No. 12-1011

IN THE

United States Court of Appeals for the Fourth Circuit

UNITED STATES EX REL. BENJAMIN CARTER,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia,
No. 1:11-cv-00602-JCC-JFA
James C. Cacheris, Senior District Judge

REPLY IN SUPPORT OF MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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April 5, 2013

Pursuant to Fed. R. App. P. 27(a)(4), the Chamber of Commerce of the United States of America (the "Chamber") submits this reply in support of its motion for leave to file a brief as amicus curiae in support of appellees' petition for rehearing en banc. Contrary to the arguments made by appellant Benjamin Carter ("Carter") in an attempt to keep the Court from even considering the Chamber's brief, the Chamber is serving the proper role of an amicus curiae by informing the Court of the broader negative implications of the panel's decision on the Nation's businesses. Its motion for leave to file should therefore be granted.

1. Citing out-of-circuit authority, Carter argues that leave to file amicus briefs should be granted only in limited circumstances. *See* Opp. 1-3. But as then-Judge Alito explained in *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128 (3d Cir. 2002) (Alito, J.), "[e]ven when a party is very well represented, an amicus may provide important assistance to the court" by, *inter alia*, "'explain[ing] the impact a potential holding might have on an industry or other group.'" *Id*. at 132 (citation omitted). Thus, "it is preferable to err on the side of granting leave" because while an unhelpful brief can always be disregarded, "if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance." *Id*. at 133. And "[a] restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination" and "may also convey an unfortunate message about the openness of the court." *Id*.

But even under Carter's cited authority, the Chamber's brief is appropriate because the Chamber "'has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" Opp. 2 (citation omitted). The Chamber is the world's largest business federation and is uniquely positioned—in a way that appellees are not—to inform the Court of the broader harmful effect that the panel's decision would have on the Nation's diverse business community. The Chamber has participated before this Court as an amicus curiae on numerous occasions,[1] and has previously been granted leave to file a brief as amicus curiae in support of a petition for rehearing en banc. *See* Order, *Palisades Collection LLC v. Shorts*, No. 08-2188 (4th Cir. Jan. 13, 2009) (Dkt. 20). Its participation is equally warranted here.

Carter cites the order in *LaRue v. Dewolff, Boberg & Assocs.*, 458 F.3d 359 (4th Cir. 2006), but the panel in that case granted leave to file an amicus brief in support of rehearing. The government in that case had waited to file until 13 days after the rehearing petition and was admonished to have participated at an earlier stage. Here, however, the Chamber has appropriately expressed its views at the

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1 *See, e.g.*, *Huntington Ingalls, Inc. v. NLRB*, Nos. 12-2000 & 12-2065 (4th Cir.) (pending); *Jaffe v. Samsung Electronics Co.*, No. 12-1802 (4th Cir.) (pending); *Nestle Dreyer's Ice Cream Co. v. NLRB*, Nos. 12-1684 & 12-1783 (4th Cir.) (pending); *United States ex rel. Bunk v. Gosselin World Wide Moving*, Nos. 12-1369, 12-1417 & 12-1494 (4th Cir.) (pending); *Soutter v. Equifax Information Servs.*, No. 11-1564 (4th Cir. Dec. 3, 2012); *Virginia ex rel Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Livingston v. Wyeth*, 520 F.3d 344 (4th Cir. 2008); *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007).

rehearing stage. The perceived errors in *LaRue* were apparent from the trial court's ruling, which the panel affirmed. In this case, by contrast, the district court correctly interpreted and applied the law and the harms identified by the Chamber were first engendered by the panel's contrary decision. Moreover, the Chamber filed its brief on the same day as the rehearing petition and, unlike the government, the Chamber is not in a position to file briefs in every panel case where an adverse result could conceivably occur.

2. Carter also argues that the Chamber lacks a unique perspective in apprising the Court of the far-reaching impacts of the panel's decision as allegedly shown "by a review of the Chamber's submission." Opp. 4. But that is exactly what the Chamber's motion seeks—a review of its brief. In any event, Carter's criticisms are unfounded and are no reason to deny leave to file.

Carter contends that the panel's WLSA decision will have no broad effect because the facts of this case are related to wartime activities. *Id*. at 5-6. But nothing in the panel's opinion expressly limits its holding to war-related claims and the statutory language applies to any "offense"—which the panel wrongly interpreted to cover claims by private FCA relators—"involving fraud or attempted fraud against the United States or any agency thereof in any manner." 18 U.S.C. § 3287(1). Not only will other relators argue that this covers all FCA claims—not just those involving wartime activities—but at least one already has. On the same

day the Chamber filed its brief, it was reported that a relator had already sought to apply the panel's WSLA ruling to a FCA case in Pennsylvania involving health care fraud having nothing to do with wartime activities. *See* Dietrich Knauth, *4th Circ. Wartime Tolling Case Cited In Pa. Kickbacks Suit*, Law360.com (Apr. 1, 2013) (www.law360.com/articles/428786/section=employment).

Carter's response to the Chamber's concerns about the panel's "first-to-file" ruling go to the merits and are no reason to deny leave to file a brief. But in any event, the Chamber's concerns are valid. Interpreting the first-to-file bar to prevent relators from filing duplicative cases, one after another, does not "yield absurd results." Opp. 8. Just the opposite is true. As explained in the Chamber's brief, the statute is predicated on the policy that once the government has been alerted to potential fraud through a qui tam action, there is no need for any further whistleblowers—regardless of how the first action is resolved. In deciding whether to grant rehearing, the Court should consider the Chamber's views that allowing such duplicative litigation would impose undue burdens on the Nation's businesses in contravention of the statute's language and purposes.

CONCLUSION

For the foregoing reasons, and those in the motion, the Chamber respectfully requests that it be granted leave to file an amicus curiae brief in support of the petition for rehearing en banc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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