No. 12-1497

In The Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA *EX REL.* BENJAMIN CARTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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October 21, 2014

QUESTION PRESENTED

Whether the False Claims Act's first-to-file provision, 31 U.S.C. § 3730(b)(5) – which creates a race to the courthouse to reward relators who promptly disclose fraud against the Government – functions as a "one-case-at-a-time" rule that allows subsequent relators with valuable information to file *qui tam* complaints, provided that no prior, related *qui tam* claim is pending at the time of filing.

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INTEREST OF AMICUS CURIAE[1]

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. TAFEF has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as *amicus curiae*,[2] and has provided testimony before Congress about ways to improve the FCA. TAFEF has a profound interest in ensuring that the FCA is appropriately interpreted and applied and strongly supports vigorous enforcement of the Act, based on its many years of work focused on the proper interpretation and implementation of the FCA.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief and that letters reflecting the consent of both Petitioners and Respondent have been filed with the Clerk.

[2] TAFEF has submitted briefs in this Court as *Amicus Curiae* in several cases in recent years, including: Brief for *Amicus Curiae*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188 (Jan. 25, 2011); Brief of *Amicus Curiae*, *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 08-304 (Oct. 26, 2009); Brief of *Amicus Curiae*, *United States ex rel. Eisenstein v. City of New York, et al.*, No. 08-660 (Mar. 4, 2009); Brief of *Amicus Curiae*, *Allison Engine Co., Inc., et al. v. United States ex rel. Sanders*, No. 07-214 (U.S. Jan. 22, 2008); and Brief for *Amicus Curiae*, *Rockwell Int'l Corp., et al. v. United States, et al.*, No. 05-1272 (U.S. Nov. 20, 2006).

SUMMARY OF ARGUMENT

The FCA's first-to-file provision states that no person may bring a related action based on the facts underlying a "pending" action.[3] The provision is not ambiguous and therefore, pursuant to settled canons of statutory construction, it should be given its plain meaning to effectuate Congress' manifest intent – to preclude subsequently-filed *qui tam* cases if a prior related *qui tam* case is still "pending." As a majority of courts have held, the purpose of the first-to-file provision is to encourage knowledgeable relators to alert the Government to fraud promptly, while barring multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. This purpose is served by giving "pending" its plain meaning. Finding that "pending" means "first-filed," as Petitioners argue, would undermine the FCA's goal of encouraging relators to prosecute those who commit fraud, regardless of whether the Government has the knowledge and resources to do so on its own.

Petitioners' professed concern that giving the first-to-file provision its plain-language meaning will lead to an infinite number of follow on suits is without merit. Petitioners ignore a variety of limits on subsequent relators, including *res judicata* and collateral estoppel, the FCA's public disclosure provision, the FCA's statute of limitations provision, and the FCA's prohibition against *qui tam* suits where the Government has already initiated its own action to remedy the fraud. Notably, there is no

[3] 31 U.S.C. § 3730(b)(5).

evidence supporting the "dire consequences" Petitioners suggest.

The history of the FCA and its first-to-file provision demonstrate that Congress intended that knowledgeable relators could bring suits on the Government's behalf to recover stolen taxpayer funds, even if the Government was already generally aware of the alleged fraud. Congress amended the FCA several times throughout the statute's history, including in 1943, 1986, 2009 and 2010. With these amendments, Congress sought to establish and refine the roles of relators and the Government in prosecuting fraud. With the 1986 amendments, Congress enacted the "public disclosure" rule and its "original source" exception to replace the prior "government knowledge bar." These provisions encourage relators to come forward even after the Government has been put on notice of an alleged FCA violation. The first-to-file provision, which was also created in 1986, works in conjunction with the other FCA provisions to ensure that fraud claims are brought to light quickly, and that informed relators have an incentive to pursue them when the Government chooses not to do so.

In practice, the Government often encourages cooperation between first and subsequent relators in order to glean the most useful information from those who can assist the Government in recovering taxpayer dollars stolen through fraud. Subsequent *qui tam* actions frequently provide the Government with vital additional information and cannot simply be categorized as "parasitic." Indeed, in many instances, a first-filed *qui tam* complaint stays under

seal for years and remains unknown to subsequent relators, who therefore cannot have any parasitic intent. In addition, some first-filed *qui tam* actions are dismissed purely on procedural, non-merits grounds, and holding that complaints suffering from such defects forever bar all subsequent related actions will deprive the Government of crucial information necessary to prosecute fraud, will defeat Congress' intent, and will lead to consequences that Congress could never have intended.

