

**“BASED UPON” AND THE FALSE CLAIMS ACT’S
QUI TAM PROVISION: REEVALUATING THE
SEVENTH CIRCUIT’S METHOD OF STATUTORY
INTERPRETATION**

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INTRODUCTION

Each year, fraud takes approximately \$100 billion from the federal government.¹ To help recover some of that substantial sum, Congress expanded the False Claims Act (“the FCA”).² Through its *qui tam* provision,³ a plaintiff (called a “relator”) may sue those who defraud the government and share the damages the U.S. Attorney’s Office ultimately collects.⁴ But Congress has struggled to keep opportunistic relators from using publicly available information to file *qui tam* suits that do not detect any new fraud. In one egregious

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¹ See Carl Pacini & Michael Bret Hood, *The Role of Qui Tam Actions Under the False Claims Act in Preventing and Deterring Fraud Against Government*, 15 U. MIAMI BUS. L. REV. 273, 273 (2007).

² 31 U.S.C. §§ 3729-33 (2002).

³ *Qui tam* is shorthand for the Latin maxim *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY 1282 (8th ed. Bryan A. Garner).

⁴ See Pacini & Hood, *supra* note 1, at 273.

example, *United States ex rel. Marcus v. Hess*,⁵ the Supreme Court let a relator proceed even though he copied a criminal indictment verbatim into his *qui tam* complaint.⁶ Congress amended the FCA to prevent such abuse, but those amendments ended up barring meritorious *qui tam* suits. For instance, in *United States ex rel. State of Wisconsin v. Dean*,⁷ the Seventh Circuit refused to allow the State of Wisconsin to act as relator even when it had investigated Medicare fraud.⁸ In rejecting its suit for having relied upon publicly available information, the Seventh Circuit stated that “[i]f the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exception.”⁹

In response, Congress loosened restrictions on *qui tam* pleading in 1986 amendments to the FCA. But even while seeking to encourage relators to investigate and share their information with the government, Congress remained concerned about “parasitic” suits like *Hess*. Teetering between these two competing goals, Congress enacted the FCA’s Public Disclosure Bar,¹⁰ which bars actions “based upon” a “public disclosure,” unless the relator was the “original source of the information.”¹¹ Although trying to simplify the FCA, Congress ended up confounding the federal courts.¹²

⁵ 317 U.S. 537 (1943).

⁶ *Id.* at 546-48.

⁷ 729 F.2d 1100 (7th Cir. 1984).

⁸ *Id.* at 1102.

⁹ *Id.* at 1106-07.

¹⁰ 31 U.S.C. § 3729(e)(4).

¹¹ *Id.*

¹² For instance, in *United States ex rel. Merena v. SmithKline Beecham Corp.*, 14 F. Supp. 2d 352 (E.D. Pa. 2000), *rev’d*, 205 F.3d 97 (3d Cir. 2000), the exasperated district court summed up the difficulty of the issue for the federal courts:

There seems to be no unanimity both among and within individual circuits as to when claims are “based upon” public disclosures, what constitutes a public disclosure, when and under what circumstances a *qui tam* relator must first inform the government of the claims, the extent of the factual information that must be provided to the government prior to filing the *qui tam* action, when a *qui tam* action must be filed where there has been a

Last term in *Rockwell International v. United States*,¹³ the Supreme Court clarified what “original source” means, but did not resolve what makes a claim “based upon . . . a public disclosure.”¹⁴ According to the majority of circuits, a *qui tam* suit is based upon a public disclosure “when the supporting allegations are the same as those that have been publicly disclosed . . . regardless of where the relator obtained his information.”¹⁵ However, the Fourth and Seventh Circuits follow a minority standard. They interpret “based upon” to mean that the suit “both depends essentially upon publicly disclosed information and is actually derived from such information.”¹⁶ In *United States ex rel. Fowler v. Caremark Rx, LLC*,¹⁷ the Seventh Circuit reaffirmed its minority standard, emphasizing that it “holds the trump card, the plain language interpretation.”¹⁸

This Note urges the Seventh Circuit to re-examine that holding according to the three theories of statutory interpretation: textualism,

public disclosure, what are the requisites to be classified as an “original source,” when a claim is “primarily based upon” prior public disclosures and many other issues that arise under the statute.

Id. at 371-72.

¹³ 127 S.Ct. 1397 (2007).

¹⁴ *See id.* at 1405 (noting that the parties “conceded that the claims . . . were based upon publicly disclosed allegations within the meaning of § 3730(e)(4)(A)”).

¹⁵ *See, e.g.,* Minnesota Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032 (8th Cir. 2002); *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999); *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 147 F.3d 821 (9th Cir. 1998); *United States ex rel. McKenzie v. BellSouth Telecommns., Inc.*, 123 F.3d 935 (6th Cir. 1997); *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447 (5th Cir. 1996); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994); *United States ex rel. the Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992).

¹⁶ *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999); *accord United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994).

¹⁷ 496 F.3d 730 (2007), *reh’g and suggestion for reh’g en banc denied*, 2007 U.S. App. LEXIS 22319, at *1 (7th Cir. Sept. 7, 2007).

¹⁸ *Id.* at 738.

intentionalism, and purposivism.¹⁹ Part I summarizes the history of *qui tam* and the FCA. Part II discusses both sides of the “based upon” circuit split. Part III introduces *Fowler* and the Seventh Circuit’s method of statutory interpretation. Part IV evaluates the Seventh Circuit’s method according to the three theories of statutory interpretation. Part V explains why the Seventh Circuit should reconsider its minority approach. While the court purports to follow the plain meaning rule, its interpretation deprives “based upon” of its ordinary meaning. In addition, the Seventh Circuit ignores the legislative history of the FCA, which demonstrates Congress intended to limit *qui tam* suits supported by publicly available information. As a result, the court’s interpretation undermines a key purpose of the FCA: to prevent parasitic suits. Accordingly, this Note recommends that the Seventh Circuit adopt the majority approach.

I. HISTORICAL BACKGROUND

Qui tam arose from 13th Century English common law.²⁰ Even before the Magna Carta, common law *qui tam* provided an efficient way to pursue fraud without government prosecutors.²¹ In addition, private citizens valued *qui tam* more because it allowed them access to Royal Courts.²² Common law *qui tam* fell into desuetude once Royal Courts were opened to all disputes.²³ However, Parliament then enacted statutes that enabled *qui tam* actions to redress specific public wrongs.²⁴ Only this statutory *qui tam* entered American law after independence.²⁵ Indeed, the first U.S. Congress enacted *qui tam*

¹⁹ See generally WILLIAM N. ESKERIDGE, Jr., et al., LEGISLATION AND STATUTORY INTERPRETATION 219, 219-56 (2d ed. 2006) (2001).

²⁰ JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS 1, 1-7 (2d ed. 2003).

