

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   ROCKWELL INTERNATIONAL CORP.,           :

4   ET AL.,                                   :

5                   Petitioners                   :

6           v.                                   :   No. 05-1272

7   UNITED STATES, ET AL.                   :

8   - - - - - x

9                                   Washington, D.C.

10                           Tuesday, December 5, 2006

11

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 11:09 a.m.

15 APPEARANCES:

16 MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on  
17 behalf of Petitioners.

18 MARIA T. VULLO, ESQ., New York, N.Y.; on behalf of  
19 Respondent Stone

20 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
21 General, Department of Justice, Washington, D.C.;  
22 on behalf of Respondent United States

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in 05-1272, Rockwell International  
5 Corporation versus United States.

6 Ms. Mahoney.

7 ORAL ARGUMENT OF MAUREEN E. MAHONEY

8 ON BEHALF OF PETITIONERS

9 MS. MAHONEY: Mr. Chief Justice, and may it  
10 please the Court:

11 The Tenth Circuit in this case correctly  
12 held that Stone could not share in the award given by  
13 the jury unless he was an original source of pondcrete  
14 allegations. But it then went on to find that he was an  
15 original source based upon a misinterpretation of the  
16 core requirements of the statutory definition.

17 JUSTICE SCALIA: Ms. Mahoney, let me ask you  
18 a question. Am I wrong about this? It seems to me that  
19 if he was not an original source, not only shouldn't he  
20 get any money, but neither should the government. Isn't  
21 that the way the statute reads?

22 MS. MAHONEY: Your Honor, that is one  
23 possible interpretation of the statute.

24 JUSTICE SCALIA: How is there any other  
25 possible one? It says there's no jurisdiction in this

1 situation.

2 MS. MAHONEY: I think the way that the  
3 courts have handled it below is that it says that  
4 there's no jurisdiction unless it is a claim brought by  
5 a relator who is an original source or if it's brought  
6 by the United States. And if the relator drops out, I  
7 think courts deem it to at that point be viewed as a  
8 claim brought by the United States. It's sort of a  
9 retroactive amendment of the pleadings.

10 JUSTICE SCALIA: It's not brought by the  
11 United States as long as he's still there.

12 MS. MAHONEY: That's correct.

13 JUSTICE SCALIA: That's your argument.

14 MS. MAHONEY: Well, it can't be, Your Honor,  
15 because under the statutory terms, under section 3720(a)  
16 the Attorney General has the authority to bring a claim  
17 on behalf of the United States. There is no authority  
18 for the United States to bring a claim on behalf of the  
19 relator. Instead there is a second type of claim under  
20 section 3730, and that's a section (b), which authorizes  
21 a relator to bring a claim on behalf of himself and the  
22 United States.

23 Similarly, Your Honor, if you look at the  
24 provisions in section (d), which authorize an award to a  
25 relator, it requires that the action be one brought

1 under section (b), that is in other words it be an  
2 action brought by the relator which the United States  
3 then proceeds on for (d)(1).

4 JUSTICE SCALIA: I guess it really depends  
5 on whether you think the language "if the Government  
6 proceeds with an action" is equivalent to the  
7 Government's bringing the action.

8 MS. MAHONEY: Well, I don't think it can be,  
9 Your Honor, because if you look at the language  
10 throughout these sections, it differentiates between two  
11 kinds of actions, actions brought by the United States  
12 or the Attorney General and actions brought by the  
13 relator. And it is only an action brought by the  
14 relator under section (b) that authorizes an award under  
15 section (d). And it consistently talks about that.

16 What they're really arguing, Your Honor, is  
17 that --

18 JUSTICE SCALIA: Well, wait. It says under  
19 3, what is it, (c)(3) I guess, if the elects not to  
20 proceed with the action, the person who initiated the  
21 action shall have the right to conduct the action. Now,  
22 that suggests that if the Government intervenes the  
23 Government is proceeding with the action, right?

24 MS. MAHONEY: That's correct.

25 JUSTICE SCALIA: But you say that's

1 different from the Government bringing the action.

2 MS. MAHONEY: Absolutely. If you look at,  
3 if you look at the language in section (d), for  
4 instance, it says if the government proceeds with an  
5 action brought by a person under section, subsection  
6 (b). In other words, it has to be an action under  
7 subsection (b) in order to authorize an award at all.  
8 The Government has -- has authority under subsection (a)  
9 to bring an action, but it has no authority to bring it  
10 on behalf of the relator.

11 The statute consistently uses these same  
12 terms, and this Court in Graham County, which was a  
13 decision dealing with the statute of limitations,  
14 actually described this section in the same way, saying  
15 that there are two kinds of actions, those that are  
16 brought by the Attorney General under subsection (a) and  
17 those that are brought by a relator under subsection  
18 (b), which the United States can then proceed with.

19 What the relator is really arguing here is  
20 that if you look at the -- at subsection (e)(4), they're  
21 adding a phrase that's not there. They're saying that  
22 there's no jurisdiction over an action under this  
23 section if it is brought by the Attorney General or  
24 brought by a relator who is an original source or the  
25 United States intervenes and proceeds with the action.

1 And that's not in here.

2 JUSTICE SCALIA: You're being very  
3 picky-picky with this text, considering that you're  
4 willing to swallow whole the notion that so long as  
5 the -- so long as the original party, so long as the  
6 non-government plaintiff drops out, all of a sudden it  
7 become as action brought by the United States. That's a  
8 very, very expansive notion of what "brought by the  
9 United States" means.

10 What I'm saying is or, to put it another  
11 way, if you take your picky-picky notion of being  
12 brought by the United States, to be logical about it you  
13 must reach the conclusion that if you defeat the private  
14 plaintiff under -- under he's not original source, the  
15 whole thing is thrown out, not just his recovery but the  
16 Government's recovery.

17 MS. MAHONEY: Your Honor, of course that  
18 would be great for Rockwell, and so --

19 JUSTICE SCALIA: I know, but it would be so  
20 extreme that we're not likely to buy it.

21 MS. MAHONEY: Well, we don't argue for that  
22 because I think that the Court has said that the  
23 Government's intervention does not cure defects with  
24 respect to the relator, and therefore, if the relator  
25 didn't have -- that -- doesn't have standing -- you

1 know, part of this goes to the issue of the Stevens  
2 assignment. If they don't have an assignment, then they  
3 don't even have standing to be in the action, they have  
4 no right to recover.

5 And so if you're correct that it can't be  
6 cured, in effect, through a procedure like, say, 28  
7 U.S.C. section 1553, which allows amendments to  
8 defective jurisdictional allegations where I think that,  
9 while the courts don't technically require it, they  
10 could say that really this, while it was pled as a  
11 section (b) action, when the relator drops out we could  
12 treat it as a section (a) action, because --

13 JUSTICE GINSBURG: Otherwise, the Attorney  
14 General could just bring it all over again, a fresh  
15 complaint, and that would be wasted motion?

16 MS. MAHONEY: That's correct, Your Honor. I  
17 think it is a pragmatic rule. But again, if the rule is  
18 that they lose as well, then so be it. The fact is this  
19 statute uses the term that is used in section (a), which  
20 is "brought by the United States." And it makes perfect  
21 sense because otherwise think of what the consequences  
22 are if the relator can simply copy an indictment, file a  
23 complaint, and say -- and the Government intervenes  
24 because it's a major action, and then they say, aha,  
25 you're stuck with me because you've intervened and now



1   there's jurisdiction and there's no problem, I don't  
2   have to be an original source.

3               JUSTICE SCALIA:  They don't have to give  
4   them any money, though.  The court doesn't have to.

5               MS. MAHONEY:  Your Honor, I think that you  
6   could say that they don't have to give them money.

7               JUSTICE SCALIA:  But you'd then have to pay  
8   his attorneys' fees.  That's what really this is about,  
9   isn't it?

