No. 10-188

IN THE

Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, ex rel. DANIEL KIRK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the Petition for a Writ of Certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity. In addition, EEAC's members employ many veterans of the country's armed forces as well as active members of the Guard and Reserve. EEAC's members often go beyond the letter of the nation's laws promoting and protecting the employment of veterans to support their employees who have served, or are serving, in the armed forces.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, Titles I and V of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-17, 12201-13, and other employment-related statutes and regulations. Most also are federal government contractors subject to various federal record-keeping and reporting requirements, including the obligation under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. § 4211 *et seq.*, as amended, and its implementing

regulations to file annually with the U.S. Department of Labor a "VETS-100" Report on the number of covered veterans employed by them.

Thus, the issue presented in the Petition regarding the scope of the public disclosure bar to jurisdiction under the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, is extremely important to the nationwide constituency that EEAC represents. The district court below properly dismissed the instant lawsuit based in part on the statute's jurisdictional bar against actions based on the "public disclosure" of allegations or transactions in an administrative report or investigation under section 3730(e)(4)(A) of the FCA. Pet. App. 52a. The U.S. Court of Appeals for the Second Circuit, however, vacated the district court's opinion and remanded, holding that the responses provided by the U.S. Department of Labor to requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for VETS-100 Reports filed by Petitioner, did not qualify as an "enumerated source" that would trigger the FCA's jurisdictional bar. Pet. App. 33a.

EEAC's member companies file a host of required reports with the federal government each year, many of which are subject to disclosure under FOIA. Accordingly, EEAC's members are extremely concerned about the ability of private citizens to seek the substantial monetary rewards offered by the FCA based solely on mandatory reports that they obtain from federal agencies under FOIA.

EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its experience in these matters, EEAC is well-situated to brief this

Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Schindler Elevator Corporation (Schindler) manufactures, installs, and maintains elevators. Pet. App. 49a-50a. Since some of these elevators are in federal buildings, Schindler is a federal government contractor subject to the recordkeeping and reporting requirements of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. §§ 4211 *et seq.*, as amended, including the obligation to annually file VETS-100 Reports listing the number of covered veterans employed by the company during the reporting period. Pet. App. 50a.

The Relator Daniel Kirk worked for Schindler from 1978 until his voluntary resignation in August 2003. Pet. App. 4a. Following his resignation, Kirk's wife filed several requests with the U.S. Department of Labor (DOL) under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(a), for copies of Schindler's VETS-100 Reports for the years 1998 through 2006. Pet. App. 8a-9a. In response, the DOL produced copies of the company's VETS-100 Reports for 2002, 2004, 2005 and 2006, but responded that it had not located reports for the other years. *Id.*

Kirk sued Schindler under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.* Pet. App. 5a. The FCA prohibits false claims against the federal government, *e.g.*, presenting false claims for payment. 31 U.S.C. § 3729(a)(1). It allows an individual, called a "relator," to bring a *qui tam* suit on behalf of the federal government for a violation of the FCA. 31 U.S.C. § 3730(b). If the government, which has the option to participate in the suit, chooses not to do so,

and the relator's suit succeeds, the relator can be awarded an amount between 25% and 30% of the proceeds, plus expenses, attorney's fees, and costs. 31 U.S.C. § 3730(d)(2).

Kirk contends that Schindler failed to file VETS-100 Reports as required by VEVRAA for the years 1998 through 2001, and 2003, filed false VETS-100 Reports in 2004, 2005, and 2006, and filed a late, and false, VETS-100 Report in 2002. Pet. App. 10a. According to Kirk, Schindler's allegedly non-existent or deficient VETS-100 Reports rendered each request for payment submitted by the company to the federal government under the company's federal contracts a "false or fraudulent claim" in violation of the FCA. Pet. App. 11a.

