ORAL ARGUMENT NOT YET SCHEDULED
No. 12-7133

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA ex rel.
STEPHEN M. SHEA, *Plaintiff-Appellant*,

v.

CELLCO PARTNERSHIP, doing business as
VERIZON WIRELESS, et al., *Defendants-Appellees*.

On Appeal from a Judgment of the United States District Court
for the District of Columbia, No. 09-cv-1050 (Kessler, J.)

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT REGARDING PERMISSION TO FILE AND SEPARATE BRIEFING

Defendants consented to the filing of this brief, and plaintiff did not oppose its filing; on July 11, 2013, this Court granted *amicus curiae*'s unopposed motion to file this brief.[*]

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* certifies that it is aware of no other non-government *amicus curiae* planning to file a brief in this matter.

[*] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Chamber of Commerce of the United States of America certifies that:

(A) Parties and *Amici*

The list of parties and *amici* are listed in the Brief of Defendants-Appellees.

(B) Ruling under Review

Reference to the ruling at issue appears in the Brief of Plaintiff-Appellant.

(C) Related Cases

As stated in the Brief of Defendants-Appellees, this case was not previously before this court and *amicus curiae* is aware of no related cases currently pending in this court or in any other court.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. It has no parent corporation, and no company owns 10 percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases involving the False Claims Act ("FCA" or "Act"). This appeal raises significant and recurring questions about the scope of courts' jurisdiction to hear successive *qui tam* claims. In light of the potential exposure of the Chamber's members to liability resulting from *qui tam* actions—and the strong incentives they face to settle such costly litigation regardless of the claims' merits—the Chamber has a substantial interest in how the FCA's "first-to-file" bar is interpreted.

SUMMARY OF ARGUMENT

Shea asks this Court to read the "first-to-file" bar that Congress designed to preclude "copycat actions that provide [the government] no additional material information" about fraud, *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011), to allow any number of duplicative claims to be filed

so long as only one case is active at a time. Shea's "one-case-at-a-time" rule cannot be squared with the plain language of the provision or Congress's recognized goals in enacting the FCA, which make clear that the first-to-file bar continues to preclude related suits even after the first-filed suit has been dismissed or settled.

The first-to-file bar speaks in absolute, exception-free terms: Beginning the moment "[w]hen a person brings an action under [the FCA's *qui tam* provisions], *no person other than the government* may . . . bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). Shea attempts to transform "pending action" from a short-hand reference to the first-filed action (in contrast to any later-filed "related action") into a temporal limitation on the bar's preclusive effect. But there is no reason to believe Congress imposed such a fundamental limitation on the bar so obliquely. Nothing suggests that Congress meant to allow realtors to file "multiple separate suits based on identical facts and circumstances," S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290, so long as they do so one case at a time.

Shea's reading of the first-to-file bar would not further—indeed, would affirmatively undermine—the FCA's basic goal of "put[ting] the government on notice of potential fraud being worked against the government, but . . . bar[ring] copycat actions that provide no additional material information." *Batiste*, 659 F.3d

at 1210. Because it is the first-filed claim that provides the government notice of the essential facts of an alleged fraud, permitting duplicative suits contributes nothing to the government's knowledge of fraud. Indeed, Shea's reading would reduce the incentives for prompt disclosure because claims subsequent to the first-filed one would merely be delayed rather than barred. Shea's reading would harm virtually every actor involved in FCA litigation, with no corresponding benefit to anyone but the me-too relator himself. By contributing to the deluge of meritless FCA *qui tam* claims, Shea's rule would impose significant financial and reputational costs on defendant businesses, waste government resources by requiring government lawyers to review repetitive claims, and clog courts' dockets with duplicative filings.

Shea's effort to carve out a same-relator exception to the first-to-file bar fares no better. Shea provides no compelling reason to depart from what he admits is the "literal interpretation" (Br. 18) of the provision: that the bar applies to everyone but the government. Whether filed by the same relator or a new one, duplicative claims are duplicative claims—they provide no notice of additional fraud and benefit only the me-too relator to the detriment of businesses, the government, and courts.

