No. 16-1262

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. BENJAMIN CARTER,

Plaintiff-Appellant,

v.

HALLIBURTON CO., KELLOGG BROWN & ROOT SERVICES, INC., KBR, INC., SERVICE EMPLOYEES INTERNATIONAL, INC.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
The Honorable James C. Cacheris
No. 1:11-cv-602-JCC-JFA

BRIEF OF APPELLEES
HALLIBURTON CO., KELLOGG BROWN & ROOT SERVICES, INC., KBR, INC., AND SERVICE EMPLOYEES INTERNATIONAL, INC.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-1262 Caption: U.S. ex rel. Carter v. Halliburton Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Halliburton Company
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

KBR, Inc. is a co-defendant in the district court and an appellee in this Court.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John P. Elwood Date: September 9, 2016

Counsel for: Halliburton Company

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Kellogg Brown & Root Services, Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
   If yes, identify all parent corporations, including all generations of parent corporations:
   The direct parent of Kellogg Brown & Root Services, Inc. is KBR Holdings, LLC. The direct parent of KBR Holdings, LLC is KBR, Inc., a publicly-traded company incorporated in Delaware.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
   If yes, identify all such owners:
   KBR, Inc., as set out in the answer to Question No. 2

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
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Signature: /s/ John P. Elwood Date: September 9, 2016

Counsel for: Kellogg Brown & Root Services, Inc.

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(name of party/amicus)

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Signature: /s/ John P. Elwood Date: September 9, 2016

Counsel for: KBR, Inc.

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No. 16-1262 Caption: U.S. ex rel. Carter v. Halliburton Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Service Employees International Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
The direct parent of Service Employees International Inc. is KBR Group Holdings, Inc. The direct parent of KBR Group Holdings, Inc. is KBR Holdings, LLC. The direct parent of KBR Holdings, LLC is KBR, Inc., a publicly-traded company incorporated in Delaware.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
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Signature: /s/ John P. Elwood Date: September 9, 2016

Counsel for: Service Employees International Inc.

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Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 to decide whether the first-to-file bar, 31 U.S.C. § 3730(b)(5), deprived it of subject-matter jurisdiction to hear *qui tam* plaintiff Benjamin Carter's claims under the False Claims Act ("FCA"). *See United States v. Ruiz*, 536 U.S. 622, 628 (2002). The district court dismissed Carter's action without prejudice, holding that it lacked jurisdiction and alternatively that Carter failed to state a claim. JA177 n.9, 201-02. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues

"When a person brings an action under th[e] [False Claims Act], no person other than the Government may intervene or *bring a related action* based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). Under the "plain language" of this "first-to-file bar," courts "look at the facts as they existed when the [later-filed] claim was brought to determine whether an action is barred." *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013). On that basis, the District Court and this Court both previously held that Carter's late-filed action should be dismissed in its entirety under § 3730(b)(5), because a related case was pending when Carter originally filed his action. *Id.* Carter never appealed the District Court's or this Court's judgments in that regard, and the Supreme Court, addressing different questions, did not disturb them.

The questions presented are:

1. Whether binding circuit precedent and principles of the law of the case and the appellate mandate support the district court's holding that Carter's action must be dismissed without prejudice under the first-to-file bar.

2. Whether—even considering the question *de novo*—the False Claims Act's statutory text and the weight of precedent establish that the first-to-file analysis turns on facts as they existed when the late-arriving action was brought,

such that neither a first-filed case's subsequent dismissal, nor a request to amend a complaint, will cure a first-to-file defect.

3. Whether the District Court abused its discretion in denying a motion to reconsider that relied solely on non-binding out-of-circuit precedent and identified no intervening "change in controlling law," as required under Federal Rule of Civil Procedure 59(e).

Introduction

Although the procedural history of this decade-long litigation is lengthy and complex, this appeal turns on one straightforward legal question. The FCA's first-to-file bar prohibits a *qui tam* relator from "bring[ing] a related action based on the facts underlying [a] pending action." 31 U.S.C. § 3730(b)(5). The question presented is whether the first-to-file bar turns on the facts at the time the late-arriving relator *files* his case (i.e., "bring[s] a related action," *id.*)—or instead whether the late-arriving relator "bring[s] a related action" *anew* at the moment an earlier action is dismissed, with the court's authority to consider such claims springing back into existence as earlier-filed cases are litigated and dismissed and the first-to-file analysis subject to ongoing and perpetual reconsideration. As the District Court correctly concluded, this Court has already decided that very question, in this very case: a statutory bar on "bring[ing] a related action" looks to "the facts as they existed when the claim was brought," *Carter*, 710 F.3d at 183.

Thus, Carter's case must be dismissed "rather than left on ice" to potentially be revived when earlier-filed actions are dismissed. *Id.* at 183 (quoting *U.S. ex rel. Chovanec v. Apria Healthcare Grp., Inc.*, 606 F.3d 361, 362 (7th Cir. 2010)). The outcome of this case is thus squarely controlled by binding circuit precedent.

Indeed, Carter's strategic litigation choices bar him from challenging that conclusion. For more than a decade, Carter has nursed along his stale claims—through at least four separate cases, seventeen briefs, eight oral hearings, three appeals, Supreme Court review and a remand to this Court—advancing before each succeeding court the view that the first-to-file bar looks to the facts at the time a late-arriving action is filed. On that basis Carter filed cases, took dismissals, and re-filed new cases as a way to sidestep the first-to-file bar. Not once did Carter previously suggest that his case could be revived automatically or through amendment after a first-filed case was dismissed. Belatedly realizing that position no longer suits his purposes, Carter now seeks the mother of all mulligans, reversing course and arguing for the first time that courts must deem the relator to "bring a related action" anew at the moment an earlier claim is dismissed and consider *at that point* the propriety of allowing his case to proceed. It is far too late in the day for such gamesmanship. As the District Court correctly held, Carter's claims are barred by law of the case doctrine. Carter *fails even to contest* that ruling, giving this Court a straightforward basis to affirm. If any case were

ever a candidate for enforcing law of the case and related doctrines of preclusion and preservation, this decade-long ordeal is it.

But even putting that history aside, this Court's precedent is plainly correct. As a matter of plain meaning, a party "bring[s] an action," 31 U.S.C. § 3730(b)(5), by *filing* a case, not by amending a complaint. Carter offers no plausible textual argument to the contrary, instead relying on out-of-context snippets from the Supreme Court's opinion. Implausibly, Carter suggests that the Supreme Court reversed a large body of settled precedent without comment, on a question that was never presented or briefed to that Court. And Carter presses the head-scratching assertion that the High Court somehow revived his claims in an opinion that expressly *affirmed* this Court's holdings that his case should be dismissed without prejudice, precisely because the first-to-file bar is assessed at the time the late-arriving case is filed.

Carter falls back on vague policy concerns that attribute to Congress a single-minded desire to maximize the number of *qui tam* cases. But the FCA's text reflects that Congress balanced potential recoveries with the first-to-file bar and detailed statutes of limitations and repose, which make clear that attempts to litigate stale and duplicative FCA claims must eventually come to an end. Those provisions provide an essential check against runaway serial litigation, with bounty-hunting relators endlessly re-filing copies of the same complaints over and

over—just like Carter did here. Those limitations are key features of the statutory scheme, not "procedural loopholes." Carter.Br. 35. Carter's reading would disserve Congress's purpose of uncovering information about fraud and instead encourage the filing of duplicative, bare-bones placeholder complaints, render the FCA's statutes of limitations and repose a dead letter, and require courts to needlessly address complicated issues involving the interaction of the first-to-file rule, amendment, and relation back principles. This Court should affirm.

Statement of the Case

A. Congress Restricted the Scope of the False Claims Act's "Essentially Punitive" Liability Scheme Through the First-to-File Bar and Statutes of Limitations and Repose

The FCA imposes liability for knowingly presenting false or fraudulent claims to the United States for payment or approval. 31 U.S.C. § 3729(a)(1). The Act's liability scheme is "essentially punitive," imposing treble damages plus civil penalties of up to $11,000 per false claim. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 769, 784-85 (2000); 31 U.S.C. § 3729(a). The Act's *qui tam* provisions, in turn, authorize private "relators" to bring FCA actions "in the name of the Government." 31 U.S.C. § 3730(b)(1). By granting the relator a significant share of any recovery, *see id.* § 3730(d)(2), the FCA creates a strong incentive for private suits.

Congress, however, sought to strike the "golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information." *Graham Cnty. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010). "While encouraging citizens to act as whistleblowers, the [FCA] also seeks to prevent parasitic lawsuits based on previously disclosed fraud." *Carter*, 710 F.3d at 181. To that end, Congress enacted strict "limits on [the FCA's] qui tam provisions, including . . . [the] first-to-file bar." *Id.* Under that bar, "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The first-to-file bar serves Congress's "twin goals of rejecting suits which the government is capable of pursuing itself" because it is already on notice of the alleged fraud, "while promoting those which the government is not equipped to bring." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011).

"Following the plain language of the first-to-file bar," this Court "look[s] at the facts as they existed when the claim was brought to determine whether [the] action is barred." *Carter*, 710 F.3d at 183. A late-filed action will be "barred . . . if [a related] case was pending when . . . [t]he [later case] was filed." *Id.* This Court, like many others, treats the first-to-file bar as jurisdictional. *See id.* at 181-82; *U.S.*

ex rel. Palmieri v. Alpharma, Inc., No. 14-cv-1388, 2016 WL 1637995, at *1 (4th Cir. Apr. 26, 2016) (per curiam).[1]

The FCA also contains strict statutes of limitations and repose. A relator "may not br[ing]" a *qui tam* action "more than 6 years after the date on which the [FCA] violation . . . [was] committed." 31 U.S.C. § 3731(b)(1). The FCA also contains an "absolute provision for repose," *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013), which directs that "in no event [may an action be brought] more than 10 years after the date on which the violation [was] committed." 31 U.S.C. § 3731(b)(2); *accord Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1974 (2015).