²¹ *Id.* at 1-8.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

statutes in order to supplement the government enforcement against fraud.²⁶

During the Civil War, Congress enacted the FCA to create a new *qui tam* provision to pursue fraud against the Union Army.²⁷ While nicknamed the “Informer’s Act” and the “Lincoln Law,” the FCA was generally applicable to fraud against the government.²⁸ Fearing frivolous suits, Congress required the relator to pay his own legal fees and allowed the government to take over the suit entirely at any time at its sole discretion.²⁹ These strictures limited the FCA’s use for the first decades it existed.³⁰

Congress amended the FCA in 1943 after the Supreme Court controversially upheld a *qui tam* suit that completely relied on a publicly disclosed criminal indictment in *United States ex. rel. Marcus v. Hess*.³¹ Electrical contractors employed by the Public Works Administration pleaded guilty to criminal fraud.³² Relator Morris L. Marcus allegedly copied that criminal indictment into his *qui tam* complaint and—without contributing anything—sought half of any subsequent civil judgment.³³ Even though the relator contributed no additional information, the Court upheld the suit.³⁴ Writing for the Court, Justice Hugo Black determined that Mr. Marcus “contributed much to the accomplishing of the purposes for which the Act was passed” by bringing an allegation of fraud to light.³⁵ Acknowledging that Congress might have intended to limit the reward to informers who provided new information to civil prosecutions, the Court nevertheless concluded that “neither the language of the statute nor its history” supported that interpretation.³⁶

²⁶ *Id.* at 1-9

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 317 U.S. 537, 547-48 (1943).

³² *Id.* at 529

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 545.

³⁶ *Id.* at 546.

To avoid the outright repeal of the FCA, Congress amended the FCA in 1943.³⁷ The 1943 amendments eliminated the *Hess* end-run by barring jurisdiction for relators who had prior knowledge of the allegations of a criminal complaint an absolute bar to subject matter jurisdiction over *qui tam* suits.³⁸ In addition, the amendments allowed the Justice Department to take over a *qui tam* case and reduced the maximum damages if the government took over the case.³⁹

These changes initially decreased use of *qui tam* actions, but dramatic government spending growth besides military spending following World War II increased the use of *qui tam*.⁴⁰ As *qui tam* expanded beyond its historic military bounds, relators started to use the FCA against persons and corporations besides government contractors.⁴¹ But some courts, particularly the Seventh Circuit, resisted relators' use of the FCA in non-military matters. Most notably, in *United States ex rel. State of Wisconsin v. Dean*,⁴² the Seventh Circuit refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action, even though the investigation had been conducted solely by the State of Wisconsin.⁴³ The court concluded that “[i]f the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exception.”⁴⁴

In 1986 Congress did loosen the restrictions through yet another set of amendments.⁴⁵ Essentially, the 1986 amendments made the FCA's *qui tam* provision more closely resemble the permissive pleadings standards of common law fraud.⁴⁶ In addition, the

³⁷ Boese, *supra* note 20, at 1-14.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1-15.

⁴¹ *Id.*

⁴² 729 F.2d 1100 (7th Cir. 1984).

⁴³ *Id.* at 1102, 1104.

⁴⁴ *Id.* at 1106.

⁴⁵ See Boese, *supra* note 20, at 1-19-1-21 (describing important changes made by 1986 amendments).

⁴⁶ See Pacini & Hood, *supra* note 1, at 288.

Committee sought to make the FCA more effective against fraud by altering the burden of proof and other provisions.⁴⁷ In its current form, FCA relators generally must plead: 1) that a claim presented to the government by the defendant; 2) the claim was made “knowingly”; 3) that the claim was “false” or “fraudulent;” 4) that the false statement was material (in most courts); 5) causation; and 6) damage to the federal government.⁴⁸ A victorious relator might recover somewhere between 15 and 30 percent of the total damages.⁴⁹ In explaining the need for these changes, the Senate Judiciary Committee found that fraud pilfers taxpayers and “erodes public confidence in the Government’s ability to efficiently and effectively manage its programs.”⁵⁰ Moreover, the amendments sought to correct decisions like *Dean*, which restricted the use of the FCA to only military procurement fraud.⁵¹

II. THE “BASED UPON” CIRCUIT SPLIT

The 1986 amendments included Section 3730(A)(4) of the FCA, which deprives a relator of subject matter jurisdiction if her claim is “based upon” a “public disclosure” (the “Public Disclosure Bar”), unless the relator can establish she was the “original source of the information” (the “Original Source Exception”).⁵² Last term in *Rockwell*, the Supreme Court recognized that these are jurisdictional components of the FCA.⁵³ In addition, the Court held that the Original Source Exception’s phrase “‘information on which the allegations are based’ refers to the relator’s allegations and not the publicly disclosed allegations.”⁵⁴ However, the Court has not interpreted the meaning of

⁴⁷ See Boese, *supra* note 20, at 1-26.

⁴⁸ See Pacini & Hood, *supra* note 1, at 288-97.

⁴⁹ See *id.* at 298-300.

⁵⁰ S. REP. NO. 99-345, at 43 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5308.

⁵¹ See *id.*

⁵² 31 U.S.C § 3729(e)(4).

⁵³ *Rockwell*, 127 S.Ct. at 1406.

⁵⁴ *Id.* at 1408. The Court, per Justice Antonin Scalia, focused on Congress’s telling use of the word “information” instead of repeating “allegations or

“based upon.”⁵⁵ Thus, the circuits remain split according to two different interpretations of “based upon.” Subsection A examines the majority standard. Subsection B examines the minority standard.

A. *The Majority: “based upon” means “supported by”*

The leading circuit court case to interpret the Public Disclosure Bar is *United States ex rel. Precision Co. v. Koch Industries, Inc.*⁵⁶ The relator alleged that defendant systematically mismeasured crude oil and natural gas for government sale.⁵⁷ The relator’s allegations partially relied on information from some publicly disclosed RICO civil suits.⁵⁸ The Tenth Circuit affirmed dismissal of the case, holding that “based upon” meant a *qui tam* action “based in any part upon publicly disclosed allegations or transactions.”⁵⁹ In other words, the court determined that “‘based upon’ is properly understood to mean ‘supported by.’”⁶⁰ In reaching its conclusion, the court asserted that it would not “dramatically alter[] the statute’s plain meaning” by interpreting the term “based upon” to mean “solely based upon.”⁶¹ The court also emphasized that “statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.”⁶² As a result, the court decided that “based upon” acts as a “quick trigger” to quickly advance a court’s analysis to the Original

transactions.” *Id.* at 1407. Even without considering legislative history, the Court wondered why Congress would care about a distinction that caused courts to measure “the relator’s information against the often *unknowable* information on which the public disclosure was based.” *Id.* at 1408. Accordingly, the Court concluded that “[t]o bar a relator with direct and independent knowledge underlying his allegations just because no one can know what information underlies the similar allegations of some other person simply makes no sense.” *Id.*

⁵⁵ *See id.* at 1405.

⁵⁶ 971 F.2d 548 (10th Cir. 1992).

⁵⁷ *Id.* at 550.

⁵⁸ *Id.* at 554-55.

⁵⁹ *Id.* at 553.

⁶⁰ *Id.* at 552.