Shea's latest suit is precisely the kind of claim the FCA's first-to-file bar was designed to prevent. Shea actually self-identifies the two as "related," J.A. 55,

and his allegations involve the same material elements: Both concern alleged surcharges Shea says he learned of as a result of his consultant work, both were based on his review of the same document, and both involve alleged overcharges in telecommunications contracts Verizon had with the government. Although the two claims involve different contracts with different government agencies, the first claim provided "sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, [if it chose] to do so," *Batiste*, 659 F.3d at 1210, and barring the second suit would advance the FCA's central purpose.

ARGUMENT

Congress has repeatedly amended the False Claims Act's *qui tam* provisions, "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cnty Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). In doing so, Congress has recognized that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," imposing enormous costs—on the public, on potential defendants, on courts, and on the government itself, in the form of time wasted reviewing repetitive claims and recoveries diminished by the take of

numerous relators—by allowing *qui tam* suits to proceed based on "information that was already in the government's possession." *Springfield Terminal*, 14 F.3d at 649. To reduce those costs, Congress has legislated with the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 651.

The first-to-file bar, 31 U.S.C. § 3730(b)(5), represents one of Congress's most important tools to "strike the appropriate balance between . . . encourag[ing] whistleblowers to come forward with allegations of fraud and [preventing] copycat actions." *Batiste*, 659 F.3d at 1210. As discussed below, the plain language of the provision, especially as read in light of Congress's recognized "goals" under the FCA, *Springfield Terminal*, 14 F.3d at 651, dictates that the first-to-file bar must "appl[y] with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed," 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 4.03[C][2][b] (4th ed., 2012). As the court below correctly held, *see* J.A. 312-15, once a *qui tam* suit has been filed, the first-to-file bar prohibits *any* subsequent relator from filing a case based on "related" facts—even if the same relator was the first to file a related claim.

I. THE FIRST-TO-FILE BAR REQUIRES DISMISSAL OF ALL SUBSEQUENT RELATED CLAIMS

A. The Plain Text of the Bar Forecloses All Subsequent Related Claims, Even if the First-Filed Action Has Been Dismissed or Settled

The False Claims Act's first-to-file bar precludes subsequent related *qui tam* actions regardless of whether the earlier related claim remains active. The provision speaks in absolute terms: "When a person brings an action under this subsection*, 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). By its plain language, the bar is "exception-free," *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001): "no person" besides the government may bring a related action. Thus, "once a qui tam suit has been filed under the FCA, the first-to-file bar prohibits any subsequent would-be relator from filing a case based on the same underlying facts." 10A Fed. Proc. Forms § 34:550 (2013).

Shea urges (Br. 9) that under the "ordinary meaning of 'pending'" the bar ends the moment the first-filed action is resolved, and thus contends that his claim should have been dismissed without prejudice to refiling. That argument cannot be squared with the language of *the statute*. *Cf. Abuelhawa v. United States*, 556 U.S. 816, 819-20 (2009) ("[B]ecause statutes are not read as a collection of isolated phrases, '[a] word in a statute may or may not extend to the outer limits of its

definitional possibilities . . . .") (quoting *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006)) (internal citation omitted). The bar on related cases takes effect the moment "[w]hen a person brings [an FCA *qui tam*] action," but nothing in the provision terminates the bar afterward. The words "pending action" impose no time limit, but simply identify *which facts* will no longer support a claim: those "underlying the pending action." "'[P]ending' is used as a short-hand," *United States ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 08-CV-2277-RWS, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012), to distinguish between the first-filed action ("the pending action") and any subsequent matter. Thus, as the Ninth Circuit concluded, "Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts. . . . To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute . . . ." *Lujan*, 243 F.3d at 1187-88. As a result, it would make little sense to dismiss such a claim without prejudice to a later refiling; any subsequent claim is invalid because it is duplicative.[1]