The district court dismissed the case, concluding that Kirk's action was barred under the provision in the FCA that deprives courts of jurisdiction over lawsuits based on allegations or transactions that have been publicly disclosed in an administrative report or investigation. Pet. App. 87a. The Second Circuit vacated and remanded, holding that the FCA's jurisdictional bar did not apply to the Department of Labor FOIA responses that formed the basis for Kirk's suit. Pet. App. 47a-48a. Schindler has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Second and Ninth Circuits are in direct conflict with the First, Third and Fifth Circuits on an issue of extreme importance to American businesses. The First, Third and Fifth Circuits have ruled that a government agency's response to a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, is

a public disclosure of an administrative report and investigation that triggers the jurisdictional bar of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49 (1st Cir. 2009); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004). In contrast, the Second and Ninth Circuits have concluded that a FOIA response is "little more than duplication" and does not activate the jurisdictional bar. Pet. App. 19a, 47a-48a, *United States v. Catholic Healthcare West*, 445 F.3d 1147, 1153 (9th Cir. 2006).

This issue is extremely important to businesses that contract with the government. All of these companies must submit a multitude of reports to the federal government every year. Some of these, including the VETS-100 Reports at issue, are required because the companies are federal contractors; others are required of nearly all U.S. employers. If the Second and Ninth Circuit's interpretations of the FCA are permitted to stand, any and all of these reports could form the basis of *qui tam* suits by opportunists seeking the pot of gold that the FCA offers, and American businesses will pay the price.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT BELOW, ALONG WITH THE NINTH CIRCUIT, IS IN DIRECT CONFLICT WITH THE FIRST, THIRD AND FIFTH CIRCUITS ON WHETHER AN ADMINISTRATIVE REPORT UNDER THE FREEDOM OF INFORMATION ACT TRIGGERS THE JURISDICTIONAL BAR AGAINST ACTIONS BASED ON PUBLIC DISCLOSURES

A. The First, Third And Fifth Circuits Have Held That A Government Agency's Response To A FOIA Request Is A Public Disclosure Of An Administrative Investigation And Report That Precludes A FCA Action

The False Claims Act prohibits fraud against the government by federal contractors, and allows a private citizen, known as "the relator," to bring a lawsuit on behalf of the United States against a contractor for alleged practices that defraud the government. 31 U.S.C. §§ 3729 *et seq.* When Congress amended the FCA in 1986 to expand the ability of private citizens to sue a federal contractor for submitting false claims to the federal government, 31 U.S.C. § 3730, it was mindful of the dangers of allowing private citizens to seize on public information to gain a quick cash reward. "[I]n an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits . . . ," *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. ___ , 130 S. Ct. 1396, 1407 (2010), Congress specifically excluded from the subject matter jurisdiction of courts "an

action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation . . . ." 31 U.S.C. § 3730(e)(4)(A).[2]

In *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), the Third Circuit, in an opinion written by then-Judge Alito, ruled that a response to a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request constitutes a public disclosure that triggers the jurisdictional bar precluding lawsuits brought under the FCA. In that case, the relator was the general contractor for a public housing lead-based paint abatement project. *Id.* at 379. The relator sued the Housing Authority of the City of Pittsburgh and a subcontractor, alleging that the defendants had submitted false claims to the U.S. Department of Housing and Urban Development (HUD) for the cost of lead-based paint abatement. *Id.* at 381. The lawsuit claimed that two false claims had been submitted to HUD in violation of the FCA. First, the original specifications submitted by the subcontractor allegedly were false because they were based on the use of the wrong product. *Id.* at 381-82. Second, the request for additional funding to pay for

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[2] As this Court noted in *Graham County*, 130 S. Ct. at 1400 n.1, Section 10104(j)(2) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, signed into law on March 23, 2010, replaced the prior version of 31 U.S.C. § 3730(e)(4) with new language, but is not retroactive. In this brief, we use the present tense in discussing § 3730(e)(4) as it existed at the time this case arose. In any event, the new version still includes the "report . . . or investigation," language which is at issue in this case, and thus does not resolve the disagreement among the circuits.

switching to the right product allegedly was fraudulent because the stated reason for the switch was false. *Id.* at 382. The FCA claims stemmed directly from information the relator received from HUD in response to its FOIA request. *Id.* at 381.