B. Procedural History

1. For a Decade, Carter Willingly Accepted Dismissals, Abandoned Appeals, and Re-Filed New Cases to Avoid the First-to-File Bar

Appellee Kellogg Brown & Root Services, Inc. and related entities (collectively, "KBR") provided logistical services to the U.S. military in Iraq under a multi-year government contract. Between mid-January and April 2005, Appellant Benjamin Carter briefly worked for KBR as a water purification

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[1] *Accord U.S. ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014); *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001). *But cf. U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120-21 (D.C. Cir. 2015).

operator in Iraq. *Carter*, 710 F.3d at 174. On February 1, 2006, Carter filed a *qui tam* complaint, which he subsequently amended, alleging FCA violations involving contaminated water. JA65, 171. The government reviewed the complaint under seal, *see* 31 U.S.C. § 3730(b)(2), investigated, and declined to intervene. The District Court dismissed that complaint for failure to plead fraud with particularity, and Carter amended again in January 2009 ("*Carter 2009*"), this time alleging false billing for labor costs between January and June 2005. *Carter*, 710 F.3d at 175; JA64, 86.

Shortly before trial, the government notified the parties about an earlier-filed *qui tam* action in California (in which the relator was represented by Carter's own former lawyer, Mem. Op. 6 n.2, No. 08-cv-1162 (E.D. Va. May 10, 2010) [Dkt. 306], alleging similar timekeeping fraud. KBR successfully moved to dismiss under the first-to-file bar. JA66. The District Court analyzed "the facts as they existed at the time the action was brought," Mem. Op. 11, No. 08-cv-1162 (E.D. Va. May 10, 2010) [Dkt. 306], and held that the claims in the earlier-filed suit were "related" to Carter's. *Id.* at 15. Carter noticed an appeal; seven days later, the California case was dismissed. JA66; *Carter*, 710 F.3d at 175.

In August 2010, Carter refiled in a new docket what he concedes was "an identical copy" of his earlier complaint ("*Carter 2010*")—while *also* maintaining his *Carter 2009* appeal. *See* Tr. Mot. Hr'g at 22, *U.S. ex rel. Carter v. Halliburton*

Co., No. 10-cv-864, 2011 WL 2118227 (E.D. Va. May 24, 2011) [Dkt. 49] [Dkt. 49]. Carter voluntarily dismissed the *Carter 2009* appeal in February 2011 (JA67) to help clear the way for *Carter 2010*, without suggesting that *Carter 2009* might be revived automatically (or saved through amendment) when the California case was dismissed.

The District Court dismissed *Carter 2010* without prejudice, on the ground that Carter's own *Carter 2009* appeal was pending when *Carter 2010* was filed, triggering the first-to-file bar. *Carter*, 710 F.3d at 176.[2] Carter did not suggest that *Carter 2010* was automatically revived when his earlier appeal was dismissed, did not seek leave to amend his complaint, and did not appeal. Instead, on June 2, 2011, Carter brought the current action, filing a third copy of his complaint ("*Carter 2011*"), which was "identical to the complaint[s] filed in [*Carter 2010*] and [*Carter 2009*], except for its title, case number, and signature block." JA107; *Carter*, 710 F.3d at 176. The government again declined to intervene. JA67.

2. The District Court Dismissed Carter's Current Case With Prejudice

On the day *Carter 2011* was filed, two "related cases were pending: *United States ex rel. Duprey* [filed in D. Md. in 2007] . . . and another action—that is

[2] Contrary to Carter's assertion (Carter.Br. 5), the District Court did not analyze whether *Carter 2009* was pending at the time it adjudicated KBR's motion to dismiss in *Carter 2010*, but rather as of the time *Carter 2010* was filed. *U.S. ex rel. Carter v. Halliburton Co.*, No. 10-cv-864, 2011 WL 2118227, at *4 (E.D. Va. May 24, 2011) [Dkt. 46].

under seal—filed in Texas in [2004]." *Carter*, 710 F.3d at 176. *Duprey* was dismissed in October 2011; the Texas case was dismissed in 2012. In November 2011, the District Court dismissed *Carter 2011*, holding that it was "related" to *Duprey*, and thus barred under § 3730(b)(5) (JA84-85); the court "concluded that it need not decide [whether the Texas action was pending] because at least one case—*Duprey*—was pending," *Carter*, 710 F.3d at 176. In resisting dismissal, Carter did not argue that the dismissal of *Duprey* (or the Texas action) would allow his suit to move forward, nor did he seek leave to amend.

The District Court found—and all parties agreed—that allegations related to claims KBR submitted to the government prior to June 2, 2005 (i.e., more than six years before *Carter 2011* was filed on June 2, 2011) were untimely under the FCA's statute of limitations, absent tolling. JA85-86. Labor charges for two employees for one day's work—totaling $673.56—were allegedly billed on June 15, 2005, narrowly within the *Carter 2011* limitations period. JA86; *Carter*, 710 F.3d at 188 n.1 (Agee, J., concurring in part and dissenting in part).

After concluding that neither the Wartime Suspension of Limitations Act ("WSLA") nor equitable tolling extended the six-year limitations period, the District Court held that "Carter's claims are time-barred except for the [June 15, 2005 voucher] for $673.56." JA96. However, because "Carter's complaint as a whole [is] independently barred by operation of the first-to-file bar," and because

every single claim in his complaint (including the $673.56) "would be untimely were Carter to again file a new action," the District Court held that "dismissal is with prejudice." *Id.*; *see also Carter*, 710 F.3d at 176.

3. This Court Agreed that the First-to-File Bar Is Analyzed at the Time an Action Is Filed, and the Supreme Court Did Not Disturb that Judgment

a. Carter appealed, focusing on the first-to-file bar and WSLA. He argued that the first-to-file bar did not require any dismissal to be *with prejudice*, and that the earlier-filed actions were not "related." Carter did not, however, challenge the District Court's holding that the first-to-file bar should be assessed at the time the later-filed action was brought. Nor did he suggest that dismissal of the earlier-filed cases might revive *Carter 2011* automatically, or through amendment. Nor did Carter argue against a without-prejudice dismissal. Appellant's Br. 33-46, 48-49, 54, *Carter*, 710 F.3d 171 (No. 12-1011).

This Court unanimously agreed that *Carter 2011* must be dismissed in its entirety under the first-to-file bar, because *Duprey*, a related case, had been pending at the time *Carter 2011* was filed. *Carter*, 710 F.3d at 181-82. The panel explained that the first-to-file bar is "an absolute, unambiguous exception-free rule," and that "whoever wins the race to the courthouse prevails and the other case must be dismissed." *Id.* at 181. This Court expressly held that it "look[s] at the facts as they existed when the claim was brought to determine whether an action is

barred by the first-to-file bar." *Id.* at 183. This Court squarely rejected Carter's suggestion that his case was no longer subject to the first-to-file bar "because the *Duprey* and Texas action have [subsequently] been dismissed." *Id.* at 182. In this Court's view, "[f]ollowing the plain language of the first-to-file bar, Carter's action will be barred by *Duprey* or the Texas action if either case was pending *when Carter filed suit*." *Id.* at 183 (emphasis added). Because both actions were unquestionably "pending when Carter filed his complaint on June 2, 2011," Carter's action was "barred by the *Duprey* and Texas actions." *Id.*

This Court concluded that dismissal on first-to-file grounds should be without prejudice, because "once a case is no longer pending the first-to-file bar does not stop a relator from *filing a related case*." *Id.* (emphasis added). As a result, "the first-to-file bar does not preclude Carter from filing an action" in the future—precisely "what a dismissal without prejudice allows [him] to do." *Id.* This Court emphasized that *Carter 2011* must be dismissed: "if a case is brought while the original case is pending it must be dismissed 'rather than left on ice.'" *Id.* (quoting *Chovanec*, 606 F.3d at 365).

The panel agreed that all of Carter's claims (save the $673.56) were outside the six-year statute of limitations and were thus untimely the day they were filed, absent tolling. *See id.* at 177, 181; *id.* at 188 & n.1 (Agee, J., concurring in part

and dissenting in part). The panel majority held, however, that WSLA tolling was available.

b. KBR petitioned for certiorari, identifying two narrow questions for further review, neither of which questioned the District Court's or this Court's holdings that the first-to-file analysis depends on facts at the time an action is filed. To the contrary, KBR's first-to-file question was predicated on those courts' understanding that the first-to-file analysis occurs "at the time of filing." Pet. I, *Carter*, 135 S. Ct. 1970 (No. 12-1497).[3]

Carter did not cross-petition to challenge this Court's holding that the first-to-file bar is analyzed at the time a late-arriving case is filed, nor did his Brief in Opposition identify that issue as a basis for denying certiorari. Indeed, Carter *affirmatively endorsed* this Court's holding, arguing that "[t]he panel *correctly decided* that the district court's jurisdictional dismissal of the case should have been without prejudice." *See* Br. Opp. 17, *Carter*, 135 S. Ct. 1970 (No. 12-1497) (emphasis added); *accord id.* at 25 ("The panel's decision was correct . . . .").

[3] KBR's first question presented involved the WSLA, no longer at issue. The second question presented was:

> Whether, contrary to the conclusion of numerous courts, the False Claims Act's so-called "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending *at the time of filing*.

Id. (emphasis added).

Carter's merits brief assured the Supreme Court that his (incorrect) reading of the WSLA would not "open the door to an endless stream of parasitic lawsuits," because "[a] related action based on the facts underlying the pending action *must be dismissed rather than stayed*." Resp't Br. 60, *Carter*, 135 S. Ct. 1970 (No. 12-1497) (emphasis added); quoting *Chovanec*, 606 F.3d at 362).