⁶¹ *Id.*

⁶² *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

Source Exception.⁶³ In support of this interpretation, the court concluded that it would further two purposes of the FCA: to encourage private citizens with first-hand knowledge of fraud to come forward, and to avoid parasitic lawsuits that do not disclose fraud.⁶⁴

In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*,⁶⁵ the D.C. Circuit similarly held that the Public Disclosure Bar applies “where all of the material elements of the fraudulent transaction are already in the public domain and the *qui tam* relator comes forward with more evidence incriminating the defendant.”⁶⁶ However, after parsing the FCA’s language, the D.C. Circuit developed a more nuanced definition of “based upon” than the Tenth Circuit. The court concluded that “Congress sought to prohibit *qui tam* actions only when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.”⁶⁷ The court interpretation reconciled the FCA’s text with its legislative history, which sought to navigate between two extremes. First, Congress evinced that the FCA should not let relators simply copy the government’s information verbatim.⁶⁸ Second, Congress simultaneously sought to permit where the relator has real evidence of fraud, even if those suits were loosely connected to a public disclosure.⁶⁹ In resolving this dilemma, the court recognized a different test: “whether the information conveyed to the government could have formed the basis for a governmental decision on prosecution, or could at least have alerted law enforcement authorities to the likelihood of wrongdoing.”⁷⁰ Applying its standard, the court

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 14 F.3d 645 (D.C. Cir. 1994).

⁶⁶ *Id.* at 655.

⁶⁷ *Id.* at 654.

⁶⁸ *Id.*

⁶⁹ *Id.* (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981)).

⁷⁰ *Id.* (quoting *Cannon*, 642 F.2d at 1377).

concluded that the relator's information "did not present so clear or substantial an indication of foul play" for a *qui tam* suit.⁷¹

Next, the Third Circuit, per then-Judge Alito, adopted a similar approach in *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*.⁷² The relator, a general contractor, alleged that the defendant falsely claimed costs for lead-based paint abatement work at city housing projects.⁷³ The relator's *qui tam* suit cited documents produced through a Freedom of Information Act (FOIA) request and discovery from a state-court fraud suit.⁷⁴ The court held that the allegations were based upon the public disclosures.⁷⁵ In determining the meaning of "based upon," the court did acknowledge that its ordinary meaning is not "supported by."⁷⁶ Even so, the Court reasoned that "based upon" should not mean "actually derived from" because that would make the Original Source Exception superfluous.⁷⁷ To circumvent the statute's plain meaning, the court highlighted the FCA's many drafting errors, ultimately concluding that "the *qui tam* provision does not reflect careful drafting."⁷⁸ Following similar reasoning, five more circuits have held "based upon" essentially means "supported by."⁷⁹

⁷¹ *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994).

⁷² 186 F.3d 376 (3d Cir. 1999).

⁷³ *Id.* at 379-81.

⁷⁴ *Id.* at 381.

⁷⁵ *Id.* at 388. The Court had first determined this FOIA request qualified as a public disclosure. *Id.* at 383. There is disagreement about this conclusion. *See, e.g., United States v. Catholic Healthcare West*, 445 F.3d 1147, 1153 (9th Cir. 1999), *cert. denied*, 127 S.Ct. 725 (2006); 127 S.Ct. 730 (2006).

⁷⁶ *Mistick*, 186 F.3d at 386.

⁷⁷ *Id.*

⁷⁸ *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 387-88 (3d Cir. 1999).

⁷⁹ *See, e.g., Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002); *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 147 F.3d 821 (9th Cir. 1998); *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935 (6th Cir. 1997); *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447 (5th Cir. 1996); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994).

B. The Minority: “based upon” means “actually derived from.”

The Fourth Circuit split the circuits in *United States ex rel. Siller v. Becton Dickinson & Co.*⁸⁰ In a previous suit, a health care distributor had sued Becton for breaching its distributorship agreement.⁸¹ Becton had allegedly feared that the distributor would alert the federal government to a scheme to overcharge for health care products.⁸² Becton settled that lawsuit so long as the settlement terms remained confidential.⁸³ David Siller, the brother of the distributor’s president, then sued as relator in a *qui tam* action based on the overcharging scheme, asserting that he learned about overcharging before the previous lawsuits were filed and had subsequently investigated the overcharging scheme.⁸⁴

The Fourth Circuit rejected Becton’s motion to dismiss, holding that Siller’s suit was not based upon a public disclosure because “based upon” only means “actually derived from that disclosure the allegations upon which [a relator’s] *qui tam* action is based.”⁸⁵ The court relied on the dictionary definition of “based upon” is “to use as a basis for.”⁸⁶ Accordingly, the court determined “it is self-evident that a suit that includes allegations that happened to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.”⁸⁷ The court distinguished other cases, asserting that it was deciding a case of first impression: whether a *qui tam* relator may derive the factual basis of his action from a public disclosure for it to

⁸⁰ 21 F.3d 1339 (4th Cir. 1994).

⁸¹ *Id.* at 1340-41.

⁸² *Id.* at 1341.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir. 1994).

⁸⁶ *Id.* at 1348 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 180 (1986)).

⁸⁷ *Id.*

be “based upon” the public disclosure.⁸⁸ Moreover, the court rejected the majority’s interpretation of “based upon” as “extra-textual requirement that was not intended by Congress.”⁸⁹ Therefore, the court held that Siller could qualify as an original source.⁹⁰

Besides the Seventh Circuit, only Third Circuit Chief Judge Becker has supported the minority standard in dissent, arguing that it “alone is faithful to the plain language of the governing statute.”⁹¹ In rejecting the argument that the FCA was sloppily drafted, Chief Judge Becker contended that Congress “drew the line at the point of actual public disclosure because it would bring the most fraud to light without engendering unnecessary suits.”⁹² Moreover, he recognized that “there is nothing ambiguous about the phrase ‘based upon.’”⁹³ Finally, he argued that the minority approach did not read the Original Source Exception out of the statute for two reasons. First, he noted some *qui tam* suits might fall under the “based upon” language, even if they were not completely derived from public disclosures.⁹⁴ Second, he reasoned that the “based upon” and “original source” inquiries would, in tandem, successfully deter parasitic lawsuits.⁹⁵

III. UNITED STATES EX REL. FOWLER V. CAREMARK RX, LLC

In *Fowler*, the Seventh Circuit readopted the minority standard.⁹⁶ Defendant Caremark provides prescription drugs for federal

⁸⁸ *Id.* at 1349.

⁸⁹ *Id.* at 1355

⁹⁰ *Id.* at 1351.

⁹¹ *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 389 (3d Cir. 1999) (Becker, C.J., dissenting).

⁹² *Id.* at 391 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Ins. Col.*, 944 F.2d 1149, 1171 (Scirica, J., dissenting)).

⁹³ *Id.* at 398-99.

⁹⁴ *Id.* at 399.

⁹⁵ *Id.* at 400.

