

MODERN PUBLIC DISCLOSURE: READING “NEWS MEDIA”
IN THE FALSE CLAIMS ACT

Andrew Nassar*

The federal government relies on private parties to deter and enforce fraud with the False Claims Act (FCA). Unlike practically every other federal law on the books today, the FCA not only empowers the Department of Justice to go after fraudsters, but it also enlists everyone else by promising a financial reward to individuals who bring claims on behalf of the government. This qui tam enforcement regime is based on the rationale that encouraging individuals to blow the whistle on fraud can help bring it to the government’s attention while deterring would-be fraudsters in the first place.

But there is a catch. Individuals who bring claims based on fraud that was already disclosed in the “news media” are ineligible to recover and may even have their cases tossed out entirely. That restriction lies in a provision of the FCA known as the public disclosure bar, whose other features have received close scrutiny by the Supreme Court, but whose “news media” provision has so far evaded careful analysis. Lower courts’ interpretations of the “news media” category are inconsistent and troubling because their broad applications threaten to swallow the limitations of the public disclosure bar altogether. This Note seeks to provide the first academic account of this phenomenon with a solution to courts’ unbounded interpretations of “news media.” Three guiding concepts—curation, independence, and accessibility—can help courts understand “news media” in ways that are faithful to the plain text of the FCA, consistent with the statute’s history, and normatively sound.

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INTRODUCTION

“Statutory interpretation” refers to the process of understanding the words in a law that Congress wrote.¹ Sometimes—in easy cases—“statutory interpretation” just means reading. But other cases are tough and call for rigorous analysis to determine what the law really says. Congress, as it turns out, is not always clear. Rather than throw up their hands, judges reach for dictionaries,² history books,³ and sometimes even children’s books⁴ to figure out what ambiguous statutes mean. No doubt, the solutions judges give can be just as puzzling as the questions they answer. But when they

1. See Valerie C. Brannon, Cong. Rsch. Serv., R45153, *Statutory Interpretation: Theories, Tools, and Trends* 4 (2022) (describing how courts faced with a statute “do not simply determine, based on equity or natural justice, what would have been a reasonable course of action under the circumstances” but instead determine what the statute means and “apply the statutory law to resolve the dispute”).

2. See, e.g., *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565–69 (2012) (citing more than ten dictionaries to interpret the meaning of “interpreter” in the Court Interpreters Act).

3. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1752 (2020) (interpreting the phrase “on the basis of sex” in the Civil Rights Act of 1964 and citing a book on that statute’s history).

4. See, e.g., *Yates v. United States*, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting) (interpreting “tangible object” in the Sarbanes–Oxley Act with reference to Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960)).

tell us to accept that tomatoes are vegetables⁵ and fish are not tangible objects,⁶ they don't just ask us to take their word. They provide reasoned and sometimes even thoughtful analysis to trace how they got there. So—setting aside whether their decisions are right—at least they show their work. But, unfortunately, not every question of statutory interpretation receives the attention it deserves.

This Note considers one of those neglected questions: What does “news media” mean? That phrase appears in the False Claims Act (FCA), the principal federal statute making it illegal to defraud the government.⁷ Unlike practically every other federal law on the books today,⁸ the FCA not only empowers the Department of Justice (DOJ) to go after fraudsters, but it also enlists everyone else by promising a financial reward to individuals who bring claims on behalf of the government.⁹ These so-called qui tam actions are based on the rationale that encouraging individuals (known as relators) to blow the whistle on fraud can help bring it to the government's attention while deterring would-be fraudsters in the first place.¹⁰ As it turns out, this theory works in practice: In 2022, qui tam suits accounted for nearly ninety percent of the government's \$2.2 billion recovery under the FCA.¹¹

But there is a catch. Individuals who bring claims based on fraud that was already disclosed in the “news media” are ineligible to recover and may even have their cases tossed out entirely.¹² That restriction lies in a

5. See *Nix v. Hedden*, 149 U.S. 304, 307 (1893) (holding that tomatoes are vegetables for the purpose of assessing tariffs, even though, “[b]otanically speaking, tomatoes are the fruit of a vine”).

6. See *Yates*, 574 U.S. at 532 (noting that although a “fish is no doubt an object that is tangible,” it is not a “tangible object” under the Sarbanes–Oxley Act).

7. Press Release, DOJ, Justice Department's False Claims Act Settlements and Judgments Exceed \$5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> [<https://perma.cc/KQU4-R2N5>] (“[T]he False Claims Act serves as the government's primary civil tool to redress false claims involving a multitude of . . . government operations and functions.”).

8. See Charles Doyle, Cong. Rsch. Serv., R40785, *Qui Tam: The False Claims Act and Related Federal Statutes 2* (2021) (noting only two existing federal qui tam statutes: the FCA and a Native American protection provision).

9. See *infra* section I.A (discussing the origins of qui tam).

10. See *infra* section I.A (describing the history and policy underlying qui tam actions).

11. See Press Release, DOJ, False Claims Act Settlements and Judgments Exceed \$2 Billion in Fiscal Year 2022 (Feb. 7, 2023), <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022> [<https://perma.cc/7U95-H624>]. In the past ten years, the portion of settlements and judgments resulting from qui tam suits has ranged from thirty percent (in 2021) to ninety-four percent (in 2013). See DOJ, *Fraud Statistics – Overview: October 1, 1986 – September 30, 2022*, <https://www.justice.gov/opa/press-release/file/1567691/download> [<https://perma.cc/FVW5-LGUQ>] (last visited Feb. 19, 2023).

12. 31 U.S.C. § 3730(e) (2018).

provision of the FCA known as the public disclosure bar.¹³ Despite its name, it does not block claims based broadly on information that has been publicly disclosed.¹⁴ Instead, it bars claims based on information in three specific categories: (1) “Federal criminal, civil, or administrative hearing[s] in which the Government or its agent is a party”; (2) “congressional, Government Accountability Office, or other Federal report[s], hearing[s], audit[s], or investigation[s]”; or (3) “from the news media.”¹⁵ If a suit is based on “substantially the same” allegations as ones appearing in any of those categories, the defendant can move for dismissal.¹⁶ The public disclosure bar’s potential fatality to *qui tam* actions has made it the focus of significant attention: In 2010, Congress amended the provision’s first two categories,¹⁷ and the Supreme Court has considered the meaning of particular words appearing in those two categories’ statutory text three times since 2007.¹⁸

Meanwhile, the third category—“from the news media”—has evaded Supreme Court scrutiny as lower courts have interpreted the phrase in wildly expansive ways, with some going so far as to say that something can constitute news media merely by virtue of its publication online.¹⁹ Plainly, courts have stretched the meaning of the phrase far beyond the text and

13. See *infra* section I.B (describing the genesis of the public disclosure bar).

14. See *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 414 (2011) (“By its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others.”); *United States ex rel. Putnam v. E. Idaho Reg’l Med. Ctr.*, No. CIV. 07-192 E-BLW, 2009 WL 3806337, at *2 (D. Idaho Nov. 2, 2009) (“[A] disclosure of allegations underlying a *qui tam* action made outside of one of the enumerated fora—whether made at a public park or in a deposition—simply cannot constitute a ‘public disclosure’ under § 3730(e)(4)(A).”); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11:40 (2022) (“Although nicknamed the ‘public disclosure bar,’ section 3730(e)(4) is not implicated by all public disclosures of information. Section 3730(e)(4) is implicated only by public disclosures of . . . information *in* certain fora. If those fora are not implicated, the inquiry is at an end.” (footnote omitted)).

15. 31 U.S.C. § 3730(e)(4)(A).

16. *Id.*

17. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (amending 31 U.S.C. § 3730(e)(4)).

18. *Schindler*, 563 U.S. at 404 (holding that a federal agency’s response to requests under the Freedom of Information Act is a “report” under the bar); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 (2010) (interpreting “administrative” in the second prong of the public disclosure bar); *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 467 (2007) (interpreting the “original source” exception to the bar), superseded by statute, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (amending 31 U.S.C. § 3730(e)(4)).

19. See, e.g., *United States ex rel. Repko v. Guthrie Clinic, P.C.*, No. 3:04cv1556, 2011 WL 3875987, at *7 (M.D. Pa. Sept. 1, 2011) (“[P]ublicly available websites can be public disclosures within the meaning of the FCA.”), *aff’d*, 490 F. App’x 502 (3d Cir. 2012); *United States ex rel. Brown v. Walt Disney World Co.*, No. 6:06-cv-1943-Orl-22KRS, 2008 WL 2561975, at *4 & n.7 (M.D. Fla. June 24, 2008) (concluding that a Wikipedia page constitutes “news media” because “[t]he internet can qualify as ‘news media’”), *aff’d*, 361 F. App’x 66 (11th Cir. 2010).

policy of the statute. Despite the attention some parts of the FCA have garnered, this third category, “news media,” has been the subject of surprisingly little inquiry.²⁰ Beyond observing that the term reveals that the public disclosure bar, as a whole, has a “broad[] sweep,”²¹ the Court has not confronted what “news media” means in light of recent lower court decisions interpreting the term broadly enough to capture health clinic websites and online university faculty profiles.²² The phrase has not yet produced a split among circuit courts, but given the FCA’s frequency on the Supreme Court’s docket²³ and courts’ boundary-pushing interpretations, one may be forming.²⁴

When it comes to understanding “news media,” courts offer little guidance and no consistency. These unbounded interpretations of the phrase “news media” are troubling as a matter of statutory interpretation and legal doctrine, but even more so because they pose a threat to the individuals who make justice under the FCA possible. Whether a source counts as news media matters to the individuals trying to raise claims under

20. E.g., R. Ben Sperry, *The False Claims Act’s Public Disclosure Bar: Does It Apply to ‘New Media’?*, Westlaw J. Gov’t Cont., Nov. 29, 2010, at *1 (“Current jurisprudence on the disclosure bar has done little, though, to flesh out the limits of the meaning of ‘news media,’ which are frequent sources of information for *qui tam* relators.”).

21. *Graham Cnty.*, 559 U.S. at 290.

22. See *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) (holding that health clinics’ websites constitute “news media”); *United States ex rel. Juan Hong v. Newport Sensors, Inc.*, No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016) (finding that faculty profiles on the University of California, Irvine and Columbia University’s websites were publicly disclosed because “[i]nformation publicly available on the Internet generally qualifies as ‘news media,’”), *aff’d mem.*, 713 F. App’x 724 (9th Cir.), amended by 728 F. App’x 660 (9th Cir. 2018).

23. *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 664 (2015) (noting that an action is no longer “pending” under the first-to-file rule when that suit is dismissed); *Schindler*, 563 U.S. at 404 (2011) (holding that a federal agency’s response to requests under the Freedom of Information Act constitutes a “report”); *Graham Cnty.*, 559 U.S. at 283 (interpreting the word “administrative”); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 665 (2008) (interpreting phrases that define the acts for which defendants are liable); *Rockwell Int’l Corp.*, 549 U.S. at 467 (interpreting the “original source” exception to the public disclosure bar); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (holding that a local government is a “person” who can be liable under the FCA); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (holding that a state or its agency is not a “person” who can be liable under the FCA).

24. See *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *14–16 (C.D. Cal. July 16, 2019) (criticizing expansive interpretations of the phrase and suggesting five guideposts to interpret “news media”), *rev’d and remanded sub nom. Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App’x 840 (9th Cir. 2021); see also *Silbersher v. Allergan Inc.*, 506 F. Supp. 3d 772, 805–07 (N.D. Cal. 2020) (endorsing and applying the *Integra* guideposts to find that information on the Patent Application Information Retrieval website was not publicly disclosed), *rev’d and remanded sub nom. United States v. Allergan, Inc.*, 46 F.4th 991, 999–1000 (9th Cir. 2022) (holding that the website does constitute a public disclosure as an “other Federal . . . hearing” in another prong of the bar without reaching the question of whether the “news media” bar applies).

the FCA and to the corporate defendants trying to bury them. The problem lies not only with the courts who have read “news media” broadly. Other courts have been more restrained in their approaches to applying the category to novel sources, but they lack a cohesive and unified approach to interpreting the phrase.²⁵ Without a common foundation or set of principles to guide courts, broad readings of “news media” threaten to “swallow limitations that Congress specifically placed on the scope of the public disclosure bar” altogether.²⁶

This Note intervenes by building on an innovative district court opinion²⁷ and providing the first academic account of this phenomenon with a solution to courts’ unbounded interpretations of “news media.” In Part I, this Note discusses the history of the FCA as a Civil War statute with roots in Roman law. It traces the evolution of the public disclosure bar as Congress has sought to strike a balance between foreclosing opportunistic litigation on the one hand and deterring fraud on the other. Part II provides an overview of the jumble of “news media” interpretations and discusses how courts have tried to make sense of the phrase in light of modern conditions. Lastly, Part III looks to a trailblazing opinion and identifies three principles from the FCA’s statutory language to guide courts in interpreting “news media” in an age when information largely lives on the internet. Three guiding concepts—curation, independence, and accessibility—can help courts understand “news media” in ways that are faithful to the plain text of the FCA, consistent with the statute’s history, and normatively sound.