In analyzing the case, the Third Circuit pointed first to the plain text of the FOIA, which provides that "'each agency shall make available *to the public*' certain specified categories of information." *Id.* at 383 (citation omitted). Relying on this Court's decision in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), which held that the disclosure of information in response to a FOIA request constituted a public disclosure under the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.*, the Third Circuit concluded that documents released in response to the FOIA request were the product of an administrative investigation that triggered the public disclosure bar under the FCA. *Id.*

The Third Circuit pointed out this Court's observation in *GTE Sylvania*: "'*As a matter of common usage the term "public" is properly understood as including persons who are FOIA requesters.* A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of [the Consumer Product Safety Act].'" *Id.* at 383 (quoting 447 U.S. at 108-09). Accordingly, the Third Circuit concluded: "We see no sound basis for construing the term 'public disclosure' any more narrowly here than the Supreme Court did in *GTE Sylvania*." *Id.*

The Third Circuit next concluded that a FOIA response constitutes a "report" and "investigation" for the purpose of invoking the FCA's jurisdictional bar. Noting the dictionary definition of the word "report,"

the Third Circuit concluded that "[a] response to a FOIA request falls within these definitions. Such a response provides information and notification regarding the results of the agency's search for the requested documents and constitutes an official and formal statement concerning those results." *Id.* at 383-84.

In so doing, the Third Circuit took notice of the obligations that FOIA places on an agency that receives a request, and the actions that agency must perform in response. It observed:

> HUD's search for the documents sought under the FOIA and its decision to disclose them clearly satisfied our court's interpretation of the term 'administrative,' and we believe that these processes should be viewed as constituting an 'investigation' within the meaning of 31 U.S.C. § 3730(e)(4)(A). Accepted definitions of the term 'investigation' include 'a detailed examination,' . . . and the 'making of a search.' . . . When an agency receives a FOIA request, it is obligated to conduct a search that is reasonably calculated to uncover all relevant documents. . . . Such a search falls within the common understanding of the term 'investigation.'

186 F.3d at 384 (citations and footnotes omitted).

The Third Circuit thus ruled in *Mistick* that a response to a FOIA request is a "public disclosure" that triggers the jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A).

The Fifth Circuit reached the same conclusion in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F.3d 168 (5th Cir. 2004). There, a relator sought to maintain

an FCA suit for Medicare fraud based in part on information she obtained through FOIA requests. "[P]ersuaded by the reasoning of *Mistick*," the Fifth Circuit held in its turn that "the response to [the relator's] FOIA request is an administrative report constituting a public disclosure under § 3730(e)(4)(A)." *Id.* at 176 (footnote omitted).

Similarly, in *United States ex rel. Ondis v. City of Woonsocket*, the First Circuit, relying in part on *Mistick*, concluded that "a response to a FOIA request is an act of public disclosure because the response disseminates (and, thus, discloses) information to members of the public (and, thus, outside the government's bailiwick)." 587 F.3d 49, 55 (1st Cir. 2009). Here, too, the First Circuit noted this Court's observation in *GTE Sylvania* that the word "public" includes FOIA requesters for the purpose of the statute being construed in that case, and concluded, that "this reasoning [is] easily transferable to the jurisprudence of the FCA . . . ." *Id.*

The First Circuit concluded that "a FOIA response is a report, at least in the sense that it constitutes an official statement concerning the results of the agency's search of its files." *Id.* at 56. Like the Third Circuit in *Mistick*, the First Circuit looked at the dictionary definition of "report" and concluded that "[t]he result of an agency's search of its files in response to a FOIA request fits comfortably within this broad definition." *Id.* Acknowledging the work involved in an agency's response to a FOIA request, the First Circuit concluded that "[j]ust as transmittal of the FOIA response to the relator constitutes an act of public disclosure, the end product of the government's search (locating and compiling the requested documents) independently constitutes an administra-

tive report – and this is so regardless of the character of the underlying documents." *Id.*

The Sixth Circuit also has stated that "[i]t is generally accepted that a response to a request under the FOIA is a public disclosure." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) (citations omitted).

