the ordinary meaning of "the news media."

Defendants have attempted the lawyer's trick of taking the broadest definitions of the words "news" and "media" in isolation and smashing them together, ignoring that the phrase "the news media" has a settled meaning that is far narrower than the outer limits of definitional possibility. *Cf. Bond v. United States*, 572 U.S. 844, 861-62 (2014) (holding that despite broad definitions, the ordinary meaning of "chemical weapon" in statute implementing the international Convention on Chemical Weapons was not any chemical used to cause harm, but instead a narrower class of weapons). Defendants' misguided hyperliteralism is not how textualism works. *See, e.g.*, Antonin Scalia & Bryan Garner, *Reading Law* 356 (2012) (footnote omitted) ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text.");

William N. Eskridge Jr., *Interpreting Law* 62 (2016) (cautioning that judges should take care to follow ordinary meaning "when two words combine to produce a meaning that is not the mechanical composition of the two words separately," recognizing that a phrase can cover a "dramatically smaller category than either component term"). Indeed, defendants ignore an important textual cue, which is the inclusion of the article "the" before "news media"—which strongly suggests Congress intended the phrase "news media" to refer to outlets that were understood to be *the* media at the time of enactment, and not to any channel that might conceivably disclose news under the broadest possible interpretation.

When Congress enacted the public disclosure bar in 1986—three years before the World Wide Web was invented—"the news media" surely did not sweep in every new book; or everything contained in scientific studies; or anything found in corporate marketing materials, handbooks, and spreadsheets. It certainly did not mean every statement by the millions of people who prolifically use Twitter and Facebook to broadcast their thoughts. Yet, all these are now commonly found on the Internet. Treating them all as "the news media" would not be faithful to the text; it would be absurd. And of course, the same was true when Congress amended the statute in 2010. The news media has *always* referred to professionals who report the news for a living—and not every new statement on the Internet.

Indeed, as the district court explained, defendants' "unbounded reading of the news media provision" fundamentally conflicts with the text and structure of the amended public disclosure bar. ER30. In 2010, Congress amended Section 3730(e)(4)(A)(i)—which previously encompassed disclosure in any "criminal, civil, or administrative hearing"—to require that information must instead be disclosed in a "Federal criminal, civil, or administrative hearing *in which the Government or its agent is a party*." 31 U.S.C. § 3730(e)(4)(A)(i) (emphasis added). Congress thus deliberately sought to narrow the class of proceedings that would trigger the bar by excluding, for example, all civil litigation and administrative proceedings in which the Government is not a party. But by 2010, virtually all information disclosed in federal civil proceedings was available online through PACER. Similarly, filings in many administrative proceedings were available in similar electronic databases, such as PAIR (Patent Application Information Retrieval—the Patent Office's counterpart to PACER) for patent prosecution proceedings, for example.

Under defendants' interpretation, these records would count as "news media" because they are on publicly accessible websites. That would eviscerate the 2010 amendment to Section 3730(e)(4)(A)(i) because documents that Congress specifically sought to exclude from the public disclosure bar would now trigger it. That violates the canon requiring courts to interpret statutes as cohesive, harmonious wholes. *E.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Indeed, as the district court observed, defendants' interpretation "would run contrary to the purposes underlying the public disclosure bar, and indeed the FCA itself." ER30. The same considerations dictate the same result for third-party providers like Westlaw or LexisNexis that merely repackage court and administrative decisions and make them available online.

Defendants argue that adopting the district court's framework to determine whether something on the Internet is "news media" would be cumbersome and confusing. Insofar as defendants are arguing that we do not need a six-point test to determine whether a source counts as "news media," we agree; the inquiry is in fact far simpler. But the district court recognized that, too: The core of the court's rule—"the most important consideration"—is whether a source is "news media" in ordinary parlance. ER35. There is nothing complicated about that. Indeed, courts interpret undefined statutory terms according to their ordinary meaning all the time, including terms like "reasonable," "misleading," or "fraudulent" that have fuzzy boundaries—and Congress is of course free to use such words to strike the balance it wants in legislation.

Assuming *arguendo* that hard cases may arise at the margins of the ordinary meaning of "the news media," that does not help defendants for two reasons. First, this is not a hard case. Company websites and online discussion forums are so far afield from the ordinary meaning of "news media" that there is no need to fret about the precise location of the boundary. Second, as a matter of statutory interpretation, defendants' response to possible ambiguity—which is to give up and treat everything on the Internet as "the news media"—is unacceptable. Courts cannot avoid ambiguities in the language Congress used by jettisoning the ordinary meaning. They especially should not do so when, as here, the effect would be to undermine the FCA's remedial purpose. Instead, to the extent ambiguities exist, they should be resolved on a case-by-case basis using ordinary canons of statutory construction.