ARGUMENT

I. The Term "Pending," as Used in the First-to-File Rule, Must be Given Its Plain-Language Meaning, Lest the FCA be Turned on Its Head

Congress amended the FCA in 1986 and added the "first-to-file" provision, which states:

> When a person brings an action under [the FCA's *qui tam* provision], no person other than the Government may intervene or bring a related action based on the facts underlying the **pending** action.[4]

This provision – in conjunction with the other 1986 amendments to the FCA – furthers Congress' stated goal of strengthening the statute by encouraging knowledgeable persons to promptly alert the

[4] 31 U.S.C. § 3730(b)(5) (emphasis added).

Government to fraud, while also preventing *qui tam*[5] suits that do not meaningfully add to the Government's investigation and efforts to recover stolen funds.[6] Contrary to Petitioners' assertion, the first-to-file provision was not principally designed to prevent parasitic lawsuits – that is the purpose of the FCA's public disclosure provision. Rather, the first-to-file provision was created to prevent multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. The first-to-file provision is clear – it only applies when a prior, related *qui tam* suit is still "pending." Giving "pending" its plain-language meaning furthers Congress' goal of encouraging relators to file their *qui tam* complaints without delay, while also permitting subsequent relators possessing valuable information to file suit if the first action has been dismissed before a final judgment has been entered. Petitioners propose a definition of "pending" under the first-to-file

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[5] "*Qui tam*" references FCA cases initiated by a private person – called a "relator" – on behalf of the Government. The term is shorthand for the phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which means "he who sues for himself as well as for the king." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2000).

[6] *See, e.g.* S. Rep. No. 345, 99th Cong., 2d Sess. (1986), 1, 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 ("[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."); *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.,* 579 F.3d 13, 32 (1st Cir. 2009) (*quoting United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) and observing that "a goal behind the first-to-file rule" is to provide incentives to relators to "promptly alert[ ] the government to the essential facts of a fraudulent scheme.").

provision that does not appear in any dictionary, and which severely undermines Congressional intent.

Petitioners ignore this plain meaning and seek to turn the provision into something entirely different, arguing that "pending action" should be applied to an earlier action that is no longer pending. This tortured interpretation of an unambiguous term violates bedrock tenets of statutory construction and would defeat Congress' intent and turn the FCA on its head. Indeed, the majority of courts to address this issue have rejected similar attempts to distort the meaning of the first-to-file provision.[7] Finding that "pending" simply means "first-filed" undermines the *qui tam* provision's purpose of encouraging relators to prosecute those who commit fraud, regardless of whether the Government has the resources, knowledge, or ability to do so on its own.[8]

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[7] *See*, *e.g.*, *United States ex rel. Chovanec v. Apria Healthcare Group Inc.,* 606 F.3d 361, 365 (7th Cir. 2010) (finding that the FCA "provides that if one person 'brings an action' then no one other than the Government may 'bring a related action' while the first is 'pending.'"); *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals),* 566 F.3d 956, 964 (10th Cir. 2009) ("The 'pending' requirement much more effectively vindicates the goal of encouraging relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator who qualifies as an original source may pursue his own."); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) (holding that the first-to-file provision barred a *qui tam* suit since a prior related *qui tam* suit – which was eventually dismissed – was still pending at the time the subsequent action was commenced).

[8] *See, e.g.*, 145 Cong. Rec. E1546, E1548 (July 14, 1999) (statement of Rep. Berman) ("One of the principal goals of the 1986 Amendments was to ameliorate the 'lack of resources on the part of Federal enforcement agencies.' That was one of the

A. Departing From the Plain Language Meaning of "Pending" Violates a Basic Rule of Statutory Interpretations and Frustrates Congressional Intent

This Court has previously cautioned against interpreting the FCA "in a way inconsistent with a plain reading of its text."[9] That caution applies here. The purpose of the first-to-file provision is to bar duplicative actions based on the facts underlying a related *qui tam* action that is still pending. The plain language of the first-to-file provision makes clear that no person may bring a related action based on the facts underlying a "pending" action. There is nothing ambiguous about the word "pending" in the context of the first-to-file provision, and thus, the term must be interpreted based on its plain meaning. When the 1986 FCA amendments were enacted, "pending" was defined as "[b]egun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is said to be 'pending' from its inception until the rendition of final judgment."[10] That definition

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reasons we strengthened the qui tam provisions of the law. Thus, we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators would work together in many cases to achieve a just result.") (internal citation omitted).

[9] *See Schindler Elevator Corp. v. United States ex rel. Kirk,* 131 S. Ct. 1885, 1893 (2011).

[10] Black's Law Dictionary 1021 (5th ed. 1979).

remains unchanged today.[11] Yet, Petitioners would read "pending" out of the provision altogether, or ascribe an entirely new definition to the word.