B. In Contrast, The Second And Ninth Circuits Have Ruled That A Government Agency's Response To A FOIA Request Is "Little More Than Duplication" And Does Not Activate The Jurisdictional Bar

In direct contrast to the First, Third and Fifth Circuits, the court below, and the Ninth Circuit as well, have concluded that a federal administrative agency's response to a FOIA request is not always a public disclosure that triggers the FCA's jurisdictional bar. Pet. App. 47a-48a; *United States v. Catholic Healthcare West*, 445 F.3d 1147, 1153 (9th Cir. 2006). The court below, relying largely on the Ninth Circuit's decision in *Catholic Healthcare*, ruled that "whether a document obtained through a FOIA request is an enumerated source within the meaning of § 3730(e)(4)(A) depends on the nature of the document itself." Pet. App. 23a. Disagreeing specifically with *Mistick*, the court below gave the language of the jurisdictional bar a much narrower interpretation, stating that a "report," in this context, "connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a 'hearing' or 'audit.'" *Id.* at 24a. Contrary to the Third Circuit's recognition of the effort an agency must put forth in responding to a FOIA request, the Second Circuit

dismissed these labors as a "mechanistic production of documents, *id.*, as did the Ninth Circuit in *Catholic Healthcare*, 445 F.3d at 1153 (quoting *Mistick*, 186 F.3d at 393) (Becker, C.J., dissenting). *See also id.* (describing a response to a FOIA request as "little more than duplication").

The Second and Ninth Circuits underrate significantly the amount of effort a government agency must devote to responding to a FOIA request. As the government itself explains, an agency that receives a FOIA request must "find the records, examine them, possibly consult with other agencies or components within the same agency, decide whether to disclose all of the information requested, and prepare the records for release. . . ."[3] Under FOIA, when an agency receives a request, it must conduct a search to determine if it has any relevant documents in its possession. *See* 5 U.S.C. § 552(a). The search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). FOIA requires each agency to develop and publicize a reference guide for submitting FOIA requests. 5 U.S.C. § 552(g).

Even if the agency locates documents responsive to the FOIA request, it cannot simply provide copies to the requester. Instead, it must conduct a thorough analysis of the records to determine if one or more of the nine exemptions (including multiple subparts) set forth in 5 U.S.C. § 552(b) would apply to bar the agency from disclosing the documents. In addition,

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[3] GSA Ofc. of Citizen Servs. and Communs., Fed. Citizen Info. Ctr., *Your Right to Federal Records: Questions and Answers on the Freedom of Information Act and the Privacy Act* 7 (Nov. 2009), *available at* http://www.pueblo.gsa.gov/cic_text/fed_prog/foia/foia.pdf

the agency must review the documents in light of three statutory exclusions that pertain to especially sensitive law enforcement and national security matters. 5 U.S.C. § 552(c).

In its own FOIA Guide, the Department of Labor describes the labor-intensive investigation that agency officials must conduct to respond to FOIA requests: "Some components of the Labor Department, [sic] receive thousands of requests each year. *Many of these requests require a line-by-line review of hundreds or even thousands of pages of documents.*" U.S. Dep't of Labor, *The Freedom of Information Act Guide*.[4]

As the DOL points out in its FOIA Guide, not only must the agency analyze the relevant documents to determine whether any of the FOIA exemptions apply, but if it concludes that information should not be disclosed, then it must identify the specific exemption that applies. "There are statutory exemptions that authorize the withholding of information of an appropriately sensitive nature. When the Labor Department withholds information, it ordinarily must specify which exemption of the FOIA permits the withholding." *Id.* The agency thus creates a written record to report the relevant exemption(s) to the requester: "The determination letter will advise you of any information that is being withheld pursuant to one or more of the exemptions. When pages are being withheld in their entirety, the component will specify the volume of the materials denied and/or, if feasible, the location of excluded material." *Id.* Moreover, even if the agency's analysis leads it to