The Supreme Court granted certiorari and reversed in part, unanimously holding that the WSLA applies only in criminal cases but agreeing that the first-to-file provision "ceases to bar suits" that might be filed in the future, after the earlier-filed case "is dismissed." *Carter*, 135 S. Ct. at 1978. As a result, the Supreme Court concluded that "dismissal *with prejudice* was not called for" "under the first-to-file rule." *Id.* (emphasis added). The Supreme Court understood the first-to-file question before it as "whether the [FCA's] first-to-file bar keeps *new claims* out of court only while related claims are still alive." *Carter*, 135 S. Ct. at 1973 (emphasis added).

As to Carter's one claim that had not been barred by statute of limitations when he filed *Carter 2011*, the Supreme Court held that "dismissal *with prejudice* was not called for under the first-to-file rule." *Id.* at 1978. The Supreme Court did not dispute this Court's conclusion that, under to the first-to-file bar, Carter "had the right to refile his case." *Id.* at 1975, 1978. The Supreme Court affirmed this Court's judgment, rejecting KBR's argument that the first-to-file bar "forever bars

any subsequent related action" from being filed. *Id.* at 1979. But the Court gave no suggestion that it was reversing this Court's holding on the distinct question—never presented or briefed to that Court—whether the first-to-file analysis occurs at the time of filing.[4]

4. This Court Remanded for the District Court to Implement the Supreme Court's Judgment that First-to-File Dismissal Should Be Without Prejudice

On remand to this Court, the parties briefed, among other things, whether Carter was entitled to equitable tolling of the six-year statute of limitations. Viewing that question as "[t]he only issue left for [appellate] resolution," this Court answered "no," summarily affirming the District Court's judgment on that issue. As to the first-to-file bar, Carter conceded that the Supreme Court had "reversed" the District Court's ruling, in the sense of changing a dismissal with prejudice "to *without* prejudice." Carter Resp. 3, *U.S. ex rel. Carter v. Halliburton*

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[4] While the *Carter 2011* certiorari petition was before the Supreme Court, Carter filed a fourth copy of his complaint ("*Carter 2013*"). *U.S. ex rel. Carter v. Halliburton Co.*, 19 F. Supp. 3d 655, 658-59 (E.D. Va. May 2, 2014). In seeking to avoid another dismissal on first-to-file grounds, Carter argued that *Carter 2011* was no longer pending, notwithstanding KBR's then-pending petition. Carter argued that "the issues presented to the Supreme Court could not result in an opinion that would revive [*Carter 2011*] as neither issue challenges [the District Court's] dismissal of the [*Carter 2011*] complaint." Mem. Opp. 2-3, *Carter*, 19 F. Supp. 3d 65 (No. 13-cv-1188) [Dkt. 28]; *see also id.* at 3 ("[T]he petition for *certiorari* could *never result in the revival* of the complaint that the district court dismissed." (emphasis added)). The District Court dismissed *Carter 2013* without prejudice, holding that *Carter 2011* was pending when *Carter 2013* was filed. Carter did not appeal.

Co., 612 F. App'x 180 (4th Cir. 2015) (No. 12-1497) [Dkt. 93]. This Court concluded that "'dismissal *with prejudice* of [Carter's] one live claim' was 'not called for' *under the first-to-file rule*." *Carter*, 612 F. App'x at 181 (emphases added) (quoting *Carter*, 135 S. Ct. at 1978-79). On that basis, this Court remanded "for further proceedings consistent with the Supreme Court's opinion." *Id.*

5. The District Court Dismissed Without Prejudice and Denied Leave to Amend

a. On remand, KBR sought leave to brief whether Carter's one remaining claim should be dismissed *with prejudice*, given that the entire case would be dismissed under the first-to-file bar, and all the claims would be untimely under the statutes of limitations and repose if refiled. KBR Mot., No. 11-cv-602 (E.D. Va. Aug. 7, 2015) [Dkt. 95]. Carter responded that this Court had "unequivocally direct[ed] [the District Court] to dismiss this action without prejudice, in accordance with the . . . Supreme Court's [o]pinion in this matter." Carter Ltr. 1-2, No. 11-cv-602 (E.D. Va. Aug. 11, 2015) [Dkt. 96]. Carter further explained: "the District Court is obligated to follow the Supreme Court and Fourth Circuit's directives to dismiss the matter without prejudice." *Id.*

The District Court allowed briefing on whether dismissal should be with prejudice. Reversing course, Carter argued against any form of dismissal, and sought leave to amend his complaint to include allegations dating from March and July 2005. JA176; JA269-308. *For the first time*, Carter argued that (1) dismissal

of the earlier-filed actions automatically revived his complaint as a matter of law and, (2) alternatively, he should be allowed to amend his complaint, and the first-to-file analysis should look to the time of amendment.

b. The District Court again dismissed without prejudice under Rules 12(b)(1) and (b)(6), rejecting Carter's new theories. The District Court viewed its conclusion as compelled not only by law of the case and Circuit precedent, but also the text of the first-to-file bar and the best-reasoned decisions from other courts.[5]

Carter's new theory of "automatic first-filer status," the District Court held, was "contrary" to "[t]he law of th[e] case and Fourth Circuit precedent." JA179, 184-84. Based on its review of "prior proceedings in this case," the District Court found it "clear [that] this Court applied the first-to-file bar at the time a complaint was filed." JA180. "The Fourth Circuit endorsed this view on appeal when it rejected the exact argument [Carter] makes here." *Id.* (citing 710 F.3d at 183). This Court had been "explicit in this analysis," and its judgment is "law of this case and this Circuit." JA180-81 (citing *Carter*, 710 F.3d at 183).

The District Court also rejected Carter's suggestion that the Supreme Court's opinion was "controlling contrary authority" to justify departing from law of the case. JA181-82. That argument, the District Court held, "is contradicted by

[5] Noting the D.C. Circuit's then-recent conclusion that the first-to-file bar is not jurisdictional, the District Court emphasized "[e]ven if the first-to-file bar were to sound in non-jurisdictional terms, however, the result in this case would not change." JA177 n.1.

a proper reading of [the Supreme Court's opinion], the state of the law at the time [it] was decided, and a sister court's recent interpretation." JA181. The Supreme Court's statement that "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed," 135 S. Ct. at 1979, must be understood in the context of its "statement of the issues before it," which emphasized the narrow nature of its holding. JA182. The question actually presented referred to keeping "new claims out of court," 135 S. Ct. at 1973, and "did not purport to address what effect a dismissal has on existing claims that were previously barred." JA182. Instead, the Supreme Court's focus had been on resolving a split with the D.C. Circuit, which had held that "a first-filed action forever barred all subsequent related cases, even after the first-filed case was dismissed." JA183 (citing *U.S. ex rel. Shea v. Cellco P'ship*, 748 F.3d 338, 344 (D.C. Cir. 2014), *vacated*, 135 S. Ct. 2376 (2015)). Nothing in the Supreme Court's opinion "comment[ed] on or displace[d] [this Court's] conclusion that 'we look at the facts as they existed when the claim was brought.'" JA183-84 (quoting *Carter*, 710 F.3d at 183).

As to the "automatic first-filer" theory, the District Court followed *U.S. ex rel. Shea v. Verizon Communications, Inc.*, No. 09-cv-1050, 2015 WL 7769624 (D.D.C. Oct. 6, 2015), which had carefully analyzed the Supreme Court's decision here, and concluded that although "several aspects of the first-to-file bar" had been "clarified," "its essence remains well-defined: Plaintiffs, other than the

Government, may not *file FCA actions* while a related action is pending." JA184-85 (quoting *Shea*, 2015 WL 7769624, at *10) (emphasis added). Thus, "the temporal focus of the first-to-file bar remains the time a later suit is *filed*." JA184.

c. The District Court similarly rejected the suggestion that Carter could sidestep the first-to-file bar through amendment.[6] "Amending the complaint would not cure the first-to-file bar and therefore is futile," because "the law in this case and the Fourth Circuit requires this Court to 'look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar.'" JA192 (quoting *Carter*, 710 F.3d at 183).

On the merits, the District Court reasoned that amendment was irrelevant because, under the plain statutory text, "a plaintiff does not 'bring an action' [under 31 U.S.C. § 3730(b)(5)] by amending a complaint," but rather "[o]ne brings an action by commencing suit." JA194 (quoting *Chovanec*, 606 F.3d at 362). While emphasizing that the outcome "would not change" even if the bar were non-jurisdictional, the District Court noted that its reading accorded with the rule that federal court jurisdiction "must exist as of the time the action is commenced." JA196-97, 177 n.1.[7] The trial court also noted with approval the weight of

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[6] The District Court also rejected Carter's contention that he could amend as-of-right under Federal Rule of Civil Procedure 15(a)(1)(B). JA186-90. Carter does not challenge that holding.

[7] After "close inspection," JA197, the District Court rejected Carter's reliance on *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007).

precedent holding that amendment cannot cure a first-to-file defect. JA193-94 (citing *U.S. ex rel. Moore v. Pennrose Props., LLC*, No. 11-cv-121, 2015 WL 1358034 (S.D. Ohio Mar. 24, 2015); *Shea*, 2015 WL 7769624; *U.S. ex rel. Branch Consultants LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248 (E.D. La. 2011)).[8]

Finally, the District Court emphasized that Carter's reading would "interfere with the efficient operation of *qui tam* suits," because a relator could simply file a "skeletal complaint to secure a place in the 'jurisdictional queue,'" thereby "trump[ing] any meritorious, related actions that were filed in the meantime." JA199. "[K]eeping the emphasis on the time the initial complaint was filed" also "'has the advantage of simplicity.'" JA199-200.[9]

Rockwell involved a previous version of the public disclosure bar, which barred jurisdiction over FCA suits "based upon the public disclosure of allegations or transactions" unless the plaintiff was "an original source of the information." 549 U.S. at 460 (citing 31 U.S.C. § 3730(e)(4)(A) (2006)). The *Rockwell* relator was an original source of the allegations in his initial complaint, but amended that complaint to include claims based on publicly available information. The District Court here found "convincing[]" several recent district court cases that rejected the argument Carter now advances. As those courts have concluded, in *Rockwell* jurisdiction depended on the actual substance of the plaintiff's allegations, whereas "[i]n the first-to-file context, . . . the timing of the filing carries the weight of jurisdictional relevance." JA198-99.