[1] Even if Shea were correct that the preclusive effects of the first-to-file bar are only temporary, he would not benefit from that rule. It is undisputed that Shea's first suit "was pending when Shea filed his initial complaint in [his second suit]." Shea Br. 12-13. Contrary to Shea's assertion (Br. 12-13), it is irrelevant that he amended the complaint in the second suit after the first action was dismissed. Allowing Shea to amend his way out of the first-to-file bar would run afoul of "the longstanding rule that the amendment process cannot 'be used to

Shea's proposed reading would transform a description of the facts encompassed by the bar into a full-blown element establishing a temporal limitation on the first-to-file bar's preclusive effects. Had Congress meant for the bar to apply only "while the earlier-filed action is pending," it would have been a simple matter to say that. There is no reason to believe that Congress imposed such an important limitation on the first-to-file bar in such an oblique manner. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

Nothing in the provision's legislative history supports treating "pending" as a substantive restriction rather than a description. That understanding is confirmed by the House Judiciary Committee's description of how the provision would operate: "When an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). And the Senate Judiciary Committee's report spoke broadly of its intent that "private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances."

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create jurisdiction retroactively where it did not previously exist.'" *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) (quoting *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986)). Because the court lacked jurisdiction over Shea's original complaint, "amendments cannot save it." *Id.*

S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290. Nowhere in the contemporaneous legislative materials was it suggested that Congress intended to permit "multiple separate suits based on identical facts and circumstances" so long as they proceed one at a time. Shea's rule would allow the broadly expressed goal of foreclosing "multiple separate suits" to be circumvented the very moment the first-filed suit is dismissed, permitting a relator to "file an identical complaint the next day." Shea Br. 9.

B. Treating the First-to-File Bar As A "One-Case-at-a-Time" Rule Would Undermine the Goals of the False Claims Act

Shea's proposed reading of the statute—under which the termination of a first-filed action renders the first-to-file bar inapplicable, *even if* subsequent actions merely duplicate the allegations made in the first—would do nothing to further, and indeed would undermine, the recognized purposes of the False Claims Act. As this Court has recognized, the Act's *qui tam* provision, 31 U.S.C. § 3730(b), is "designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information." *Batiste*, 659 F.3d at 1210; *see also Lujan*, 243 F.3d at 1187 ("The first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims."). Instead of barring suits that "provide no additional material information," however, Shea's proposed rule would simply require that they

proceed one duplicative case at a time. Under Shea's theory, Congress's interest in "prevent[ing]" duplicative actions, *Batiste*, 659 F.3d at 1210, somehow ceases to be relevant "the day after dismissal," Shea Br. 12, when another relator would be free to file a related action.

Moreover, Shea's proposed rule conflicts with the FCA's design, which allows *qui tam* actions—and thus diminishes the government's potential recovery—only where the relator pursues a novel claim that "the government is not equipped to bring on its own." *Springfield Terminal*, 14 F.3d at 651. The FCA explicitly requires the Attorney General to "diligently . . . investigate" alleged violations, "suggest[ing] that the primary function of a *qui tam* complaint is to notify the *investigating* agency, *i.e.*, the Department of Justice." *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41-42 (D.D.C. 2010). "Once the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). Because information about the alleged fraud is communicated to the government when the first complaint addressing a fraud scheme is filed, the FCA's purpose is served whether the first-filed claim went to judgment, was settled, or—as in the vast majority of *qui tam* actions, *see* Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007)—was

eventually dismissed. *Lujan*, 243 F.3d at 1188 ("Dismissed or not, [the first-filed action] promptly alerted the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule."). "[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." *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998).