I. THE DEVELOPMENT AND MECHANICS OF THE FALSE CLAIMS ACT

This Part summarizes the history and statutory framework behind the FCA. Section I.A situates the initial passage of the FCA within the broader context of *qui tam* actions in early American history. Then, section I.B describes the process for bringing a claim under the FCA and the relationship between the government and private plaintiffs suing under the statute. That section also traces the evolution of the public disclosure bar and Congress’s back-and-forth calibration to achieve a bar that is neither overly restrictive of whistleblowers nor overly permissive of opportunistic *qui tam* actions.

25. See, e.g., *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 69 F. Supp. 3d 416, 425 (D. Del. 2014) (emphasizing the source’s lack of journalistic quality in finding that material from *CNN iReport* did not constitute “news media”), rev’d, 812 F.3d 294 (3d Cir. 2016), remanded sub nom. *United States v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436 (D. Del. 2016); *United States v. Pac. Health Corp.*, No. CV 12-960 RSWL (SHx), 2014 WL 12859894, at *8 n.6 (C.D. Cal. May 30, 2014) (holding that a review accessible on Google Maps did not constitute “news media” because it did not resemble traditional news).

26. *Integra*, 2019 WL 3282619, at *11.

27. *Id.* at *14–16.

A. *History and Origins*

The Civil War was a national and moral crisis, but it was also administrative nightmare: The government was “billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.”²⁸ With President Abraham Lincoln’s support, Congress enacted the FCA in 1863²⁹ in response to these “frauds and corruptions practiced in obtaining pay from the Government” during the Civil War.³⁰ Besides imposing fines and penalties on those defrauding the government,³¹ the new law included a so-called *qui tam*³² provision that Congress hoped would cast a wider net to catch perpetrators.³³ That feature allowed private individuals to bring claims under the statute on behalf of the federal government and recover a portion of the damages for themselves.³⁴ In other words, Congress enlisted private individuals in the government’s fight against fraud by offering them a share of the bounty.

Congress’s decision to include a *qui tam* provision was by no means novel. Statutes that enforce the government’s rights and yet rely on and encourage private parties to protect them trace their origins to Roman criminal law.³⁵ English history, too, is littered with examples of *qui tam* across a spectrum of contexts. One statute from 1331 offered a bounty to those who informed against merchants failing to comply with laws governing the length of fairs.³⁶ *Qui tam* statutes retained their momentum as they

28. *United States v. McNinch*, 356 U.S. 595, 599 (1958).

29. See Act of Mar. 2, 1863, Pub. L. No. 37-67, § 1, 12 Stat. 696, 696.

30. Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Howard); see also 1 Fred Albert Shannon, *The Organization and Administration of the Union Army, 1861–1865*, at 55–56, 58 (1965) (“For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols[,] the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.” (internal quotation marks omitted) (quoting Robert Tomes, *The Fortunes of War*, *Harper’s New Monthly Mag.*, July 1864, at 227, 228)).

31. See § 3, 12 Stat. at 698.

32. This provision gets its name from the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*” which means he “who pursues this action on our Lord the King’s behalf as well as his own.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000); see also 3 William Blackstone, *Commentaries* *160.

33. Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863) (statement of Sen. Howard) (“The bill offers . . . a reward to the informer who comes into court and betrays his coconspirator.”).

34. § 3, 12 Stat. at 698.

35. See J. Randy Beck, *The False Claims Act and the English Eradication of *Qui Tam* Legislation*, 78 N.C. L. Rev. 539, 566 (2000) (discussing Roman criminal statutes that offered informers a portion of the defendant’s property).

36. Statute of Westminster 1331, 17 Edw. 3 c. 5 (Eng.) (“[S]uch Merchant shall forfeit to our Lord the King the double Value . . . and . . . every Man that will sue for our Lord the King . . .”); see also Beck, *supra* note 35, at 568 (explaining the role of the statute in regulating fairs).

spread to the former English colonies.³⁷ In its inaugural session, Congress passed multiple statutes with qui tam clauses, allowing individuals to sue on behalf of the government in exchange for a bounty.³⁸ Courts, too, recognized the utility of qui tam statutes and situated them within their historical tradition.³⁹ The FCA's inclusion of a qui tam cause of action, as these prior examples demonstrate, was a conscious decision by Congress to outsource enforcement in a tried-and-true manner.

B. *Statutory Framework*

This section examines the mechanics of FCA qui tam litigation and describes the central procedural limitation to relator claims: the public disclosure bar.

1. *Bringing Claims Under the FCA.* — The FCA is the principal federal law that prohibits defrauding the government: Under the statute it is illegal to “knowingly present[] . . . a false or fraudulent claim for payment or approval” to the federal government.⁴⁰ Violators face stiff penalties.⁴¹ Not only are they liable for civil fines ranging from approximately \$13,500 to \$27,000 per claim,⁴² but they also must pay treble damages for the government's losses, turning any gain they may have made into a bill three-times as large.⁴³

FCA claims begin in two ways. The government, through the Attorney General, can file a civil action.⁴⁴ Or, a private party, known as a relator, can bring a qui tam claim “in the name of the Government” for their self and “for the United States.”⁴⁵ Claims under the first route proceed like other

37. *Vi. Agency*, 529 U.S. at 776 (“*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution.”).

38. E.g., Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137–38 (“[E]very person who shall attempt to trade with the Indian tribes . . . without a license . . . shall forfeit all the merchandise so offered . . . which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.”); Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45 (repealed 1790) (“Every collector, naval officer and surveyor, shall cause to be affixed, and constantly kept . . . a fair table of the rates of fees, and duties . . . and in case of failure herein, shall forfeit and pay one hundred dollars . . . to the use of the informer”); see also Doyle, *supra* note 8, at 3–4 & n.22 (collecting early American qui tam statutes); Beck, *supra* note 35, at 553–54 & n.54 (same).

39. See, e.g., *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885) (“[The FCA] was passed upon the theory . . . as old as modern civilization, that one of the least expensive and most effective means of preventing frauds . . . is to make the perpetrators . . . liable . . . under the strong stimulus of personal ill will or the hope of gain.”).

40. 31 U.S.C. § 3729(a)(1)(A) (2018). For a full list of acts to which the FCA attaches liability, see *id.* § 3729(a)(1).

41. See *id.* § 3729(a)(1).

42. Civil Monetary Penalties Inflation Adjustment for 2023, 88 Fed. Reg. 5776, 5778 (Jan. 30, 2023) (codified at 28 C.F.R. pt. 85) (updating FCA penalties for inflation).

43. 31 U.S.C. § 3729(a)(1).

44. *Id.* § 3730(a).

45. *Id.* § 3730(b)(1).

civil litigation by the government; qui tam claims, however, are governed by requirements unique to the FCA.⁴⁶

In a nutshell, a relator begins an FCA action by filing a complaint under seal and serving the government with a copy along with “substantially all material evidence and information.”⁴⁷ The government then has sixty days to decide whether to intervene and take over the action or leave it to the relator to proceed on their own.⁴⁸ If the government intervenes, it assumes “primary responsibility,” though relators may still continue as parties to the litigation.⁴⁹ If the government declines to intervene at the outset, it can nevertheless intervene later “upon a showing of good cause.”⁵⁰

Following a successful qui tam suit, relators are entitled to a portion of the government’s recovery based on a sliding scale that depends on their involvement.⁵¹ If the government took over the action from the relator, she is entitled to between fifteen and twenty-five percent of the proceeds, depending on the extent to which she “substantially contributed” to the litigation.⁵² If the government did not intervene, the relator can receive between twenty-five and thirty percent of the recovery.⁵³

46. See *id.* § 3730(b)–(h).

47. *Id.* § 3730(b)(2).

48. *Id.* § 3730(b)(2)–(4).

49. *Id.* § 3730(c)(1). Relator participation is subject to four exceptions. *Id.* § 3730(c)(2)(A)–(D).

50. *Id.* § 3730(c)(3).

51. See *id.* § 3730(d).

52. *Id.* § 3730(d)(1). Under one circumstance, courts are prohibited from awarding relators more than ten percent of the proceeds. This cap is triggered by a court’s finding that the action was “based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media.” *Id.* (footnote omitted). These sources of information are identical to those covered by the public disclosure bar in 31 U.S.C. § 3730(e)(4)(A) that prohibits relators from bringing actions where their claims are “substantially the same” as allegations disclosed in those sources. *Id.* § 3730(e)(4)(A).

The ten percent award cap applies to the thin slice of cases brought by relators whose claims were not stopped by the public disclosure bar because they qualified as “original source[s]” under 31 U.S.C. § 3730(e)(4)(B), but “the essential elements of the case” were nevertheless publicly disclosed through the same set of channels. *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (internal quotation marks omitted) (quoting 132 Cong. Rec. 29,322 (1986) (statement of Rep. Berman)). For a detailed analysis of how 31 U.S.C. § 3730(d)(1) applies, see generally James B. Helmer, Jr., *How Great Is Thy Bounty: Relator’s Share Calculations Pursuant to the False Claims Act*, 68 U. Cin. L. Rev. 737, 751–57 (2000).

53. 31 U.S.C. § 3730(d)(2).

2. *The Public Disclosure Bar as a Balancing Act.* — Congress included a qui tam provision in the FCA to encourage private parties to blow the whistle on fraud,⁵⁴ but it did not imagine the types of opportunistic behavior that would later come to frustrate its purpose.⁵⁵ One of the principles that animates qui tam is the idea that private parties may be better situated to expose wrongdoing than the government, either because of the government's lack of information or because of the individual's access to it.⁵⁶ In these cases, the federal government hands over a portion of the bounty to these private attorneys general in exchange for their role in collecting it.⁵⁷ But this principle comes with a corollary: Private parties should not profit from the government's recovery without providing something valuable in return. Bringing FCA claims for wrongdoing the government is already investigating (or even already prosecuting) can be a boon for relators but a wasteful expense for the government, which otherwise would receive the entire portion of damages itself.

The 1863 version of the FCA that emerged during the Civil War did not include any limit on the types of information that could form the basis of relators' claims.⁵⁸ As a result, relators without their own information to contribute could "merely plagiarize[] information in indictments returned in the courts, newspaper stories or congressional investigations."⁵⁹ And that is exactly what they did.⁶⁰

Outrage erupted after a relator brought suit on the basis of information he gathered from a federal criminal indictment.⁶¹ After *United States ex rel. Marcus v. Hess*, the Third Circuit decision that prompted the Supreme Court's review, Attorney General Francis Biddle began a campaign to Congress to reconsider the qui tam provision altogether.⁶² Noting that qui tam claims "have become mere parasitical actions" that rest on information already in the government's possession, Biddle implored Congress to repeal the whistleblower feature completely.⁶³

54. Cong. Globe, 37th Cong., 3d Sess. 955 (1863) (statement of Sen. Howard) (describing the bill as one that rewards "the informer who comes into court and betrays his coconspirator").

55. See *infra* notes 58–63 and accompanying text.

56. See *supra* section I.A (discussing the origins of qui tam actions).

57. See *supra* section I.B.1 (summarizing the mechanics of qui tam actions).

58. See Act of Mar. 2, 1863, Pub. L. No. 37-67, 12 Stat. 696.

59. *United States v. Burmah Oil Co.*, 558 F.2d 43, 46 n.1 (2d Cir. 1977).

60. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943) (confronting a case where a relator's claims were identical to those in an indictment).

61. *Id.*

62. S. Rep. No. 77-1708, at 1–2 (1942) (reprinting a 1942 letter from Attorney General Biddle to the Speaker of the House requesting repeal of the qui tam provisions); see also H.R. Rep. No. 78-263, at 1–2 (1943) (same).

63. S. Rep. No. 77-1708, at 2 ("I recommend the enactment of legislation which would repeal the existing law relating to actions by informers based on frauds of the United States.").