[8] In the District Court's view, the statutory text and precedent foreclosed the approach in *U.S. ex rel. Kurnik v. PharMerica Corp.*, No. 11-cv-1464, 2015 WL 1524402 (D.S.C. Apr. 2, 2015), which sought to distinguish Circuit precedent on the ground that it did not involve an amended complaint. JA193.

[9] The District Court reserved judgment on KBR's alternate arguments for denying leave to amend and dismissing with prejudice based on the statute of limitations, statute of repose, and prejudice to KBR. The District Court

6. The District Court Declined Reconsideration

Carter sought reconsideration under Rule 59(e), citing the First Circuit's intervening decision in *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015). The District Court held, however, that out-of-circuit authority such as *Gadbois* did not constitute an "intervening change in *controlling* law" as Rule 59(e) requires. JA206-07 (citing *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). The District Court also found *Gadbois* unpersuasive. The First Circuit's discussion of the Supreme Court's *Carter* opinion was "very brief," and "failed to consider the [decision's] context." Nor had *Gadbois* "given sufficient weight to the plain [statutory] language." Finally, whereas in *Gadbois*, requiring the relator to re-file would have been a "pointless formality," 809 F.3d at 6, in Carter's case, "dismissal and refiling could implicate significant statute of limitations and repose problems." JA208-10.[10]

Summary of Argument

1. The doctrines of law-of-the-case, this Court's appellate mandate, waiver, and forfeiture establish that the first-to-file analysis looks to the time a

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acknowledged KBR's "compelling briefing" arguing that Carter's claims (dating from July 2005), would be barred by the FCA's six-year statute of limitations and ten-year statute of repose if refiled. JA201-02.

[10] The District Court rejected KBR's alternative grounds for resisting amendment, concluding that Carter's new allegations were related to his original ones, that amendment would not prejudice KBR, and that the relation-back doctrine could avoid the statute of repose. JA215-24.

complaint is filed, and that Carter's complaint must be dismissed without prejudice. Carter does not even acknowledge this basis for the District Court's decision, much less challenge it; his appeal fails for that reason alone. In any event, the ruling is correct. The District Court's 2011 decision and this Court's prior ruling both expressly held that the first-to-file bar is evaluated based on "the facts as they existed at the time the action is brought." Carter never challenged that premise in his first appeal to this Court or in the Supreme Court—indeed, he affirmatively embraced it. That aspect of this Court's decision was not disturbed by the Supreme Court, and is therefore the binding law of the case.

In suggesting otherwise, Carter relies on an unreasonable reading of snippets from the Supreme Court's *Carter* opinion, divorced from context and ignoring that the Court was never asked to decide the issue Carter suggests it conclusively determined. Reading the Court's opinion in the context of the questions it granted certiorari to consider and the circuit split it resolved forecloses Carter's reading. Carter is wrong to suggest that the Supreme Court adopted a proposition (i.e., that dismissal of a first-filed case revived his complaint *sua sponte*) that no court had *ever* previously accepted, and did so implicitly, without even acknowledging that it was overruling settled law. And because Carter had never attempted to amend his complaint, the Supreme Court had no reason to hold (as Carter suggests) that amendment allows a relator to read the first-to-file bar out of the FCA.

2. Even considering the issue *de novo*, the District Court's judgment is compelled by the FCA's text and the weight of case law. The first-to-file bar prohibits a *qui tam* relator from "bring[ing] a[n] . . . action" while a "related action" is "pending." Because one "bring[s] an action" by filing a complaint (not amending a complaint), the relevant question is whether a related action was pending when Carter's case was filed in June 2005. This reading aligns with the rule that jurisdiction is determined at the time an action is brought and the best-reasoned decisions interpreting the Supreme Court's *Carter* opinion.

Carter urges a contrary result, suggesting that his case was revived *sua sponte* ("by operation of law," Carter.Br. 11) when *Duprey* was dismissed, or alternatively that he can revive it by amendment. Carter offers no argument grounded in statutory text. Instead, he again relies on isolated snippets from the Supreme Court's *Carter* opinion that do not actually decide the issue. Carter's argument gains no support from the First Circuit's *Gadbois* decision and two district court cases he cites. Those cases are not on point, because dismissing and re-filing would have been a "pointless formality" there, as the claims (unlike Carter's) were within the statutes of limitations and repose. *None* of those courts were presented with the key question here: whether a relator can use amendment to sidestep—and effectively repeal—the FCA's statutes of limitations and repose, and to deprive the first-to-file bar of any practical effect.

3. The District Court did not abuse its discretion in denying Carter's motion for reconsideration based on *Gadbois*, because that out-of-circuit case is not "controlling" in the Fourth Circuit. Carter does not even acknowledge the Rule 59(e) standard for reconsideration, never mind challenge the District Court's analysis, which is correct and not an abuse of discretion.

4. Carter's policy arguments cannot justify ignoring the plain statutory text. Congress balanced the FCA's liability scheme by enacting express limitations on suit, including the first-to-file bar and the statutes of limitations and repose. Carter's reading would lead to anomalous and implausible outcomes. A case could *never* actually be dismissed under the first-to-file bar, but rather would be held in abeyance indefinitely until earlier-filed cases ended. Carter's rule would encourage relators to file skeletal complaints to hold their place in line, depriving the government of information about potential fraud. Carter's reading would also invite bounty-hunting relators to file an infinite series of cases within the limitations period, each of which would then move forward in line for years and decades to come.

Argument

I. Standard of Review

This Court reviews *de novo* the dismissal of a complaint under Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6). *U.S. ex rel. Rostholder v. Omnicare, Inc.*,

745 F.3d 694, 700 (4th Cir. 2014); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 & n.5 (4th Cir. 1999). The denial of leave to amend, and denial of a motion for reconsideration, are reviewed for abuse of discretion. *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999); *Orem v. Rephann*, 523 F.3d 442, 451 n.2 (4th Cir. 2008) (Shedd, J., concurring).

II. Circuit Precedent, the Law of this Case, the Appellate Mandate, and Related Doctrines Compel Dismissal of Carter's Complaint Without Prejudice

Carter's two principal arguments—that the first-to-file bar evaporates *sua sponte* with the dismissal of an earlier-filed case, or can be evaded by amendment—are independently barred by circuit precedent, law-of-the case, the appellate mandate, waiver, and forfeiture. Carter ignores these procedural bases for the District Court's opinion, and instead advances a flawed and unreasonable reading of the Supreme Court's narrow decision in this case. Those arguments fail.

A. The District Court and this Court Squarely Held that the First-to-File Bar Is Analyzed at the Time a Late-Arriving Relator Files his Original Complaint

In a case that has had more than its share of twists and turns, one constant throughout has been the principle that Carter only belatedly challenges in this appeal. As the District Court held in November 2011, "whether a *qui tam* action is barred by [the first-to-file bar] is determined by looking at the facts as they existed when the action was brought." JA84. Carter never appealed that ruling or sought

to amend his complaint, instead embracing the proposition that the first-to-file analysis looks to the time of filing. *See* Appellant's Br. 48-49, *Carter*, 710 F.3d 171 (No. 12-1011) (citing cases applying the time-of-filing rule); *id.* at 47 (arguing that dismissed first-filed case should not "have preclusive effect for all time *as to future actions*" (emphasis added)).

Following Carter's lead, this Court affirmed in pertinent part, holding that it "look[s] at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." 710 F.3d at 183.[11] Carter never sought Supreme Court review on this issue, and KBR's cert. petition did not raise the point. Pet. I, *Carter*, 135 S. Ct. 1970 (No. 12-1497). Indeed, Carter assured the Supreme Court that this Court "correctly decided that the district court's jurisdictional dismissal of this case should have been without prejudice." Br. Opp. 17, *Carter*, 135 S. Ct. 1970 (No. 12-1497).

B. The Supreme Court Did Not Disturb the District Court and this Court's Holdings that the First-to-File Analysis Looks to the Facts at the Time the Original Complaint Was Filed

Carter does not (and could not) seriously dispute this history, instead staking his appeal on the notion that the Supreme Court implicitly overruled this Court's interpretation of the first-to-file bar, without the question having been presented or

[11] On remand from this Court, in a hearing on whether his claims were barred by the public disclosure bar, Carter's counsel expressly agreed that he would "have to refile his complaint." JA142.

briefed. In particular, Carter reads the Supreme Court to have held that (a) his claim was revived automatically when *Duprey* was dismissed; (b) notwithstanding the plain text of the FCA, Congress intended to maximize the number of FCA actions to be brought; and (c) the first-to-file bar did not apply to the one claim (for $673.56) that can escape the FCA's statute of limitations. Carter.Br. 14-22. Carter is mistaken.

Issues "not presented by the question on which [the Supreme Court] granted certiorari" are generally "not before the Court" and not addressed. *Hudson v. McMillian*, 503 U.S. 1, 12 (1992). Here, the High Court correctly understood the question presented to be "whether the False Claims Act's first-to-file bar keeps *new claims out of court* only while related claims are still alive or whether it may bar those claims in perpetuity." *Carter*, 135 S. Ct. at 1973 (emphasis added). That question would determine, the Court explained, "whether [Carter's] claims must be dismissed *with prejudice* under the first-to-file rule." *Id.* at 1978 (emphasis added). That narrow question gave the Supreme Court no basis to disturb this Court's prior holding on the different question Carter presses in this appeal. Indeed, Carter acknowledged that fact when it suited his purposes: Carter told the District Court when he sought to file *Carter 2013* while KBR's *Carter 2011* certiorari petition was pending that "the issues presented to the Supreme Court *could not result in an opinion that would revive* [*Carter 2011*] as neither issue challenges [the District

Court's] dismissal of the [*Carter 2011*] complaint." Mem. Opp. 2-3, *Carter*, 19 F. Supp. 3d 655 (No. 13-cv-1188) [Dkt. 28] (emphasis added).