Indeed, Shea's reading would affirmatively *undermine* the goals of the FCA by reducing the incentives for prompt reporting. The Act "reflects the strong congressional policy of encouraging whistleblowers to come forward by rewarding the first to do so," *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005), "award[ing] the spoils to those vigilant enough to blow the whistle first, not to every whistle-blower," *United States ex rel. Batiste v. SLM Corp.*, 740 F. Supp. 2d 98, 102 (D.D.C. 2010), *aff'd*, 659 F.3d 1204. By design, then, the statute "encourages prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of the fraud." *Campbell*, 421 F.3d at 821; *accord United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377 (5th Cir. 2009); *LaCorte*, 149 F.3d at 234. A robust first-to-file bar that does not reward delayed disclosures is a necessary component to "spur the prompt reporting of fraud." *Branch Consultants*, 560 F.3d at 377 (internal quotation marks omitted).

Shea's interpretation of the first-to-file bar would frustrate Congress's design and "create[s] perverse incentives" antithetical to promptly uncovering fraud. *Powell*, 2012 WL 2885356, at *5. If subsequent suits are simply delayed rather than permanently barred, relators could risk delay in reporting to let the alleged fraud continue in order to increase the government's "fraud loss"—and thus their prospective recovery. Thus "a race to the courthouse would not occur," and "fraud would continue to occur in the interim." *Id.*

C. Shea's Rule Would Impose Significant Costs Throughout the Justice System With No Corresponding Public Benefit

The predictable result of adopting Shea's favored rule would be to impose significant costs on all actors involved in FCA litigation without any offsetting benefit of ferreting out additional fraud.

FCA *qui tam* actions are expanding dramatically. Since 1987, the number of annual *qui tam* filings has increased twenty-fold; in just the time since Shea filed his first complaint, the number of annual *qui tam* filings has increased steadily from 365 in 2007 to 647 last year. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2012*, at 1-2 (2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. The rule that Shea advocates would exacerbate that trend further by permitting would-be relators to file any number of duplicative actions, so long as only one is active at any given time.

American businesses, like the government and the American public, have an interest in rooting out fraud. But there is strong evidence that the vast majority of *qui tam* relator suits are meritless, serving only to inflict costs on courts, businesses, and ultimately the public. Approximately 78% of FCA cases brought between 2007 and 2012 were *qui tam* actions, with such actions accounting for 82% of the total in 2012. *Fraud Statistics*, *supra*, at 1-2. After investigating the claims, the United States traditionally has declined to exercise its statutory right to participate in approximately 78% of these suits. Broderick, *supra*, at 971 (analyzing suits during period 1987-2004). Tellingly, this vast mass of "non-intervened" cases accounts for only a tiny fraction of *qui tam* recoveries: During the entire period 1987-2012, *qui tam* actions in which the government had declined to intervene have accounted for just 3.2% of total *qui tam* monetary settlements and judgments. *See Fraud Statistics*, *supra*, at 1-2.

According to one comprehensive study, 92% of cases in which the United States declined to intervene were dismissed—compared to only 4.1% of cases in which the government had intervened. Broderick, *supra*, at 975. Less than ten percent of *qui tam* actions actually result in recovery. Of the remaining ninety-plus percent, a large majority are dismissed as frivolous or otherwise lacking merit. *Id.*; *see also* Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 9 (2007). Thus, the vast majority of

qui tam cases in which the government declines to intervene are found to be meritless. But although the Department of Justice has the authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss any *qui tam* action, it rarely does so, instead routinely letting relators "proceed with[] thousands of non-meritorious qui tam suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008).

Every actor involved in FCA litigation bears significant costs as a result of meritless cases clogging the courts. American businesses undergo significant hardship—both financial and reputational—as a result of meritless *qui tam* FCA actions. Defending against an FCA claim is costly and requires a "tremendous expenditure of time and energy." Canni, *supra*, at 11 n.66; *see also* John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (Oct. 2011) ("[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act investigations). Meritless lawsuits can continue for years before dismissal. Because the prospect of years of costly litigation can "pressure[]" defendants "into settling [even] questionable claims," *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1752 (2011), FCA allegations can "be used to extract settlements from defendants who hope to avoid even more expensive litigation costs." Sean

Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012); *accord* Canni, *supra*, at 11-12.