Though it stopped short of granting Biddle's full wish, Congress did clamp down on qui tam with several changes.⁶⁴ To manage "busybody" relators,⁶⁵ Congress's 1943 amendments included a requirement that relators give the government information underlying their claims and a prerogative for the government to intervene within sixty days.⁶⁶ The amendments also slashed relator awards from fifty percent of the proceeds, capping them at twenty-five percent in cases where the government did not intervene and ten percent where the government did intervene.⁶⁷

The change that was most tailored to the result in *Marcus* introduced a bar on suits for claims "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."⁶⁸ Known as the "government knowledge bar,"⁶⁹ this gating mechanism stripped courts of their jurisdiction to hear qui tam claims based on information in the government's possession and erected a barrier to the type of action that motivated Biddle's plea to Congress.⁷⁰

Though Congress's 1943 changes to the FCA were arguably designed just to clamp down on "parasitical" qui tam actions, in practice they proved to be a much blunter tool.⁷¹ Reduced awards, as well as courts' broad interpretation of the government knowledge bar, increased the risk to relators that they could be hung out to dry after exposing fraud by their employers.⁷² Courts read the bar so capaciously that if "information about fraud was in a file somewhere in the vast federal bureaucracy, a qui tam case was barred even if the government was unaware of the information in

64. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608 (codified at 31 U.S.C. § 232(C) (1946)). Both houses of Congress separately repealed the qui tam provisions during different congressional sessions, but strong opposition in the Senate during the new session blocked a wholesale removal of the provision. See S. 2754, 77th Cong., 88 Cong. Rec. 9138 (1942) (passed by the Senate); H.R. 1203, 78th Cong., 89 Cong. Rec. 2800-01 (1943) (passed by the House).

65. *Marcus*, 317 U.S. at 558 (Jackson, J., dissenting).

66. 31 U.S.C. § 232(C) (1946).

67. Compare 31 U.S.C. § 234 (1940), with 31 U.S.C. § 232(E) (1946) (introducing a bar on information in the government's possession).

68. 31 U.S.C. § 232(C) (1946).

69. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("This [1943] amendment erected what came to be known as a Government knowledge bar . . .").

70. 31 U.S.C. § 232(C) (1946) ("The court shall have no jurisdiction to proceed . . . 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.").

71. *Sylvia*, supra note 14, § 2:9 ("By the 1980s, it was evident that the False Claims Act was no longer an effective tool against fraud.").

72. *Id.* (noting that courts interpreted the 1943 bar broadly and that whistleblowers may have become discouraged from bringing claims because of reduced awards).

its files or had done nothing to pursue it.”⁷³ This result is far more limiting of relators than the case in *Marcus*, in which the government not only had information in its files but was actively relying on it in its own criminal indictment.⁷⁴ According to the principle that the bar is “broad enough to cover information obtained by the government from any source whatever,”⁷⁵ some courts even dismissed cases when the relator himself was the source of the information in the government’s possession.⁷⁶

This overbreadth was no secret. To reinvigorate the statute after it had been “mostly left for dead,”⁷⁷ Congress again amended the FCA in 1986.⁷⁸ The 1980s saw several scandals involving high-profile fraud by defense contractors that shined a spotlight on the FCA.⁷⁹ Motivated by these political winds, Congress sought to “increase the ‘bite’ on those who make false claims against their Government.”⁸⁰

The 1986 amendments strengthened the FCA—especially its *qui tam* provision—along multiple dimensions, including by increasing statutory penalties and upgrading double damages to treble damages.⁸¹ Relators’ awards under the new amendments increased from a maximum of twenty-five percent to thirty percent.⁸² Taking a step back from its 1943 amendments, Congress also dramatically reimagined the public disclosure

73. 145 Cong. Rec. 16,031–32 (1999) (printing a letter from the 1986 FCA amendment drafters to Attorney General Janet Reno).

74. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943).

75. *United States v. Aster*, 176 F. Supp. 208, 209 (E.D. Pa. 1959), *aff’d*, 275 F.2d 281 (3d Cir. 1960).

76. *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103–04 (7th Cir. 1984) (dismissing a case under the government knowledge bar in which the plaintiff had provided information to the federal government during the state government’s investigation of the defendant on criminal grounds).

77. Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to William Barr, Att’y Gen., DOJ 5 (Sept. 4, 2019), [https://www.grassley.senate.gov/imo/media/doc/2019-09-04%20CEG%20to%20DOJ%20\(FCA%20dismissals\).pdf](https://www.grassley.senate.gov/imo/media/doc/2019-09-04%20CEG%20to%20DOJ%20(FCA%20dismissals).pdf) [<https://perma.cc/S3YB-P777>].

78. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. §§ 3729–3733 (1988)).

79. See Beck, *supra* note 35, at 561 & n.98 (“This was the era of the \$435 hammer, the \$640 toilet seat cover, and the \$7622 coffee maker.”); see also James Gerstenzang, *Admiral Removed Over High-Priced Ashtrays*, L.A. Times, May 31, 1985, at 4, 29 (on file with the *Columbia Law Review*) (“[T]he Navy paid \$640 for a toilet seat cover for P3-C Orion submarine-hunter airplanes, but the price was eventually reduced to \$100. In addition, \$7,622 was paid for a coffee maker and \$435 for a hammer.”).

80. False Claims Reform Act: Hearing Before the Subcomm. on Admin. Practice & Proc. of the Comm. on the Judiciary, 99th Cong. 15 (1985) (prepared statement of Sen. DeConcini, Member, S. Comm. on the Judiciary); see also S. Rep. No. 99-345, at 2–3 (1985), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267 (“In 1985 . . . 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for . . . fraud Additionally . . . four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial.”).

81. Compare 31 U.S.C. § 3729 (1982), with 31 U.S.C. § 3729(a) (1988).

82. Compare 31 U.S.C. § 3730(c)(2) (1982), with 31 U.S.C. § 3730(d)(2) (1988).

bar.⁸³ Under the amended FCA, Congress altered the bar to remove jurisdiction for claims “based upon the public disclosure of allegations . . . in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media.”⁸⁴ These limits would not apply, however, if the action is “brought by the Attorney General or the [relator] is an original source.”⁸⁵

On its face, this new public disclosure bar was much less restrictive of relators’ ability to bring claims. Compared to the 1943 bar, this version sought “the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.”⁸⁶ Not only did the bar now limit the disqualifying public disclosures to three enumerated categories, but it also provided for an exception if a relator was an “original source,” meaning “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action.”⁸⁷

Many, including the Supreme Court, perceived the 1986 changes to the public disclosure bar as Congress’s attempt to “strike a balance” between the types of opportunistic access afforded to relators under the original 1863 version that spurred the outrage in *Marcus* and the severely curtailed qui tam provision after 1943.⁸⁸ But when courts began to interpret the new public disclosure bar, some legislators thought courts were reading the provision in a way that unjustifiably limited relators from bringing qui tam actions.⁸⁹

83. Compare 31 U.S.C. § 3730(b)(4) (1982), with 31 U.S.C. § 3730(e) (1988).

84. 31 U.S.C. § 3730(e)(4)(A) (1988).

85. *Id.*

86. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

87. 31 U.S.C. § 3730(e)(4)(B) (1988).

88. See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294–95 (2010) (“Rather than simply repeal the Government knowledge bar . . . Congress replaced it with the public disclosure bar in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in *Hess*.”); see also Eric M. Fraser, Comment, Reducing Fraud Against the Government: Using FOIA Disclosures in Qui Tam Litigation, 75 U. Chi. L. Rev. 497, 504 (2008) (“[T]he [1986] False Claims Act strikes a balance between the original False Claims Act, which allowed even purely duplicative qui tam actions, and the 1943 amendments, which imposed a restrictive bar to qui tam actions based on even non-disclosed, unanalyzed government documents.”).

89. See 145 Cong. Rec. 16,031–32 (1999) (noting, in a letter from the 1986 FCA amendment drafters to Attorney General Reno, that “[f]raud may well go unpunished and . . . undetected” because of courts’ readings of the public disclosure bar).

Congress amended the FCA several more times after 1986.⁹⁰ The next—and latest—change to the public disclosure bar came in 2010 through the Patient Protection and Affordable Care Act (ACA).⁹¹ In addition to comprehensively reforming health insurance in the United States,⁹² the ACA also amended parts of the FCA, including the public disclosure bar.⁹³

Scholars generally agree that Congress's 2010 changes expanded access to *qui tam* suits and lessened the burden on individuals bringing these claims.⁹⁴ To start, the bar is no longer jurisdictional.⁹⁵ In other words,

90. See Major Fraud Act of 1988, Pub. L. No. 100-700, § 9, 102 Stat. 4631, 4638 (1988) (codified at 31 U.S.C. § 3730(d)(3) (1994)) (giving courts discretion to reduce awards to relators who were part of the underlying FCA violation); see also Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (amending parts of the FCA).

91. Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (amending 31 U.S.C. § 3730(e)(4)).

92. Understanding the Affordable Care Act, Am. Med. Ass'n, <https://www.ama-assn.org/delivering-care/patient-support-advocacy/understanding-affordable-care-act> [<https://perma.cc/JT37-98EH>] (last visited Feb. 19, 2023).

93. § 10104(j)(2), 124 Stat. at 901. The public disclosure bar now reads as follows:

- (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
 - (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
 - (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
 from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

- (B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)(4)(A)–(B) (2018).

94. See, e.g., Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 Penn St. L. Rev. 77, 79 (2011) (“[T]he PPACA has broadened the ability of relators to commence *qui tam* lawsuits under the Act enormously.”). There is also a general consensus among courts that the amendments do not apply retroactively, so *qui tam* actions based on allegations of fraud that predate the amendments are considered under the previous version of the public disclosure bar. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010) (“The legislation makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners’ claimed defense to a *qui tam* suit.”).

95. Compare 31 U.S.C. § 3730(e)(4)(A) (2006), with 31 U.S.C. § 3730(e)(4)(A) (2012). This change overruled the result in *Rockwell International Corp. v. United States*, in

whether allegations have been publicly disclosed under the FCA is no longer a question of courts' Article III authority to hear claims; instead, it is an affirmative defense the alleged fraudsters may raise.⁹⁶ Congress notably carved out an exception to this affirmative defense for cases in which dismissal is "opposed by the Government."⁹⁷

The amendments also rephrased the conditions that trigger the bar. Instead of applying to claims that are "based upon" public disclosure in the enumerated categories, the newly amended bar applies to allegations that are "substantially the same" as those that have been publicly disclosed.⁹⁸

Congress also tweaked parts of the bar that enumerate the kinds of sources where information must be publicly disclosed to trigger the bar.⁹⁹ It limited the first category of "criminal, civil, or administrative hearing[s]" to those that are "Federal" and "in which the Government or its agent is a party."¹⁰⁰ These changes—particularly the inclusion of the word "Federal"—overrode the Supreme Court's 2010 decision in *Graham County*, in which the Court held that the word "administrative" included state and local government reports, not just federal ones.¹⁰¹ The ACA similarly updated the second category by introducing the word "Federal" to modify "report, hearing, audit, or investigation."¹⁰² Significantly, Congress did not touch the third category, which continues to bar claims relying on information "from the news media" in exactly the same

which the Supreme Court held that the public disclosure's jurisdictional nature meant neither a court nor the government could waive it. See 549 U.S. 457, 476–78 (2007) (rejecting the argument that the government's intervention cures the jurisdictional deficiency because the relator relied on information under the public disclosure bar and was not himself an original source), superseded by statute, § 10104(j)(2), 124 Stat. at 901; see also Joel D. Hesch, Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments, 51 U. Rich. L. Rev. 991, 1001–03 (2017) (discussing how the 2010 amendments overrule the result in *Rockwell*).

96. See *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 40 (4th Cir. 2016) ("[T]he public-disclosure bar is a grounds for dismissal—effectively, an affirmative defense . . .").

97. Compare 31 U.S.C. § 3730(e)(4)(A) (2006), with 31 U.S.C. § 3730(e)(4)(A) (2012).

98. Compare 31 U.S.C. § 3730(e)(4)(A) (2006), with 31 U.S.C. § 3730(e)(4)(A) (2012). This change resolved a split among circuit courts about the meaning of "based upon." Sylvia, *supra* note 14, § 11:36.

99. Compare 31 U.S.C. § 3730(e)(4)(A) (2006), with 31 U.S.C. § 3730(e)(4)(A) (2012).

100. 31 U.S.C. § 3730(e)(4)(A)(i) (2012).