Historically, when courts have departed from Congress' intent in construing the FCA, Congress has reacted by amending the statute to avoid further misinterpretations. In fact, the history of the FCA, discussed *infra*, reflects Congress' continual efforts – over the course of several decades – to calibrate the statute's *qui tam* provisions and correct judicial interpretations that diverged from congressional intent. For instance, the FCA was amended in 1943 in immediate response to the Court's ruling in *United States ex rel. Marcus v. Hess*.[12] In 1986, the statute was again amended, in response to the Seventh Circuit's decision in *United States ex rel. Wisconsin v. Dean*.[13] More recently, the FCA was amended in 2009 as part of the Fraud Enforcement and Recovery Act, after the Court's rulings in *United States ex rel. Totten v. Bombardier Corp.* and *Allison Engine Co. v. United States ex rel. Sanders*.[14] The next year, in light of the Court's consideration of the FCA issues in *Graham County Soil & Water District v. U.S. ex rel. Wilson*, Congress amended the statute

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[11] *See* Black's Law Dictionary 1314 (10th ed. 2014) (defining "pending" as "[r]emaining undecided; awaiting decision <a pending case>").

[12] 317 U.S. 547 (1943); *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5375-77.

[13] 729 F.2d 1100 (7th Cir. 1984); *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 11, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78.

[14] 380 F.3d 488 (D.C. Cir. 2004); 553 U.S. 662 (2008); *see also* S. Rep. No. 111-10 (2009); 152 Cong. Rec. E1298 (June 3, 2009) (statement of Rep. Berman).

again – this time as part of the Patient Protection and Affordable Care Act – to clarify its intent.[15]

In light of this history of congressional adjustments, the fact that Congress has never amended the first-to-file provision is telling; the provision has worked as Congress intended. Only one circuit court has held that "pending" under the FCA should not be given its plain-language meaning – and that ruling is less than a year old and includes a vociferous dissenting opinion.[16] Other circuit courts have established that the first-to-file provision "applies only while the initial complaint is 'pending.'"[17] Congress has not seen fit to alter that interpretation. It is clear that this majority view – that "pending" plainly means "pending" – is in accord with Congress' intent.

B. Construing the First-to-File Provision to Preclude Suits Filed Only While a Related Suit Is Pending Will Not Lead to Infinite Follow-On Suits or Other Unintended Consequences

Contrary to Petitioners' contention, giving the term "pending" its plain-language meaning will not allow "an infinite series of duplicative claims so long

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[15] *See* 559 U.S. 280, n.1 (2010).

[16] *See United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014).

[17] *See United States ex rel. Chovanec,* 606 F.3d at 365; *In re Natural Gas Royalties Qui Tam Litigation,* 566 F.3d at 963-64 (10th Cir. 2009); *United States ex rel. Lujan*, 243 F.3d at 1188.

as no prior claim is pending at the time of filing."[18] These presumed consequences – asserted by Petitioners without support – are unlikely when the FCA is viewed as a whole and evaluated in accordance with the rules of civil procedure generally.

Although the first-to-file rule permits a subsequent relator to bring a related *qui tam* suit after any earlier-filed *qui tam* suit has been dismissed and is no longer pending, the subsequent suit may be barred by a variety of other doctrines, including *res judicata* and collateral estoppel;[19] the FCA's statute of limitations;[20] the FCA's public disclosure provision;[21] and the statute's prohibition against *qui tam* suits whenever the Government has already brought its own civil action or administrative proceeding to remedy the fraud.[22]

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[18] Brief for Petitioners at I.

[19] *See, e.g. United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009) (recognizing that "the Government is bound by the judgment" in *qui tam* suits); *United States ex rel. Chovanec*, 606 F.3d at 365 (acknowledging that "the doctrines of claim and issue preclusion" might "block[] anyone (including the United States) from filing additional suits dealing with" the fraud scheme alleged in two prior earlier-filed *qui tam* suits); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 517-18 (6th Cir. 2009) ("[I]f the first-filed *qui tam* action has been dismissed on its merits or on some other grounds not related to its viability as a federal action, it can still preclude a later-filed, but possibly more meritorious, *qui tam* complaint under the first-to-file rule.").

[20] 31 U.S.C. § 3731(b).

[21] 31 U.S.C. § 3730(e)(4).

[22] 31 U.S.C. § 3731(e)(3).