As the District Court explained, this understanding of the Court's opinion is confirmed by the context in which the Court granted certiorari: a square circuit split existed on whether a first-filed case, once dismissed, would "forever bar" new cases from being filed. *Compare Carter*, 710 F.3d at 183 (no), *with Shea*, 748 F.3d at 344 (yes), *vacated by* 135 S. Ct. 2376 (no). "The [D.C. Circuit's] *Shea* holding created a 3-1 circuit split on the issue of whether a first-filed suit continues to bar all new suits in perpetuity, even after the first-filed suit is dismissed. The Supreme Court's holding . . . is best viewed as a response to this circuit split and the arguments actually litigated before the Fourth Circuit . . . ." JA183 (citation omitted).

1. In urging this Court to conclude otherwise, Carter relies on one or two isolated phrases from the Supreme Court's opinion. Carter offers an unreasonable and illogical reading under which the Supreme Court swept away an entire body of existing law without any acknowledgement of doing so, adopted a rule of law that *no court* had *ever* previously accepted, and did so on a question not presented or briefed to the Court. That is not a plausible reading of the Supreme Court's opinion.

First, Carter quotes the Supreme Court's statement that an "earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed," Carter.Br. 15-16 (emphasis omitted), parsing it as if it were an amendment to the first-to-file bar's text. *Id.* at 16. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Reading that language "in context," *Illinois v. Lidster*, 540 U.S. 419, 424 (2004), confirms that it does not support Carter's position. No party had presented or briefed the question whether the first-to-file bar is assessed as of the time a later complaint is filed. And Carter had *affirmatively endorsed* this Court's position in briefs to the Supreme Court. Given this context, it is not reasonable to suggest that the Supreme Court overruled that agreed-upon principle through the use of an (at most) ambiguous cross-reference—particularly as the Supreme Court understood itself to be *affirming* this Court's judgment on that point. *Carter*, 135 S. Ct. at 1978-79.

Perhaps that is why Carter initially conceded that the Supreme Court's decision *required* "the District Court . . . to dismiss without prejudice so as to permit refiling." Carter.Br. 6. Other courts agree with this reading: The Supreme Court's opinion "did not mandate a procedural outcome for second-filed suits whose first-filed counterparts have been dismissed; it only agreed with the Fourth Circuit that the lower court's dismissal *with prejudice* was in error." *U.S. ex rel.*

Boise v. Cephalon, Inc., 159 F. Supp. 3d 550, 556 (E.D. Pa. 2016) (emphasis added). The Court's discussion of when a first-filed case "ceases" to be pending gave no indication that the Court was adopting a ruling that abandons the plain statutory text ("no person . . . may . . . bring a related action," 31 U.S.C. § 3730(b)(5)). *Cf.* Carter.Br. 15-18.

2. Nor did the Supreme Court's shorthand reference to Carter having "one live claim" mean that the first-to-file bar does not apply. *Contra* Carter.Br. 21-22. In context, the Court was referring to the fact that nearly all of Carter's claims were barred by the statute of limitations on the day he filed them in June 2011, absent WSLA tolling. That fact potentially made it unnecessary for the Supreme Court even to reach the first-to-file question. *See Carter*, 135 S. Ct. at 1978 (after concluding WSLA did not apply, agreeing to address the first-to-file issue because Carter "has raised other arguments that, if successful, could render at least one claim timely [under the statute of limitations] on remand"). That reading is again confirmed by context. Immediately after referring to Carter's "one live claim," the Court stated that it "*agree[d] with the Fourth Circuit* that dismissal *with prejudice* of [Carter]'s one live claim was error." *Id.* at 1979 (emphasis added). Carter cannot explain how an opinion that "agree[d]" with this Court (which dismissed Carter's entire complaint without prejudice) reversed an essential premise of its analysis.

The fact that the Supreme Court remanded (rather than rendering judgment outright) does not, as Carter argues, mean the Supreme Court tacitly held—without briefing or argument—that his one claim not barred by the statute of limitations could proceed "uninterrupted" in this case. *Cf.* Carter.Br. 22. Rather, the remand reflected the fact that Carter had *also* argued (in passing) that equitable tolling might save his other claims (i.e., the ones that were more than six years old when *Carter 2011* was filed). Resp't Br. 44-46, *Carter*, 135 S. Ct. 1970 (No. 12-1497). The Supreme Court remanded to allow this Court to decide whether claims otherwise barred by the statute of limitations might be timely through equitable tolling. *See Carter*, 612 F. App'x at 181 (on remand, summarily affirming District Court's holding that equitable tolling is not available) .

3. Carter offers policy arguments supposedly supported by the Supreme Court's rhetorical question, "Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?" Carter.Br. 14, 18-21 (quoting 135 S. Ct. at 1979). But that question must be understood in the context of the argument *actually presented and briefed* to the Court: i.e., whether a first-filed suit, once dismissed, forever bars subsequent new cases from being filed. It would be inappropriate to read that sentence as rendering a dead letter not only the first-to-file bar's express prohibition on "bring[ing] a related action," but also the FCA's statutes of

limitations and repose—whose importance the Supreme Court had emphasized only pages earlier in holding that the WSLA did not toll them.

Even if the Court's policy concern was relevant to the question presented here, it would not provide a basis for disregarding the unambiguous statutory text. Congress balanced the *qui tam* mechanism with express limits on suit. "[N]o legislation pursues its purposes at all costs," *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012), and there is no indication that the Supreme Court intended to sweep away explicit statutory limits on suit in this manner—particularly not in an opinion that "reaffirmed that when applying [the first-to-file bar], courts should give the words used their 'ordinary meaning.'" *U.S. ex rel. Soodavar v. Unisys Corp.*, No. 14-cv-1217, 2016 WL 1367163, at *4 (E.D. Va. Apr. 5, 2016) (quoting *Carter*, 135 S. Ct. at 1978-79).

C. Carter's Current Arguments Are Barred by Numerous Procedural Defaults and Circuit Precedent

Given the procedural history and Supreme Court's opinion, the District Court correctly held that Carter's current arguments are foreclosed by circuit precedent and barred by procedural default.

1. Law of the Case. "[W]hen a court decides upon a rule of law, that decision continues to govern the same issues in subsequent stages in the same case." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (quoting *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999)). "[O]nce the decision of an

appellate court establishes the law of the case, it 'must be followed in all subsequent proceedings in the same case in the trial court or on later appeal,'" absent (among other things) a controlling intervening change of law. *Id.* (quoting *Aramony*, 166 F.3d at 661). The District Court correctly held that Carter never appealed that Court's holding that the first-to-file analysis looks to the time a subsequent case is brought, that this Court expressly endorsed that aspect of the District Court's ruling, and that the Supreme Court did not disturb those holdings, which are now law of the case. JA179-80.

Carter does not even acknowledge the law of the case doctrine, despite the District Court's reliance on it as one basis for decision. Thus, Carter has forfeited any challenge to that issue, and this Court can affirm the District Court's judgment on that basis alone. *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) ("[A]ppellate courts generally will not address new arguments raised in a reply brief."); *TFWS*, 572 F.3d at 195 ("[f]inding no exceptions to the law of the case[and] declin[ing] to revisit . . . prior holdings"). Even if Carter adequately raised the issue through his discussion of the Supreme Court's opinion, that argument fails for the reasons discussed above.

2. *The Appellate Mandate.* The "mandate rule" functions as a "more powerful version of the law of the case," under which "any issue conclusively decided by th[e] court [of appeals] on the first appeal is not remanded," and "any

issue that could have been but was not raised on appeal is waived and thus not remanded." *Doe v. Chao*, 511 F.3d 461, 464-65 (4th Cir. 2007). Carter's failure to challenge the District Court's 2011 ruling that the first-to-file bar looks to the time a later case was filed, and this Court's "conclusive[] deci[sion]" that "Carter's action will be barred by *Duprey* . . . if [it] was pending when Carter filed suit," *Carter*, 710 F.3d at 183, both implicate the appellate mandate. Indeed, Carter's failure to raise the issue before the Supreme Court triggered the mandate rule *again*. *See Chao*, 511 F.3d at 464-65.

Carter originally conceded these points following the Supreme Court's decision, urging the District Court on remand that it was "obligated to follow the Supreme Court and Fourth Circuit's directives to dismiss the matter without prejudice." Carter Ltr. 2, No. 11-cv-602 (E.D. Va. Aug. 11, 2015) [Dkt. 96].

3. Circuit Precedent. Even putting Carter's defaults aside, the District Court correctly held that it was bound by Circuit precedent. In its original appeal, this Court squarely held that it "look[s] at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter*, 710 F.3d at 183. This panel is bound by the prior panel precedent, which the Court's opinion is not fairly read to disturb. *E.g.*, *Bell v. Jarvis*, 236 F.3d 149, 159 (4th Cir. 2000).

4. Forfeiture and Waiver. Although the District Court did not address the issue, Carter also "intentional[ly] relinquish[ed]" his present challenge on multiple occasions, and thus "it is not reviewable on appeal." *United States v. Coppedge*, 490 F. App'x 525, 531 (4th Cir. 2012) (per curiam). Carter urged the Supreme Court that this Court "correctly decided that the district court's jurisdictional dismissal of this case should have been without prejudice." Br. Opp. 17, *Carter*, 135 S. Ct. 1970 (No. 12-1497); *accord id.* at 25 ("The panel's decision was correct . . . ."). He explicitly assured the Supreme Court that "[a] related action based on the facts underlying the pending action *must be dismissed rather than stayed*." Resp't Br. 60, *Carter*, 135 S. Ct. 1970 (No. 12-1497) (emphasis added). Carter's statements *affirmatively endorsing* the controlling legal rule affirmatively waived the arguments he now seeks to raise on appeal. At a minimum, Carter's actions forfeited his current arguments. *See Brickwood Contractors v. Datanet Eng'g, Inc.*, 369 F.3d 385, 395 n.7 (4th Cir. 2004).