⁹⁶ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739 (7th Cir. 2007) (quoting *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999)); *accord United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003).

government employee health care plans and employed relators at two of its prescription drug facilities.⁹⁷ The relators brought a *qui tam* suit, alleging Caremark had defrauded the government through several overcharging schemes.⁹⁸ During discovery, Caremark disclosed 113,000 pages of documents to the U.S. Attorney's Office.⁹⁹ When the government declined to intervene in the case in January 2006, these discovery documents were unsealed in February 2006.¹⁰⁰

The U.S. District Court for the Northern District of Illinois dismissed the first complaint for failing to meet pleading requirements of Federal Rule of Civil Procedure 9(b).¹⁰¹ Defendant Caremark then moved to dismiss the second amended complaint because the Relator's allegations were "based upon" the discovery materials publicly disclosed to the U.S. Attorney's Office.¹⁰² The court denied that request, but again dismissed the relator's complaint under Rule 9(b) for failing to "identify a single prescription through which Caremark perpetrated the alleged fraud."¹⁰³ The relators appealed the dismissal of their complaint with prejudice under Rule 9(b), and the Seventh Circuit affirmed.¹⁰⁴

In an opinion by Judge Kanne, the Seventh Circuit affirmed the district court's holding that the third amended complaint did not meet Rule 9(b) requirements.¹⁰⁵ But despite Caremark's urging, the court declined to reject its minority interpretation of the FCA's Public Disclosure Bar.¹⁰⁶ The court emphasized that the minority approach

⁹⁷ *Fowler*, F.3d at 734.

⁹⁸ *Id.* Specifically, the Relators alleged that Caremark defrauded the government by failing to credit returned prescription drugs, changing prescriptions without proper approval, misrepresenting the savings obtained from its recommendations, failing to substitute a generic version of Prilosec, failing to credit lost prescriptions, and manipulating the mandatory times for filing prescriptions. *Id.*

⁹⁹ *Id.* at 735.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 739.

¹⁰² *Id.* at 736.

¹⁰³ United States *ex rel.* *Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 735 (7th Cir. 2007).

¹⁰⁴ *Id.* at 733.

¹⁰⁵ *Id.* at 739-43.

¹⁰⁶ *Id.* at 738.

“holds the trump card, the plain meaning interpretation.”¹⁰⁷ The court asserted that, tellingly, the statute did not include a provision barring actions that are “the *same or substantially the same as* the public disclosure.”¹⁰⁸ Furthermore, the court argued that this strict textualist approach properly balances the FCA’s policies.¹⁰⁹ Echoing Chief Judge Becker, the court reasoned that the FCA’s plain meaning alone reflected a careful policy balance in trying to get insiders to come forward with information while deterring self-serving opportunists who file parasitic lawsuits.¹¹⁰ Even though the court acknowledged that perhaps this class of claims should be eliminated, the court declined to rewrite the statute, reserving that “policy choice” for Congress.¹¹¹

In *Fowler*, the Seventh Circuit identified two public disclosures: Caremark’s discovery disclosures to relators and Caremark’s discovery disclosures to the U.S. Attorney.¹¹² The court found no evidence that the relators used these public disclosures instead of the inside information they obtained while working at Caremark.¹¹³ As a result, the Seventh Circuit upheld the district court’s ruling that the third amended complaint was not actually derived from any publicly disclosure.¹¹⁴ Even so, Caremark still prevailed because the plaintiff’s complaint did not meet Rule 9(b) requirements.¹¹⁵

IV. THE SEVENTH CIRCUIT’S INTERPRETATION OF “BASED UPON” IS INCORRECT UNDER THE THEORIES OF STATUTORY INTERPRETATION

Ultimately, the Seventh Circuit reached the right result; it barred the relator’s allegations. But in reaffirming its minority interpretation

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 739.

¹⁰⁹ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739 (7th Cir. 2007).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 736.

¹¹³ *Id.* at 738.

¹¹⁴ *Id.* at 739.

¹¹⁵ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739-43 (7th Cir. 2007).

of “based upon,” the Seventh Circuit overlooked important parts of the three principal methods of statutory interpretation: textualism, intentionalism, and purposivism.¹¹⁶ First, the court does not follow a textualist approach because its minority interpretation effectively deprives “based upon” of its ordinary meaning. Second, the court completely ignores the intentionalist approach because it fails to examine the FCA’s legislative history. If it had, the court would have seen that Congress enacted the FCA’s 1986 amendments in response to the Seventh Circuit’s strict textualist approach. Finally, the court’s interpretation undermines the purpose of the FCA to prevent parasitic suits. While its interpretation allows the most fraud-catching suits to be filed, the court ignores empirical evidence that most of these lawsuits are frivolous. Although there is merit on both sides of the circuit split, the Seventh Circuit’s failure to fully consider the tools each of these methods provides forces future *qui tam* defendants to defend suits on Rule 9(b) grounds that could be more efficiently resolved under the Public Disclosure Bar, as Congress likely intended.

A. Textualism: The Seventh Circuit Assumes Away the Difficulties of Finding a Plain Meaning of “Based Upon”

Above all, textualists follow the Plain Meaning Rule: “where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”¹¹⁷ To avoid absurd or impracticable consequences, a court cannot interpret words in an overly burdensome or stingy manner.¹¹⁸ Thus, textualists search for the “ordinary” meaning of a statute’s

¹¹⁶ See generally Eskeridge, *supra* note 19, at 219-45 (identifying these categories).

¹¹⁷ *United States v. Missouri Pac. Ry.*, 278 U.S. 269, 278 (1929).

¹¹⁸ *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (“Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”).

words. Usually, dictionaries reveal a word's ordinary meaning.¹¹⁹ But judges often disagree over the proper dictionary.¹²⁰ Besides dictionaries, courts will interpret even ordinary terms according to the Canons of Statutory Interpretation, which guide interpretation of statutes according important assumptions about how legislative action should work.¹²¹ However, textualists generally avoid consulting a statute's legislative history because only a statute's text has passed the constitutional strictures of bicameralism and presentment; as a result, textualists believe legislative history is too malleable for authoritative construction.¹²²

While purporting to follow the Plain Meaning Rule, the Seventh Circuit interpreted "based upon" so stingily it deprived the phrase of its ordinary meaning. The court's reliance on a dictionary definition elides over other relevant definitions of the term. Webster's Dictionary defines the phrase to mean "to find a base or basis for."¹²³ This definition does support the minority standard because it implies that the public disclosure serves as the only basis for a *qui tam* suit. But other dictionaries support the majority approach. For instance, the Oxford English Dictionary defines "based upon" to mean "to place *on* or *upon* a foundation or logical basis."¹²⁴ In turn, the Oxford Dictionary defines "foundation" to mean "[a] basis or groundwork on which something (immaterial) is raised or by which it is supported or confirmed."¹²⁵ This supports the minority interpretation of "supported by." If two dictionaries support each approach, then the Seventh Circuit's assertion that "based upon" has a unitary meaning simply begs the question. In any event, because "based upon" is a

¹¹⁹ See Eskeridge, *supra* note 19, at 259-61.

¹²⁰ See, e.g., Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

¹²¹ See Eskeridge, *supra* note 19, at 259-94 (describing role of canons in statutory interpretation); see also *id.* at 389-97 (collecting canons used by the Supreme Court).

¹²² See Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J. L. & PUB. POL'Y 983, 988 (2007).

¹²³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180 (1986).

¹²⁴ 1 OXFORD ENGLISH DICTIONARY 979 (1989) (emphasis added).