Businesses also suffer significant reputational harm from meritless lawsuits. Allegations that a company is "defrauding [the] country sends a [harmful] message" and "[r]eputation[,] . . . once tarnished, is extremely difficult to restore." *Canni*, *supra*, at 11; *accord* Elameto, *supra*, at 824. This problem can be particularly acute for companies that do a significant volume of work for the government because "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices." *Canni*, *supra*, at 11. Ultimately, the "costs of the litigation in the vast majority of [relator *qui tam*] cases outweigh any benefit to the public. . . . [M]ost non-intervened suits exact a net cost . . . ," as business defendants must expend financial resources to defend against meritless claims and suffer unwarranted damage to their reputations. Rich, *supra*, at 1264; *see also* Canni, *supra*, at 2.

But costs to business are only the beginning. Allowing relators to file duplicative claims would "wast[e] government resources" as government officials "would be required to review the claims in each action," although they have already been subject to review previously—and it would increase the likelihood that new, valid claims will be lost among multitudes of duplicative suits. *Powell*,

2012 WL 2885356, at *5. It would also impose structural costs by further "diminish[ing] Executive Branch control over the initiation and prosecution" of a significant portion of the civil litigation that is conducted in the name of the United States. *See, e.g.*, *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754-55 (9th Cir. 1993). And it would impose significant costs on the court system, which would be required to entertain duplicative, meritless lawsuits, further crowding congested judicial dockets.

While Shea's proposed rule would thus impose significant costs, it would provide no offsetting benefit to *anyone* besides relators who file duplicative claims and their counsel. The first-to-file rule does not apply to the government and thus would not prevent it from bringing claims it had investigated and found to be meritorious. It is only non-intervened *qui tam* actions—the subset of FCA cases that are least likely to yield recovery for the government, *see* pp. 13-14, *supra*—that will be "revived" under relator's proposed rule. Under it, subsequent relators would be able to bring duplicative claims, sometimes repeatedly, even though the government (the real party in interest whose financial interests are at stake) is already on notice of the alleged fraud and has declined to pursue it. Most such claims will be "revived" after a prior action is dismissed. And virtually by definition, as "related" cases, they would bring no additional information to the attention of the United States. The predictable result is to impose significant costs

on all actors involved in such litigation without *any* offsetting benefit of ferreting out additional fraud schemes. This would be a very odd result, indeed, from a provision designed to "stop[] repetitive claims." *Lujan*, 243 F.3d at 1187.

II. THE FIRST-TO-FILE BAR PRECLUDES THE SAME RELATOR FROM FILING A SERIES OF RELATED CLAIMS

The first-to-file bar applies to *any* person who files subsequent related *qui tam* actions, whether or not he or she is the same person who filed the first action. The text of the statute leaves no doubt: "When *a person* brings an action under this subsection, *no person other than the Government* may intervene or bring a related action based on facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). Put another way, "When a person brings [the first-filed] action," the government *alone* "may intervene or bring a related action." *Id.* The placement of the word "other" is critical. "The statute does not say 'no *other* person except the Government may bring an action,' [but] simply says 'no person' which would apply equally to the original relator as any other person." *United States ex rel. Smith v. Yale-New Haven Hosp., Inc.*, 411 F. Supp. 2d 64, 75 (D. Conn. 2005). Shea concedes (Br. 18) that this is the "literal interpretation" of the provision.

But Shea argues (*id.*) that this Court should depart from this reading based on his belief that "no one would interpret 'no person other than the Government' to include the original relator" in a hypothetical statute that read "when a person

brings an action under this subsection, no person other than the Government may intervene." Because, Shea contends, reading that hypothetical intervention statute to apply to the person who filed the action would "make no sense" (*id.*), the first-to-file bar's prohibition on bringing a related action should likewise be read to incorporate a tacit exemption for relators who themselves brought the first-filed actions. That tortured reasoning does not survive even casual scrutiny.