III. The Statutory Language and Purpose, Together With the Weight of Precedent, Foreclose Carter's Reading of the First-to-File Bar

Even if this Court were to consider the question *de novo*, the statutory text, together with the weight of persuasive precedent, establish that the first-to-file bar looks to the facts at the time a case is filed. This holding forecloses both of Carter's arguments on appeal: a first-to-file defect neither evaporates *sua sponte* when the first-filed case is dismissed, nor can it be avoided by amendment.

A. The First-to-File Bar's Prohibition on "[B]ring[ing] a [R]elated [A]ction" Looks to Facts at the Time a Case Is Brought

1. By its "plain language," the first-to-file bar requires dismissal of Carter's complaint because earlier-filed related cases "w[ere] pending when Carter filed suit." *Carter*, 710 F.3d at 183. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)). The statute provides that "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). In both common and legal parlance, one "bring[s] an action" by "su[ing]" or "institut[ing] [a] legal proceeding." *Black's Law Dictionary* (10th ed. 2014). In related contexts, the Supreme Court has equated a reference to "bring[ing] a civil action" with "commenc[ing] suit in federal court." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526 (2007); *see also Chandler v. D.C. Dep't of Corr.*, 145 F.3d 1355, 1359 (D.C. Cir. 1998) ("[T]he phrase 'bring a civil action' means to initiate a suit.").

As the District Court explained, "[n]o matter how many times [Carter] amends his Complaint, it will still be true that he 'br[ought] a related action based on the facts underlying the [*then*] *pending* action.'" JA195 (quoting *Shea*, 2015 WL 7769624, at *11). This Court and its sister circuits have agreed. *See U.S. ex*

rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 406 (4th Cir. 2013) (equating "bring[ing] a civil action" with "iniat[ing] suit"); *Chovanec*, 606 F.3d at 362 ("[O]ne 'brings' an action by commencing suit.").

"[T]he filing of an amended complaint does not begin a new action; it is a continuation of the original action." *U.S. ex rel. Dhillon v. Endo Pharm.*, 617 F. App'x 208, 213 (3d Cir. 2015) (per curiam). For this reason, there is a "difference between an order dismissing" (or a statute barring) "an *action*" and "a *complaint*." *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005); *accord Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) (distinguishing "the dismissal without prejudice of a *complaint*" and "[t]he dismissal without prejudice of an *action*").

In the first-to-file bar, Congress chose to prohibit bringing an "action," not filing or amending a "complaint." 31 U.S.C. § 3730(b)(5). Congress used those two terms differently elsewhere in the FCA. *See, e.g.*, 31 U.S.C. § 3730(b)(2) ("The Government may elect to intervene and proceed with *the action* within 60 days after it receives both *the complaint* and the material evidence and information." (emphases added)). Congress' "use of different terms within related statutes generally implies that different meanings were intended." *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 46:06 (6th ed. 2000)).

2. The best-reasoned cases, both before and after the Supreme Court's decision here, hold that the plain text requires that the first-to-file bar must be analyzed at the time an action was brought. *Unisys*, 2016 WL 1367163, at *7-10 ("The plain text of the first-to-file statute indicates that amendment will not cure the first-to-file bar."); *Shea*, 2015 WL 7769624, at *10 ("What offends the first-to-file bar is the bringing of the action (*i.e.*, filing an initial complaint), not the failing to amend a complaint or litigating the case."); *Pennrose Props.*, 2015 WL 1358034, at *12-15 ("Under any logical application of the plain language of the first-to-file bar, the [related, dismissed action] was a 'pending action' at the time the [later] Case was filed."); *Branch Consultants*, 782 F. Supp. 2d at 259-60 ("The first-to-file bar and the original source exception to the public disclosure bar refer specifically to jurisdictional facts that must exist when an 'action,' not a complaint, is filed."). Carter makes no effort to address these cases.

3. Although the District Court expressly held that it would rule the same way regardless of whether the first-to-file bar is jurisdictional, its judgment is consistent with the normal rule that subject-matter jurisdiction is evaluated at the "time-of-filing," and amendments cannot create jurisdiction. *Branch Consultants*, 782 F. Supp. 2d at 260; *accord Carter*, 710 F.3d at 183 ("[W]e look at the facts as they existed when the claim was brought . . . ."); *Grynberg*, 390 F.3d at 1276 ("[L]ook[] at the facts as they existed at the time that action was brought . . . .");

U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503, 510 (6th Cir. 2009) ("[J]urisdiction must be apparent from the facts existing at the time the complaint is brought."); *U.S. ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) ("If [relator's original] complaint did not establish jurisdiction, it should have been dismissed; his amendments cannot save it."); *U.S. ex rel. Johnson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, No. 10-cv-3496, 2013 WL 9583076, at *4 (S.D. Tex. Mar. 29, 2013) ("[W]hen evaluating subject-matter jurisdiction in the context of the first-to-file bar, the original complaint, rather than the amended complaint, must be considered."), *aff'd*, 570 F. App'x 386 (5th Cir. 2014).

Carter halfheartedly suggests that this Court "may also wish to reconsider" its longstanding view that the first-to-file bar is jurisdictional. Carter.Br. 24 n.1. Even assuming that footnote preserves the question for potential en banc review, *but cf. Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646, 650 (4th Cir. 2014) (per curiam), Carter correctly does not suggest that this panel has authority to overrule Circuit precedent. *See United States v. Chong*, 285 F.3d 323 (4th Cir. 2002).[12] And as the District Court noted, the textual analysis in no way depends on the inquiry's jurisdictional nature.

[12] In any event, Carter's reasons are unpersuasive. Every other circuit to consider the question agrees that the first-to-file bar is jurisdictional; none have followed *Heath* 791 F.3d at 120-21. *United States v. Kwai Fun Wong*, 135 S. Ct.

B. The District Court Correctly Rejected Carter's "Automatic First-Filer" Theory, Which No Court Had Ever Previously Adopted

On appeal, Carter appears to argue (in passing) that dismissal of the earlier-filed actions revived his case by operation of law. *E.g.*, Carter.Br. 16 ("without any other action on the part of the later-filed case"), 17 (same). His only substantive argument depends on reading fragments from the Supreme Court's opinion out of context. *Id.* As explained above, however, Carter's analysis of the Supreme Court's use of the phrase "ceases to bar" (*id*. at 16-17) cannot be reconciled with the question actually presented and briefed to the Court, or the Court's judgment affirming this Court's holding that the first-to-file analysis depends on facts at the time the late-arriving case is brought. *See supra* pp. 27-33. Read in context, the language simply establishes that once a first-filed case has

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1625, 1632 (2015), cautioned that its holding "d[id] not mean 'Congress must incant magic words'" of "jurisdiction," but only that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." As other courts have held, there is "no reason to believe that *Wong* calls into question the jurisdictional character of requirements other than statutes of limitations." *Bennally v. United States*, No. 13-cv-604, 2015 WL 10987109, at *3 (D.N.M. Oct. 22, 2015). Post-*Wong*, courts have confirmed that language similar to the first-to-file bar is jurisdictional. *E.g.*, *Rosario v. Brennan*, No. 15-cv-1440, 2016 WL 3525340, at *4-5 (D. Conn. June 22, 2016) (statute providing that "[a]n action shall not be instituted" without having exhausted administrative remedies was "explicit statutory language [creating] jurisdiction"). Congress's direction that no private relator "may intervene or bring a related action," 31 U.S.C. § 3730(b)(5), is "an absolute, unambiguous, exception-free rule" that bars access to court even without using the "magic words." *Carter*, 710 F.3d at 181.

been dismissed, it "ceases to bar" (135 S. Ct. at 1978) relators from filing new cases.

Carter's reading of the Supreme Court's opinion is particularly implausible, as it would make that Court the first in history ever to have adopted an "automatic first-filer" rule. Carter "conceded [below] . . . that he cannot cite any . . . case [before the Supreme Court's decision here] that interpreted the first-to-file bar to automatically disappear when the earlier-filed case is dismissed." JA179. As one of Carter's most-cited cases explains, "[p]recedent uniformly supports the view that the subsequent dismissal of a first-filed *qui tam* action, without more, cannot cure the filing of a second *qui tam* action while the first action was pending." *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 850 (D. Md. 2013). This includes every court of appeals to consider the question. *E.g.*, *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) ("To hold that a later dismissed action was not a then-pending action [at the time the second complaint was filed] would be contrary to the plain language of the statute and the legislative intent."); *Chovanec*, 606 F.3d at 362 ("an action . . . 'brought' while [an earlier case is pending] must be dismissed rather than left on ice").

C. Carter Cannot Avoid the First-to-File Bar Through Amendment

Carter devotes the bulk of his brief to arguing that a relator can sidestep the first-to-file bar by amending a complaint, reasoning that the first-to-file analysis would look to the time of the amended, not original, complaint. Carter.Br. 23-37.