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[4] *available at* http://www.dol.gov/dol/foia/guide6.htm (last visited Aug. 26, 2010) (emphasis added).

conclude that a particular record is subject to a FOIA exemption, the FOIA requires it to further analyze the record to determine whether there is any portion of it which is "reasonably segregable" so as to allow for its disclosure. 5 U.S.C. § 552(b).

In fiscal year 2008, DOL reported processing nearly 17,000 FOIA requests.[5] Of those FOIA requests, the agency granted only 28% in full. DOL denied 32% in full – 10% based on one or more of the statutory exemptions, and 22% based on grounds other than the FOIA exemptions. *Id.* Another 40% were granted in part and denied in part. That the agency granted in full only 28% of the FOIA requests it processed that year shows that merely duplicating documents accounts for, if anything, only a small portion of the FOIA responses conducted by agencies every year. *Id.*

There is a sharp and clear conflict among the courts of appeals on this issue. The Second and Ninth Circuits have discounted significantly the extent of the investigation that FOIA demands each agency perform in response to a request as well as the nature of the report that is issued. EEAC respectfully submits that this Court should grant a writ of certiorari, resolve the conflict, and reverse the decision of the Second Circuit below.

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[5] U.S. Dep't of Labor, *Freedom of Information Act Annual Report for Fiscal Year 2009*, http://www.dol.gov/sol/foia/2010anrpt.htm (last visited Aug. 26, 2010).

II. THE ISSUE IS EXTREMELY IMPORTANT TO AMERICAN COMPANIES THAT DO BUSINESS WITH THE GOVERNMENT, ALL OF WHOM ARE REQUIRED TO SUBMIT A PLETHORA OF REPORTS

A. Federal Contractors Must Submit Numerous VETS-100 Reports Every Year Under Complex And Confusing Regulations

Allowing private individuals to sue under the FCA for fraud based on the filing of mandatory reports to the government that have been publicly disclosed pursuant to a FOIA request would adversely affect the efficiency and economy with which the federal government purchases goods and services from contractors. In fiscal year 2009, the federal government reported that nearly 50,000 companies had government contracts worth $100,000 or more,[6] the statutory threshold for triggering the VETS-100 reporting requirement.[7]

Together, those companies employ millions of workers, any one of whom could submit a FOIA request for the VETS-100 Reports filed by his or her company and launch a *qui tam* case for fraud against the government, thus increasing substantially the risk to employers of having to defend many more frivolous lawsuits, and in turn increasing the cost to federal contractors of doing business with the government.

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[6] USAspending.gov, http://www.usaspending.gov (last visited Aug. 26, 2010).

[7] The Jobs for Veterans Act of 2002 raised the monetary threshold for government contracts from $25,000 to $100,000 to trigger the VETS-100 filing. 38 U.S.C. § 4212(a)(1).

Further complicating matters, Congress has revised the reporting requirements of the VETS-100 Report multiple times over the past several years. The DOL, in turn, has revised its regulations to implement the changes, although those revisions often have not become final until after the effective date of the changes already has occurred. The confusion that has resulted over which version of the regulations and forms contractors must follow makes it patently unreasonable to expect complete accuracy of every VETS-100 submission.

As noted, federal contractors are required annually to report aggregate workforce demographic data on certain specified categories of covered veterans on a VETS-100 Report. VEVRAA, 38 U.S.C. § 4212(d). Initially, two categories of veterans were covered under the statute: (1) Veterans of the Vietnam Era; and (2) Special Disabled Veterans. Since 1998, however, VEVRAA has been amended three times, with each amendment resulting in changes to the categories of covered veterans for reporting purposes.