101. See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 (2010).

102. Compare 31 U.S.C. § 3730(e)(4)(A)(ii) (2006), with 31 U.S.C. § 3730(e)(4)(A)(ii) (2012). The other major change in section (e) of 31 U.S.C. § 3730 involved the "original source" exception to the public disclosure bar. Compare 31 U.S.C. § 3730(e)(4)(B) (2006), with 31 U.S.C. § 3730(e)(4)(B) (2012). See generally Hesch, *supra* note 95 (reviewing the 2010 amendments in light of the original source exception).

language as it did in 1986.¹⁰³ Following these changes, the Supreme Court has not yet heard a case implicating the public disclosure bar.

II. HOW COURTS MISREAD “NEWS MEDIA”

As the previous Part explained, the FCA is nothing new to federal courts, which have been dealing with the statute—in one form or another—for more than 150 years. But despite their experience with the overall statutory scheme, courts nevertheless struggle to apply this statute in the face of a modern phenomenon: the internet. Understandably, they may worry that the proliferation of information online will torpedo the public disclosure bar, which does not explicitly capture such information. But finding a way to fit nontraditional sources, like those on the internet, into the “news media” category requires careful analysis that most courts have either rushed through or skipped altogether. This Part explains the splintered approaches courts have taken and how the lack of consistency and structure in their analyses threatens the FCA as a whole.

A. *Sketching the Boundaries of “News Media”*

When it comes to understanding what counts as news media, not every case is a head-scratcher. Applying the provision can be straightforward, for instance, when dealing with claims involving articles in the *New York Times* revealing a government investigation¹⁰⁴ or television programs reporting a Medicare audit.¹⁰⁵ But because these cases involve information from sources that constitute news media as it is plainly understood, they do not call for analysis of the “news media” provision as much as they call for simple application of it. Harder cases, on the other hand, are the ones that present the biggest obstacle to applying the provision consistently because they challenge courts to decide what counts as news media. This section outlines general principles that emerge from observing how courts have handled cases arising under the “news media” provision.

To start, courts have interpreted the provision to apply not only to widely circulated news sources with national pull but also hyperlocal outlets that are unlikely to reach the same audience.¹⁰⁶ Reports in the

103. Compare 31 U.S.C. § 3730(e)(4)(A)(iii) (2006), with 31 U.S.C. § 3730(e)(4)(A)(iii) (2012), and 31 U.S.C. § 3730(e)(4)(A)(iii) (1988).

104. United States ex rel. Poteet v. Bahler Med., Inc., 619 F.3d 104, 110 (1st Cir. 2010) (noting no dispute over whether there were public disclosures in this case, which involved disclosures in *New York Times* articles).

105. United States ex rel. Woods v. Empire Blue Cross & Blue Shield, No. 99 Civ. 4968(DC), 2002 WL 1905899, at *1, *6–7 (S.D.N.Y. Aug. 19, 2002) (finding a disqualifying public disclosure in the case of a television program on ambulance fraud).

106. E.g., United States ex rel. Devlin v. California, 84 F.3d 358, 360 (9th Cir. 1996) (affirming dismissal involving public disclosure in the *Mariposa Gazette*). But see United States ex rel. Yannacopoulos v. Gen. Dynamics, 315 F. Supp. 2d 939, 948–49 (N.D. Ill. 2004) (holding that the public disclosure bar is not triggered “when information is divulged in a foreign publication, especially if published in a foreign language”).

Lansing State Journal, for instance, are just as much within the bounds of “news media” as those in the *Wall Street Journal*.¹⁰⁷ The Supreme Court has endorsed this understanding in dicta, noting that “news media” covers “a large number of local newspapers and radio stations” and stating that the proper test is not whether allegations of fraud would “have landed on the desk of a DOJ lawyer.”¹⁰⁸ The right question to ask, according to the Court, is whether information was publicly disclosed through the specifically enumerated channels of disclosure.¹⁰⁹

Courts have also have considered whether more niche or specialized sources of news fall under the provision and have widely concluded that they do.¹¹⁰ For example, one opinion compared scholarly and scientific periodicals to newspapers, noting that these sources are equally as accessible and that academic authors and journalists alike routinely “disseminate information to the public in a periodic manner.”¹¹¹ Because of these similarities, the district court concluded that “[n]o principle of statutory construction or public policy would compel a cramped reading of the term ‘news media’ or the imposition of a judicially created limit . . . to encompass only the newspaper context.”¹¹²

Some courts have focused on the nature of the medium in which the information is presented, as opposed to the form of the content itself.¹¹³ In other words, what matters is the vector carrying the message, not the nature of the message. For example, several courts have held that advertisements, which are not “news” in the ordinary plain meaning sense,

107. See *Dingle v. BioPort Corp.*, 388 F.3d 209, 213–15 (6th Cir. 2004) (treating publication in the *Lansing State Journal* as a qualified public disclosure).

108. *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 300 (2010).

109. See *id.* at 285–86 (“[T]he FCA’s public disclosure bar . . . deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels. The statute contains three categories of jurisdiction-stripping disclosures.”).

110. See, e.g., *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 582 F. Supp. 2d 766, 770 (W.D. Va. 2008) (finding that “published scientific articles and reference materials” fall within the provision), *rev’d in part sub nom. United States v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010); *In re Nat. Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1155 (D. Wyo. 2006) (treating a trove of “291 trade journal essays, educational materials, seminar papers, instruction manuals, and newspaper articles discussing the technical aspects of gas measurement and the factors that can cause mismeasurement to occur” as sources to which the “news media” bar would apply), *aff’d in part sub nom. In re Nat. Gas Royalties*, 562 F.3d 1032 (10th Cir. 2009); *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002) (“This Court notes that the ordinary meaning of the statutory term ‘news media,’ would encompass the publication of information in scholarly or scientific periodicals.”), *aff’d*, 53 F. App’x 153 (2d Cir. 2002).

111. *Alcohol Found.*, 186 F. Supp. 2d at 463.

112. *Id.*

113. See, e.g., *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) (“[N]ewspaper advertisements . . . qualify as news media for purposes of the public disclosure provision.”).

nevertheless qualify as news media when they appeared in newspapers—outlets that traditionally do fall within that category.¹¹⁴

B. *The Internet and “News Media”*

1. *Reading “News Media” to Capture the Internet.* — Faced with the rise of the internet and the increasing availability of just about everything online, courts have been called on to determine whether the public disclosure bar applies to internet sources and, if it does, under what circumstances. Consistent with the overall doctrinal trend, some courts have broadly pronounced that “[i]nformation publicly available on the Internet generally qualifies as ‘news media.’”¹¹⁵ To support their capacious interpretations of the phrase, courts seem to rely on a snippet from the Supreme Court in *Graham County* to conclude that the phrase “news media” has “broad[] sweep.”¹¹⁶ But their reliance is misplaced.

To understand why, consider the case from which they plucked the phrase. *Graham County* called on the Court to decide whether the word “administrative” in the second prong of the bar—covering reports, audits, and investigations—included only federal sources or also state and local ones.¹¹⁷ The Court held that it covered all of them, anchoring its analysis “within the larger scheme of the public disclosure bar.”¹¹⁸ It explained that the category should not be limited to federal sources since other parts of the public disclosure bar do not apply exclusively to federal sources either.

114. See, e.g., *id.*; *United States ex rel. Colquitt v. Abbott Lab’s*, 864 F. Supp. 2d 499, 519 (N.D. Tex. 2012) (“A person who picks up a copy of *Endovascular Today* has just as much access to the advertisements as the edited content.”), *aff’d*, 858 F.3d 365 (5th Cir. 2017); *United States ex rel. Ondis v. City of Woonsocket*, 582 F. Supp. 2d 212, 217 (D.R.I. 2008) (finding that legal notices and classified advertisements constitute public disclosure because the FCA does not “require that the information appear in any particular form or section of a newspaper”), *aff’d*, 587 F.3d 49 (1st Cir. 2009).

115. *United States ex rel. Juan Hong v. Newport Sensors, Inc.*, No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016), *aff’d mem.*, 713 F. App’x 724 (9th Cir.), amended by 728 F. App’x 660 (9th Cir. 2018). In affirming, the Ninth Circuit declined to address “the district court’s broad holding that most public webpages . . . generally fall within the category of ‘news media.’” *Juan Hong*, 728 F. App’x at 662–63.

116. See, e.g., *Osheroff*, 776 F.3d at 813 (internal quotation marks omitted) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

117. *Graham Cnty.*, 559 U.S. at 283. The Court’s interpretation was based on the public disclosure bar before it was amended by the Affordable Care Act in 2010. *Id.* at 286. That public disclosure bar read as follows:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2006).

118. *Graham Cnty.*, 559 U.S. at 289.

Here, the Court invoked the “news media” provision explicitly, writing that news media “plainly have a broader sweep” than just federal sources because the phrase also captures local newspapers.¹¹⁹ Pouncing on this sentence, lower courts have wielded it in a way that denies any hint that the Supreme Court was speaking relatively when it observed that the phrase “news media” has a “broad[] sweep.”¹²⁰ Instead, they have taken it as a sign that the public disclosure bar, as a whole, sweeps broadly enough to capture sources which lie beyond its appropriate boundaries.

Though the Court was not dealing with news media in *Graham County*, its general discussion of the public disclosure bar in this case is instructive. In analyzing the “news media” provision, the Court clarified that the proper analysis involves considering the source of the disclosure rather than the likelihood of putting the government on notice: “[S]ince the ‘news media’ include a large number of local newspapers and radio stations, this category likely describes a multitude of sources that would seldom come to the attention of the Attorney General.”¹²¹

The following year, in *Schindler*, the Court reiterated its position that the “news media” category “suggests a much broader scope” for sources covered by the FCA public disclosure bar and chastised the Second Circuit for ignoring its breadth when considering what another FCA term—“report”—meant.¹²² There, the Court used one part of the bar to inform its understanding of another. Taken together, the Court’s analyses in *Graham County* and *Schindler* suggest that terms in the public disclosure bar should be read holistically in light of the entire provision and not in separate vacuums.

Despite this admonition, many courts have not offered much analysis, if any, before asserting that the existence of information online renders it publicly disclosed under the FCA.¹²³ Most of the action has occurred at the district court level, but in the few cases in which circuit courts have analyzed whether websites fall under the provision, they, too, have coalesced

119. *Id.* at 290.

120. *Osheroff*, 776 F.3d at 813 (internal quotation marks omitted) (quoting *Graham Cnty.*, 559 U.S. at 290).

121. *Graham Cnty.*, 599 U.S. at 300.

122. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 409–10 (2011).

123. See, e.g., *United States ex rel. Brown v. Walt Disney World Co.*, No. 6:06-cv-1943-Orl-22KRS, 2008 WL 2561975, at *4 & n.7 (M.D. Fla. June 24, 2008) (concluding that a Wikipedia page constitutes “news media” because “[t]he internet can qualify as ‘news media’”), *aff’d*, 361 F. App’x 66 (11th Cir. 2010); *United States ex rel. Unite Here v. Cintas Corp.*, No. C 06-2413 PJH, 2007 WL 4557788, at *12–14 (N.D. Cal. Dec. 21, 2007) (“The ‘fact’ of the contracts between Cintas and the federal government was publicly disclosed in the news media, as that information was available on the Internet.”).

around the same broad understanding that websites count as “news media.”¹²⁴ As a result, courts apply news media expansively with little analysis underlying their interpretations.

2. *Restrained Readings of “News Media” Still Lack Structure and Undermine the FCA.* — In contrast, some courts have pumped the brakes, recognizing the need for caution “in the age of basement blogging and ease of publishing.”¹²⁵ Yet even these more restrained interpretations of “news media” lead to problems because courts diverge in how they approach and analyze the issue. This divergence is troubling for the simple reason that federal law is being applied inconsistently across similar cases. Unlike the courts that have not hesitated to make broad pronouncements that “[i]nformation publicly available on the Internet generally qualifies as ‘news media,’”¹²⁶ others suggest a case-by-case approach is better suited to applying language from 1986 to modern problems.¹²⁷ These analyses have clustered around certain factors to either analogize online sources to traditional news media or draw on the policy behind the public disclosure bar more generally. This section explores the various elements of these approaches and explains how they draw on similar ideas yet reach different conclusions.