These rules protect defendants from repetitive suits and discourage relators from delaying the filing of *qui tam* complaints or from bringing allegations in a piecemeal fashion – the result Petitioners speculate will occur if the first-to-file provision is given its plain-language meaning.[23] An earlier-filed *qui tam* suit that has been unsealed and eventually dismissed will likely have remained under seal for months, if not years; during that time, the statute of limitations will have continued to run. Thereafter, all other relators will be barred from filing related *qui tam* suits unless a series of conditions are satisfied, including: (1) the dismissal of the earlier case was not on the merits; (2) the subsequent relator is an original source of his/her fraud allegations; (3) the statute of limitations has not yet expired; and (4) the Government has not initiated its own proceeding. Once all of these contingencies are taken into account, it becomes evident that the possibility for subsequent related suits drops drastically. Petitioners present no evidence or examples supporting their assertion that reading the statute as it has been read by the majority of courts thus far has led to an "infinite series of duplicative claims."

Additionally, Petitioners' attempt to cast subsequent relators as "parasitic" is groundless and demonstrates a fundamentally flawed understanding of *qui tam* procedure.[24] The FCA requires relators to

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[23] Brief for Petitioners at 55.

[24] *See* Brief for Petitioners at 54, 57 (arguing that "[t]he [first-to-file] bar serves the broader purpose of . . . barring copycat actions that provide no additional material information," and mischaracterizing and misquoting the Fifth Circuit's holding in

file FCA *qui tam* complaints under seal, and those complaints remain under seal until the Government makes its intervention decision or moves to dismiss the action. Therefore, most subsequent relators are unaware of the existence of earlier-filed related *qui tam* actions. There is nothing parasitic about a well-informed, well-intentioned relator in California who happens to file her *qui tam* complaint days after another relator filed a related, sealed *qui tam* complaint in Virginia. On the contrary, the timing of the two filings is purely incidental, and there is no logical basis for Petitioners' suggestion that the subsequent complaint is parasitic or does not contain valuable and unique evidence of fraud.

Petitioners misconstrue the nature and purpose of the first-to-file provision – painting it as a provision designed to prevent parasitic lawsuits, rather than as a tool to encourage the timely filing of meritorious claims and to minimize interference in Government investigations resulting from multiple filings. As explained below, it is the purpose of the FCA's public disclosure provision – not its first-to-file provision – to prevent parasitic *qui tam* actions. By limiting the first-to-file provision only to situations in which a prior related *qui tam* suit is still pending, Congress created a race to the courthouse among relators with evidence of fraud. Congress did not forever bar all subsequent related *qui tam* complaints or preclude all subsequent valuable relators from assisting the Government in recovering stolen funds.

United States ex rel. Branch Consultants in an attempt to support that erroneous contention).

II. For Nearly Thirty Years, FCA Relators Have Not Been Barred from Filing *Qui Tam* Suits Simply Because the Government May Have Already Had Knowledge of the Fraud

The FCA was first enacted in 1863, as a means to combat rampant procurement fraud occurring during the Civil War.[25] The FCA was modeled after informer statutes that had been used in England and early in the history of this country.[26] Congress amended the Act several times since 1863, including in 1943, 1986, 2009, and 2010. With each amendment, Congress sought to refine the unique balance between the role of the Government and the role of relators who are incentivized to file suit on the Government's behalf in exchange for a percentage of the Government's recovery. The FCA makes clear that the Attorney General may bring a civil action under the statute.[27] However, Congress also understood that the Government will not have the capacity or resources to discover all FCA violations and file corresponding suits to recover all the funds stolen from the federal fisc.[28] Thus, the FCA also permits "a person" to bring a civil action "for the person and for the United States Government."[29]

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[25] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878)**Error! Reference source not found.**; *see also United States v. Neifert-White Co.,* 390 U.S. 228, 232 (1968); S. Rep. No. 345, 99th Cong., 2d Sess. (1986), at 8*, reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

[26] *See United States ex rel. Marcus*, 317 U.S. at 542, n.4 (1943).

[27] 31 U.S.C. § 3730(a).

[28] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 7*, reprinted in* 1986 U.S.C.C.A.N. at 5272-73.

[29] 31 U.S.C. § 3730(b)(1).

When a person brings an action for the United States, the statute provides that the action "shall be brought in the name of the Government."[30]

When the FCA was first enacted, the Government had no right to participate in *qui tam* actions, although the case could not be settled without the Government's consent.[31] When the FCA was amended in 1943, Congress for the first time allowed the Government to take over a case initiated by a relator.[32] Under the 1943 version of the FCA, if the Government took over a *qui tam* suit, then the relator had no continuing role in the litigation, but if the Government declined to intervene, then it had no opportunity to join the case at a later date.[33] In addition, during the early 1940's, relators often copied fraud allegations directly from indictments and, solely on the basis of that information, filed *qui tam* suits on behalf of the Government.[34] Without question, these suits were parasitic, as the relators simply took information from a "host" – the Government – and sought to profit at the host's expense, while offering nothing of value in return. In 1943, the Court upheld this practice,[35] and Congress immediately responded by enacting amendments to the FCA.[36] The amendments included a new

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[30] *Id.*
[31] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 296; *United States ex rel. Marcus*, 317 U.S. at 547, n.11.
[32] *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608.
[33] *See id.*
[34] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 10*, reprinted in* 1986 U.S.C.C.A.N. at 5275.
[35] *See United States ex rel. Marcus*, 317 U.S. 547.
[36] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5375-77.