¹²⁵ 6 OXFORD ENGLISH DICTIONARY 120.

colloquialism derived from ordinary conversation, the utility of dictionaries is diminished. Unlike words with a defined meaning, colloquialisms are simply part of conversational English.¹²⁶ Justice Scalia criticizes the use of Webster's Third New International Dictionary because it includes too many colloquial terms.¹²⁷ Indeed, Congress should not have even used the unclear phrase "based upon." If Congress had consulted a style manual, it probably would have recommended Congress to use a different construction.¹²⁸ Thus, these sources suggest "based upon" is an innately ambiguous term.

Since it lacks a plain meaning, the Canons of Statutory Interpretation become most important. Yet the *Fowler* court improperly applied these Canons. In particular, the court disregarded the Whole Act Rule, which presumes that Congress uses terms consistently throughout a statute.¹²⁹ Indeed, "it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."¹³⁰ Relying on the Whole Act Rule, Judge Alito's *Mistick* opinion concluded that "based upon" should mean "supported by."¹³¹ Even though its assumption that Congress is an omniscient author is undercut by the mistakes in the FCA's drafting,¹³² the Whole Act Rule properly cautions against the minority interpretation because it smothers the Original Source Exception.¹³³

Furthermore, the Seventh Circuit ignored the presumption of statutory consistency, which further counsels against turning "based

¹²⁶ A colloquial phrase is a phrase "having to do with or like conversation," and is thereby more informal. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 288 (4th ed. 2000).

¹²⁷ See *MCI v. AT&T*, 512 U.S. 218, 228 n.3 (1994).

¹²⁸ See, e.g., THE CHICAGO MANUAL OF STYLE 202 (15th ed. 2003).

¹²⁹ Eskeridge, *supra* note 19, at 271.

¹³⁰ *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.).

¹³¹ *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999).

¹³² See *id.* at 387-88 (describing mistakes in drafting); Eskeridge, *supra* note 19, at 271 (discussing assumptions of Whole Act Rule).

¹³³ See *Mistick*, 186 F.3d at 387.

upon” into a technical requirement.¹³⁴ “Based upon” is used throughout the FCA. Specifically, it is used in another jurisdictional bar¹³⁵ and in a provision explaining the procedure for modifying or setting aside a civil investigative demand, three times in the FCA.¹³⁶ Moreover, perhaps owing to its colloquial nature, Congress constantly uses “based upon” in its legislation.¹³⁷ No similar circuit split yet exists over the meaning of “based upon” in other parts of the FCA.¹³⁸ By determining that “based upon” always means “actually derived from” if used in its ordinary sense risks calling much of the U.S. Code into question, and the presumption of statutory consistency cautions against exactly that result.

More troublingly, the Seventh Circuit appears to rely on the Canon of *expresio unius*, which states that if Congress includes one term, it implies the exclusion of all other terms.¹³⁹ In the words of the *Fowler* court, Congress’s choice of “based upon” rules out any other interpretation of the term.¹⁴⁰ Yet the primary justifications for this Canon lie in the criminal law context. Like the Rule of Lenity, “[t]his

¹³⁴ See Eskeridge, *supra* note 19, at 273-74.

¹³⁵ 31 U.S.C. § 3730(e)(3) (requiring that “[i]n no event may a person bring an action under subsection (b) which is *based upon* allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party) (emphasis added).

¹³⁶ 31 U.S.C. § 3733(j)(2)(B) (stating that a petition seeking relief “may be *based upon* any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person”) (emphasis added).

¹³⁷ A Westlaw Search conducted November 26, 2007, revealed 949 documents in the United States Code using “based upon” in their text.

¹³⁸ No published case discusses Section 3733(j)(e)(2). In interpreting Section 3730(e)(3), the circuits did not similarly split over the meaning of “based upon.” See, e.g., *Costner v. URS Consultants, Inc.*, 153 F.3d 667 (8th Cir. 1998); *United States ex rel. S. Praver v. Fleet Bank of Me.*, 24 F.3d 320, 328 (1st Cir. 1994) (holding that section 3730(e)(3) typically only bars a *qui tam* suit “based upon allegations or transactions pleaded by the government trying to recover fraud committed against it”).

¹³⁹ *Expresio unius* is shorthand for the Latin maxim “*expresio unius est exclusio alterius*.” BLACK’S LAW DICTIONARY (8th ed. Bryan A. Garner), at 620.

¹⁴⁰ See *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739 (7th Cir. 2007).

rule of thumb rests on the supposition that directives normally allow what they don't prohibit."¹⁴¹ But the *qui tam* provision is a unique grant of power to private citizens ordinarily reserved for Attorneys General. Accordingly, the Public Disclosure Bar is not a prohibition on certain conduct. Rather, it simply discusses a baseline rule. Just as commanding a child, "Don't hit, punch, or choke your sister" does not permit pinching or pushing, *expressio unius* should not compel the court to let relators bring any action so long as it is not a verbatim copy of a public disclosure.¹⁴²

Interestingly, no court uses the Canon of Constitutional Avoidance to justify a limitation on the FCA, even though that Canon suggests courts should narrowly interpret "based upon." The Canon counsels that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."¹⁴³ Indeed, there are doubts about the constitutionality of the FCA.¹⁴⁴ The FCA raises separation of powers issues because it arguably permits the judiciary to interfere with the government's ability to intervene in a suit.¹⁴⁵ More troublingly, the prosecutorial powers granted to a private citizen may violate the Appointments Clause of Article II.¹⁴⁶ Thus, interpreting "based upon" to increase the power of relators to participate in actions may at some point implicate one of these constitutional issues. Even though several courts have upheld the constitutionality of the FCA, a cautious court should consider the Canon of Constitutional Avoidance in interpreting the meaning of "based upon." Since "supported by" creates a better limit on the prosecutorial power granted to citizens

¹⁴¹ Eskeridge, *supra* note 19, at 263.

¹⁴² *See id.* 264.

¹⁴³ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See generally* Eskeridge, *supra* note 19, at 360-67.

¹⁴⁴ *See* Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 382 n.3 (2001) (collecting scholarship on the issue).

¹⁴⁵ *See, e.g.,* Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 867-68 (1997); James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 702 (1993).

¹⁴⁶ *See, e.g.,* Lovitt, *supra* note 145, at 867-68; Blanch, *supra* note 145, at 702.

than “actually derived from,” the Canon counsels against the Seventh Circuit’s approach.

In any event, the Seventh Circuit’s questionable use of *expressio unius* eviscerates the Public Disclosure Bar because it assumes that Congress only intended that provision to prohibit *qui tam* actions actually derived from a public disclosure. By so stingily applying the Plain Meaning Rule, the Seventh Circuit improperly followed the textualist approach. Rather, it merely concluded that the language itself clearly reflects “a careful policy balance” that Congress can easily change. The colloquial term “based upon” is not easily definable, and the text of the FCA does not show that Congress chose that term after careful deliberation. Even the Plain Meaning Rule recognizes that words may not be given their ordinary meaning if it would lead to absurd or impracticable consequences. Moreover, the court assumes away the difficulties of amending legislation.¹⁴⁷ Instead, the court should recognize that the Plain Meaning Rule is so difficult to apply here. As a result, the Court should have considered the legislative history of the FCA.