10              MS. MAHONEY:  Well, it is about that, but we  
11   don't have to pay his attorneys' fees, Your Honor, if he  
12   doesn't get a share, because the way that section (d) is  
13   written is it says that a relator who is paid a share of  
14   the proceeds shall also be entitled to attorneys' fees.  
15   So this is not just an issue between the United States  
16   and Stone.  The statute controls the award of fees based  
17   upon whether he's entitled to a share.  So even if this  
18   weren't an issue of jurisdiction, if he's not entitled  
19   to a share under a section (d)(1), then he's also not  
20   entitled to attorneys' fees.  And therefore, we would  
21   win.  He would still need to -- whether it's a  
22   jurisdictional rule or a substantive rule, if he's not  
23   an original source he's out.

24              But the share is not the only issue that  
25   makes the Government's -- or that makes Stone's argument

1 implausible here. That is that once the relator is in  
2 the action, the United States can't get them out of the  
3 action. Even if they don't have to pay them money,  
4 under subsection (c) they have a whole range of rights  
5 to participate in the action. They can't dismiss the  
6 relator. So it makes no sense to read this statute to  
7 say that someone who copies an indictment, files a  
8 complaint, the Government intervenes, they're in there  
9 forever. It instead makes much more sense to read the  
10 terms the way they're used elsewhere in the statute, to  
11 mean that there is only jurisdiction if it is a section  
12 (a) claim brought by the United States on behalf of  
13 itself or if it is a section b) claim by a relator that  
14 is an original source. That's what makes sense of the  
15 statute as a whole.

16           If I could turn to the issue of whether or  
17 not the Tenth Circuit correctly held that Stone had  
18 direct and independent knowledge of the information on  
19 which his allegations were based. It bears emphasis  
20 that every act that he had to prove in order to recover  
21 on the pondcrete allegations -- whether they're measured  
22 at the beginning of the case or the end of the case  
23 doesn't matter -- every single act occurred after he  
24 left the plaintiff, after he had left his job. And we  
25 can see that from the outset of the case. If you look

1 at his Responses to Interrogatories at JA-189 to 190, he  
2 identifies the factual basis for the pondcrete  
3 allegations that he is asserting. And that factual  
4 basis is described he is asserting and that factual  
5 basis is described as Rockwell's knowing storage of  
6 pondcrete on outdoor pads at the plant in violation of  
7 RCRA with false certification from 1987 to 1989.

8 Now, he left his job in March of 1986. How  
9 could he possibly have direct and independent knowledge  
10 of those predicate acts?

11 JUSTICE KENNEDY: Well, suppose a company  
12 has a plan to defraud the Government and it use a  
13 certain chemical mix to save money and that's what the  
14 real fraud is. And it puts it in place and it puts it  
15 in place in 1988. And the -- and it has just two  
16 containers full of this. And the relator knows about  
17 it. The relator then quits. Then for 10 years the  
18 company does the same thing, following the same  
19 patterns, same method, same improper formula.

20 And he then rings -- he then brings this to  
21 the attention of the Government in the proper way and  
22 files a suit. He cannot recover for the later action  
23 which was the same pattern, practice?

24 MS. MAHONEY: Perhaps, Your Honor, in  
25 certain circumstances. I think the key question is

1 what's the standard, and he has to have substantial  
2 knowledge about core fraudulent acts. And it may be  
3 reasonable in your hypothetical or some others to infer  
4 that he knew plenty about this fraudulent conduct and  
5 had plenty of reason to conclude that it was continuing  
6 on.

7 But here, Your Honor, nothing of the kind  
8 happened. He didn't know about any fraudulent conduct  
9 pertaining to pondcrete before he left. And In fact,  
10 his allegations start in 1987. He does not say that  
11 there were pondcrete violations before then and indeed  
12 there were not.

13 The reason there weren't is because when he  
14 was at the plant Rockwell was producing hard pondcrete,  
15 hard pondcrete, and it wasn't storing it on site, it was  
16 shipping it to Nevada. So he couldn't -- and it wasn't  
17 even clear that it was subject to RCRA because DOE  
18 didn't enter into a RCRA compliance agreement until  
19 after he left.

20 He also concedes in his deposition that he  
21 was not, except with one exception -- he was not aware  
22 of any time when Rockwell affirmatively represented that  
23 it was in compliance with environmental safety and  
24 health provisions when it was not. That's JA-106. So  
25 he didn't -- unlike your hypothetical, he didn't know

1 anything about there being a pondcrete fraud prior to  
2 the time of his departure and doesn't even allege one.  
3 Instead, what the Tenth Circuit rested upon was the fact  
4 that he had reviewed a design for making pondcrete 5  
5 years -- in fact, not for making pondcrete; it was  
6 actually a design for removing sludge from the ponds --  
7 5 years before any of the events at issue here, and he  
8 said he predicted there would be a design problem.

9 CHIEF JUSTICE ROBERTS: It wouldn't have to  
10 have anything to do with pondcrete at all. The statute  
11 just says the information on which his allegations are  
12 based. They don't say the allegations that eventually  
13 give rise to a recovery.

14 MS. MAHONEY: Your Honor, every court that  
15 has considered that question has said that it has to be  
16 analyzed on what they call a claim by claim basis. Let  
17 me explain the reason. First of all, let me explain  
18 what they mean by claim by claim. They really mean a  
19 factual theory of falsity, and that it has to be done on  
20 a claim by claim basis, and here's why --

21 JUSTICE SCALIA: Factual theory of falsity,  
22 that doesn't mean anything to me.

23 MS. MAHONEY: A theory of falsity. In other  
24 words, a claim, what is called a claim in these cases in  
25 the claim by claim analysis is a theory of falsity. In

1 other words, it's why were -- why was the fraudulent  
2 claim false? Because there may be a certification, for  
3 instance, of compliance with let's say all laws and  
4 there could be five different, completely different fact  
5 patterns as to why that was false, and the damages might  
6 be completely differ as well.

7 So all of the courts have said that's really  
8 the way that FCA cases are litigated, that's really what  
9 we call a claim.

10 And then, moving back, if you didn't do it  
11 on a claim by claim basis, you would allow a relator to  
12 copy an indictment that he knows nothing about, come to  
13 court, file it, add one theory that he does know about,  
14 an overcharge for five dollars on a hammer, say that,  
15 I'm now entitled to proceed on the whole thing and if  
16 the Government doesn't intervene I get a minimum of 25  
17 percent of the --

18 CHIEF JUSTICE ROBERTS: That's one way to  
19 look at it. Another way would be you would allow a  
20 relator in a situation who alleges a particular fraud  
21 that causes the government to examine the books and  
22 uncovers a different fraud to recover on that basis.  
23 It's an unusual situation to have a jurisdictional  
24 prerequisite determined only after the case is over.

25 MS. MAHONEY: But, Your Honor, it doesn't

1 have to be determined after the case is over. These  
2 inquiries should -- it should have been determined here  
3 as well at the very outset of the case. And it was. It  
4 was just determined wrong.

5 We do not have to show that it was wrong at  
6 the end of the trial in order to prevail in this case.  
7 It was wrong at the beginning. The interrogatories --

8 CHIEF JUSTICE ROBERTS: If you only show  
9 that it's wrong at the end, you still say that they  
10 should be thrown out.

11 MS. MAHONEY: Yes, we do, Your Honor but it  
12 is not by any means necessary to the outcome in this  
13 case. And the reason why I think that you do have to at  
14 least allow for the possibility of looking at the end of  
15 the case, whether there is jurisdiction or not, is  
16 because of the nature of this particular jurisdictional  
17 bar. This is a jurisdictional bar that turns on the  
18 nature of the allegations at issue in the case.