"government knowledge" bar that precluded *qui tam* suits "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought" – regardless of whether the Government was aware that it possessed information, understood its significance, or made any effort to remedy the fraud, and regardless of whether the relator was the source of the Government's information.[37] Following the 1943 amendments, however, courts began erroneously construing the FCA to bar *qui tam* actions that were in no way parasitic.[38] As a result, the FCA fell into disuse among relators.

For instance, in *United States ex rel. Wisconsin v. Dean*, the State of Wisconsin had investigated and convicted a defendant of Medicaid fraud, and pursuant to applicable regulations, reported information regarding the fraud to the Federal Government. The State later filed a *qui tam* suit to recover damages and penalties on behalf of the Federal Government, and requested an exemption from the government knowledge bar. The Seventh Circuit reviewed the legislative history of the provision and rejected the State's request, holding that Wisconsin could not maintain its *qui tam* action on behalf of the Federal Government, which already possessed information regarding the fraud. The circuit court noted that any exemption to

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[37] Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.
[38] *See, e.g.*, *United States ex rel. Wisconsin*, 729 F.2d 1100; *United States v. Rippetoe*, 178 F.2d 735 (4th Cir 1949); *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1949); *United States ex rel. Lapin v. Int'l Bus. Machines Corp.*, 490 F. Supp. 244 (D. Hi. 1980).

the government knowledge bar should be obtained from Congress.[39] Two years later, in 1986, Congress responded by overhauling and modernizing the FCA through significant amendments that encouraged more relators to file *qui tam* suits, thereby strengthening the law.[40] The 1986 amendments also further refined the relationship between the Government and relators, as Congress observed that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[41] As several circuit courts have noted, the 1986 amendments were an attempt by Congress to encourage relators to start using the FCA again, while rewarding only deserving relators who add value and assist the Government by recovering stolen funds and combating fraud.[42]

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[39] *See United States ex rel. Wisconsin*, 729 F.2d at 1106.

[40] *See Graham County Soil & Water Conservation District*, 559 U.S. at 298 ("We do not doubt that Congress passed the 1986 amendments to the FCA 'to strengthen the Government's hand in fighting false claims,' and 'to encourage more private enforcement suits.'") (internal citations omitted); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 233-234 (3d Cir. 1998) ("Following a decline in qui tam litigation after the 1943 amendment, the legislature again amended the Act in 1986. The primary purpose of this change was to 'shift the advantage back to the government' in the fight against fraud.").

[41] S. Rep. No. 345, 99th Cong. 2d Sess., at 2, *reprinted* in 1986 U.S.C.C.A.N. at 5267.

[42] *See United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376-77 (5th Cir. 2009); *United States ex rel. Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *United States ex rel. LaCorte*, 149 F.3d at 233-234 ; *see also* 145 Cong. Rec. E1546 (July 14, 1999) (statement of Rep. Berman) (stating that "Three goals inspired the 1986 Amendments. First and foremost, Congress wanted to

In 1986, Congress codified the procedures relators must follow to file *qui tam* suits, requiring complaints to be filed under seal and to be served on the Government but not the defendant, and mandating that relators provide the Government with a "written disclosure of substantially all material evidence and information the person possesses."[43] The revised statute also provided to the Government an initial sixty-day period in which to investigate a relator's allegations before deciding whether to proceed with an action by intervening in a *qui tam* suit.[44] If the Government decides to intervene, then it takes primary responsibility for the litigation and the relator "shall have the right to continue as a party;" if the Government declines to intervene, then the relator will have the right to conduct the action without the Government.[45] The Government may also dismiss *qui tam* actions, even over the objections of a relator;[46] may settle a *qui tam* action without the relator's consent;[47] and may seek to restrict the relator's participation in an intervened suit, under certain circumstances.[48]

Thus, at the outset of every *qui tam* suit, the Government will have been made aware of all the

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encourage those with knowledge of fraud to come forward. Second, we wanted a mechanism to force the government to investigate and act on credible allegations of fraud. Third, we wanted relators and their counsel to contribute additional resources to the government's battle against fraud").