B. Intentionalism: The Seventh Circuit Ignored the FCA’s Legislative History and Thereby Derogated its Gap-Filling Role

Intentionalists seek to resolve statutory ambiguities in favor of the intent evident in its statute’s legislative history.¹⁴⁸ Courts consider applicable legislative history according to a hierarchy of reliability.¹⁴⁹ Like a poker game, whoever presents the highest-ranked legislative history on point typically prevails. Generally, a Congressional Committee Report is most authoritative document because it usually describes the need for a statute and the role of each provision in serving that need.¹⁵⁰ Next, courts consider congressional floor debates.¹⁵¹ These statements explain the need for specific provisions,

¹⁴⁷ See generally Eskeridge, *supra* note 19, at 70-80.

¹⁴⁸ See generally *id.* at 221-26.

¹⁴⁹ *Id.* at 310-22.

¹⁵⁰ See *id.* at 317.

¹⁵¹ See *id.*

but are less reliable because they only reflect the views of one legislator— not Congress as a whole.¹⁵² After reports and debates, any other legislative history is dramatically less reliable because it does not explain Congress’s rationale for enacting a statute and is more prone to political manipulation by a single legislator.¹⁵³

The FCA’s legislative history is as confusing as the term “based upon.” The Senate Report best supports the minority position. Led by Sen. Charles E. Grassley of Iowa, several Senators introduced the False Claims Reform Act to the Senate Judiciary Committee on August 1, 1985.¹⁵⁴ The Senate Bill proposed to bar actions:

[B]ased upon allegations or transactions which are the subject of a civil suits in which the Government is already a party or within six months of the disclosure of specific information relating to such allegations or transactions in a criminal civil or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.¹⁵⁵

The Senate Report’s explanation of this provision does not help define “based upon.”¹⁵⁶ But, indirectly, testimony cited in the Senate Report supports the minority’s position. Summarizing the views of several witnesses, the Senate Report emphasized that its legislation sought to break “the ‘conspiracy of silence’ that has allowed fraud against the Government to flourish.”¹⁵⁷ The Committee further stated that it sought to “rectify the unfortunate result” of the Seventh Circuit in *Dean*, which prevented a state from becoming a relator simply

¹⁵² *See id.*

¹⁵³ *See id.* at 312-18

¹⁵⁴ S. REP. NO. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

¹⁵⁵ False Claims Amendments Act, Pub. L. No. 99-562, § 6 (1986).

¹⁵⁶ *See* S. REP. NO. 99-345, at 30, *reprinted in* 1986 U.S.C.C.A.N. at 5294 (explaining that proposed § 3730(e)(4) would “disallows jurisdiction for *qui tam* actions based on allegations in a criminal civil or administrative hearing, a congressional or General Accounting Office report or hearing, or from the news media”).

¹⁵⁷ *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271.

because the U.S. Government learned of the fraud through information provided by the State of Wisconsin.¹⁵⁸

On the other hand, the House version proposed a Public Disclosure Bar that would have triggered under two circumstances. First, it would have barred actions “based on specific evidence or specific information which the Government disclosed as a basis for allegations” in a different proceeding.¹⁵⁹ Second, it would have barred actions “based on specific information disclosed during the course of a Congressional investigation or based on specific public information disseminated by any news media.”¹⁶⁰ However, the House version provided a safe harbor for relators if the Government had the publicly disclosed information for six months before the *qui tam* action was filed and the Government did not intervene.¹⁶¹ In addition, the House version put the “burden on the defendant to prove the facts warranting dismissal of a case under these circumstances”¹⁶²

The House Report could also support both positions. In its Report, the House Judiciary Committee reaffirmed the need for the 1943 Amendments in order to prevent frivolous lawsuits like the one the Supreme Court upheld in *Hess*.¹⁶³ However, the Committee was concerned about barring suits where the Government knew of the information that was the basis of the suit, but decided not to intervene.¹⁶⁴ Although the Committee does not cite the case, this resembles the *Dean* situation that the Senate Report explicitly mentioned. If so, this language supports the majority position. However, the House Report could arguably support the minority

¹⁵⁸ *Id.* at 13, reprinted in 1986 U.S.C.C.A.N. at 5278.

¹⁵⁹ Proposed 31 U.S.C. § 3730(b)(5)(A), as reproduced in H.R. REP. NO. 99-660 (1986), at 2-3, reprinted in U.S. Cong. Serial Set 13702, 99th Cong. 2d Session, January 21-October 18, 1986.

¹⁶⁰ Proposed 31 U.S.C. § 3730(b)(5)(B), as reproduced in H.R. REP. NO. 99-660, at 3.

¹⁶¹ Proposed 31 U.S.C. § 3730(b)(5)(B)(ii), as reproduced in H.R. REP. NO. 99-660, at 3.

¹⁶² H.R. REP. NO. 99-660, at 30.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 22.

position, since it described these provisions as barring actions based “solely” on publicly available information.¹⁶⁵

Since the “based upon” language and the Original Source Exception appeared for the first time in the enacted statute, no sponsor could even discuss the bar in floor debate.¹⁶⁶ And those few statements related to the jurisdictional bars preserved in the Congressional Record are often incorrect.¹⁶⁷ Despite its reduced reliability, the legislative history considered as a whole suggests that the enacted statute was a compromise. The Senate was particularly concerned with permitting states to use publicly available information that they originally found, trying to overrule *Dean*.¹⁶⁸ But both the Senate and House Committees were concerned about permitting too many frivolous lawsuits like the famous *Hess* example.¹⁶⁹

Presuming that Congress sought to remedy the mischief caused by the Seventh Circuit’s interpretation in *Dean*, it seems most probable that the enacted bill included the “original source” exception to apply to a situation where a State was the original source of fraud allegations that it publicly disclosed to the government during a fraud investigation. Admittedly, the legislative history does also support the minority approach. Indeed, the House Report mentions that the jurisdictional bar would apply to those actions based *solely* on a public disclosure, but also sought to encourage the largest number of fraud catching suits.¹⁷⁰ The Senate Report similarly wanted to encourage the largest number of fraud-catching *qui tam* suits.¹⁷¹ Yet, the Seventh Circuit did not address this legislative history at all in *Fowler*. While

¹⁶⁵ H.R. REP. NO. 99-660 (1986), at 22-33, *reprinted in* U.S. Cong. Serial Set 13702, 99th Cong. 2d Session, January 21-October 18, 1986.

¹⁶⁶ *See* Boese, *supra* note 20, at 4-44.

¹⁶⁷ For instance, Representative Berman explained that the original source must have made information available “to the government or the news media in advance of the false claims being publicly disclosed.” 132 Cong. Rec. 29,322 (Oct. 7, 1986). The statutory language does not support his apparent intent for the jurisdictional bar.

¹⁶⁸ S. REP. NO. 99-345, at 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78.

¹⁶⁹ *See* S. REP. NO. 99-345, at 10-11; 1986 U.S.C.C.A.N. at 5278.

¹⁷⁰ H.R. REP. NO. 99-660, at 23.