19 Much like -- I think the Foreign Sovereign  
20 Immunities Act is a perfect example because it too talks  
21 about jurisdiction being predicated on, for instance,  
22 commercial -- claims that are based upon commercial  
23 activity. Suppose that the plaintiff at the outset of  
24 the case when the 12(b)(1) motion is filed posits one  
25 theory of the case that involves a predicate commercial

1 act. But when it gets to trial he's abandoned that  
2 theory and now he doesn't have any commercial act.  
3 Surely the Court would say you have to satisfy  
4 jurisdiction over the theory that has actually gone to  
5 trial.

6 This statute is very much the same. And it  
7 should not be read in a way that allows relators to  
8 simply disguise the true basis of their claims, hide the  
9 relevance of the public information, and then just shift  
10 gears when you get to trial.

11 But here again, if we just look at the very  
12 beginning of the case, he does identify in those  
13 interrogatory responses, for instance, what the factual  
14 basis for the pondcrete allegations are. All that  
15 factual basis is all identified as -- as core acts that  
16 occurred after he left the plant. So we can look back  
17 in this case and say that the trial court erred at the  
18 outset by not dismissing this portion of his claim as  
19 well as, in fact, should have dismissed the whole thing,  
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Well, his allegation  
22 was that this, the design is not going to work.

23 MS. MAHONEY: But Your Honor --

24 CHIEF JUSTICE ROBERTS: That's not an  
25 allegation that's -- I mean, it is either true or it's



1 not true. The fact that you find out after he's left,  
2 after he's been terminated, that it doesn't work, I  
3 don't see how that should affect the validity of his  
4 allegations.

5 MS. MAHONEY: Because, Your Honor, this,  
6 this is a statute about fraud. It's not a statute  
7 that's violated because Rockwell may have had a  
8 suboptimal pipe. That's not, that's not even the RCRA  
9 violation. That's not -- and it is certainly not a  
10 False Claims Act violation. They weren't selling  
11 pondcrete to the United States. He didn't know about a  
12 plan to defraud the United States.

13 CHIEF JUSTICE ROBERTS: They were certifying  
14 their compliance with the applicable laws --

15 MS. MAHONEY: At that, at the time --

16 CHIEF JUSTICE ROBERTS: -- based upon their  
17 pondcrete design.

18 MS. MAHONEY: At the time that he was there  
19 that was not actually -- he didn't even allege that he  
20 knew they were doing that with respect to pondcrete. He  
21 didn't allege that there were any problems with respect  
22 to the pondcrete production or, or certifications during  
23 his tenure. From -- they began producing pondcrete in  
24 1985, Your Honor. And there were no problems that were  
25 alleged with respect to that pondcrete.

1           His claim by his own admission starts in  
2   1987, after he was gone. And again, the mere fact that  
3   there may have been a defective pipe wouldn't establish  
4   the RCRA violation, because what they had to show by  
5   their owning pleading here was that they were storing it  
6   on site, that it was actually leaking, and, of course,  
7   the mere fact there may have been a problem with the  
8   pipe doesn't mean it is actually going to leak, because  
9   they can fix it in a variety of ways. They can add more  
10  cement, they can put it in metal containers, they can do  
11  a myriad of things.

12           He didn't even say he knew know that there  
13  was a plan to not remedy and problems in the design that  
14  he had identified if and when there became a problem  
15  with it.

16           JUSTICE SCALIA: Am, am I correct that they  
17  were, in fact, using that same pipe or that same pipe  
18  system during a period when perfectly fine cement blocks  
19  were being produced?

20           MS. MAHONEY: We think that's correct, Your  
21  Honor.

22           JUSTICE SCALIA: Is that true, is that  
23  conceded?

24           MS. MAHONEY: Well, I think that it's  
25  conceded that -- well, their own counsels told the jury

1     that they were making it wrong, they weren't adding  
2     enough cement, that that was the reason that it was  
3     failing; and the Government told the jury that they were  
4     making it fine until they reduced the ratio of cement.  
5     So yes, I think it is correct that it has been conceded  
6     at trial that the system was working fine as long as  
7     they were adding enough cement.

8                     But instead what happens after he left --

9                     CHIEF JUSTICE ROBERTS:  The whole purpose,  
10    the whole purpose of this legislation is to ferret out  
11    fraud on the Government.  I mean, if he makes an  
12    allegation that this design is not going to work, the  
13    pondcrete is not going to work, and the Government,  
14    prompted by his lawsuit, investigates it and finds out  
15    that because of human error they're not making it the  
16    right way, even if the design does work, he get no  
17    credit for that?

18                    MS. MAHONEY:  Well, Your Honor, the statute  
19    isn't written in that way.  But let me also call your  
20    attention to some facts.  And that is that a year before  
21    he brought this claim --

22                    CHIEF JUSTICE ROBERTS:  Well, what about the  
23    hypothetical?  Are you suggesting that in a situation  
24    like that -- we'll talk about whether the facts comport  
25    with it later -- but in a situation like that, he's not

1 entitled to share in the recovery that the Government  
2 eventually receives?

3 MS. MAHONEY: If -- the mere fact that he is  
4 a trigger for the Government discovery of a different  
5 problem, no, that is not a basis for recovery. The  
6 statute says that if there has been a public disclosure,  
7 if -- let's assume there was a public disclosure. If  
8 there's no public disclosure it is no problem. He can  
9 bring whatever claim he wants. He doesn't have to have  
10 direct knowledge of it. But if there has been a public  
11 disclosures at that point he has to have direct  
12 knowledge of the information on which the allegations  
13 are based. And that has to be a substantial standard.  
14 Direct knowledge is one of the key things that the Tenth  
15 Circuit just did not --

16 CHIEF JUSTICE ROBERTS: You would, you would  
17 change that to say direct knowledge of the information  
18 not on which the allegations are based, but on which  
19 recovery is eventually -- eventually ordered?

20 MS. MAHONEY: On which the allegations of  
21 the claim is based. In other words, it, it's not -- it  
22 has to be -- and the Government says this as well --  
23 they say under that Section D(1), the relator isn't  
24 entitled to share in the proceeds of anything that the  
25 jury gives. The relator is only entitled to share in

1 the proceeds of a claim for which they were an original  
2 source or for which they brought the -- brought the  
3 action under, under Section B.

4 Sometimes the Government intervenes and adds  
5 its own claims not on behalf of the relator, because it  
6 doesn't have authority on behalf of the relator, and it  
7 takes the position, I think correctly, that the relator  
8 isn't entitled to a share in those circumstances.

9 And Your Honor, this -- the courts have  
10 identified all the ways in which this statute doesn't  
11 make any sense if it is looked at on --

12 CHIEF JUSTICE ROBERTS: Identified them all?

13 MS. MAHONEY: -- on a global basis. Excuse  
14 me?

15 CHIEF JUSTICE ROBERTS: They've identified  
16 them all already?

17 (Laughter.)

18 MS. MAHONEY: No, I don't think they have  
19 identified them all. But I --

20 JUSTICE SCALIA: You may find another one.

21 MS. MAHONEY: I, I would also -- again, it  
22 would allow the relator to get, you know, a share of,  
23 when the Government doesn't intervene, a minimum of 25  
24 percent of a billion dollar recovery after a public  
25 disclosure that he knew nothing about, if he just knew

1 one little piece after separate theory of fraud.

2 JUSTICE GINSBURG: But the theory is not  
3 necessarily bad. The, the relator has to cooperate with  
4 the Government, ideally he should. And if the  
5 Government said we prefer a variance of your theory, and  
6 the relator said fine, "I don't want to put competing  
7 theories before the jury, so I'll surrender my first  
8 theory and go with the Government's," why should the  
9 relator be penalized for that good litigation practice?  
10 It doesn't necessarily mean that the original complaint  
11 is no good or even that it might not have been proved,  
12 if the Government had preferred another route.