A key way in which courts have analyzed whether “news media” covers websites and information online is by analogizing to traditional news sources. One route considers ease of access to members of the public. For example, the court in *United States ex rel. Green v. Service Contract Education & Training Trust Fund* found that a promotional webpage “qualifie[d] as news media in light of the concerns motivating the FCA’s public disclosure bar.”¹²⁸ Elaborating, the court noted that the webpage was readily accessible to the public on an external website, had a “simple Internet

124. *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 43 n.6 (4th Cir. 2016) (noting in dicta that “[c]ourts have unanimously construed the term ‘public disclosure’ to include websites and online articles”); *Osheroff*, 776 F.3d at 813 (“Because the term ‘news media’ has a broad sweep, we conclude that the newspaper advertisements and the clinics’ publicly available websites, which are intended to disseminate information about the clinics’ programs, qualify as news media for purposes of the public disclosure provision.”).

125. *United States ex rel. Colquitt v. Abbott Lab’ys*, 864 F. Supp. 2d 499, 518 (N.D. Tex. 2012), *aff’d*, 858 F.3d 365 (5th Cir. 2017).

126. *United States ex rel. Juan Hong v. Newport Sensors, Inc.*, No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016), *aff’d mem.*, 713 F. App’x 724 (9th Cir.), amended by 728 F. App’x 660 (9th Cir. 2018). The Ninth Circuit’s affirmance declined to address the lower court’s assertion that “most public webpages . . . fall within the category of ‘news media.’” *Juan Hong*, 728 F. App’x at 662–63.

127. See, e.g., *United States ex rel. Simpson v. Bayer Corp.*, No. 05-3895 (JLL), 2013 WL 4710587, at *7 (D.N.J. Aug. 30, 2013) (“[W]hile it is certainly the case that websites may constitute news media in certain instances, not everything posted on the internet qualifies. Accordingly, the Court concludes that a case-by-case approach is more appropriate.” (citations omitted)), abrogated on other grounds by *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017).

128. 843 F. Supp. 2d 20, 33 (D.D.C. 2012).

address” where it remained unchanged for six years, and was not limited to visitors affiliated with the website host, a labor union.¹²⁹ Even though the webpage may have been targeted to a specific audience because of its subject matter, the court found that this fact did not “detract from its ready accessibility.”¹³⁰ Furthermore, “thousands of professionals” could have come upon the website like the relator had.¹³¹ The court based its holding on public accessibility as well as “the concerns motivating” the public disclosure bar that counsel “in favor of broad constructions of its terms.”¹³² Another court also emphasized accessibility to find that information on several websites was publicly disclosed as “news media” under the FCA, noting that websites are generally “available to anyone with an internet connection, and access is not restricted.”¹³³

Though accessibility figures into many courts’ conceptions of news media, its role in the analysis can take different shapes. In one case, the District Court for the Southern District of Illinois held that “an internal newsletter directed to [Northwestern] University’s employees” did not constitute “news media.”¹³⁴ The court based its decision in part on how many steps were required for the public to access the information, which was archived on the University’s purchasing services website.¹³⁵ Despite the Supreme Court’s instructions not to focus on the likelihood of detection for traditional media,¹³⁶ this case illustrates a lower court’s willingness to consider how likely information is to be discovered by the public in assessing whether websites constitute “news media.”¹³⁷ A public URL makes a webpage accessible to anyone who can navigate to that page, but

129. *Id.* at 32–33.

130. *Id.* at 33.

131. *Id.*

132. *Id.*

133. See *United States ex rel. Repko v. Guthrie Clinic, P.C.*, No. 3:04cv1556, 2011 WL 3875987, at *7 (M.D. Pa. Sept. 1, 2011), *aff’d*, 490 F. App’x 502 (3d Cir. 2012). Curiously, the court claimed that information on Bloomberg Professional—a sophisticated repository of troves of financial data and analysis that financial professionals rely on—“may be accessed by any user with a computer and access to a web browser.” See *id.* at *8; Bloomberg Professional, www.bloomberg.com/professional (on file with the *Columbia Law Review*) (last visited Feb. 19, 2023). Though anyone with a computer can visit the URL, accessing the proprietary information and data it holds is limited to paying members, a distinction the court seems to have missed.

134. *United States ex rel. Liotine v. CDW Gov’t, Inc.*, No. 05-33-DRH, 2009 WL 3156704, at *6 (S.D. Ill. Sept. 29, 2009).

135. *Id.* at *6 n.5.

136. *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 300 (2010) (“[S]ince the ‘news media’ include a large number of local newspapers and radio stations, this category likely describes a multitude of sources that would seldom come to the attention of the Attorney General.”).

137. See, e.g., *Green*, 843 F. Supp. 2d, at 33 (noting that “thousands of professionals” could have stumbled upon the website like the relator did); *Liotine*, 2009 WL 3156704, at *6 (observing that an internal university newsletter “does not bring to the attention of the relevant authority a false claim against the government”).

the ease with which someone can find that page—depending on the overall architecture of the webpage—can also play a role in the analysis.

Another prism through which courts have analogized online sources to traditional news media is the extent to which they share a similar journalistic purpose.¹³⁸ One district court confronted the question of whether online message boards counted as news media.¹³⁹ Acknowledging that the information was “easy to find” and accessible to the public, the court nevertheless declined to classify the information as news media because it was “not geared toward the dissemination of ‘news’” and “amounted to nothing more than vague allegations . . . without any indicia of reliability or substantiation.”¹⁴⁰ Similarly, another court found that material posted on *CNN iReport* did not constitute “news media” in one case because even though it was part of CNN—“the world leader in online news and information”¹⁴¹—it was a community forum with a fatal disclaimer: “Stories submitted to CNN iReport are not edited, fact-checked or screened before they post. So we mark all iReports with the label ‘NOT VETTED BY CNN.’”¹⁴² The court’s attention to the journalistic quality of material posted through an outlet that clearly constitutes news media—CNN—stands in stark opposition to cases that have held that advertisements in printed magazines fall within the category of “news media”¹⁴³ and those that have held that online comments on news websites do too.¹⁴⁴

138. See, e.g., *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) (finding that clinics’ publicly available websites constitute “news media,” which they resemble in their “inten[tion] to disseminate information”); *Repko*, 2011 WL 3875987, at *7 (analogizing websites to traditional news sources in the sense that they share the purpose “to provide the general public with access to information”).

139. *United States ex rel. Simpson v. Bayer Corp.*, No. 05-3895 (JLL), 2013 WL 4710587, at *6–7 (D.N.J. Aug. 30, 2013), abrogated on other grounds by *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017).

140. *Id.* at *7.

141. About CNN Digital, CNN Digital, <https://www.cnn.com/about> [<https://perma.cc/6KRH-U987>] (last visited Feb. 19, 2023).

142. *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 69 F. Supp. 3d 416, 425 (D. Del. 2014), rev’d, 812 F.3d 294 (3d Cir. 2016), remanded sub nom. *United States v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436 (D. Del. 2016). The case was reversed and remanded on appeal, though the Third Circuit made no mention of the district court’s finding that the *CNN iReport* sources were not “news media.” See *Moore & Co.*, 812 F.3d at 301 & n.7.

143. See, e.g., *Osheroff*, 776 F.3d at 813; *United States ex rel. Colquitt v. Abbott Lab’s*, 864 F. Supp. 2d 499, 519 (N.D. Tex. 2012), aff’d, 858 F.3d 365 (5th Cir. 2017); *United States ex rel. Ondis v. City of Woonsocket*, 582 F. Supp. 2d 212, 217 (D.R.I. 2008), aff’d, 587 F.3d 49 (1st Cir. 2009).

144. See *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, No. 10-CV-1401 JLS (WVG), 2015 WL 4892259, at *6 (S.D. Cal. Aug. 17, 2015) (holding that an online comment to an article in the *San Diego Reader*, “a well-established website designed to convey the news to the public,” constituted “news media”).

Another district court based its determination that reviews posted on Google Maps did not constitute news media on its finding that the reviews “bear little resemblance” to traditional news sources because they do not need to be regularly updated, do not share information with the public regularly, and are not “identif[ied] . . . as a place where news . . . can be found.”¹⁴⁵ The court also noted that any person or entity is capable of creating these reviews, which may be based on no “actual, verifiable information.”¹⁴⁶

As the above discussion shows, courts have interpreted the term “news media” from multiple angles with little cohesion among their approaches. Some look to accessibility,¹⁴⁷ while others consider purpose.¹⁴⁸ To some extent, it’s understandable that courts have leaned on a variety of factors to conclude that “news media” covers more than just newspapers and radio shows because courts are trying to adapt language written in 1986 to modern problems. Nevertheless, these approaches lack consistency and lead to different applications of the same federal law across jurisdictions.

C. *Courts’ Interpretations Are Unmoored From FCA Text and Policy*

Courts’ readings of “news media” are troubling along two dimensions. First, these capacious and inconsistent interpretations stray dangerously far from the text that Congress enacted into law. There is no doubt that courts must use their judgment to apply the law that Congress has written. But their interpretations must remain faithful to the law itself. Currently, they do not.

Courts’ interpretations of the “news media” provision have become unmoored from the text of the statute itself. Reading the term to bar qui tam actions where the allegations appeared in advertisements,¹⁴⁹ on university faculty directory websites,¹⁵⁰ and in individuals’ comments on news stories¹⁵¹ stretches far beyond the language Congress used to craft the public disclosure bar. These interpretations present issues because they stray from Congress’s intent, which is traceable to the text of the statute itself: “[I]t is utterly impossible to discern what the Members of

145. *United States v. Pac. Health Corp.*, No. CV 12-960 RSWL (SHx), 2014 WL 12859894, at *8 n.6 (C.D. Cal. May 30, 2014).

146. *Id.*

147. See, e.g., *United States ex rel. Green v. Serv. Cont. Educ. & Training Tr. Fund*, 843 F. Supp. 2d 20, 32–33 (D.D.C. 2012) (considering a source’s accessibility to the public).

148. See, e.g., *Osheroff*, 776 F.3d at 813 (finding that, because clinics’ publicly available websites “inten[d] to disseminate information,” they qualify as “news media”).

149. See, e.g., *id.* at 813.

150. See, e.g., *United States ex rel. Juan Hong v. Newport Sensors, Inc.*, No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016) (finding that because “[i]nformation publicly available on the Internet generally qualifies as ‘news media,’” faculty profiles on university websites were publicly disclosed), *aff’d mem.*, 713 F. App’x 724 (9th Cir.), amended by 728 F. App’x 660 (9th Cir. 2018).

151. See *supra* text accompanying note 144.

Congress intended except to the extent that intent is manifested in the *only* remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.”¹⁵² The problem is that applications of the “news media” provision bear little to no resemblance to the ordinary meaning of that very text.¹⁵³

Second, broad readings of “news media” undermine the goals animating the FCA as a matter of history and policy. These interpretations limit whistleblowers’ ability to bring successful qui tam actions and consequently undercut the regulatory scheme that Congress carefully designed. The public disclosure bar is a product of multiple Congresses calibrating enforcement with competing objectives in mind.¹⁵⁴ But courts’ unmoored interpretations reveal a thumb on the scale for corporate defendants at the expense of vulnerable whistleblowers. Even setting aside the scholarly view that the thumb is on the wrong side, history and policy provide additional support for why courts should rein in their understanding of “news media.”¹⁵⁵

The legislative history behind the 1943 revisions to the FCA confirms Congress sought to curb abuse by opportunistic relators while at the same time reaffirming the value that qui tam actions offered to American taxpayers. After considering—and almost passing—amendments which would have repealed the qui tam provision entirely, Congress retreated and instead sought to strike a balance by introducing a bar on information already in the government’s possession.¹⁵⁶ It is hard enough to draw inferences from what Congress chose to do, let alone what it chose not to do. But qui tam’s persistence in the FCA, especially as comparable provisions have vanished from other areas of law,¹⁵⁷ reveals a remaining commitment to relator involvement in FCA prosecutions.

152. *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment).

153. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (internal quotation marks omitted) (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004))). For additional discussion on the ordinary meaning of the term, see *infra* section III.B.

154. See, e.g., *Graham Cnty.*, 559 U.S. at 294–95 (describing the public disclosure bar as “an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits”); Fraser, *supra* note 88, at 504 (analyzing the 1986 False Claims as “striking a balance between the original False Claims Act, which allowed even purely duplicative qui tam actions, and the 1943 amendments, which imposed a restrictive bar to qui tam actions based on even non-disclosed, unanalyzed government documents”).