¹⁷¹ S. REP. NO. 99-345, at 13-14; 1986 U.S.C.C.A.N. at 5277-78.

the Seventh Circuit has previously noted the FCA's legislative history in passing,¹⁷² the court has never examined it in detail. The *Fowler* court only avoided discussing legislative history because it incorrectly concluded that "based upon" has a "plain language interpretation."¹⁷³ But "based upon" does not seem to have only one meaning, particularly because the vast majority of circuits have reached a different interpretation of the term. In addition, the Seventh Circuit did not seriously consider the notion that its overly strict textualist approach in *Dean* may have caused Congress to amend the FCA in the first place, as the legislative history suggests.

Moreover, by failing to consider legislative intent, the Seventh Circuit derogated its responsibility to fill gaps in the application laws, particularly when the legislative history suggests Congress intended that result. For instance, in *Green v. Bock Laundry Machine Co.*,¹⁷⁴ the Supreme Court held that Federal Rule of Evidence 609(a)(1) requires a judge to allow impeachment of a civil witness with evidence of prior felony convictions.¹⁷⁵ Even though the plain meaning of the rule suggested that a judge would weigh the prejudice to the defendant as in a criminal trial,¹⁷⁶ the Court consulted legislative history that proved that Congress's textual limitation of the prejudice balance to criminal defendants "resulted from deliberation, not oversight."¹⁷⁷ Even staunch textualist Justice Scalia concurred in the judgment, and although he did not consider legislative history, he recognized that the literal interpretation of the rule "produces an absurd, and perhaps unconstitutional result."¹⁷⁸

Similarly, the Seventh Circuit should recognize that Congress deliberated the FCA and intended it to continue the protections against frivolous suits as in *Hess* while permitting suits investigated by a

¹⁷² *United States v. Bank of Farmington*, 166 F.3d 853, 857-88 (7th Cir. 1999)

¹⁷³ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 738 (7th Cir. 2007).

¹⁷⁴ 490 U.S. 504 (1989).

¹⁷⁵ *Id.* at 527.

¹⁷⁶ *Id.* at 509.

¹⁷⁷ *Id.* at 523.

¹⁷⁸ *Id.* (Scalia, J., concurring).

relator as in *Dean*. In addition, courts have already filled gaps in the interpretation of the FCA. For example, even though it mirrors common law fraud pleading requirements, the FCA does not require that a “material” false or fraudulent claim in order to impose liability.¹⁷⁹ However, several circuits infer a materiality requirement from common law fraud.¹⁸⁰

Besides following common law fraud requirements, such gap filling is warranted because of the difficulty of amending legislation. For over 20 years, members of Congress and lobbyists have pushed to amend the FCA.¹⁸¹ Indeed, Sen. Grassley recently submitted a bill to amend the FCA in light of *Rockwell* which would, in part, bar claims “based on a public disclosure only if the person bringing the action derived his knowledge of all essential elements of liability of the action or claim alleged in his complaint from the public disclosure.”¹⁸² While Sen. Grassley evidently supports the minority interpretation of the FCA, the Seventh Circuit should not dare Congress to enact legislation to retroactively deal with the cases before it.

Arguably, the Seventh Circuit’s strict textualist approach might encourage Congress to draft clearer statutes. But, until Sen. Grassley’s bill becomes law, the Senate and House Reports are the most authoritative statement of the entire Congress’s intent in enacting these amendments that is available. Since those documents suggest Congress intended to narrowly abrogate the FCA’s protections against parasitic lawsuits in light of *Dean*, the Seventh Circuit erred by not analyzing this legislative history to interpret an ambiguous statute.

C. Purposivism: The Seventh Circuit’s Interpretation Undermines the FCA’s Purpose to Prevent Parasitic Qui Tam Suits

Furthermore, the Seventh Circuit correctly noted the purposes of the FCA, but failed to properly analyze how its interpretation affects those purposes. As the Supreme Court has long recognized, “a thing

¹⁷⁹ See Pacini & Hood, *supra* note 1, at 293.

¹⁸⁰ See *id.* at 293-95.

¹⁸¹ Boese, *supra* note 20, at 1-34.2 (describing efforts to amend the FCA).

¹⁸² S. 2041, 110th Cong. (2007).

may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”¹⁸³ Unlike textualists, purposivists generally interpret a statute to further the policy reasons for its enactment.¹⁸⁴ Of course, Congress enacts statutes for several, often competing purposes. Nevertheless, by interpreting a statute in light of its general purpose, purposivism achieves democratic legitimacy and allows courts to adapt static language to new and unforeseen circumstances.¹⁸⁵

In interpreting the FCA, all circuits—even the textualist Fourth and Seventh Circuits—have justified interpretations of “based upon” in terms of the FCA’s purpose.¹⁸⁶ The Seventh Circuit correctly recognized the two competing purposes of the FCA’s jurisdictional bar. On the one hand, Congress sought to loosen the restriction in order to encourage whistle blowing.¹⁸⁷ On the other hand, Congress sought to deter “parasitic” lawsuits like the FCA’s 1943 amendments sought to avoid after *Hess*.¹⁸⁸ Basically, the “based upon” circuit split concerns the appropriate balance between these two, competing goals. In the Seventh Circuit’s view, Congress’s choice of the phrase “based upon” reflects a careful “balance” between these two phrases.¹⁸⁹

While thoughtful, the Seventh Circuit’s reasoning is misguided because the court does not consider the best source of Congress’ purpose: the FCA’s legislative history. That history shows that Congress’ primary purpose was to let one party (particularly a state) investigate a fraud, then publicly disclose its information to the federal

¹⁸³ *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

¹⁸⁴ *See generally* Eskeridge, *supra* note 19, at 228-30.

¹⁸⁵ *See id.* at 229.

¹⁸⁶ *Compare* *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1354-55 (4th Cir. 1994) *with* *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (circuit cases on both sides of split supporting their conclusions with discussion of statutory purpose).

¹⁸⁷ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739 (7th Cir. 2007).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

government.¹⁹⁰ In that situation, the relator is likely the “original source” of the allegations. Even though Congress was concerned about permitting valid *qui tam* suits, the Seventh Circuit’s narrow interpretation of “based upon” overextends to include too many *qui tam* suits. Undoubtedly, some of these suits are frivolous.

The Seventh Circuit recognized this, but readopted its standard because it believes that the majority standard would “eliminat[e] otherwise valid claims that Congress currently allows to go forth.”¹⁹¹ Yet empirical evidence suggests its premise is mistaken. Between 1986 and 2004, the Attorney General declined to intervene in 78% of all cases that where investigation was completed.¹⁹² Presuming that the Attorney General generally does not intervene in non-meritorious suits, one author has concluded that this data suggests that the majority of these cases were probably parasitic.¹⁹³ If so, the FCA should restrict more *qui tam* suits in order to accomplish the purpose of preventing parasitic suits. Interpreting “based upon” to bar suits supported by publicly disclosed information would accomplish this goal.

V. WHY “BASED UPON” SHOULD MEAN “SUPPORTED BY.”

Perhaps the Seventh Circuit’s approach does reflect the plain language of the term “based upon;” it may even accord with Congress’s intent and purpose in enacting the Public Disclosure Bar. But troublingly, the Seventh Circuit’s method of statutory interpretation does not use all available tools of each method of statutory interpretation. The court ignores some Canons of Statutory Interpretation entirely.¹⁹⁴ The court disregards the FCA’s legislative

¹⁹⁰ See S. REP. NO. 99-345 (1986), at 13, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278; H.R. REP. NO. 99-660 (1986), at 22-33, *as reproduced in* U.S. Cong. Serial Set 13702, 99th Cong. 2d Session, January 21-October 18, 1986.