B. In the alternative, a relator that discovers a hidden fraud using original analysis of data qualifies as an original source.

The Court can affirm on the alternative ground that Integra is an "original source" of the information in its complaint. An "original source" can sue even if substantially the same allegations or transactions have been publicly disclosed. 31 U.S.C. § 3730(e)(4)(A). Under the pre-2010 version of the FCA, a relator required "direct and independent" knowledge of the fraud to qualify as an "original source." Most courts interpreted that language to require the relator to have firsthand knowledge of the historical facts underlying the claim. The architects of the public disclosure bar—Senator Grassley and Representative Berman—criticized that interpretation as unduly narrow, arguing that a relator should be able to qualify as an original source through data analysis, as long as the analysis reveals a fraud that the Government otherwise would not have discovered. *See supra* pp. 5, 15-16. And in 2008, the Senate Judiciary Committee (commenting on a bill introduced by Senator Grassley), expressed concern that “cases that have expanded the public disclosure bar and narrowed the original source doctrine threaten to limit the FCA more than the Committee ever intended in passing the 1986 Amendments.” S. Rep. No. 110-507, at 24. These cases had deviated from the original intent, which was “to only bar truly ‘parasitic’ lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government.” *Id*. at 22.

In 2010, Congress responded to this negative trend in the case law by broadening the original source exception. Specifically, Congress eliminated the “directness” requirement. Now, a relator can sue if it has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions,” and “has voluntarily provided the information to the Government before filing an action.” 31 U.S.C. § 3730(e)(4)(B). The statute does not limit the type of “knowledge” that qualifies.

Under the new statutory language, data analysis techniques and other specialized expertise qualify as “knowledge” for original source purposes. These forms of knowledge plainly fall within the ordinary meaning of the term “knowledge”—and, as explained above, their inclusion promotes the FCA’s purpose, which is to enlist the citizenry to spot and redress fraud. Such knowledge is “independent” of public disclosures as long as it comes from other sources (*e.g.*, from training in data analysis, or from industry expertise). The principal question will be whether the relator's knowledge "materially adds" to the publicly disclosed information. If the relator's complaint merely amalgamates public information without providing any additional insight, then it will not qualify. However, if the relator's analysis shows that facially innocuous transactions are in fact likely to be fraudulent, then it does "materially add" to the publicly disclosed information—just as Markopolos's analysis of Madoff's business materially added to the publicly available information about Madoff. Indeed, the new language appears designed to codify Senator Grassley's understanding that a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action." 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1547.

Whether data analysis can qualify a relator for original source status under the new statutory language is an open question in this Circuit, and other precedent is mixed. Some courts have correctly held that data analysis can be enough. *See* Integra Br. 59-60; *see also Illinois ex rel. Edelweiss Fund LLC v. JPMorgan Chase & Co.*, No. 2017-L-000289 (Ill. Cir. Ct. Feb. 1, 2019) (holding that outsider relator that used its industry knowledge to spot alleged fraud from facially innocuous market data was "original source"). Others, however, have applied the pre-amendment view that an original source must have independent knowledge of historical facts. This Court has never interpreted the new "original source" language in a precedential decision. This case presents an opportunity to clarify that the 2010 amendments opened the door to a broader range of knowledge that can qualify a relator as an "original source." That was what Congress intended when it amended the statute, and the text is clear.

III. Statistical analysis, coupled with additional facts suggestive of fraud, is sufficient to plead falsity.

The analysis of data to identify patterns and discover hidden truths is prevalent, well-accepted, and has been successfully employed in innumerable areas of human endeavor—from credit card companies detecting suspicious transactions, to marketers tailoring advertisement campaigns, to financial institutions plumbing consumer behavior, to trade regulators identifying anticompetitive activities. *See generally* Douglas M. Kochelek, *Data Mining and Antitrust*, 22 Harv. J.L. & Tech. 515, 517 (2009) (citing examples and additional authority). These tools are critically important in fraud enforcement, and especially health care fraud enforcement, because fraud wastes up to 10% of all health care spending, or $300 billion *every year*. *See* Nat'l Health Care Anti-Fraud Ass'n, *The Challenge of Health Care Fraud*, https://www.nhcaa.org/resources/health-care-anti-fraud-resources/the-challenge-of-health-care-fraud/ (last visited Sept. 8, 2020). Indeed, the Government has recognized that outlier billing patterns often suggest fraud, and uses data analysis in its own enforcement efforts. *See* U.S. Dep't of Justice, *Fraud Section Year in Review*

2019, at 18 (2020) (explaining that the Government "uses advanced data analytic techniques to identify aberrant billing levels in health care hotspots—districts with high levels of billing fraud—and target suspicious billing patterns").