1. The Statutory Text and Best-Reasoned Precedent Confirm that Amendment Does Not Allow a Relator to Sidestep the First-to-File Bar

Even if this Court's prior holdings were not binding, they are plainly correct. "[T]he filing of an amended complaint does not create an exception to the time-of-filing rule." *Pennrose*, 2015 WL 1358034, at *13. "Following the plain language of the first-to-file bar, Carter's action will be barred by [the earlier-filed actions] if either case was pending when Carter filed suit"—i.e., "when Carter filed his complaint on June 2, 2011." *Carter*, 710 F.3d at 183. That is so because a court "look[s] at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Id.*

The majority of Courts of Appeals to consider this question agree. *Chovanec* is on point. There, as here, it was uncontested that earlier-filed actions were pending when the relator filed her case. Those earlier cases were settled after the district court dismissed the suit. 606 F.3d at 362. Under the first-to-file bar, the Seventh Circuit explained, "if one person 'brings an action' then no one other than the Government may 'bring a related action' while the first is 'pending,'" and

"[o]ne 'brings' an action by commencing suit." *Id.* As a result, a "'related action' . . . must be dismissed rather than stayed." *Id.* Because the earlier-filed cases had been dismissed, however, Chovanec "[wa]s entitled to file a new *qui tam* complaint—entitled, that is, as far as § 3730(b)(5) goes," subject to the FCA's other statutory bars to suit and other preclusion principles. *Id.* at 365.[13] *Dhillon*, 617 F. App'x at 211, which postdates the Supreme Court's *Carter* decision, is to similar effect. The Third Circuit recognized that "[t]he first-to-file bar . . . prohibits a Relator from bringing a case based on the same 'essential facts' as an earlier-filed complaint" and noted that, for first-to-file purposes, "[a]lthough an amended complaint supersedes an original complaint, . . . the filing of an amended complaint does not begin a new action; it is a continuation of the original action." *Id.* at 211, 213.

So too in *Branch Consultants*, 782 F. Supp. 2d at 260, which held that amendment cannot revive a case barred by the first-to-file bar "at the time the

[13] On remand, the relator filed an unopposed motion for leave to amend to allow the parties time to discuss settlement. The case settled without an amended complaint ever being filed. *See* Relator/Pl.'s Mot. for Leave to File Am. Compl. 2, *Chovanec*, No. 04-cv-4543 (N.D. Ill. Aug. 18, 2010) [Dkt. 2-1]; Minute Entries, *id.* (Jan. 12, 2011, Feb. 24, 2011 & Apr. 14, 2011) [Dkts. 66, 70, 76]. After numerous additional, unopposed extensions, "a settlement was reached" and the case "dismissed with prejudice." *See* Minute Entries, *id.* (Nov. 2, 2010 & May 6, 2011) [Dkts. 60, 82]. Given that the defendant in *Chovanec* did not oppose amendment, the court's unpublished minute order giving the relator more time to decide whether to amend gives no support to Carter's position here. *See Pennrose*, 2015 WL at 1358034, at *12.

original complaint was filed." In addition to the plain-text argument that the bar must be evaluated "when an 'action,' not a complaint, is filed," *Branch Consultants* looked to the "time-of-filing rule," under which "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 259, 260 (citing cases). The court also noted the numerous practical problems that a contrary reading would cause. It would render "meaningless" the "pre-filing disclosure requirement of § 3730(e)(4)(B)," because a relator could fail to disclose information to government, file his action, and then disclose later, just before amending. *Id.* at 263-64. A relator could also secure a place in line "before actually conducting [his own] investigation"—"shut[ting] out deserving relators." And a contrary rule would be unworkable in practice, given that FCA cases often "involve multiple claims, complaints, and defendants." *Id.* at 264. Well-reasoned recent district court opinions have reached similar conclusions. *E.g.*, *Pennrose*, 2015 WL 1358034, at *13-15; *Shea*, 2015 WL 7769624, at *10.

2. *Gadbois* Is Distinguishable and Unpersuasive

Carter relies on *U.S. ex rel. Gadbois v. PharMerica Corp.*, Carter.Br. 31-35, in which the First Circuit remanded to allow the district court to decide, in the first instance, whether the relator could supplement his complaint under Federal Rule of Civil Procedure 15(d) after a first-filed action was dismissed. 809 F.3d at 3. Carter mentions the case only in arguing that the district court abused its discretion

in denying his motion for reconsideration. Carter.Br. 30-35. But even considering *Gadbois*' reasoning on its merits does not support reversal.

The outcome in *Gadbois* rested heavily on the First Circuit's conclusion that requiring dismissal and re-filing would be a "pointless formality," because the relator there immediately "could . . . refile[]," 809 F.3d at 3, 4, 6, because the relator's claims fell well within the statutes of limitations and repose. The complaint alleged conduct from 2010 through mid-2013, comfortably within the six-year statute of limitations if re-filed. *See, e.g.*, Sec. Am. Compl. ¶¶ 118-19, 114, *U.S. ex rel. Gadbois v. PharMerica Corp.*, No. 10-cv-471 (D.R.I. Feb. 25, 2014) [Dkt. 40]. In contrast, all of Carter's allegations, including his amended allegations, would fall outside of the FCA's statutes of limitations and repose if re-filed. JA96.

Also, as the District Court here observed, *Gadbois* "d[oes] not give sufficient weight to the plain language" of the first-to-file bar. JA209. Indeed, *Gadbois* erroneously suggests that the FCA refers to dismissal merely of "claims," 809 F.3d at 3, when in fact it refers to complete "action[s]," § 3730(b)(5). The court's cryptic suggestion that the Supreme Court's *Carter* decision caused a "tectonic . . . shift[]" in first-to-file jurisprudence ignores the strong textual and contextual evidence (discussed above) of the focused nature of the Supreme Court's decision. 809 F.3d at 3; *see supra* pp. 27-33.

The *Gadbois* court also relied heavily on jurisdictional analysis inapplicable in this Circuit. *Gadbois* sought to avoid the normal rule that "'[j]urisdiction is determined based on whether it existed at the time the plaintiff filed the original complaint," by limiting that doctrine to diversity jurisdiction cases, not those involving a federal questions. 809 F.3d at 4-5; Carter.Br. 33. This Court takes a different approach. *See Carter*, 710 F.3d at 181, 183.[14] Finally, *Gadbois* arose in a unique and distinguishable procedural context, where the first-filed case was dismissed while the case was pending on appeal, and the relator (unlike Carter here) sought to deem his complaint supplemented under Rule 15(d). 809 F.3d at 4.

3. Carter's Few Authorities Are Readily Distinguishable and Wrongly Decided

Carter relies heavily on three district court cases in arguing that amendment can cure a first-to-file defect. Carter.Br. 23-30, 35-37.

U.S. ex rel. Palmieri v. Alpharma, Inc. is not "nearly identical" to this case (Carter.Br. 27), but readily distinguishable. As Carter repeatedly concedes (*id.* at 26, 40), the allegations there would have been timely if re-filed, *see* 928 F. Supp. 2d at 843, 846—unlike here, where every single claim would be barred under the statutes of limitations and repose. That distinction plainly mattered to the court.

[14] Contrary to Carter's frivolous suggestion (Carter.Br. 34), the Supreme Court's denial of certiorari in *Gadbois* should not be understood to express any view on the merits. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[D]enial of a writ of certiorari imports no expression of opinion upon the merits of the case.").

Pointedly noting that "Palmieri [could] fil[e] an identical pleading under a new case number tomorrow," the court concluded it would "elevate form over substance" to require the relator to take a dismissal and re-file. *Id.* at 851-52. It was likewise true in *U.S. ex rel. Kurnik v. PharMerica Corp.* that the relator could immediately re-file, as the court noted and even the defendant conceded. No. 11-cv-1464, 2015 WL 1524402, at *6 & n.6 (D.S.C. Apr. 2, 2015); Defs.' Mot. to Dismiss 14-15, *Kurnik*, 2015 WL 1524402 (No. 11-cv-1464) [Dkt. 187-1].[15]

U.S. ex rel. Boise v. Cephalon is distinguishable for similar reasons. The Court there initially denied a motion to dismiss because the defendants *acquiesced in* the relator's view that, under the Supreme Court's *Carter* decision, their case could proceed because the first-filed action had subsequently been dismissed. *See* Order at 1-2 & n.1, *Boise*, No. 08-cv-287 (E.D. Pa. July 30, 2015) [Dkt. 137]. The Court recognized the potential need to dismiss the relator's case without prejudice, because it "was filed before [the first-filed action] was dismissed," but declined to dismiss because "the ultimate outcome [wa]s the same." *Id.* at 2 n.1. The defendants belatedly raised the statute-of-limitations issue in a motion for

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[15] Carter gets his dates wrong in suggesting that his case is truly the "original" action here, and thus somehow more deserving of a judicially-crafted exception to the first-to-file bar. Carter.Br. 13, 27. To the contrary, the Texas Action was filed in July 2004, a year and a half before Carter's first complaint, and nearly five years before Carter ever made timekeeping allegations, which appeared for the first time in his Second Amended Complaint (*Carter 2009*), filed in January 2009. *See supra* pp. 9-11.

reconsideration, which the court denied without reaching its merits, emphasizing the narrow and limited grounds that would support reconsideration and the absence of any "intervening change in controlling law." *Boise*, 159 F. Supp. 3d at 556, 558.

4. *Rockwell* Does Not Compel a Different Result

Like the courts in *Palmieri* and *Kurnik*, Carter briefly invokes *Rockwell* for the idea that "that an amended complaint [could] satisfy [a] jurisdictional requirement." *Palmieri*, 928 F. Supp. 2d at 851; *Kurnik*, 2015 WL 1524402, at *6; Carter.Br. 26-27. But as the District Court correctly noted, *supra* note 7, *Rockwell* involved a completely different jurisdictional limitation on FCA actions. The case at most stands for the proposition that a relator can *eliminate* jurisdiction by removing original-source allegations through amendment, thus triggering the former public disclosure bar, 31 U.S.C. § 3730(e)(4). 549 U.S. at 470; *see supra* note 7.