¹⁹¹ *Fowler*, 496 F.3d at 739.

¹⁹² Civil Div., U.S. Dep’t of Justice, *Fraud Statistics-Overview* (Mar. 4, 2005), at www.taf.org/fcastatistics2006.pdf.

¹⁹³ Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 971 (2007).

¹⁹⁴ See *supra* notes 129-37; 143-46 and accompanying text.

history, and in so doing, asserts a purpose that may not have been Congress's purpose in amending the FCA.¹⁹⁵

These additional tools of statutory interpretation suggest that "based upon" should mean "supported by." Under a textualist Plain Meaning Rule approach, "supported by" more comfortably fits in the statute. Given that "based upon" is a colloquial term, Congress probably did not intend it to create a technical, dictionary-based requirement. Instead, as the Tenth Circuit recognized, the ordinary usage suggests "based upon" would serve as a "quick trigger," barring suits partially supported by public disclosure.¹⁹⁶ This interpretation accords with the legislative history, which expressed particular concern at allowing a suit like *Dean* while keeping the 1943 Amendment's prohibition on parasitic suits. In addition, because empirical evidence suggests that many *qui tam* suits are frivolous, interpreting "based upon" to mean "supported by" would further the FCA's purpose to eliminate parasitic suits.¹⁹⁷

Despite these benefits, the majority standard does have costs. First, it makes pleading more difficult for relators. This arguably will stymie the FCA's purpose to eliminate the "conspiracy of silence" that prevents fraud from coming to light. In addition, there are other vehicles to protect against parasitic suits. Keep in mind that Caremark ultimately won because the relators did not satisfy Rule 9(b) pleading requirements.¹⁹⁸ Nevertheless, the Seventh Circuit and the Supreme Court should adopt the majority standard because its benefits outweigh these costs. First, Rule 9(b) is an insufficient guard against parasitic suits. Indeed, in *Hess* Mr. Marcus probably would have pleaded fraud with particularity when he copied the criminal indictment into his *qui tam* complaint. Thus, the Public Disclosure Bar should provide an additional safeguard against parasitic suits.

¹⁹⁵ See *supra* notes 148-93 and accompanying text.

¹⁹⁶ *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

¹⁹⁷ See Broderick, *supra* note 193, at 971.

¹⁹⁸ *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 739-43 (7th Cir. 2007)

But what exactly is a “parasitic” suit? To clarify this issue, the Seventh Circuit could adopt the First Circuit’s definition of “parasitic” as meaning that a *qui tam* case receives support from the government without giving any useful or proper return to the government.¹⁹⁹ By this standard, the case in *Fowler* was probably parasitic because it was probably partially derived from the U.S. Attorney’s extensive discovery. Since the U.S. Attorney did not decide to proceed after that fraud, it seems that although the *qui tam* suit may have brought a fraud allegation to light, the U.S. government did not find enough evidence of fraud to pursue it.²⁰⁰ Therefore, in combination with the quick trigger interpretation of “based upon,” a more specific definition of “parasitic” would properly prevent truly parasitic *qui tam* suits.

Even though this interpretation makes *qui tam* pleading more difficult for relators, it may further the purposes of the FCA because it might encourage better pleading in *qui tam* suits. In *Rockwell*, the Supreme Court already made pleading more difficult for a relator by forcing her to show that she is the original source of every allegation in the complaint.²⁰¹ By additionally requiring that relators show that each allegation is not supported by a public disclosure, courts would encourage better pleading by relators. In so doing, courts would discourage situations like *Fowler*, where the relators went through three dismissed complaints.²⁰²

Most importantly, the Seventh Circuit should realize that its strict textualist approach in *Dean* helped cause Congress to amend the FCA in 1986.²⁰³ Given the Senate Report’s evident concerns with the *Dean* decision,²⁰⁴ Congress seems to have intended a narrower interpretation

¹⁹⁹ United States *ex rel.* S. Praver v. Fleet Bank of Maine, 24 F.3d 320, 327-28 (1st Cir. 1994).

²⁰⁰ See *Fowler*, 496 F.3d at 735.

²⁰¹ See Aaron P. Silberman & David F. Innis, *The Supreme Court Raids the Public Disclosure Bar: Cleaning Up After Rockwell International v. United States*, 42 PROCUREMENT LAW 1, 20 (Summer 2007).

²⁰² See, e.g., *Fowler*, 496 F.3d at 735.

²⁰³ See *id.* at 738; United States *ex rel.* State of Wisconsin v. Dean, 729 F.2d 1100, 1106-07 (7th Cir. 1984).

²⁰⁴ S. REP. NO. 99-345, at 13 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5278.

of the Public Disclosure Bar and Original Source Exception, limited only to let relators investigate and share fraud allegations.²⁰⁵ Even so, Congress did not intend its amendments to return to the days of *Hess*-type parasitic *qui tam* suits.²⁰⁶ Yet the Seventh Circuit's current method of statutory interpretation suggests that Congress must pinpoint exactly what suits to allow and to prohibit when it legislates.²⁰⁷ Although this might encourage Congress to draft statutes more precisely, it derogates the Court's historic gap-filling role for unclear statutes.²⁰⁸ Moreover, as then-Judge Alito recognized in his *Mistick* opinion, a strict textualist interpretation renders superfluous the original source exception, thereby smothering its protection against parasitic suits.²⁰⁹

CONCLUSION

In its efforts to clarify the FCA, Congress unfortunately chose the phrase "based upon" for its Public Disclosure Bar. Yet that poor word choice should not defeat the ordinary meaning of the phrase. Moreover, that choice should not defeat Congress's intent and purpose in enacting the FCA. As the Supreme Court recently recognized in *Rockwell*, the FCA's Public Disclosure Bar is anything but clear. In addition, Justice Alito—the author of *Mistick*—now sits on the Supreme Court. Since his opinion went beyond the difficult text of the FCA to consider legislative history, purpose, and common sense, his approach should be persuasive when the Court inevitably resolves this circuit split. In any event, the Fourth and Seventh Circuits should re-evaluate their minority standard in terms of the three methods of statutory interpretation, and realize their errors in reasoning. Until they

²⁰⁵ See *id.*; H.R. REP. NO. 99-660 (1986), at 22-33, as reproduced in U.S. Cong. Serial Set 13702, 99th Cong. 2d Session, January 21-October 18, 1986.

²⁰⁶ See S. REP. NO. 99-345, at 13, reprinted in 1986 U.S.C.C.A.N. at 5278; H.R. REP. NO. 99-660, at 30.

²⁰⁷ See *United States ex rel. Fowler v. Caremark Rx, LLC*, 496 F.3d 730, 738 (7th Cir. 2007); *Dean*, 729 F.2d at 1106-07.

²⁰⁸ Cf. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 523-27 (1989).

²⁰⁹ See *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999).

do, *qui tam* litigants will have to wait for the Supreme Court or Congress to clarify this confusing provision of the FCA.