Here, the district court held that when statistical analysis demonstrating a high probability of fraud (*e.g.*, a 1 in 1,000 to 1 in 100 million probability that the statistical anomaly is due to chance) is paired with additional factual allegations providing a plausible explanation that the anomalies are not merely statistical outliers, but rather the result of fraud, then the complaint is sufficient to survive a motion directed to the pleadings. ER41-43.

Defendants argue that Integra's allegations of fraud are not "plausible" under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), because defendants' overuse of certain lucrative billing codes compared with other hospitals is subject to the "obvious alternative explanation" that defendants were merely ahead of the curve in coding their procedures correctly. This ignores the allegations of the complaint, which combine data showing high rates of expensive billing with evidence that defendants sought to use these codes in clinically inappropriate situations.

More broadly, defendants overread *Twombly*. In that antitrust case, the plaintiffs alleged that incumbent phone companies agreed to prevent competitors from gaining a foothold in their markets. The key allegation was the existence of an agreement, and the *only* well-pled fact supporting that allegation was that the defendants had engaged in parallel conduct, which was equally consistent with innocent behavior. *See* 550 U.S. at 564-66.

The Supreme Court held that the plaintiffs' allegation of parallel conduct came "close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557 (cleaned up). This was so because nothing in the complaint suggested that the parallel behavior "was anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance." *Id*. at 566. Indeed, a large body of well-publicized commentary and evidence indicated that the alternative explanation was the more likely one. *See id.* at 556-57 & n.4.

This case is different because defendants have not shown that the innocent explanation is more likely than the culpable one. Integra's statistical analysis, combined with the documentary evidence it discovered, suggests fraud. And unlike in *Twombly*, no well-publicized body of evidence suggests defendants' conduct is more likely to be innocent. Instead, we know that the health care system is being overwhelmed by billing fraud, and that billing data can reliably identify fraudulent schemes. Defendants' alternative explanation also requires the Court to accept, on faith, that they are head-and-shoulders better at billing than the vast majority of profit-maximizing hospitals—a proposition that is by no means "obvious." In this factual context, Integra's allegations of fraud are plausible. That does not mean they will necessarily prove true. But at the pleading stage, proof is not required.

Defendants say that Federal Rule of Civil Procedure 9(b) requires Integra to be more specific in alleging the plausibility of fraud, given the lack of consensus in medical judgment when coding for certain health conditions. This argument conflates Rule 9's specificity requirement with *Twombly*'s plausibility standard. As the district court correctly determined, Integra's corroborating allegations concerning defendants' business practices (summarized by the district court at ER44-45) were sufficient in identifying the "particular details of a scheme to submit false claims." ER44. The details of that scheme plausibly raised an inference that the statistical anomalies identified by Integra's data analysis were attributable to fraud, as opposed to some other explanation.

Defendants, the Chamber of Commerce, and the American Hospital Association contend that requiring defendants to answer complaints in circumstances like this one will expose them to excessive litigation costs. The unstated premise is that outsider relators will be keen to pursue meritless claims. But nobody wants to invest the time, money, and effort it takes to launch a meritless FCA case, and sophisticated outside relators like Integra have no incentive to do so.

Defendants also have ways to avoid litigation costs that further the public interest. For example, they can seek the Government's approval before engaging in questionable practices. Or they can ask the Government to dismiss meritless lawsuits. *See* 31 U.S.C. § 3730(c)(2)(A).

Finally, defendants' self-serving solution to their litigation-costs problem would exacerbate a greater evil by leaving fraud on the Government unchecked. Last year alone, the Government recovered $2.6 billion in FCA matters involving the health care industry. U.S. Dep't of Justice, *Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019. FCA actions in which the Department of Health and Human Services is the primary client agency have yielded over $41 billion since 1987. *See* U.S. Dep't of Justice, *Fraud Statistics* 6 (2020), https://www.justice.gov/opa/press-release/file/1233201/download. These statistics dramatically understate the amount of fraud. Other agencies (*e.g.*, the Department of Defense, and the Department of Justice's Criminal Division) also deal with massive amounts of health care fraud. Moreover, the recovery statistics only describe the frauds we catch. Undetected frauds account for billions more. In enacting and repeatedly strengthening the FCA, Congress decided that redressing the wave of fraud on the Government takes priority over defendants' litigation budgets. The Court should respect that choice.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

s/ Tejinder Singh

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains 6,881 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: September 8, 2020 *<u>/s Tejinder Singh</u>*