[43] 31 U.S.C. § 3730(b)(2).

[44] *Id.*

[45] *See id. at* § 3730(b)(4)(A) and (B).

[46] *See id.* at § 3730(c)(2)(A).

[47] *See id.* at § 3730(c)(2)(B).

[48] *See id.* at § 3730(c)(2)(C).

relator's material evidence and will have had an opportunity to investigate the fraud allegations. Without question, by the time any *qui tam* case is unsealed, the Government will have been alerted to the fraud. Yet, if the Government declines to intervene in the relator's suit and does not seek to dismiss the suit, then relators are not only permitted to pursue their claims on behalf of the Government but are specifically incentivized to do so. The FCA states that if the Government intervenes in a *qui tam* suit, then the relator's award will be between 15% and 25% of the Government's recovery.[49] However, if the relator proceeds without the Government's intervention, then the range for the potential reward increases to between 25% and 30% of the Government's recovery.[50]

The 1986 amendments reflect Congress' recognition that the Government simply lacks the resources to prosecute all viable FCA claims, even when it knows of fraudulent conduct.[51] Moreover, through the 1986 amendments, Congress sought to diminish the Government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government."[52] The FCA's *qui tam* provisions give relators a private right of action – even if the Government chooses not to act. As noted above, the 1986 amendments specifically bar *qui tam* actions

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[49] *See id.* at § 3730(d)(1).
[50] *See id. at* § 3730(d)(2).
[51] *See*, *e.g., United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (internal citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).
[52] *Id.*

after the Government becomes involved in a related civil or administrative proceeding. The fact that Congress included this provision and explicitly abandoned the government knowledge bar indicates that the Government's mere knowledge of the fraud is insufficient to preclude subsequent *qui tam* actions; instead, the Government must act on that knowledge by commencing its own civil action or administrative proceeding in order to preclude a related *qui tam* filing.

A. The FCA's "Public Disclosure" Provision Replaced the Government Knowledge Bar and Explicitly Permits Relators to File *Qui Tam* Suits After the Government has been Notified of the Fraud

Consistent with the goals of the 1986 amendments, Congress created a "public disclosure" provision, which replaced the government knowledge bar. As this Court recently recognized:

> Congress apparently concluded that a total bar on qui tam actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress replaced it with the public disclosure bar in

> an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in Hess."[53]

The 1986 version of the public disclosure bar provision stated:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[54]

The amended statute also defined "original source":

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the

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[53] *Graham County*, 559 U.S. at 294.

[54] 31 U.S.C. § 3730(e)(5)(A) (1986); 132 Cong. Rec. 17,936 (1986).

> allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.[55]

By creating the public disclosure provision, Congress eliminated the underlying assumption of the 1943 law – that the *qui tam* provisions were designed to allow relators to assist the Government only when the Government lacked information regarding the fraud.[56] Since 1986, the fact that the Government may have already been made aware of a fraud scheme has not served as a bar to *qui tam* suits.[57]

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[55] *Id.*

[56] *See Graham County*, 559 U.S. at 309 (*quoting Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) and stating that "[b]y replacing the Government knowledge bar with the current text of § 3730(e)(4)(A) and including an exception for 'original source[s],' Congress 'allowed private parties to sue even based on information already in the Government's possession.'").

[57] *See, e.g.*, *In re Natural Gas Royalties Qui Tam Litig.,* 566 F.3d at 963 ("Allowing an original source to bring an action even when the government should be on notice of the fraud serves the purpose of the FCA by increasing valid enforcement actions. The government could lack the resources (or indeed, the political will) to pursue a claim, even if it has been set on its trail. The government might lack sufficient evidence of its own to win in court. In these cases, qui tam suits provide a valuable way to deter false claims and compensate the government for its lost revenue.").

B. The FCA's "First-to-File" Provision Fits Perfectly Within the Framework of the Amended Statute

Congress drafted the FCA's first-to-file and public disclosure provisions in 1986. Contrary to Petitioners' argument, the first-to-file bar was not principally concerned with rooting out parasitic relators, as the public disclosure bar was designed to address that issue.[58] Instead, the primary purposes of the first-to-file rule are to encourage relators to file *qui tam* suits without delay, while also preventing multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. Without the first-to-file provision, defendants would be subject to multiple simultaneous suits, resulting in potentially inconsistent judgments. In addition, the Government would be required to share its recoveries with multiple relators, even if a first-filed relator's allegations were sufficient to recover the Government's stolen funds.[59] Congress added the

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[58] *In re Natural Gas Royalties Qui Tam Litig.* 566 F.3d at 963 ("The public disclosure bar already removes jurisdiction from suits brought by relators who simply feed off another relator's complaint and offer no useful information to government officials who should already be on notice of the fraud. Applying that standard to the first-to-file bar will do no more to weed out opportunistic relators than the public disclosure bar already does."); 145 Cong. Rec. E1546 (July 14, 1999) (statement of Rep. Berman) (explaining that the public disclosure provision was drafted in 1986 "to deter so-called 'parasitic cases'").