- In 1998, the Veterans Employment Opportunities Act (VEOA) added "Other Protected Veterans" to the list of covered veterans categories for reporting purposes, and defined this new category as those veterans "who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized." Pub. L. No. 105-339, 112 Stat. 3182 (1998).
- In 2000, the Veterans Benefits and Health Care Improvement Act (VBHCIA) added "Recently Separated Veterans" to the list of covered veterans categories for reporting purposes, and defined this new category to

include "any veteran during the one-year period beginning on the date of such veteran's discharge or release from active duty." Pub. L. No. 106-419, 114 Stat. 1822 (2000).

- In 2002, the Jobs for Veterans Act (JVA), added "Armed Forces Services Medal Veterans" to the list of covered veterans categories for reporting purposes, expanded the definition of "Recently Separated Veterans" to include "any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty," replaced the "Special Disabled Veterans" category with a newly defined "Disabled Veterans" category, and eliminated the category for Vietnam Era Veterans. The JVA changes, though, applied only to federal contracts or subcontracts of $100,000 entered into or modified on or after December 1, 2003. Pub. L. No. 107-288, 116 Stat. 2033 (2002).

To make matters even more confusing for federal contractors, there are now two sets of regulations that implement the reporting requirements established by VEVRAA. The first set of regulations – 41 C.F.R. Part 61-250 – establishes the VETS-100 reporting requirements under VEVRAA for federal contracts entered into prior to the December 1, 2003 effective date of the JVA. The second set of regulations – 41 C.F.R. Part 61-300 – establishes the reporting requirements under VEVRAA as amended by the JVA of 2002. Because the JVA did not replace the VETS-100 reporting requirements that had been in effect prior to its enactment, DOL was required to issue separate regulations and institute a *new* annual reporting form, the VETS-100A, that reflected the

JVA's higher dollar threshold and new covered veteran categories. As a result of these cumulative changes, federal contractors have been in a constant state of flux for the past several years over how to best comply with their VETS-100 reporting requirements.

Moreover, a federal contractor's VETS-100 and VETS-100A reporting obligations are more than a single report. Covered employers with multiple establishments must file a VETS-100/VETS-100A form for each establishment (or "hiring location") employing 50 or more persons. Establishments with fewer than 50 employees may submit their own separate VETS-100/VETS-100A forms or may be consolidated with other under-50 locations in the same state.[8]

B. Federal Law Obligates Federal Contractors To Submit Many Other Reports As Well

In addition to submitting annual VETS-100 and VETS-100A Reports, federal contractors must comply with many other reporting requirements as a condition of doing business with the government, which if deemed subject to the rule adopted by the Second and Ninth Circuits also potentially would expose them to a flood of costly and time-consuming litigation. The Federal Acquisition Regulations (FAR) require contractors subject to the Davis-Bacon Act, for example, to submit to the contracting officer, on a weekly basis, copies of their payrolls containing the weekly

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[8] U.S. Dep't of Labor, VETS-100 Federal Contractor Report on Veterans Employment, http://www.dol.gov/vets/programs/fcp/VETS-100.pdf, and Federal Contractor Veterans Employment Report VETS-100A, http://www.dol.gov/vets/programs/fcp/VETS-100a.pdf (last visited Aug. 26, 2010).

wages and hours worked by laborers and mechanics. 48 C.F.R. § 52.222-8(b)(1). The payroll records must set out "accurately and completely all of the information required to be maintained," and must be accompanied by a "Statement of Compliance" signed by the contractor that certifies that the information "is correct and complete." *Id.* at §§ 52.222-8(b)(1)-(b)(2)(i).

Similarly, the Service Contract Act (SCA), 41 U.S.C. §§ 351 *et seq.*, requires federal government contractors performing service on covered contracts to pay employees no less than the applicable wage rates and fringe benefits for their work. Contractors must submit to the contracting officer a Standard Form 1444, Request for Authorization of Additional Classification and Rate, if they have an unlisted class of employees that is to perform any contract work. 48 C.F.R. § 52.222-41(c)(2)(ii).