13 MS. MAHONEY: Well it there, if there's a  
14 minor variation, you know, something like that, I  
15 certainly don't think that disqualifies the relator  
16 from, from being an original source. And again, here he  
17 wasn't an original source even under his own theory at  
18 the outset of the case.

19 What happened at trial is the one little  
20 thing that he knew or claimed to know, his prediction  
21 that a pipe would have a problem five years before, was  
22 dropped completely from the case. So he went from being  
23 a relator who knew something very small about the case  
24 or about the theories to nothing at all. It was never  
25 good enough, but certainly once, once that theory was --

1 once that piece of information dropped out, it just  
2 demonstrated, it just highlights that he's not an  
3 original source.

4 And Your Honor, here it wasn't just that  
5 they didn't want to use that bit of evidence. It was  
6 actually inconsistent with the theory that they, that  
7 they pressed with the jury. They said the equipment was  
8 fine. Rockwell was making pondcrete just fine from 1985  
9 forward until it stopped adding the cement.

10 And that's what they -- that's the theory  
11 they went with. But again, measure it at the outset of  
12 the case, and he still wasn't an original source.

13 If I could save the remainder of my time?

14 JUSTICE STEVENS: May I ask just one quick  
15 question?

16 MS. MAHONEY: Yes, Your Honor.

17 JUSTICE STEVENS: What was the public  
18 disclosure of the claim that ultimately prevailed?

19 MS. MAHONEY: The public -- there -- the  
20 public disclosure was in 19 -- it can be from several  
21 pieces. But in 1988, there were widely covered stories  
22 of the fact that pondcrete was being stored at Rocky  
23 Flats on outdoor pads, that it was leaking and that the  
24 reason it was occurring was because the employees had  
25 reduced the ratio of cement.

1                   And then you couple that with the disclosure  
2    --

3                   JUSTICE STEVENS: And the public disclosure  
4    was made in the newspapers rather than in an official  
5    Government proceeding?

6                   MS. MAHONEY: That's correct. It was in the  
7    newspapers. But it was definitely covered, Your Honor.  
8    And that was more than a year before he brought his  
9    action. And then in addition, there were disclosures of  
10   allegations of performance bonuses being paid based upon  
11   falsified evaluations. That's JA 143.

12                  Thank you.

13                  CHIEF JUSTICE ROBERTS: Thank you,  
14   Ms. Mahoney.

15                  Ms. Vullo.

16                  ORAL ARGUMENT OF MARIA T. VULLO,  
17                  ON BEHALF OF RESPONDENT STONE

18                  MS. VULLO: Mr. Chief Justice, and may it  
19   please the Court.

20                  The Court should affirm the decision of the  
21   Court of Appeals because as the Government recognizes,  
22   Mr. Stone is an original source. And it is important to  
23   the look at the statute and its purpose. The original  
24   source provision is intended to determine who may bring  
25   a claim on behalf of the United States Government. And



1 the recovery provision, 3730(d)(1), determines how much  
2 if anything a relator may share in the Government's  
3 recovery. In this case, whether where the Government  
4 fully supports the relator, I would submit that the  
5 interests of the statute and the interests of the United  
6 States are fully satisfied.

7 And that is because Mr. Stone is the  
8 paradigm not parasitic relator. He had knowledge  
9 firsthand from his six years at Rockwell of a pattern,  
10 Justice Kennedy, a pattern of criminal conduct and a  
11 pattern of Rockwell concealing that information.

12 JUSTICE SCALIA: Unfortunately, it was not  
13 the criminal conduct that was ultimately -- it was not  
14 the manner of criminal conduct that was ultimately the  
15 basis on which the Government proceeded? He knew about  
16 this bad pipe, right? Or he said that this was a bad  
17 pipe system? He didn't say anything as I understand it  
18 about their not adding enough cement which is the theory  
19 that went to the jury.

20 MS. VULLO: Justice Scalia, I would beg to  
21 differ on that. Mr. Stone in his affidavit at 179 in  
22 the joint appendix and also in his disclosure statement,  
23 which is at 29 -- I'm sorry, 174 and 175 of the joint  
24 appendix, and the disclosure statement at 290, what he  
25 described was a defective design of the system for

1 taking the sludge out of the pond. And what he  
2 specifically said -- and this is very important -- what  
3 he specifically said was when you took the sludge out of  
4 the ponds in that manner, it was going to have too much  
5 liquid, and it was going to lead to deterioration of the  
6 environment. He said that in the very beginning of the  
7 case. And at trial, what the testimony was -- and I  
8 would direct the Court to Mr. Freibach's testimony at  
9 joint appendix 522, as well as at the trial transcript  
10 at 987, the issue there was the variability of the  
11 sludge which may have caused greater inspections and may  
12 have required additional cement.

13 And what is very important is even  
14 Mr. Freibach who is the first foreman, on whom  
15 petitioners rely, he testified that during his tenure,  
16 the variation of the sludge required between 200 and 350  
17 pounds of cement. That's at the trial transcript at 987  
18 and the joint appendix at 522.

19 JUSTICE SCALIA: Yeah. Let me -- let me  
20 look at what -- let me look at 175. This is, this what  
21 he says. "After careful study, I concluded that the  
22 suggested process" -- this means of piping the sludge  
23 out -- "would result in an unstable mixture that would  
24 later deteriorate and cause unwanted release of toxic  
25 wastes to the environment. I also noted based on my

1 analysis of chemical processes at Rocky Flats that that  
2 the sludge and liquid present in the -- present in the  
3 evaporation ponds contained some of the most toxic and  
4 radioactive substances at Rocky Flats."

5 I mean, that's all very good, but it has  
6 nothing to do with what this company was convicted of,  
7 which is not -- cutting down on the amount of cement it  
8 was adding.

9 MS. VULLO: That's --

10 JUSTICE SCALIA: During a certain period  
11 after this it was creating perfectly good blocks by  
12 adding more cement. Then they got a new manager who  
13 said let's use less cement. And that's when they  
14 started producing the defective blocks. It has nothing  
15 to do with his allegations.

16 MS. VULLO: Justice Scalia, two important  
17 points. First is that neither the criminal conviction  
18 nor the jury's verdict determined the cause of  
19 insolidity. The issue in the criminal case and the  
20 issue in the False Claims Act case as to pondcrete was  
21 that the pondcrete was insolid and they were lying to  
22 the -- the Government about that.

23 JUSTICE SCALIA: And why did the government  
24 claim it was insolid? What was the claim made for -- as  
25 to the reason for the insolidity?

1 MS. VULLO: Your Honor, one of the pieces of  
2 evidence -- and I would -- out of 55 witnesses and 500  
3 documents, was that there were certain people who were  
4 using too little cement. There was also evidence --

5 JUSTICE SOUTER: No, but was the reason they  
6 were using too little cement, the reason that there was  
7 a variation in the amount of liquid being taken out with  
8 the sludge as you've described to us that he had  
9 claimed, or was the reason simply that there was a kind  
10 of standard ratio of cement to sludge and that standard  
11 ratio was not followed in the later cases?

12 In other words, is it because there was such  
13 a tremendous variation in the liquid in the sludge or  
14 simply because there was a standard formula having no  
15 particular relationship to the liquid in the sludge, and  
16 they simply didn't follow the standard formula? I  
17 thought the government's theory was the latter, and if  
18 it was the latter, it has nothing to do with the claim  
19 that he was making that there was too much variation in  
20 the amount of liquid in the sludge.

21 MS. VULLO: That's not correct,  
22 Justice Souter. The reason for the variation and the  
23 need for additional cement was because the sludge had  
24 variations and there was too much liquid in it, which  
25 was precisely what Mr. Stone said. And every one of the

1 witnesses testified to huge variation of the liquid  
2 content in the sludge which required more cement, and  
3 even the amount of cement that was required was very  
4 variable.