Contrary to Shea's assertion, *any* reader of his hypothetical intervention bar would conclude it prohibits the person who "brings an action" from intervening. The undeniable meaning of its language is that *everyone but the government* is barred from intervening. While Shea may think it "makes no sense" to prohibit "[r]elators [from] interven[ing] in their own suits," *id.*, it would be perfectly rational: A party cannot be both a plaintiff and also an intervenor in the same suit. Shea's reading—by exempting those who filed earlier suits from being deemed a "person"—would *permit* a plaintiff to intervene in his or her own suits, which *really* makes no sense. And in any event, the first-to-file bar (unlike Shea's hypothetical) encompasses both intervention and filing related actions; while it may prohibit unlikely scenarios (such as intervention in one's own action), that is only because of the broad and absolute nature of its prohibition, which underscores the error of Shea's argument. "By drafting the statute in such unequivocal language, Congress made the strongest possible statement against private party

intervention in qui tam suits or by extension bringing another related suit," whether or not the second actor is the "original relator." *Smith*, 411 F. Supp. 2d at 75 (internal quotation marks omitted).

A duplicative lawsuit is a duplicative lawsuit; nothing about the identity of the relator, or his past actions, diminishes the costs inherent in filing a duplicative claim or increases the benefit of such an action for the United States. A duplicative lawsuit brought by the original relator provides no greater notice of additional fraud than a suit by any other plaintiff. The burdens imposed on defendants, the United States, and the courts (*see* pp. 14-16, *supra*) are just as great as a suit filed by any other plaintiff. And the first-to-file bar's "purpose" of "prevent[ing] the filing of multiple lawsuits which are based on the same claims" is violated just the same as if the subsequent suit were brought by another relator. *United States ex rel. Manion v. St. Luke's Reg'l Med. Ctr., Ltd.*, No. CV-06-498-S-EJL, 2008 WL 906022, at *6 (D. Idaho Mar. 31, 2008).[2] No matter the filer, "secondary suits that do no more than remind the United States of what it has already learned from the initial suit deflect recoveries from the Treasury to rewards

[2] Shea acknowledges (Br. 24) that the "government has an interest in preventing piecemeal litigation." But he follows that concession by trying to justify his "same relator" exception with the assertion that "the government does not have an interest in discouraging relators from discovering additional fraud and coming forward with knowledge of that wrongdoing." *Id.* True enough. But the first-to-file bar only precludes claims *related to* the first-filed action. If the first relator discovers a truly separate fraud, bringing suit would not constitute piecemeal litigation, and the first-to-file bar would not bar the claim.

under the [*qui tam* provision]." *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 364 (7th Cir. 2010); *see Branch Consultants*, 560 F.3d at 378 ("a relator who merely adds details to a previously exposed fraud does not help reduce fraud or return funds to the federal fisc, because once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds") (internal quotation marks omitted).

Moreover, a "same relator" exception would lead to a host of "perverse incentives." *Powell*, 2012 WL 2885456, at *5. Shea's reading of the first-to-file bar would essentially endow first-to-file realtors with "'reappearing' jurisdiction." *Id.* This would mean that upon being first to file a claim, that relator would forever after "be able to file, dismiss, and re-file identical *qui tam* actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action." *Id.*; *see also Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010) ("forum shopping constitute[s] the opportunistic and parasitic behavior that the FCA seeks to preclude").[3] And first-

[3] Shea's extra-textual reading relies heavily (*see* Br. 19-22) on the Fifth Circuit's decision in *Bailey*. But as the district court correctly concluded (J.A. 314-315), and as defendants-appellees note (Br. 30-31), *Bailey* did not concern a relator's ability to serially file related lawsuits; rather, on unusual facts involving the case's transfer, *Bailey* addressed the validity of "fil[ing] the *same* claim in a *different* jurisdiction." 609 F.3d at 720 (emphasis added) (internal quotation marks omitted).

to-file relators would be able to do so at their leisure,[4] confident in the knowledge that other relators would be barred from doing so.