Further, under the government's new transparency efforts, a new interim rule, which the issuing federal agencies describe as "sweeping" in its breadth, will require most federal contractors to report to the government key information on all first-tier subcontracts of $25,000 or more, including the names and addresses of all first-tier subcontractors and the dates and amounts of all subcontracts; and, if certain thresholds are met, (1) disclose and report the names and total compensation of each subcontractor's five most highly compensated executives; and (2) disclose and report the names and total compensation of each of their own five most highly compensated executives. Reporting Executive Compensation and First-Tier Subcontract Awards, 75 Fed. Reg. 39,414, 39,416 (July 8, 2010) (to be codified at 48 C.F.R. pts. 4, 12, 42 & 52). The rule expands upon and makes perma-

nent a pilot program tested in 2007 to implement the Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 286, as amended by section 6202 of the Government Funding Transparency Act of 2008, Pub. L. No. 110-252, 122 Stat. 2323, which required the federal government to create a single, easily accessible, searchable and cost-free database that allows the public to see how its tax dollars are being spent on federal awards. *Id.*

In addition, federal contractors also must comply with various federal recordkeeping and reporting requirements that apply to employers generally. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, requires all employers with 100 or more employees to file annually with the government the "Employer Information Report" (EEO-1), which contains statistical data on the race and ethnicity of the employer's workforce at each establishment, broken down into various job categories. 42 U.S.C. § 2000e-8(c).[9] Covered employers with multiple establishments must file an EEO-1 form for each establishment employing 50 or more persons, as well as a headquarters report and a consolidated report.[10] In 2008, the government reported that over 68,300 employers, collectively em-

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[9] The FAR provides that federal contractors "shall also file Standard Form 100 (EEO-1), or any successor form, as prescribed in 41 C.F.R. part 60-1." 48 C.F.R. § 52.222-26(c)(7).

[10] Equal Employment Opportunity Commission, *Standard Form 100 Instruction Booklet*, http://www.eeoc.gov/employers/eeo1survey/upload/instructions_form.pdf (last visited Aug. 26, 2010).

ploying more than 62.2 million workers, filed EEO-1 Reports.[11]

C. If The Second And Ninth Circuit Decisions Are Permitted To Stand, The Financial Impact On The Many American Businesses Who Are Federal Contractors Will Be Significant

Every VETS-100, EEO-1 or other report that a federal contractor submits to the federal government thus produces a record that potentially is subject to public disclosure pursuant to a FOIA request. Under the rule adopted by the Second and Ninth Circuits, each one of those documents, once disclosed in a FOIA response, could lead to a *qui tam* lawsuit against a company, thus exponentially increasing the exposure of employers to parasitic lawsuits filed by opportunistic plaintiffs seeking to capitalize on publicly disclosed information, and forcing courts to rule on significantly more cases.

As the U.S. District Court for the District of Columbia once said,

> it must be the case that information obtained pursuant to an [sic] FOIA request has been made public through the administrative process and cannot form the basis of a qui tam action. If that were not the case then, . . . public agency records would be flooded with citizens requesting information in order to bring qui tam suits. Congress did not intend the qui tam provision to transform

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[11] Equal Employment Opportunity Commission, *Job Patterns for Minorities and Women in Private Industry (EEO-1)*, http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm (last visited Aug. 26, 2010).

> FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.

United States ex rel. Herbert v. Nat'l Academy of Sciences, 1992 U.S. Dist. LEXIS 14063, at *16, 1992 WL 247587, at *6 (D.D.C. Sept. 15, 1992), *quoted in Mistick*, 186 F.3d at 385. If this Court allows the Second and Ninth Circuit's interpretation to stand, American businesses will shoulder the exorbitant costs of the many pot of gold searches that are guaranteed to ensue. EEAC respectfully submits that this Court should grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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