[59] *United States ex rel. Chovanec*, 606 F.3d at 364 ("Me-too suits designed to divert some of the reward to latecomers do not serve any useful purpose, and they weaken the incentive to dig out the facts and launch the initial action. What's more,

first-to-file rule to restrict the number of suits – and the number of relators – that could bring the same FCA allegations at any given time against any individual defendant.

In view of the fact that Congress simultaneously enacted the first-to-file provision and abolished the government knowledge bar, it is clear that the first-to-file provision in no way limits relators' ability to file *qui tam* suits based on when the Government is already on notice of the alleged fraud. Any other result would directly conflict with the public disclosure provision, which in 1986

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secondary suits that do no more than remind the United States of what it has learned from the initial suit deflect recoveries from the Treasury to rewards under § 3730(d)."); *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 and 824 (9th Cir. 2005) (stating that the first-to-file bar "encourages prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud. . . The FCA reflects the strong congressional policy of encouraging whistleblowers to come forward by rewarding the first to do so."); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("[O]riginal qui tam relators would be less likely to act on the government's behalf if they had to share in their recovery with third parties who do no more than tack on additional factual allegations to the same essential claim."); *United States ex rel. LaCorte*, 149 F.3d at 234 (discussing concerns that under an "overly narrow interpretation" of the first-to-file provision, "dozens of relators could expect to share a recovery for the same conduct, decreasing their incentive to bring a *qui tam* action in the first place."); *United States ex rel. Precision Co. v. Koch Indus. Inc.*, 31 F.3d 1015, 1018 (10th Cir. 1994) (stating that "[t]he *qui tam* complaint filed first blocks subsequent *qui tam* suits based on the same underlying facts. In so doing, the statute prevents a double recovery.") (citing *United States ex rel. Erickson v. American Inst. of Bio. Sci.*, 716 F. Supp. 908 (E.D. Va. 1989)).

explicitly allowed "original source" relators to sue, even after the fraud allegations were publicly disclosed "in a criminal, civil, or administrative hearing," including in a previous, unsealed *qui tam* suit.[60] "Because original sources are still permitted to bring a *qui tam* complaint after public disclosure, Congress clearly believed that original sources possessed valuable information that would assist the government in prosecuting false claims actions."[61] Congress reiterated that intent when it amended the public disclosure and "original source" provisions in 2009 to authorize the Government to oppose motions to dismiss on public disclosure grounds, recognizing that some original sources might "materially add" to the information already publicly disclosed.[62]

In short, the common-sense interpretation of the first-to-file provision – that "pending" means pending – is consistent with the public disclosure provision because it permits subsequent relators to come forward, even after the Government is on notice of the fraud. If a subsequent relator qualifies as an "original source" of fraud allegations, then the Government will benefit from a new *qui tam* filing, and if all prior related *qui tam* complaints have been dismissed, then the subsequent relator will have an

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[60] 31 U.S.C. § 3730(e)(4)(A)(i).

[61] *See United States ex rel. Campbell,* 421 F.3d at 822.

[62] 31 U.S.C. § 3730(e)(4)(A) and (B) (providing that, in the event of a qualifying public disclosure, a *qui tam* complaint will be dismissed on public disclosure grounds "unless opposed by the Government," and re-defining "original source" to include a relator "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.")

opportunity to earn a share of the Government's recovery.

Petitioners attempt to avoid this inescapable conclusion with flawed arguments and reasoning. They argue that pursuant to additional FCA amendments enacted in 2009 and 2010, the public disclosure provision is now only triggered by the disclosure of prior *qui tam* suits in which the Government intervened.[63] This characterization of the public disclosure provision is wholly mistaken.

First, Petitioners rely on this Court's opinion in *United States ex rel. Eisenstein v. City of New York*,[64] in which the Court held that unless the Government intervenes in a *qui tam* suit, it is not a party to the suit for purposes of Federal Rule of Appellate Procedure 4(a), and therefore, the relator has only thirty, not sixty days to file a notice of appeal. Without offering any support, Petitioners make the unfounded leap that the Court's interpretation of a rule of appellate procedure somehow informs the proper analysis of the FCA's amended public disclosure provision.

Second, section 3730(e)(3) of the FCA – which immediately precedes the public disclosure provision – already prohibits *qui tam* suits "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a

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[63] Brief for Petitioners at 50-51.