Shea argues (Br. 23-24) that applying the first-to-file bar to subsequent suits by the same relator is inconsistent with the FCA's goals, because "relators cannot race *themselves* to the courthouse." (Emphasis added). But they *can* race to the courthouse, and exempting them from the ordinary operation of the first-to-file bar provides such relators no incentive to fulfill the goals of the Act and promptly disclose the full extent of their knowledge to the government. Shea's artfully worded claim that "[s]ubsequent suits filed by the same relator do not 'divide the bounty' *amongst third parties*" (*id.* at 23 (emphasis added)) is true as far as it goes. But it overlooks the fact that permitting duplicative suits transfers recoveries from the real party in interest—the United States (and hence the public)—to individual relators (and their lawyers), in exchange for information the government "has already learned from the initial suit." *Chovanec*, 606 F.3d at 364. It is hard to maintain that such suits do anything but undermine the purposes of the Act.

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[4] Shea claims (Br. 24) that "[t]he district court's opinion creates a perverse incentive for a relator to file the broadest, speculative claims because the relator would be precluded by his own earlier suit from discovering and alleging additional wrongdoing." But any "risk that plaintiffs will engage in such artful pleading" is addressed by Rule 9(b)'s requirement that plaintiffs "plead fraud with particularity, specifying the time, place and substance of the defendant's alleged conduct." *LaCorte*, 149 F.3d at 234.

III. SHEA'S CURRENT CLAIMS ARE "RELATED" TO HIS PREVIOUS ACTION

Finally, Shea contends that his current claims are not "related" to his previously filed suit because while they involve concededly "similar conduct"—allegedly charging various fees on "telecommunications contracts with the United States" (Br. 5-6)—the later-filed claims involved different agencies and different contracts (*id.* at 26). The district court correctly rejected that argument.

This Court has adopted a "material elements" test for relatedness, under which "§ 3730(b)(5) bars any action incorporating the same material elements of fraud as an action filed earlier." *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003). Under that test, "two complaints need not allege identical facts for the first-filed complaint to bar the later-filed complaint." *Batiste*, 659 F.3d at 1208.

Shea faults the district court (Br. 27-29) for applying "a notice-based standard to the first-to-file bar," which he urges this Court to reject. But as Shea is forced to acknowledge (*id.* at 25, 28 n.34) this Court in *Batiste* specifically looked to notice principles in determining whether later claims were "related," inquiring whether "[t]he [first] [c]omplaint would suffice to equip the government to investigate [the second company's] allegedly fraudulent . . . practices." *Batiste*, 659 F.3d at 1209. Although Shea contends (Br. 26) that notice is not dispositive, he fails to note that *Batiste*'s reasoning confirms the central importance of notice

considerations. For instance, *Batiste* rejected arguments that an earlier-filed claim must meet the pleading requirements of Federal Rule of Civil Procedure 9(b) for the first-to-file bar to apply. In doing so, this Court emphatically rejected that proposition in favor of a purely notice-based standard, saying that prior allegations need "*provide only sufficient notice for the government to initiate an investigation* into the allegedly fraudulent practices, should it choose to do so." 659 F.3d at 1210 (emphasis added).

Whether an earlier complaint put the government on notice is an appropriate test of relatedness. This Court has looked to "the purposes of the *qui tam* provisions" in determining the scope of the relatedness bar. *Hampton*, 318 F.3d at 218. A notice-based standard serves the purposes of the statute because there is no question that the first-to-file bar is designed to prohibit "actions that provide no additional material information," *Batiste*, 659 F.3d at 1210, because "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied," *Grynberg*, 390 F.3d at 1279. After "the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *LaCorte*, 149 F.3d at 234; *see also Folliard*, 722 F. Supp. 2d at 41-42 ("the policy underlying § 3730 militates against accepting relator's argument" that fraud schemes are unrelated because they "involve 'completely different contracts and completely different agencies'").