155. See *supra* note 94 and accompanying text.

156. See *supra* section I.B.2.

157. Apart from the FCA, only one other federal statute retains a qui tam provision. See *supra* note 8 and accompanying text.

Congress's changes kept qui tam intact but also erected new barriers for individuals filing qui tam claims.¹⁵⁸ Subsequent amendments in 1986 show Congress pumping the brakes on its campaign to restrict whistleblowers; it recognized that the 1943 bar was too harsh by stripping qui tam actions under the FCA of their deterrent strength.¹⁵⁹ But rather than repeal the public disclosure bar entirely—likely because Congress continued to endorse some sorts of restrictions on qui tam—Congress again sought to strike a balance by dramatically reshaping the bar.¹⁶⁰

In addition to the text of the statute and its lengthy history, there are normatively sound reasons for cabining courts' broad readings of the public disclosure bar. Protecting whistleblowers is an important part of the FCA, which Congress emphasized in its 1986 revisions to the statute, citing retaliation in the form of harassment, demotion, and loss of employment.¹⁶¹ Because whistleblowers often learn of their allegations through their employment, they can face professional repercussions from coming forward with allegations of fraud.¹⁶² Whistleblowing is also emotionally burdensome and stressful, leading to negative physical and mental health outcomes.¹⁶³ A study in the *New England Journal of Medicine* documented the personal toll qui tam relators face and the potential for this strain to dissuade whistleblowers from reporting fraud.¹⁶⁴ These difficulties already discourage individuals from coming forward to expose fraud, and reading the public disclosure bar more broadly only exacerbates this whistleblowing penalty. There are serious costs to whistleblowing, and a broader public disclosure bar means more case dismissals and greater risks to calling attention to fraud.

The legislative saga surrounding the public disclosure bar, as well as normative policy implications, demonstrate how Congress has not single-mindedly sought to write out qui tam actions from the FCA. Admittedly, it

158. See *supra* section I.B.

159. See *supra* section I.B.

160. See *supra* section I.B.

161. See S. Rep. No. 99-345, at 34 (1985), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299 (“The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation.”).

162. See Evan Ballan, Note, Protecting Whistleblowing (and Not Just Whistleblowers), 116 Mich. L. Rev. 475, 488 (2017) (noting the “long and sordid history of individuals who have been targeted and persecuted for their whistleblowing activity,” often suffering professional repercussions).

163. *Id.* (“Even when a whistleblower does not experience professional repercussions for her actions, the experience of reporting an employer is often a stressful and grueling one that can produce a range of adverse effects on the physical and mental health of the whistleblower and her family.”).

164. See Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies, 362 New Eng. J. Med. 1832, 1837 (2010) (finding that “the strain the process places on individuals' professional and personal lives may make prospective whistle-blowers with legitimate evidence of fraud reluctant to come forward”).

has also not tried to make filing a qui tam action effortless. Instead, Congress tinkered with language to try to make conditions just right.¹⁶⁵ Reading “news media” expansively makes pursuing qui tam actions more difficult and throws a wrench in Congress’s calibration of the public disclosure bar.

III. A FRAMEWORK FOR READING “NEWS MEDIA”

In light of this interpretive problem, this Part offers courts a framework to apply the “news media” category in ways that are consistent with the text and goals of the FCA. No doubt, each case before a court presents issues of first impression that can evade academic attempts at tidy resolution. But courts are reaching different—and wrong—conclusions about what the same two words mean, leading to serious inconsistencies in the application of a major federal law.

Because of the divergent approaches courts have taken so far, even modest guidance has the potential to steer courts in the right direction. Section III.A first describes one court’s innovative attempt to grapple with the meaning of “news media” in light of precedent and modern difficulties.¹⁶⁶ Section III.B then takes that court’s framework, adds new considerations, and distills three principles to guide future courts: curation, independence, and accessibility.

A. *Integra’s “News Media”*

1. *Integra’s Disavowal of Unrestrained “News Media.”* — The most thorough analysis—and rejection—of some courts’ vast interpretations of news media comes from an opinion in the Central District of California by Judge Philip S. Gutierrez in *United States ex rel. Integra Med Analytics LLC v. Providence Health & Services*.¹⁶⁷ *Integra* is the most innovative case on the “news media” provision because it both departed from courts’ broad readings of the phrase and, uniquely, offered a structured five-part framework for thinking about what “news media” means in light of the internet.¹⁶⁸ Like many FCA cases, *Integra* involved healthcare fraud.¹⁶⁹ But unlike many qui tam relators, *Integra* was not an employee or insider with

165. Some scholars evoke the fairy tale “Goldilocks” to describe Congress’s calibration of the public disclosure bar. See, e.g., Fraser, *supra* note 88, at 519–20 (“This history represents Congress’s ‘Goldilocks’ progression.” (citing Deborah L. Collins, *The Qui Tam Relator: A Modern Day Goldilocks Searching for the Just Right Circuit*, *Army Law.*, June 2001, at 1, 1)).

166. See *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *5–16 (C.D. Cal. July 16, 2019), *rev’d* and remanded sub nom. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App’x 840 (9th Cir. 2021).

167. *Id.*

168. *Id.*

169. *Id.*

first-hand knowledge of the claims it was bringing. Rather, Integra is in the business of using forensic data analysis to shed light on healthcare fraud.¹⁷⁰ In this case, it learned of the alleged fraud in part by analyzing data it obtained from the Centers for Medicare & Medicaid Services (CMS) and information on the defendant's business practices.¹⁷¹ Based on its findings, Integra alleged that several hospital defendants, working with a third-party consultant, trained physicians to "upcode" claims they submitted to Medicare.¹⁷² Upcoding is essentially the exaggeration of medical conditions for larger reimbursements to health care providers.¹⁷³ Pursuant to its authority under 31 U.S.C. § 3730(b)(4), the Department of Justice declined to intervene,¹⁷⁴ and, expectedly, the defendants moved for dismissal for failure to state a claim.¹⁷⁵

The defendants based their motion in part on the public disclosure bar.¹⁷⁶ To bring its claims, Integra relied upon information about the third-party consultant's business practices, including a YouTube training video, coding documentation tip sheets, and a monthly hospital newsletter, among other sources.¹⁷⁷ Defendants argued that these sources qualified as "news media" because they were all publicly available on the internet.¹⁷⁸ This argument teed up a lengthy discussion by the court of what exactly counts as news media.

The court started by rejecting the defendants' argument that anything on the internet qualifies as news media.¹⁷⁹ It noted that such a sweeping conclusion not only contradicts the ordinary meaning of the term but also threatens "to swallow limitations that Congress specifically placed on the scope of the public disclosure bar."¹⁸⁰ Plus, that kind of interpretation defies the policies animating the statute.¹⁸¹ Pointing to examples, the court explained that the phrase cannot encompass the entire internet because that would cover sources that nobody would characterize as "news media," like a menu on a restaurant's website, online

170. Integra Med Analytics, <https://www.integratedanalytics.com> [<https://perma.cc/GHG4-QRUH>] (last visited Feb. 19, 2023) ("Integra Med Analytics researches and investigates fraud, waste and abuse in healthcare. . . . [W]e aim to share our findings publicly such as through papers and research reports. While we are not affiliated with the government, we may also file claims and/or present our findings to the government.").

171. *Integra*, 2019 WL 3282619, at *5.

172. *Id.* at *2–3.

173. *Id.*

174. 31 U.S.C. § 3730(b)(4) (2018).

175. *Integra*, 2019 WL 3282619, at *4.

176. *Id.* at *7.

177. *Id.* at *9.

178. *Id.*

179. See *id.* at *11–12.

180. *Id.* at *11.

181. See *id.* at *12.

ticket prices for a baseball game, or available appointments on a doctor's scheduling website.¹⁸²

Next, the court noted that such a capacious reading of the phrase is incompatible with Congress's careful enumeration of other parts of the public disclosure bar.¹⁸³ The court pointed to the first category in the bar applying to material "in a Federal criminal, civil, or administrative hearing *in which the Government or its agent is a party.*"¹⁸⁴ According to the court, this provision militates against the defendants' suggested interpretation because it "evinces Congress's intent to exclude from the public disclosure bar information disclosed at hearings in cases in which the Government is *not* a party."¹⁸⁵ Transcripts of such hearings are widely available on the internet, particularly through the federal courts' PACER website.¹⁸⁶ If everything online constitutes "news media," then Congress's careful enumeration of the sources that should be excluded under the public disclosure bar is meaningless.

The court's final reason for rejecting the defendants' "unbounded reading" was rooted in Congress's policy objectives.¹⁸⁷ Under this analysis, the court explained that the "mere posting" of information online could render information unusable by a relator when it otherwise would not be.¹⁸⁸ This result, the court concluded, defies Congress's intentions for the FCA to encourage individuals to expose fraud and bring wrongdoers to justice.¹⁸⁹

The court also swiftly rejected the argument that Congress's 2010 amendments "implicitly ratified" the inclusion of internet sources under the "news media" provision pursuant to the prior-construction canon.¹⁹⁰ Under that canon, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts . . . they are to be understood according to that construction."¹⁹¹ That canon was unavailing

182. See *id.* at *11. The court also rejected the defendants' argument that everything online qualifies as "news media" because ninety-three percent of adults get their news online: "Just as the fact that 93 percent of Americans may get their milk from the supermarket does not make everything in the supermarket milk, the fact that 93 percent of adults get their news online does not make everything on the internet a news media source." *Id.* at *12.

183. See *id.* at *11.

184. See *id.* (quoting 31 U.S.C. § 3730(e)(4)(A)(i) (2018) (emphasis added by the court)).

185. *Id.*

186. *Id.* at *11–12.

187. See *id.* at *12 (noting that the results under the defendants' view "would run contrary to the purposes underlying the public disclosure, and indeed the FCA itself").

188. *Id.*

189. *Id.*

190. See *id.*

191. *Id.* (alterations in original) (internal quotation marks omitted) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

for two reasons. First, the “vast majority” of cases supporting the defendants’ proposed interpretation—and all of the circuit court decisions—were issued after Congress amended the FCA in 2010.¹⁹² Only four of the defendants’ cited decisions were issued before 2010, and all came from district courts.¹⁹³ Furthermore, the court noted that “four scattered district court decisions” do not settle the law for purposes of the prior-construction canon.¹⁹⁴

2. *Integra’s Five Guideposts.* — Once the court disposed of the argument that “news media” can include anything on the internet, it then did something no other court to date has done: lay out a framework for analyzing the proper scope of the provision.¹⁹⁵ To provide structure to what had otherwise been an amorphous doctrine, the court articulated five guideposts to define the scope of the news media provision.¹⁹⁶

The initial analytical step the court takes is to orient its analysis around the ordinary meaning of the term “news media.”¹⁹⁷ To determine the ordinary meaning, the *Integra* court started with a dictionary, just like the Supreme Court did in *Schindler* when it was trying to ascertain the ordinary meaning of another undefined term—“report”—in the FCA.¹⁹⁸ Like in *Schindler*, the court looked to *Webster’s Third New International Dictionary* from 1986, the year the public disclosure was adopted.¹⁹⁹ Though the two-word term does not have its own entry, its component parts do. “News” means a “‘report of a recent event,’ ‘what is reported in a newspaper, news periodical, or news broadcast,’ or ‘matter that is interesting to newspaper readers or news broadcast audiences . . . or is suitable for news copy.’”²⁰⁰ The entry for “medium,” the singular form of

192. *Id.*

193. *Id.* at *12 (citing *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 582 F. Supp. 2d 766, 772 (W.D. Va. 2008), *rev’d in part sub nom. United States v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010); *United States ex rel. Brown v. Walt Disney World Co.*, No. 6:06-cv-1943-Orl-22KRS, 2008 WL 2561975 (M.D. Fla. June 24, 2008), *aff’d*, 361 F. App’x 66 (11th Cir. 2010); *United States ex rel. Unite Here v. Cintas Corp.*, No. C 06-2413 P/JH, 2007 WL 4557788 (N.D. Cal. Dec. 21, 2007); *United States ex rel. Doyle v. Diversified Collection Servs., Inc.*, No. 2:04 CV 053, 2006 WL 3834407 (S.D. Ohio Dec. 29, 2006)). The court noted that some of these cases did not even adopt the broad interpretation for which the defendants were advocating, and one court specifically refused to do so. *Id.* at *12 n.7 (citing *Radcliffe*, 582 F. Supp. 2d at 772).