5 JUSTICE SOUTER: But if they had followed  
6 the formula that they followed at the beginning, isn't  
7 it true that there's no evidence that even these  
8 variations in the liquid in the sludge would have  
9 resulted in instable or insolid pondcrete?

10 MS. VULLO: No. That's not correct,  
11 Justice Souter. In fact, there was no particular ratio  
12 that had to be followed of cement to sludge. There was  
13 testimony that different individuals who worked on the  
14 pondcrete used different amounts of cement. And as I  
15 said --

16 JUSTICE SOUTER: This was truly even before  
17 the troubles started, even before the insolid pondcrete?

18 MR. STEWART: Yes, Your Honor. Yes,  
19 Justice Souter. Mr. Freibach, who was the earlier  
20 foreman, testified that under his watch, he needed  
21 between 250 and 300 pounds of cement, and that there was  
22 a constant inconsistency in the sludge content coming  
23 out of the ponds.

24 JUSTICE SCALIA: Was -- here's an easy  
25 question. Was this evidence that we read, his testimony

1 from 175 of the joint appendix, was that introduced at  
2 the trial?

3 MS. VULLO: Mr. Stone did not testify at  
4 trial.

5 JUSTICE SCALIA: Was this evidence  
6 introduced from some other source? Was the jury told  
7 there was this piping that was taking out too much  
8 liquid with the sludge? Was the jury told that?

9 MS. VULLO: The jury -- Mr. Freibach  
10 described the process. We did not get into the  
11 engineering detail, Your Honor, of it.

12 JUSTICE SCALIA: So his central allegation  
13 was not even placed before the jury?

14 MS. VULLO: Your Honor, I would submit to  
15 you, Justice Scalia, that that wasn't required. What we  
16 needed to prove --

17 CHIEF JUSTICE ROBERTS: But it is worse than  
18 that, though.

19 This information was not even provided to  
20 the government, which the statute requires. He not only  
21 has to have direct and independent knowledge, he has to  
22 voluntarily provide that to the government. And I  
23 understand that the Tenth Circuit, to have relied solely  
24 on the document at joint appendix page 605, that's the  
25 only thing he provided to the government. And all it

1 says is that this design will not work. There are a lot  
2 of things that don't work, but that doesn't mean there's  
3 fraud on the government. You don't know if they're  
4 going to fix it, they're going to change it, use a  
5 different design, not make a claim based on that design.  
6 Why is that enough to satisfy the statute?

7 MS. VULLO: Mr. Chief Justice, the  
8 voluntarily provides prong requires the relator to be  
9 honest and truthful and submit all the information he  
10 has. And Mr. Stone did that and the government has  
11 never said otherwise. In fact, he met with the FBI  
12 agent --

13 CHIEF JUSTICE ROBERTS: But he has to -- if  
14 the information that he provides isn't direct and  
15 independent information of the allegations, it would  
16 seem that the statute is not satisfied.

17 MS. VULLO: That is correct, Your Honor, but  
18 Mr. Stone did have direct and independent knowledge of  
19 his allegations. And I'd like to go back to the  
20 discussion with petitioner's counsel as to the  
21 jurisdictional petition in this statute. There is no  
22 question that --

23 CHIEF JUSTICE ROBERTS: I don't want to get  
24 off my question here but did you -- do you agree that  
25 this page JA 605 was the only information that he

1 provided to the government?

2 MS. VULLO: No, Your Honor.

3 CHIEF JUSTICE ROBERTS: Well, maybe I'd  
4 better phrase it differently. Do you agree that that is  
5 the only information on which the Tenth Circuit relied?

6 MS. VULLO: That, the Tenth Circuit did rely  
7 on that document and did not consider any other  
8 information as a result of its ruling with respect to  
9 that document. The Tenth Circuit also had before it the  
10 awards fee documents which Mr. Stone provided to the  
11 government, and those are at joint appendix 247 to 249.  
12 It also had Mr. Stone's affidavit when he testified in  
13 his affidavit as to his meetings with the government,  
14 and also had additional affidavits --

15 CHIEF JUSTICE ROBERTS: Well, but this -- he  
16 has to provide this information before filing an action.

17 MS. VULLO: That's correct, Your Honor. And  
18 his affidavit describes his meetings with the FBI and  
19 EPA beginning in 1986, and that's at joint appendix 180  
20 through 181.

21 JUSTICE STEVENS: I have a question.

22 MS. VULLO: Yes, Justice Stevens.

23 JUSTICE STEVENS: As I understand the  
24 statute, you his the first prong. It has to be an  
25 action based on public disclosure of information, which



1     you agree it was; is that right?

2                   MS. VULLO:   Justice Stevens, we in the  
3     courts below agreed for purposes of the original source  
4     provision that there was a public disclosure.  I think  
5     what's important following up on the question --

6                   JUSTICE STEVENS:  You agree that it's within  
7     4(a), that it was an action based on a public disclosure  
8     of information disclosed in newspapers; is that right?

9                   MS. VULLO:  In newspapers and also the  
10    criminal investigation, but I think what's important is  
11    that the standard that Rockwell seeks to have this Court  
12    adopt would actually require such a great level of  
13    specificity that is not in the public disclosure at all.  
14    And I think, Justice Stevens, you asked that precise  
15    question.  The public disclosure was very general.  And  
16    the Tenth Circuit --

17                  JUSTICE STEVENS:  I am asking you, really  
18    what I'm seeking to find out is what is the scope of the  
19    public disclosure that everyone agrees was made?  Was it  
20    all newspapers?

21                  MS. VULLO:  It was newspapers, and the FBI  
22    agents' search warrant affidavit was also publicly  
23    disclosed prior to Mr. Stone's filing of the action.

24                  JUSTICE STEVENS:  If it was publicly  
25    disclosed in the newspapers, does that fit into one of

1 the categories of public disclosure mentioned in 4(a)?

2 MS. VULLO: Yes. It says news reports in  
3 that provision of the statute.

4 JUSTICE STEVENS: And everybody agrees on  
5 what those news reports contained?

6 MS. VULLO: Well, I'm not sure what Rockwell  
7 agrees, but I could tell Your Honor what I believe those  
8 news reports said, and they said that there were  
9 environmental violations. There were some news reports  
10 in June of 1988 about a spill on the pondcrete pads.  
11 Not a single one of the news reports about the spill on  
12 the pondcrete pads described at all any false claim or  
13 false statement, and neither did the agents' search  
14 warrant affidavit.

15 JUSTICE STEVENS: So you're saying that the  
16 original source of the information was published?

17 MS. VULLO: I don't believe that that's the  
18 appropriate test. It's not before this Court, but I  
19 believe that the direct and independent knowledge  
20 requirement is information on which the allegations are  
21 based, and the allegations refer to Mr. Stone's  
22 allegations at the commencement of the action. After  
23 all, it's a jurisdictional provision, and it should be  
24 determined at the outset of the action.

25 CHIEF JUSTICE ROBERTS: I would have thought

1 the allegations referred to the public disclosure. It  
2 talks about public disclosure of allegations, and then  
3 says he has to have direct and independent knowledge of  
4 the allegations. So I would assume that's the important  
5 linkage.

6 MS. VULLO: Mr. Chief Justice, there is a  
7 split in the circuits on that issue. The issue was not  
8 decided by the Court of Appeals and as I understand even  
9 Rockwell's position, that is not Rockwell's position,  
10 that Rockwell's position is like our position, that it's  
11 information in the allegations of the complaint.