Thus, it is appropriate, in determining whether a later complaint is "related" to the first-filed complaint, to inquire whether the earlier complaint "provide[s] the government sufficient information to launch an investigation of a fraudulent scheme." *Batiste*, 659 F.3d at 1210. A notice-based test also has the virtue of preventing a relator from breaking a single alleged fraud scheme into a series of suits against a single contractor, proceeding from one contract to the next seeking to maximize his share of the recovery. While a relator could obtain a good living making a "cottage industry" of suing a single contractor—indeed, it appears Shea is doing *precisely that* here—it would do nothing to bring additional fraud schemes to light.

A straightforward "side-by-side comparison," *Batiste*, 659 F.3d at 1209, of Shea's claims makes plain that the two are related. Indeed, Shea self-identifies the complaint in the second action as "related" to the first. *See* J.A. 13-14 (Compl. ¶ 7 (June 5, 2009) ("In 2007, Relator Stephen Shea filed a related action, Civ. Action No. 07CV0111(GK), also pending in the United States District Court for the District of Columbia.")); J.A. 55 (Second Am. Compl. ¶ 5 (Sept. 12, 2012) (same)). Both actions concern surcharges Shea claims to have learned of as a result of his consulting work, based on his review of the *same document*. *Compare* J.A. 54 (Second Am. Compl. ¶¶ 3, 4), *with* J.A. 141-42, 152 (Compl. in Orig.

Action ¶¶ 12, 13, 70, 71 (Jan. 17, 2007)).[5] Both cases involve telecommunications contracts with government agencies, and differ merely in the particular form of the alleged surcharge and the particular contract and agency involved. Shea Br. 27; *accord id.* at 29.

Notice principles support the conclusion that the second lawsuit is "related" to the first. Upon discovering evidence that a government contractor has committed fraud with one agency, one of the most basic steps of any investigation would be to determine whether the contractor had engaged in similar conduct in its related contracts with that and other agencies. There can be little question, therefore, that "'investigations launched in direct consequence of [the first] complaint[] would have revealed'" the alleged acts of fraud at issue in the second suit. *Foillard*, 722 F. Supp. 2d at 43 (quoting *Chovanec*, 606 F.3d at 365). As the

[5] As Verizon notes (Br. 46-49), the information Shea "investigated" to support his claim was available on the Internet, bringing his claim within the "broad[] sweep," *Graham Cnty*, 559 U.S. at 290, of the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A); *see also* Verizon Br. 47 n.12 (information available on the Internet falls within the public-disclosure bar's prohibition on suits based on information disclosed in the "news media"). Moreover, even if it were not otherwise barred, as Verizon explains (Br. 52-53), Shea's bare-bones allegations do not "state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b). It is especially important that courts apply the heightened pleading requirements for fraud rigorously in the FCA context, because "[a] special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate." *United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 309 (5th Cir. 1999), *abrogated on other grounds by United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009).

Folliard court reasoned in considering a factually similar case, "a DOJ attorney looking into [the first-filed] claims could have easily reviewed publicly available information to determine whether [the company] was a party to other government procurement contracts that" contained the same feature. *Id.* Thus, the allegations in Shea's complaint here are a textbook example of an alleged "fraudulent scheme the government already would be equipped to investigate based on the [first-filed claim]." *Batiste*, 659 F.3d at 1209.

This Court and others have not hesitated to find similar claims "related" although they involved allegations of fraud by different companies, occurred in different geographic areas, or involved different agencies. *See, e.g.*, *Hampton*, 318 F.3d at 218 (claims related though suit "named different defendants" and operations in different state); *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011) (stating that allegations that defendant made false claims "to different agencies under different contracts does not mean that the complaints incorporate different material elements"); *Folliard*, 722 F. Supp. 2d at 41 (rejecting argument that later suit "involve[d] 'completely different contracts and completely different agencies'").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,428 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2013, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Appellees was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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