194. *Id.* at *12 (citing *United States v. Davis*, 139 S. Ct. 2319, 2331 (2019) (noting that decisions from three circuit courts of appeals may not have sufficiently settled a statute’s meaning)).

195. *Id.*

196. See *id.* at *14–15.

197. *Id.* at *14 n.8 (“[T]he Court believes that it is important to provide an ordinary meaning definition. . . . [P]erhaps this attempt to fashion an ordinary meaning definition of the term will lead others to attempt the same.”).

198. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407–08 (2011).

199. *Id.*; *Integra*, 2019 WL 3282619, at *6, *11.

200. *Integra*, 2019 WL 3282619, at *11 (alteration in original) (quoting *News*, *Webster’s Third New International Dictionary* 1524 (1986)).

“media,” describes it as a “‘channel, method, or system of communication, information, or entertainment’ or ‘a vehicle (such as a radio or television program or a newspaper) used to carry advertising.’”²⁰¹

The court then used these definitions to articulate its first guidepost to understanding “news media.” Based on the definitions of “news” and “media,” the court wrote that “news media” “includes methods of communication that are used to convey a particular type of information: information about recent events or that would otherwise commonly be found in a newspaper, news broadcast, or other news source.”²⁰² Courts considering whether a source falls within the category should therefore consider “the extent to which the information typically conveyed by a source would be considered newsworthy.”²⁰³

The second factor leaned on the definition of “news media” that appears in another federal statute: the Freedom of Information Act (FOIA).²⁰⁴ FOIA defines the phrase “a representative of the news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”²⁰⁵ Though the court declined to adopt that definition for the same phrase in the FCA, it nevertheless used it to conclude that the term reflects sources that exercise editorial judgment and curate information for an audience, not simply sources publishing information about themselves.²⁰⁶

The court’s third factor asks whether it was the source’s “intent to disseminate information widely, as opposed to only a few individuals.”²⁰⁷ Fourth, the court discussed how traditional news media, like newspapers, undoubtedly qualify under the category.²⁰⁸ So, sources that function similarly to these traditional outlets are more likely to qualify under the provision too. Factors such as whether it is a source’s “primary purpose” to publish newsworthy information online inform that determination.²⁰⁹

The court’s final factor was grounded in the ordinary meaning of the phrase.²¹⁰ Here, the court emphasized that if no one would describe a source as “news media”—for example, an online restaurant menu—then it should not be swept under the umbrella.²¹¹ But if at least some people

201. *Id.* (quoting *Medium*, Webster’s Third New International Dictionary (1986)).

202. *Id.*

203. *Id.* at *14.

204. *Id.*

205. *Id.* (quoting 5 U.S.C. § 552(a)(4)(A)(ii) (2018)).

206. *Id.*

207. *Id.*

208. *Id.* at *15 (“[T]raditional news outlets like newspapers and radio and television stations unquestionably fall within the news media provision of the public disclosure bar.”).

209. *Id.*

210. *Id.*

211. *Id.*

would consider a source to be news media, like a blog, then that may reasonably inform a court's decision as to whether a website qualifies.²¹²

After detailing these five nondispositive guideposts, the court tabled its analysis of how they applied to *Integra's* claims because “[w]ithout evidence and briefing from both sides about the specific nature of each source,” the court was unable to rule on the public disclosure bar raised here as an affirmative defense.²¹³ Ultimately, the district court denied defendant's motion to dismiss with respect to the FCA claims.²¹⁴ But on appeal, the Ninth Circuit reversed and remanded with instructions to dismiss the complaint altogether, finding that *Integra* failed to state a plausible claim for relief because its allegation did not address an obvious alternative explanation.²¹⁵ Despite its reversal, the Ninth Circuit did not address the public disclosure bar analysis at all.²¹⁶

Though it lacks precedential weight in any court, Judge Gutierrez's *Integra* framework has not gone unnoticed.²¹⁷ One district court, for example, endorsed and applied the *Integra* guideposts to reach its holding that information posted on the Patent Application Information Retrieval (PAIR) website was not publicly disclosed.²¹⁸ Like PACER, PAIR includes public dockets, so reading “news media” to encompass that source “would nullify the limitation Congress added” in 2010 to the first category in the public disclosure bar.²¹⁹ The *Integra* court's work in providing five considerations for determining whether something is news media under the FCA, therefore, may encourage more robust analysis of what that term means.

212. *Id.*

213. *Id.* at *16.

214. *Id.* at *23–24. The court granted the motion to dismiss with respect to other claims, such as those arising under the Anti-Kickback Statute. *Id.*

215. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App'x 840, 841 (9th Cir. 2021).

216. *Id.* at 842 n.1 (“Because *Integra* did not adequately allege that Providence submitted false claims, we do not address whether the public-disclosure bar applies.”).

217. See, e.g., *United States ex rel. MC2 Sabtech Holdings, Inc. v. GET Eng'g Corp.*, 580 F. Supp. 3d 876, 889–90 (S.D. Cal. 2022) (applying the *Integra* guideposts); *United States v. Valley Campus Pharmacy, Inc.*, No. 2:16-cv-04777-MCS-PLA, 2021 WL 4816648, at *8–9 (C.D. Cal. June 23, 2021) (same). One court also relied on the *Integra* analysis to interpret the same phrase in the New York False Claims Act. *New York ex rel. TZAC, Inc. v. New Israel Fund*, 520 F. Supp. 3d 362, 379–85 (S.D.N.Y. 2021).

218. *Silbersher v. Allergan Inc.*, 506 F. Supp. 3d 772, 805–07 (N.D. Cal. 2020), rev'd and remanded sub nom. *United States v. Allergan, Inc.*, 46 F.4th 991, 999–1000 (9th Cir. 2022) (reversing on the grounds that information on PAIR falls within the second prong relating to an “other Federal . . . hearing” without analyzing the “news media” category).

219. *Silbersher*, 506 F. Supp. 3d at 807. But see *United States ex rel. Paulos v. Stryker Corp.*, No. 11-0041-CV-W-ODS, 2013 WL 2666346, at *5–6 & n.7 (W.D. Mo. June 12, 2013) (finding that media coverage of a lawsuit in which the government was not a party would be independently foreclosed by the “news media” category even though it would otherwise be excluded by the other two), aff'd, 762 F.3d 688 (8th Cir. 2014).

B. *Curation, Independence, and Accessibility: A Three-Part Framework*

Integra presented five well-reasoned guideposts to interpret “news media” and comprehensively tackled the problem presented by courts’ wandering interpretations. But there is room for improvement. This section stops short of merely endorsing the factors from *Integra* or piling on more questions for courts to ask. Instead of a checklist or a multi-pronged test, this section centers interpretation of the provision around the statutory text with three principles: curation, independence, and accessibility.

Despite *Integra*’s robustness, this Note’s approach differs from *Integra*’s for two reasons. First, *Integra*’s guideposts are helpful in channeling courts’ discretion, but the number and nature of those factors may be too narrowly tailored around specific questions that obscure the purpose and animating ideas underlying the FCA. Asking courts to consider broad concepts, like curation, is purposely open-ended but sufficiently cabins existing interpretations, which lack principled application of the text. Second, this Note’s framework explicitly relies on the concept of accessibility, a factor that neither *Integra* nor most other courts have been willing to embrace outright. The accessibility inquiry seeks to define the scope of “news media” by directly confronting an unresolved question raised by the Supreme Court about whether access to a source should have any bearing on the public disclosure bar’s application. Accessibility matters for the policy goals underlying the public disclosure bar, and it provides a pragmatic and administrable way for courts to evaluate whether a source triggers the bar in the litigation context, which is precisely where it matters.

To a great extent, these three factors emphasize many of the same considerations as the court did in *Integra*. A particularly diligent court could, of course, consider both the *Integra* factors and the guiding principles offered here, though there will likely be significant overlap in the analysis. As discussed below, each of these guiding principles helps courts buttress their reasoning and reach a grounded conclusion about whether modern sources, like those on the internet, constitute “news media” under the FCA. Where a source’s identity as “news media” is in dispute, either because it does not resemble traditional news outlets or because of other issues, courts should use these criteria to inform their conclusions about whether the public disclosure bar is triggered.

1. *Curation*. — The first factor courts should consider to determine whether information was disclosed “from the news media” is the extent to which the content was curated by the source. At its core, this factor is about whether the source resembles the types of “news media” Congress likely contemplated in 1986 when drafting the public disclosure bar. As dis-

cussed below, this criterion also resonates with the first two *Integra* guideposts²²⁰ as well as other statutes, including FOIA and the New York and Georgia state false claims acts.²²¹ Considering curation can also help courts address information coming from a dizzying range of novel sources, such as internet databases.

Curation emerges from the ordinary plain meaning of “news media.” The initial move to discern plain meaning is clear: “[B]egin[] with the text.”²²² The FCA nowhere defines “news media,” so the first stop, like in *Integra* and *Schindler*, is the dictionary.²²³ Those cases relied on definitions from 1986, the year the public disclosure bar was first enacted.²²⁴ *Integra* took the definitions of “news” and “medium” to suggest that “news media” “includes methods of communication that are used to convey a particular type of information: information about recent events or that would otherwise commonly be found in a newspaper, news broadcast, or other news source.”²²⁵ Relying on this ordinary meaning leads to curation. News media refers to the communication of a specific subset of information. Necessarily, identifying curation requires the court to make determinations around newsworthiness, editorial rigor, and general interest.

The concept of curation also reflects the core ideas underlying the first two guideposts from *Integra*. The first guidepost centered around a source’s pattern of publishing “newsworthy” content, while the second looked to whether the content demonstrated some exercise of editorial

220. See United States ex rel. *Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *14 (C.D. Cal. July 16, 2019), rev’d and remanded sub nom. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App’x 840 (9th Cir. 2021).

221. See 5 U.S.C. § 552 (2018); N.Y. State Fin. Law § 190(9)(b)(iii) (McKinney 2022); see also Ga. Code Ann. § 23-3-122(j)(3)(C) (2022).

222. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (“Statutory interpretation, as we always say, begins with the text”); *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (“As with any other question of statutory interpretation, we begin with the text”). Justice Elena Kagan famously observed that “we are all textualists now.” Harvard Law School, The Scalia Lecture: A Dialogue With Justice Elena Kagan on the Reading of Statutes, YouTube, at 8:10 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (on file with the *Columbia Law Review*); see also Jonathan H. Choi, The Substantive Canons of Tax Laws, 72 *Stan. L. Rev.* 196, 207 n.58 (2020) (observing how Justice Kagan’s statement itself “has become a virtual cliché in scholarly work on statutory interpretation”).

223. See *supra* notes 197–201 and accompanying text. Judge Learned Hand famously cautioned “not to make a fortress out of the dictionary.” *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). Though dictionaries appear to be neutral sources for understanding ordinary meaning, the choice of which dictionary and which definition to use is loaded with potential for manipulation and even just subjectivity. See, e.g., Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 *Harv. L. Rev.* 1437, 1446 (1994) (“Individual judges must make subjective decisions about which dictionary and which definition to use. . . . The fiction that the particular definitions cited by the Court accurately capture statutory meaning is as tenuous as the assumption that scraps of legislative history reveal the intent of legislatures.”).

224. See *supra* notes 197–203 and accompanying text.

225. *Integra*, 2019 WL 3282619, at *11.

judgment.²²⁶ Courts considering whether a source has curated content need to determine whether the publisher specially selected the information and presented it in a way that would be easily digestible for users. Curation—as opposed to data warehousing—necessarily implies incompleteness.²²⁷ Not all curated sources, such as online restaurant menus, would pass this test because they reflect a different breed of curation and do not resemble traditional news media.

Integra's second guidepost also leaned on a definition from FOIA for the meaning of “a representative of the news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”²²⁸ FOIA also defines “news” in that section as “information that is about current events or that would be of current interest to the public.”²²⁹ Taken together, these definitions revolve around the concept of curation and view news media as a source where professionals exercise their discretion to assemble, edit, and publish selected stories of public interest. Courts should look to this statute's definitions to inform their analysis of “news media” in the FCA.

Another potential pitfall that courts can avoid by focusing on curation emerges from the vast troves of data available on the internet. Two states—New York and Georgia—recognized the potential for these types of sources to be swept in under the “news media” umbrella when they amended their own state false claims acts. Under those statutes, claims from the news media would be covered by the bar “provided that such allegations or transactions are not ‘publicly disclosed’ in the ‘news media’ merely because information of allegations or transactions have been posted on the internet or on a computer network.”²³⁰ This articulation of the “news media” category responds directly to some courts' eagerness to bar any piece of information available on the internet as “news media.”²³¹ It also protects a modern breed

226. *Id.* at *14.