12 But I would submit that that would make no  
13 difference in this case because Mr. Stone's knowledge is  
14 direct and independent of the information in his  
15 complaint as well as the information in the public  
16 disclosure. And what is important is that Rockwell is  
17 asking this Court to adopt the quick trigger that the  
18 Court of Appeals adopted because that was the Tenth  
19 Circuit's law on public disclosure. Yet in this case,  
20 say that Mr. Stone's direct and independent knowledge  
21 has to be very, very specific. It has to be of the  
22 particular false statements, and that would eviscerate  
23 the entire original source rule.

24 And if I could just get to the point of the  
25 jurisdictional issue and why Rockwell's position as to

1 the trial evidence is wrong, it's wrong for two reasons.  
2 The first is that the statute speaks in terms of  
3 allegations. It does not speak in terms of evidence.  
4 In fact, in the provision E.2, which is a provision  
5 regarding bringing claims against members of the  
6 judiciary and members of Congress, Congress said  
7 information or evidence, but in this provision E.4,  
8 Congress only said information. So looking at the trial  
9 evidence would be wrong by virtue of the plain language  
10 of the statute.

11 It also would be wrong as, Mr. Chief  
12 Justice, you pointed out. Since 1824, I believe this  
13 Court has held that jurisdiction is determined at the  
14 time of commencement as of the state of things at that  
15 time. And as, Justice Ginsburg, you pointed out, it  
16 would be an inappropriate rule to say that if the  
17 government decides to refine the allegation, after all,  
18 it is still a concrete allegation.

19 JUSTICE SCALIA: We've also said that  
20 jurisdiction must be maintained throughout the case.  
21 Something like standing. We say standing is examined  
22 throughout the trial. There's an easier standard at the  
23 beginning, and then for the complaint; and then for a  
24 motion to dismiss, a somewhat higher standard; and  
25 finally, if the facts of -- involving standing are

1     tried, there's the highest standard at the end of the  
2     trial.

3                 I mean, it seems to me jurisdiction has to  
4     be assured throughout.

5                 MS. VULLO: Justice Scalia, I think this is  
6     a jurisdictional provision that Congress created. We're  
7     not talking about the Federal question jurisdictional  
8     statute. But in this provision, just like in the Clean  
9     Water Act in the Walton case, the statute uses the word  
10    allegations. As in that case, the statute used the word  
11    alleged. And the Court held very clearly that you look  
12    at it as of commencement.

13                Now it might be a different case if we had a  
14    federal question case and the relator or the plaintiff  
15    withdrew the Federal claim. Then there would be a loss  
16    of jurisdiction. Here of course, the amended complaint  
17    satisfied jurisdiction when the government adopted the  
18    relator's claim.

19                Thank you.

20                CHIEF JUSTICE ROBERTS: Thank you,  
21    Ms. Vullo.

22                Mr. Stewart?

23                ORAL ARGUMENT OF MALCOLM L. STEWART

24                ON BEHALF OF RESPONDENT UNITED STATES

25                MR. STEWART: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 One of the features of this case that may  
3 appear anomalous is the fact that the government is  
4 aligned with Stone. That is, it's Rockwell's position  
5 that the entire recovery in this case should go to the  
6 United States. It is Stone's position that the recovery  
7 should be shared with the relator, and the government  
8 agrees with Stone.

9 It might be natural for the Court to wonder,  
10 why would it be in the government's interest to advocate  
11 that a share of the money damages in this case should be  
12 given to a private party. And the reason is that the  
13 government believes that there are three systemic  
14 government interests that are implicated by this case  
15 and that would be endangered if Rockwell's position  
16 prevailed.

17 First, in our view, Stone is precisely the  
18 type of relator that Congress intended to encourage.  
19 Stone was somebody who had substantial firsthand  
20 knowledge of Rockwell's environmental practices and of  
21 its billing practices, and moreover, Stone was somebody  
22 who didn't conceal his information from the government.

23 JUSTICE SCALIA: Well, that's all very nice,  
24 but Congress didn't leave it up to you to decide who  
25 ought to get rewarded or not. It laid down some textual

1 conditions in the statute. And unless they are complied  
2 with, the fact that you think this is the kind of person  
3 you think ought to get the money is really totally  
4 irrelevant.

5 MR. STEWART: We agree. And as to Stone's  
6 original complaint, the statute frames the inquiry as  
7 whether Stone has direct and independent knowledge of  
8 the information on which the allegations were based.  
9 And we agree with Rockwell and with Stone that that  
10 refers to the allegations in his complaint.

11 Now the allegations were fairly generalized.  
12 They didn't refer specifically to pondcrete, and they  
13 covered a wide range of time, from 1980 through to the  
14 present, which was 1989 as of the filing of the  
15 complaint. Stone subsequently submitted a lengthy  
16 affidavit in which he explained what led him to the  
17 conclusion that Rockwell was engaged in a systematic  
18 practice of violating the environmental laws and  
19 misrepresenting the nature of its compliance to the  
20 government. That information --

21 JUSTICE ALITO: What if the defect that he  
22 identified turns out to be entirely different? What if  
23 there is no dispute, it's completely different from the  
24 defects that led to the false claims on which there were  
25 recovery?

1                   MR. STEWART: I mean, there certainly could  
2 be a situation in which the government intervenes in a  
3 suit but files what can be regarded as a substantially  
4 different claim. For instance, if the government had  
5 intervened in this suit and had claimed that Rockwell's  
6 requests for payment were fraudulent because Rockwell  
7 had misrepresented its compliance with the  
8 anti-discrimination laws, that would be an example of a  
9 fundamentally different fraudulent scheme and --

10                  JUSTICE SCALIA: Let's take this case. Did  
11 the government use any of the evidence that Stone  
12 produced? Did it introduce that affidavit which said  
13 the pipe wasn't working right? Was that part of the  
14 evidence?

15                  MR. STEWART: It didn't introduce the  
16 engineering report. And I do want to focus on --

17                  JUSTICE SCALIA: Well, what else had he  
18 provided beyond -- did you use anything that came from  
19 him?

20                  MR. STEWART: He had provided substantial  
21 information about a pattern of concealment of  
22 environmental violations generally. That at least to  
23 some extent was responsible for an FBI investigation  
24 which uncovered further --

25                  JUSTICE SCALIA: But did you use at trial



1 anything that he provided you?

2 MR. STEWART: We proved essentially the  
3 state of affairs that he predicted would occur.

4 JUSTICE SCALIA: Did you use anything he  
5 provided you in order to prove it?

6 MR. STEWART: I'm not aware of anything  
7 that --

8 JUSTICE SCALIA: No, neither am I.

9 MR. STEWART: But nevertheless, the relator  
10 had direct and independent knowledge of the information  
11 on which his allegations were based.

12 And I'd like to focus on this question of  
13 the cause of the insolidity of the pondcrete because I  
14 think to regard that as the theory of the government's  
15 liability really reflects a misunderstanding of the  
16 False Claims Act. For purposes of the False Claims Act  
17 counts in this case, it was sufficient for the  
18 government to prove that the pondcrete in fact failed,  
19 leaked hazardous substances into the environment, that  
20 Rockwell was aware that the pondcrete was failing, and  
21 that Rockwell nevertheless continued to represent that  
22 it was in compliance with the environmental laws.

23 For purposes of proving those allegations,  
24 it was not necessary for the Government to offer any  
25 hypothesis as to why the pondcrete failed. It would

1 have been sufficient to prove that the pondcrete failed  
2 and that Rockwell knew about it. In fact, I wouldn't  
3 encourage the Court to read the whole trial transcript,  
4 but I think if the Court reads the plaintiff's statement  
5 of claims, which is about 30 pages of the joint appendix  
6 beginning at JA-463, that summarizes the events that  
7 Rockwell -- I mean, I'm sorry, that Stone and the United  
8 States intended to prove at trial, and by far the  
9 predominant focus is on the fact of pondcrete failures  
10 and Rockwell's awareness that they had -- that pondcrete  
11 had failed.