Carter also ignores that this Court has rejected "mechanical[] appli[cation] [of] [*Rockwell*'s] statement that 'courts look to the amended complaint to determine jurisdiction.'" *U.S. ex rel. Beauchamp v. Academi Training Ctr. LLC*, 816 F.3d 37, 45 (4th Cir. 2016). As *Beauchamp* explains, *Rockwell* reflects the text of the *public-disclosure* bar, which "did not speak in terms of allegations in the original complaint.'" *Id.* at 44. "[W]hen a plaintiff's claims arise for purposes of

the public-disclosure bar is governed by the date of the first pleading to particularly allege the relevant fraud and not by the timing of any subsequent pleading." *Id.* at 46. By contrast, the first-to-file bar focuses on conditions when an action is brought. *See supra* pp. 37-41. This Court has also concluded that *Rockwell* does not change the rule that jurisdiction is evaluated when an action is brought. *Beauchamp*, 816 F.3d at 45.

Other courts have similarly rejected the idea that *Rockwell* allows amendment to cure the first-to-file bar. *Branch Consultants* correctly read *Rockwell* for the proposition that jurisdiction may be "defeated if a plaintiff amends the complaint to withdraw the allegations upon which the court's jurisdiction is based," but explained "*Rockwell* does not suggest that a plaintiff can establish jurisdiction by amendment when jurisdiction did not previously exist." 782 F. Supp. 2d at 261-62. Similarly, *Pennrose* explained that this *Rockwell*-based argument "confuses the significance of the allegations that demonstrate jurisdiction with the procedural act of filing an amended complaint." 2015 WL 1358034, at *13-14. "[I]n *Rockwell* jurisdiction depended upon the actual substance of the complaint's allegations," but "[i]n the first-to-file context, however, the timing of the filing carries the weight of jurisdictional relevance." JA199; *accord Unisys*, 2016 WL 1367163, at *7.

IV. The District Court Did Not Abuse its Discretion in Denying Carter's Motion to Reconsider

Carter argues that the District Court "erred by failing to grant [his] motion for reconsideration," in light of the First Circuit's *Gadbois* decision. Carter.Br. 30 (capitalization omitted).[16] Carter correctly notes that this ruling is reviewed only for abuse of discretion (*id.* at 31), but neither acknowledges nor challenges the primary stated basis for the court's decision: i.e., that out-of-circuit authority is not controlling in this Circuit. His failure to do so is a sufficient and independent ground to affirm the District Court's judgment. And because Carter has elected to rely on *Gadbois* only in the context of his reconsideration motion, this Court need not consider that case in addressing Carter's other claims of error.

Carter sought reconsideration under Rule 59(e), which contemplates a "motion to alter or amend a judgment." Fed. R. Civ. P. 59(e). "[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quoting 11 Charles A. Wright et al., *Federal Practice & Procedure* § 2810.1 (2d ed. 1995)). In this Circuit, "there are three grounds for amending an

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[16] Carter also discusses *Kurnik* and *Palmieri* in challenging the District Court's denial of his motion to reconsider. Carter.Br. 35-37. Decisions from the Districts of Maryland and South Carolina were not "controlling" on the District Court, and so they cannot serve as a basis for concluding that the District Court abused its discretion in denying reconsideration. *See Talley v. Novartis Pharm. Corp.*, No. 08-cv-00361, 2011 WL 3515858, at *2 (W.D.N.C. Aug. 11, 2011).

earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.*

As the District Court correctly found, *Gadbois* did not constitute an "intervening change in controlling law," because that prong of the Rule 59(e) standard applies "specifically to binding precedent only." JA207. Nonbinding opinions such as *Gadbois* "certainly do not 'control' th[e] [District] Court's decisions" and thus cannot "justify reconsideration under Rule 59(e)." JA207-08 (citing cases). Carter has not shown that the Court abused its discretion. His third claim of error should be denied on that basis.

V. The Policies Underlying the First-to-File Bar Support this Court's Interpretation

Lacking textual and doctrinal support for his arguments, Carter ultimately resorts to policy considerations, effectively asking this Court to ignore the FCA's first-to-file bar and statutes of limitations and repose in service of (his flawed portrait of) congressional intent. Carter.Br. 40-42. But as explained above, the first-to-file bar's statutory text is clear and controlling. Carter's "policy disagreements with the statutory text" are "an insufficient basis for deviating from the law as written." *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 161-62 (4th Cir. 2010). In any event, the FCA's express procedural

limitations embody Congress's purpose; "no legislation pursues its purposes at all costs," *Freeman*, 132 S. Ct. at 2044.

A. Carter's Flimsy Policy Arguments Cannot Justify Ignoring the FCA's Plain Text

Carter's claimed concerns about dismissing barred claims are a makeweight. His concern that a new complaint will be under seal for 60 days is an explicit statutory requirement, 31 U.S.C. § 3730(b)(2), that did not dissuade Carter from taking dismissals and re-filing his complaint *four times*. And as Carter elsewhere notes, "[t]he Government's investigation is long complete." Carter.Br. 12. Carter's suggestion that the District Court did not "comprehend the [FCA's seal] procedures," *id.* at 37, is impossible to square with the District Court's long experience, which included presiding over the four under-seal periods in Carter's case alone.

Carter's real complaint is that his claims—which date, at the latest, from July 2005—if re-filed, will be untimely under the six-year statute of limitations and ten-year statute of repose. The District Court recognized KBR's "compelling" arguments in that regard. JA201. Carter's shrill assertions that KBR may "never face a trial" on stale allegations that failed to interest the government after repeated investigations ring hollow: That is the necessary result of the strategic litigation choices of a well-counseled private litigant over more than a decade. Having gambled on filing and re-filing cases to sidestep the first-to-file bar—rather than

ever previously attempting to amend or arguing that his cases were revived *sua sponte* with the dismissal of other actions—Carter cannot now be heard to complain about the foreseeable results of his own strategic choices.

B. Carter's Interpretation Would Undermine the False Claims Act

Carter's reading of the first-to-file bar would cause implausible outcomes that cannot be squared with the FCA's statutory structure and purpose.

1. As the District Court correctly observed, JA199-200, Carter's proposed reading of the first-to-file bar would encourage relators to file bare-bones complaints as quickly as possible to establish their place in line. Late-arriving relators could hold their cases in abeyance (or allow dismissal of their complaint without prejudice), and move forward with the placeholder complaint, or seek leave to amend, once the earlier-filed case is no longer pending.

Such a rule would in turn undermine the incentive structure Congress designed. The *qui tam* procedure is a means of "put[ting] the government on notice of potential fraud." *Batiste*, 659 F.3d at 1210. "[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). "[T]he primary function of a *qui tam* complaint is to notify the *investigating* agency, *i.e.*, the Department of Justice"

of the allegations and to disclose evidence of the alleged fraud. *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41-42 (D.D.C. 2010).

Carter's reading would disserve that statutory purpose. If a relator can evade the first-to-file bar by amendment, he "could neglect to inform the government of the information upon which the allegations are based before filing his or her action." *Branch Consultants*, 782 F. Supp. 2d at 259-64. Carter's rule also increases the government's administrative burden, as duplicative skeletal complaints "wast[e] government resources," as the government must "review the claims in each action." *U.S. ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012).

2. Allowing relators to sidestep the first-to-file bar by amending their complaints would effectively render a dead letter the FCA's strict statutes of limitations and repose, as this case illustrates. Under Carter's theory, relators could file an infinite series of complaints while a first-filed case remains "pending" (but within the statute of limitations), and hold those cases in abeyance. Relators could later amend (as Carter belatedly sought to do here), relying on their initial complaints to satisfy the statute of limitations (and perhaps repose), and seek to have new allegations relate back to the original complaint's date of filing under Federal Rule of Civil Procedure 15(c). If, as the District Court held here, relation

back overcomes the statute of repose, JA219-24, there would literally be no end point.

3. Finally, while the District Court's rule is easily administrable, Carter's would generate extensive new litigation, needlessly requiring development of a new body of law to govern the interaction between the first-to-file rule, amendment procedures, and relation back principles. Under the District Court's reading, the first-to-file text compels a straightforward inquiry that can be undertaken from the face of two complaints. If an earlier-filed "action" is "pending" when another "related" "action" is "br[ought]," that later-filed action must be dismissed without prejudice. This rule does not require comparing multiple generations of later-filed complaints (or "the entire chronology of *qui tam* complaint[s]," Carter.Br. 16). "[K]eeping the emphasis on the time the initial complaint was filed 'has the advantage of simplicity.'" JA199-200 (quoting *Branch Consultants*, 782 F. Supp. 2d at 264).

Carter's rule would generate needless complexities. Follow-on complaints would be dismissed without prejudice while a first-filed case is pending, but the underlying action would remain alive. If the first-filed case were dismissed, relators might attempt to move forward with their original complaints, or amend—with amendments not necessarily occurring in the order the cases were filed. If the

third-in-line relator amended his complaint before the second-in-line relator, which case would proceed under the first-to-file bar?

Carter's rule also raises novel issues under Rule 15(c), under which an amended complaint relates back to the date of the original complaint if it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." If the third-filing relator amends a complaint to include allegations distinct from those in the original complaint, and the second-filing relator later amends to add allegations closely related to those in her original complaint, a court will need to address how Rule 15 interacts with the first-to-file bar. Other questions abound. For instance, if a second-filing relator seeks leave to amend and a third-filing relator then amends as-of-right before the first motion is granted, which complaint should have priority? If two copycat relators seek leave to amend, does the date of their motions (or the date the court grants leave) control? This is just a small sample of the unnecessary and complicated legal questions that avoided through applying this Court's straightforward rule.

Conclusion

The judgment below should be affirmed.

Dated: September 9, 2016

Respectfully submitted,

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Statement Concerning Oral Argument
(Fourth Circuit Rule 34(a))

Carter's arguments are so clearly meritless that this Court should act without the further cost and burden of oral argument.

Certificate of Compliance With Rule 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: September 9, 2016

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Certificate of Service

I hereby certify that I electronically filed the foregoing Brief of Appellee, with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on September 9, 2016.

All counsel of record in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

In addition, on this day, a copy of the foregoing Brief was served by Federal Express on:

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