227. Historically, certain news media (specifically, newspapers) have engaged in a sort of data presentation by printing financial indicators, such as stock and commodity prices. See, e.g., Commercial and Money Affairs, *N.Y. Daily Times* (Sept. 18, 1851) (on file with the *Columbia Law Review*) (reporting, in the first print issue of the *New-York Daily Times*, stock exchange sales and indicators on commodities, including flour and grain). Modern data storage is arguably not just this same practice on a greater scale but differs qualitatively because it does not involve the same degree of tailoring for audiences.

228. 5 U.S.C. § 552(a)(4)(A)(ii) (2018).

229. *Id.*

230. N.Y. State Fin. Law § 190(9)(b)(iii) (McKinney 2022); see also Ga. Code Ann. § 23-3-122(j)(3)(C) (2022) (barring claims “[f]rom the news media, provided that such allegations or transactions are not publicly disclosed in the news media merely because information of allegations or transactions have been posted on the Internet or on a computer network”).

231. See *New York ex rel. TZAC, Inc. v. New Israel Fund*, 520 F. Supp. 3d 362, 379 (S.D.N.Y. 2021) (discussing the caveat in the “news media” category as a response by New York state legislators who were concerned that federal courts, including the Supreme Court, were misinterpreting the FCA in a way that created loopholes making it harder to combat

of whistleblower—like Integra itself²³²—that may be emerging to root out fraud with sophisticated data mining techniques.²³³

Individuals should be able to rely on noncurated sources, like raw data or digital records libraries, because filing a *qui tam* claim based on this information reflects diligence and effort on the part of the relator, who had to process, clean, and extract data in order to discover the alleged fraud. As a result, the public disclosure bar—and especially the “news media” category—should not prohibit claims based on noncurated content.

2. *Independence.* — The second criterion courts should consider when evaluating whether information comes “from the news media” is the identity of the source itself. As the Supreme Court has emphasized, especially in the FCA context, the text of a statute should guide its application.²³⁴ In addition to looking to the ordinary meaning of the phrase, the public disclosure bar, as a whole, is helpful to see how this factor flows naturally from the language of the phrase. Information that is “substantially the same” as allegations “*from* the news media” triggers the public disclosure bar.²³⁵ Focusing on the identity of the source publishing the information is consistent with principles of textualism because it relies on Congress’s framing of the public disclosure bar. In writing “*from* the news media” instead of “*in* the news media,” Congress chose different language than it used for the first two categories of the bar, which it introduced with the preposition “*in*.”²³⁶ Using the word “*from*” instead of “*in*” creates an arguably more awkward expression, indicating the choice was a conscious decision in the drafting process. This distinction matters

fraud (citing Press Release, Eric T. Schneiderman, Sen., N.Y., Senator Eric T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature (July 1, 2010), <https://www.nysenate.gov/newsroom/press-releases/eric-t-schneiderman/senator-eric-t-schneiderman-shepherds-historic-anti> [<https://perma.cc/X3LD-2KTW>])).

232. See *supra* note 170 and accompanying text.

233. See, e.g., Jack Burns, Data Mining for *Qui Tam* False Claims Act Suits: Business Opportunity for the Technology Age, or Doomed Goose Chase?, 22 Tul. J. Tech. & Intell. Prop. 1, 19 (2020) (“There is currently a fight brewing over whether the future will have a place for corporate *qui tam* plaintiffs engaged in data analysis whistleblowing . . .”).

A case in Massachusetts considered how a similar provision applied in the context of data stored online. Interpreting the Massachusetts False Claims Act, which has a nearly identical public disclosure bar that also covers “news media,” the Massachusetts Supreme Judicial Court held that the official repository for municipal bonds information qualified as news media under that state’s statute. *Rosenberg v. JPMorgan Chase & Co.*, 169 N.E.3d 445, 461 (Mass. 2021).

234. See *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) (“Because the [FCA] does not define ‘report,’ we look first to the word’s ordinary meaning.”); see also *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”).

235. 31 U.S.C. § 3730(e)(4)(A) (2018) (emphasis added).

236. *Id.* § 3730(e)(4)(A)(i)–(ii) (barring suits in which the allegations were publicly disclosed “(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation”).

because it suggests that sources appearing in news media that are not themselves the product of news media efforts should be excluded from the public disclosure bar.

Appreciating the difference between “from” and “in” differs from *Integra*’s ordinary meaning interpretation of “news media” centering around “methods of communication.”²³⁷ Contrasting “in” and “from” suggests a difference between a method or channel or communication and an author of that information. Focusing on “from” in this interpretation precludes the application of the bar to sources that some courts have concluded do trigger the bar, like advertisements in newspapers²³⁸ and comments on news websites.²³⁹

Focusing on the identity of the source also means that information published on non-news media websites would not trigger the public disclosure bar. Implicit in this bar is the idea that the information should be independent of the defendant; in other words, the defendant should not be able to trigger the public disclosure bar with their own disclosures. If defendants’ disclosures fell within the public disclosure bar, they could preemptively disclose “bad facts” about themselves along the lines of risk factor disclosure in securities regulation.²⁴⁰ This kind of regime is incompatible with the one Congress created in limiting the public disclosure bar to three specifically enumerated classes of sources.

3. *Accessibility*. — The third factor courts should consider is the public accessibility of the source and its content. Like curation and independence, accessibility flows from the ordinary meaning of “news media.”²⁴¹ Whether news media seek to make a financial profit or not, they are designed to communicate information. In other words, they exist to provide content for consumption by others. The extent to which a source is available and accessible, then, is a helpful indicator of whether it resembles traditional news media.

Some courts have already relied on accessibility in their analyses of whether a source is “news media.”²⁴² But others, including *Integra*, have shied away from the concept and instead approached the scope of the audience with other factors, like intent to disseminate information widely.²⁴³ This factor is the most significant departure from *Integra*’s

237. See *supra* notes 197–203 and accompanying text.

238. See, e.g., *Osheroff*, 776 F.3d at 813 (finding that advertisements in newspapers qualify as “news media”).

239. See *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, No. 10-CV-1401 JLS (WVG), 2015 WL 4892259, at *6 (S.D. Cal. Aug. 17, 2015) (finding that an online comment posted in response to an article on a local news website constituted “news media”).

240. See Regulation S-K, 17 C.F.R. pt. 229 (2021) (governing public company disclosure requirements).

241. See *supra* notes 197–201 and accompanying text.

242. See *supra* notes 128–137 and accompanying text.

243. See *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *14 (C.D. Cal. July 16, 2019), *rev’d and*

framework and presents a way of looking at the provision that is consistent with the policy behind it.

One reason courts may be reluctant to consider accessibility may be fear of reprisal given the Supreme Court's admonition in dicta that because "news media" covers "a large number of local newspapers and radio stations," the proper test is not whether the allegations would "have landed on the desk of a DOJ lawyer."²⁴⁴ This section explains why courts should in fact rely on accessibility and why the Court's language in *Graham County* does not—and should not—foreclose looking to a source's accessibility.

The Supreme Court's statements regarding the reach of "news media" do not preclude courts from considering a source's accessibility. In *Graham County*, the Court wrote that for sources that are "news media," accessibility is irrelevant.²⁴⁵ In other words, even local newspapers trigger the public disclosure bar despite their limited readership because they are undoubtedly "news media."²⁴⁶ The extent of a source's audience is irrelevant for determining whether information was "publicly disclosed" under the statute. But the Supreme Court's dicta doesn't foreclose consideration of accessibility to help answer a different question: whether a source itself is "news media."

The Court noted that because many sources that are "news media" are local in nature, they would "seldom come to the attention of the Attorney General."²⁴⁷ The Court's observation was that if something is covered by one of the classifications of the public disclosure bar, such as the "news media" category, that source's accessibility to the public is irrelevant because Congress wrote the public disclosure bar to apply to everything in those categories.²⁴⁸ But this does not imply that accessibility is always irrelevant in the context of public disclosure; here, the extent to which a source is accessible can inform a court of whether that source itself is "news media."

There are also sound policy justifications for considering accessibility. First, it is a good proxy for traditional news media. The entire business model of news outlets is readership, either because revenue comes from news sales or because companies pay more to advertise in outlets with larger audiences. Arguably, *Integra's* third guidepost—a source's "intent

remanded sub nom. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App'x 840 (9th Cir. 2021).

244. *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 300 (2010).

245. *Id.* (dismissing the importance of accessibility because many sources of news media are unlikely to "land[] on the desk of a DOJ lawyer").

246. *See id.*

247. *Id.*

248. *See id.* at 299–300 ("Just how accessible to the Attorney General a typical state or local source will be, as compared to a federal source, is an open question. And it is not even the right question.").

to disseminate” news widely—approximates this concept,²⁴⁹ but in a roundabout way that is more difficult to measure than ease of access and viewership. Intent is paradigmatically difficult to judge, and though a court could couch its analysis here in terms of “intent to disseminate,” that obfuscates a point that does not merit obfuscation. More importantly, claims that are not easily accessible by a relator should not be barred by the public disclosure bar because such a rule defeats the goal of incentivizing relators to come forward with information of fraud. The reason why *qui tam* actions exist in the first place is to expose fraud that the government would not otherwise have learned about.

* * *

Together, these three principles can help sketch the boundaries of “news media” in an age when information lives on the internet. No single concept is more important than another. Indeed, part of this approach—articulating three broad principles for courts to consider—is based on the assumption that courts require flexibility in tackling interpretive questions on their dockets. Courts should holistically consider each of these criteria to decide whether information presented in a source that does not seem to quite “fit” the traditional definition of “news media” nevertheless qualifies under the FCA.

Courts should lean on these factors to exercise their discretion wisely and with an eye to the text and policy of the FCA. By providing three high-level principles for courts, this Note seeks to relieve them of some of the burden of tackling new and unprecedented sources of public disclosure. Admittedly, courts will still be called on to decide novel cases. Is a Tweet “news media”? What if the author is a reporter? What if, after several days, it receives millions of retweets, including by the BBC? Can something that is not “news media” at inception later become “news media”? And, what about fake news?²⁵⁰

Obviously, there are unanswered questions. Courts’ problematic interpretations may have emerged because the internet presented new problems, but they persisted because the problems went unrecognized and unaddressed. This Note does not seek to suggest bright-line rules for deciding what is and what is not “news media.” Until Congress decides to wrestle with the public disclosure bar again, courts will have to decide

249. See *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *14 (C.D. Cal. July 16, 2019), rev’d and remanded sub nom. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App’x 840 (9th Cir. 2021).

250. See *What Is Fake News?*, Ctr. for Info. Tech. & Soc’y, Univ. of Cal. Santa Barbara, <https://www.cits.ucsb.edu/fake-news/what-is-fake-news> [https://perma.cc/TA82-VYDM] (last visited Feb. 19, 2023) (“The term *fake news* means ‘news articles that are intentionally and verifiably false’ designed to manipulate people’s perceptions of real facts, events, and statements.” (footnote omitted) (quoting Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 *J. Econ. Persps.*, Spring 2017, at 211, 213)).

which novel sources constitute “news media” and which do not.²⁵¹ Instead, it proposes these three factors to guide courts as they confront issues presented by the collision of old statutory text and modern conditions.

At a minimum, this Note draws attention to a stellar opinion for other courts to emulate. It might also supply more tools for courts to tackle the problem. More generally, it sketches a blueprint for thinking about statutory interpretation in the face of technological change.

CONCLUSION

The FCA’s prohibition on qui tam actions whose claims match those disclosed in the “news media” has morphed into a much broader limitation than Congress wrote. When courts read the phrase to encompass any information available on the internet, they shield corporate defendants from answering for fraud at the expense of vulnerable whistleblowers at risk of retaliation. This Note offers a way forward that reconciles the language of the text with the modern dilemma courts face when confronted with the massive amounts of information available on the internet.

251. Importantly, the public disclosure bar states that courts “shall dismiss an action” if the bar is triggered, “*unless* opposed by the Government.” 31 U.S.C. § 3730(e)(4)(A) (2018) (emphasis added). This route suggests the government may be able to play an active role in shaping courts’ application of the public disclosure bar by opposing dismissal in cases where the bar is applied questionably. However, the sample of cases in which the government has not already intervened but wishes to oppose dismissal on this basis is likely too small to create meaningful policy in this area.