12                   There were a couple of paragraphs in  
13 those 30 pages that alluded to the supposition that the  
14 cause of the failure was inadequate cement content.  
15 There were also isolated references to that theory at  
16 trial. But to characterize that as the theory of  
17 liability I think would be a misconception. The  
18 Government didn't have to persuade the jury one way or  
19 the other as to why the pondcrete failed.

20                   JUSTICE SCALIA: How is it possible to say  
21 that he had direct knowledge of events that occurred  
22 after he had left Rockwell? I mean, all of this failure  
23 occurred after he was gone.

24                   MR. STEWART: But again --

25                   JUSTICE SCALIA: Not only not because of

1    this pipe thing that he predicted would cause a failure,  
2    not only it was not because of that. But he was gone.

3               MR. STEWART: Again, the statute doesn't  
4    require direct and independent knowledge of the fraud.  
5    It requires direct and independent knowledge of the  
6    information on which the allegations were based.

7               JUSTICE SCALIA: That's right. And how  
8    would he know except from published report that these  
9    blocks were failing?

10              MR. STEWART: His basis for making that  
11   prediction was that he believed that the process would  
12   malfunction. He was also aware --

13              JUSTICE SCALIA: But prediction is not  
14   knowledge. Prediction is not direct knowledge.

15              MR. STEWART: I think independent of whether  
16   there had every been a public disclosure, it would have  
17   been open to Rockwell to argue in response to the  
18   original complaint that Stone couldn't consistent with  
19   Rule 11 make allegations as to what had happened at the  
20   plant after he left because he no longer had an  
21   evidentiary basis for doing so. Rockwell could have  
22   made that argument, again regardless of whether a public  
23   disclosure had occurred, and the question whether it is  
24   a permissible inference for a plaintiff to say, I saw  
25   them committing systematic environmental violations

1 while I was there and I inferred that the same thing  
2 would go on after I left -- the question that's a  
3 permissible inference for a plaintiff in a Federal civil  
4 action to make is a question to be decided under the  
5 Federal Rules of Civil Procedure. The public disclosure  
6 provision serves a different purpose entirely. It's  
7 designed for those cases in which the relator has  
8 sufficient information to file a complaint that complies  
9 with the federal rules of similar procedure, but that  
10 information overlaps substantially with information in  
11 the public domain.

12 JUSTICE SCALIA: And his sufficient  
13 information you assert is his prediction that these  
14 blocks would fail for a reason that turned out not to be  
15 the reason for their failure. That is what you say is  
16 his direct knowledge.

17 MR. STEWART: That knowledge, but I think  
18 it's also important to recognize that the original  
19 complaint was not focused on pondcrete specifically.  
20 The original complaint alleged more generally that  
21 Rockwell was engaged in widespread environmental safety  
22 and health violations and was consistently  
23 misrepresenting to the Government that it was in  
24 compliance and -- even though it knew that it was not  
25 doing so.

1 JUSTICE SCALIA: So you think relators can  
2 get part of the Government's recovery even where their  
3 initial allegations before the Government intervenes  
4 have nothing whatever to do with the reason the  
5 Government is ultimately giving money? You think they  
6 are still entitled to a piece of the pie?

7 MR. STEWART: I guess I would -- I would  
8 disagree with the premise that his reasons had nothing  
9 whatever to do with why the Government is getting money.  
10 Again to return to the hypothetical I suggested earlier,  
11 if the Government then filed --

12 JUSTICE SCALIA: So you don't believe that,  
13 then. You think that indeed the reason the Government  
14 was given the money has to be connected with, with his  
15 allegations? Right?

16 MR. STEWART: It has to be connected with  
17 his allegations. And certainly, if you look at the  
18 theory of liability that prevailed at trial, namely that  
19 pondcrete blocks were leaking hazardous substances into  
20 the environment and Rockwell was nevertheless asking for  
21 Government funds based on misrepresentations that it was  
22 in compliance, if you look at that theory of liability  
23 and then examine Stone's original complaint, clearly  
24 that theory is logically encompassed within the more  
25 generalized --

1 CHIEF JUSTICE ROBERTS: What do you mean by  
2 connected? Is it -- I got -- I'm getting the sense that  
3 you think it's enough that he says, look, Rockwell is  
4 just lying to the Government in this area, and you say  
5 well -- what if what if you added a count in your  
6 complaint when you intervene on tax fraud? You found  
7 out also that they didn't pay taxes. Would he be able  
8 to recover for that, because, you know, if they're going  
9 to lie about pondcrete they're going to lie about taxes.  
10 Is that sufficiently connected?

11 MR. STEWART: No, and I think I would put  
12 that with the hypothetical that I offered about the  
13 Government adding a claim that Rockwell had  
14 misrepresented its compliance with the  
15 antidiscrimination laws. And I think there won't be a  
16 clear dividing line, but I think this is a line that  
17 courts have to draw for other purposes as well.

18 CHIEF JUSTICE ROBERTS: And it doesn't  
19 matter to you if he just, if he's completely wrong?  
20 Let's say he says -- you have special interrogatories to  
21 the jury and his allegation has always been the  
22 pondcrete's going to fail because you're putting in the  
23 wrong kind of cement. And it turns out it has nothing  
24 to do with that at all. The jury says, no, that's not  
25 the reason it failed, it failed for another reason. Is

1     that a sufficient connection?

2                   MR. STEWART:  I think we would -- I think  
3     there could still be a sufficient connection even if his  
4     reason for thinking the pondcrete failed, they all  
5     turned out to be correct.  And again, we would emphasize  
6     that that's particularly so here because the reason for  
7     the pondcrete failure was not an element of the claim.  
8     I mean, imagine if this case had been tried to the jury  
9     and there had been an established rule in place that if  
10    the pondcrete was shown to have failed because of a  
11    defect in the machinery, Stone would get a share, but if  
12    it was shown to have failed because the human operator  
13    added too little cement Stone wouldn't get a share.  If  
14    that had been the rule there would have been a clear  
15    potential for disharmony between the Government and the  
16    relator.  It would have raised exactly the specter that  
17    Justice Ginsburg alluded to, where the Government  
18    prefers to emphasize one view of the facts rather than  
19    another and the defendant is getting in the way by  
20    suggesting that the relator will be deprived of a share.

21                  JUSTICE SCALIA:  Try this hypothetical.  The  
22    relator says:  I know that they've been cheating the  
23    Government because I, I observed the president of the  
24    company going into a meeting with the chief engineer and  
25    another person, and at that meeting I suspect they were

1     devising this scheme to defraud the Government.

2                     It turns out there was indeed a scheme to  
3     defraud the Government, but that meeting never occurred.  
4     It wasn't the president of the company who went into the  
5     meeting. It was Charlie Chaplin. And the facts are  
6     totally, totally wrong. Does he get money?

7                     MR. STEWART: Well, I think --

8                     JUSTICE SCALIA: Does he get money just  
9     because he came out with the same charge that the  
10    Government ultimately proves? Simply because he said  
11    the company is guilty of cheating the Government, even  
12    though the facts on which he bases it are entirely  
13    wrong?

14                    MR. STEWART: I mean, I need to know more  
15    about the hypothetical, but my initial reaction is that  
16    that's a complaint that's easily dismissed based on Rule  
17    11, leaving aside the question of any public disclosure.  
18    And I can imagine extreme hypotheticals --

19                    JUSTICE SCALIA: Well, assume one that just  
20    gets over the line.

21                    MR. STEWART: I think if the complaint just  
22    gets over the line, that is if the evidence in the  
23    relator's possession is just barely good enough to  
24    sustain the allegation of fraud or at least to allow the  
25    suit to go forward, there's no reason to read the public



1 disclosure --

2 JUSTICE SCALIA: It turns out to be entirely  
3 wrong. Turns out to be entirely wrong, so that the only  
4 reason he believed this company was defrauding the  
5 Government was absolutely wrong.

6 MR. STEWART: I think we would still want to  
7 compare the nature of the fraud that the Government  
8 alleged with the nature of the fraud that the relator  
9 alleged. And obviously this is a question in which the  
10 Court is going to have to balance competing interests.  
11 It's possible to come up with hypotheticals in which it  
12 seems as though the relator has no equitable entitlement  
13 to a share. The two things we want to emphasize are,  
14 first, in terms of the way that the lawsuit progresses  
15 even when the Government doesn't intervene, relators  
16 once they file suit, if they are allowed to proceed on  
17 their own, they presumably can take advantage of all of  
18 the rules of civil procedure. And those include the  
19 discovery provisions of the Federal Rules.

20 And it would obviously be self-defeating to  
21 tell the relator: You can invoke discovery and you can  
22 learn relevant information from the defendant, but if  
23 you didn't know it already you can't use it at trial,  
24 because if you use something that you didn't have direct  
25 and independent knowledge of before the complaint was

1 filed and it turns out to be persuasive to the jury you  
2 can be kicked for not being an original source.

3 I don't think Congress can be said to have  
4 had that intention.

5 Second, in cases where the Government and  
6 the relator intervenes -- where the Government  
7 intervenes in the a relator's suit and the two prosecute  
8 the suit together, we would want the Court to avoid a  
9 rule that would create artificial disincentives to  
10 cooperation between the two plaintiffs. And the idea  
11 that relatively minor variations in factual assertions  
12 that are ultimately not necessary to the establishment  
13 of False Claims Act liability, if those carried the day  
14 then relators in future circumstances would have a  
15 strong disincentive to accede to the Government's  
16 request that one view of the evidence be emphasized  
17 rather than another.

18 If the Court has nothing, no further  
19 questions --

20 JUSTICE GINSBURG: Explain why it would be a  
21 minor variation if what he has identified as a defect in  
22 the pipe system and what turns out to be the situation  
23 that was covered up is the inadequate cement that caused  
24 the loss?

25 MR. STEWART: It's a minor variation in the

1 sense that it's not relevant to the defendant's ultimate  
2 liability. That is, if we had proved that the pondcrete  
3 leaked hazardous substances into the environment and  
4 that Rockwell knew that it was having that effect and  
5 that it nevertheless represented to the Government it  
6 was in compliance, that would be enough to establish the  
7 knowing submission of a false claim even if we had no  
8 idea what was the reason for the pondcrete failure.

9           And even if Rockwell had taken the most  
10 Herculean measures to produce good pondcrete and had not  
11 departed from standards of care in any respect, if  
12 nevertheless they knew that the pondcrete was in fact  
13 failing despite their best efforts and they represented  
14 that it was succeeding, they would be liable under the  
15 False Claims Act.

16           JUSTICE STEVENS: May I ask this question:  
17 Supposing he is the only source of the information  
18 that's publicly disclosed on which precipitated the  
19 filing of the complaint, and after the complaint is  
20 filed discovery reveals other violations of law on which  
21 the Government prevails, but they do not prevail on the  
22 theory of the original complaint. Would he be -- come  
23 within the statute or without? The statute focuses on  
24 the information that gave rise to the suit, not on  
25 what's found by way of discovery.

1 MR. STEWART: I mean, my instinct would be  
2 that probably he could still recover. I think the  
3 question then would boil down to whether the discovery  
4 responses are themselves public disclosures such that  
5 they would trigger a new original source.

6 JUSTICE STEVENS: Assuming we only look at  
7 the public information at the time the complaint is  
8 filed.

9 MR. STEWART: I mean, probably that question  
10 would raise no public disclosure issue to begin with,  
11 because if there had been no -- at least if there had  
12 been no public disclosure of the fraudulent conduct that  
13 was revealed through discovery, there would be no need  
14 for him to satisfy the original source test with respect  
15 to those new allegations.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Stewart.

18 Ms. Mahoney, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

20 ON BEHALF OF THE PETITIONER

21 MS. MAHONEY: I would like to first just  
22 address, the Government's suggested that he could be an  
23 original source because he had knowledge of false  
24 representations and concealments derived throughout his  
25 employment. I just want to emphasize that the Tenth

1 Circuit did not rely on that theory, said that he did  
2 not have to have knowledge of any fraudulent acts. It  
3 was just enough that he knew something that might be  
4 relevant to the proof of an environmental violation.  
5 And the reason that the Tenth Circuit said that was  
6 because Stone had conceded in his deposition at pages  
7 JA-106 and 112 that he did not know about any false  
8 representations and he did not know whether DOE was  
9 aware of any of the environmental problems.

10 JUSTICE SCALIA: What is your response to  
11 the Government's assertion, which seems to me quite  
12 true, that in order to -- in order to prevail it did not  
13 have to show why these blocks were not solidified?

14 MS. MAHONEY: I think what --

15 JUSTICE SCALIA: It just had to show that  
16 they weren't. So it doesn't matter whether they were  
17 using his theory or too little cement. It doesn't  
18 matter.

19 MS. MAHONEY: Your Honor, the point is that  
20 Mr. Stone wasn't there when the manufacturing problems  
21 occurred, so he didn't actually have direct knowledge  
22 that pondcrete was leaking. That's the real point.  
23 What they're really saying is that his theory about why  
24 it might leak some day didn't turn out to be important  
25 to the gravamen of the claim. This is a fraud claim.

1 He didn't know anything about fraud and he couldn't have  
2 known they were leaking at the time, 5 years later  
3 because he wasn't there.

4 And the statute requires direct knowledge.  
5 The Government's suggestion that somehow Rule 11 will be  
6 the basis on which we can sort out who's an original  
7 source and who's not strikes me as rather odd. First of  
8 all, nothing hardly ever gets dismissed on Rule 11  
9 grounds. And this is a jurisdictional statute that  
10 requires direct knowledge. A relator could read an  
11 indictment and satisfy Rule 10 just by copying the  
12 allegations. Does that count?

13 I think that direct knowledge means there  
14 can't be undue conjecture. The only thing that he said  
15 he knew, even though it wasn't the gravamen of the  
16 claim, was clearly based upon conjecture, a belief that  
17 in his opinion this pipe would not work.

18 And then when we get to the trial, there  
19 were 55 witnesses. Stone had not identified a single  
20 one of them as a person with relevant knowledge at the  
21 outset of the case when he answered his interrogatory  
22 responses. In addition, every person -- no person he  
23 identified testified at the case. He identified four  
24 documents that he said were key. None of them were  
25 introduced. He knew nothing about what went to trial.

1                   In addition, I'd like to focus on the  
2   "voluntarily provide". That is a separate ground for  
3   reversal in this case, and would emphasize that the  
4   Tenth Circuit said the engineering order that refers to  
5   removal of sludge and says in my opinion this won't  
6   work, that's all it says -- the Tenth Circuit says  
7   that's fine. The district court made a factual finding  
8   that Stone had not communicated his concerns to the  
9   Government about pondcrete, saltcrete, or spray  
10  irrigation, the three theories issues at issue at trial  
11  here.

12                   JUSTICE GINSBURG: There were other  
13  documents. He said there were other documents and the  
14  district court said sorry, you came up with that too  
15  late, I'm not going to look at the other documents.

16                   MS. MAHONEY: Your Honor, what they're  
17  referring to is the affidavit, I think. He filed an  
18  affidavit at the outset of the case when Rockwell filed  
19  the motion to dismiss and then tried to do a new one 10  
20  years later that was rejected.

21                   Thank you very much.

22                   CHIEF JUSTICE ROBERTS: Thank you  
23  Ms. Mahoney.

24                   The case is submitted.

25                   (Whereupon, at 12:11 p.m., the case in the

1   above-entitled matter was submitted.)  
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