[64] *See United States ex rel. Eisenstein v. City of New York,* 556 U.S. 928 (2009), cited in Brief for Petitioners at 50-51.

party."[65] Since all intervened *qui tam* suits are "civil suit[s] . . . in which the Government is already a party," Petitioners' reading of the public disclosure provision would render section 3730(e)(3) superfluous, in contravention of well-established principles of statutory construction.[66] Moreover, nothing in the FCA suggests that when Congress amended the public disclosure provision in 2009 and 2010, it intended to recognize a distinction between the Government's status as a "party" and as a "real party in interest." In fact, the opposite is true. For example, FCA section 3730(c) is entitled "Rights of the parties to qui tam actions." Yet, subsection 3730(c)(3) discusses the Government's rights when "the Government elects not to proceed with the [*qui tam*] action." Clearly, Congress' reference to the Government as a "party" in section 3730 is not limited to intervened *qui tam* suits. Congress' intent in limiting the public disclosure provision to "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party" distinguishes civil cases between private parties (including state court proceedings) from federal proceedings (including federal *qui tam* suits). Proceedings in the latter category presumably put the Government on notice of fraud – and thus,

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[65] 31 U.S.C. § 3730(e)(3).

[66] *See, e.g., Cooper Indust., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (stating that statutes must be construed in a manner that gives effect to all of their provisions); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (same); *TRW v. Andrews*, 534 U.S. 19 (2001) (same).

trigger the public disclosure provision – while those in the former category do not.[67]

Petitioners' arguments regarding the public disclosure provision have no merit. None of the amendments to the public disclosure provision changed the nature of the first-to-file rule, which still permits relators to file suit on behalf of the Government, in the event that neither the Government nor any other relator is currently pursuing those claims.

C. In Practice, First-Filed *Qui Tam* Complaints Are Often Insufficient to Recover the Government's Stolen Funds and the Government Actively Encourages Cooperation Between and Among First and Subsequent Relators in Order to Maximize Its Recoveries

Petitioners' position, if adopted, would deprive the Government of potentially valuable information that subsequent "original source" relators can offer – information that may be crucial to the Government in instances in which the first-filed relator's allegations are limited and do not include sufficient factual allegations to fully apprise the Government of the fraud. In practice, first-filed complaints are often lacking in detail regarding the conduct at issue, the full range of participants, or other essential

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[67] *See, e.g., United States ex rel. McKenzie v. Bellsouth Telecomms.,* 123 F.3d 935, 939 (6th Cir. 1997).

information. Thus, the Government has a vital interest in encouraging other relators who have additional information to come forward with their own *qui tam* complaints and to cooperate with any prior relators. As a leading FCA treatise notes, the Government has the right to seek dismissal of subsequent related *qui tam* complaints pursuant to the first-to-file rule, but the Government "has little incentive to do so. It is the author's experience that the government will first suggest to all relators that they mutually reach some agreement as to how to proceed with the case."[68] For that reason, the Government often encourages relators who allege the same general scheme to combine forces in order to provide the best and most accurate information to the Government and the courts.[69]

For example, in *United States ex rel. Howard v. Lockheed Martin Corp.*,[70] two relators filed an initial *qui tam* complaint in Ohio in 1999 and two other relators filed a related *qui tam* complaint against the same defendant in Georgia in 2002. As the Ohio court explained, "[t]he Government became aware of both suits, and upon leave of [both district courts], informed each set of Relators about the

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[68] James B. Helmer, Jr., False Claims Act: Whistleblower Litigation 771 (6th ed. 2012).

[69] *See, e.g., United States ex rel. Penizotto v. Bates East Corp.*, No. 94-3626, 1996 WL 417172, at *1 (E.D. Pa. July 18, 1996) (after two related *qui tam* suits were filed against overlapping defendants in two separate federal district courts, the Government intervened in both suits and successfully moved to transfer venue so that the two suits could be in the same court).

[70] No. 99-285, 2011 WL 4348104, at *1 (S.D. Ohio Sept. 16, 2011).

existence of the other."[71] The second set of relators voluntarily dismissed their complaint and the first set of relators moved to amend their complaint to add the second set of relators as co-plaintiffs; the Government did not oppose the motion.[72]

As explained above, Petitioners' argument that the first-to-file provision serves the purposes of "rejecting suits which the government is capable of pursuing itself," has no merit.[73] Congress rejected the government knowledge bar nearly thirty years ago in favor of a standard that recognizes that the Government will not bring every FCA suit that it "is capable of pursuing itself," and modified the FCA to offer higher rewards to relators who pursue the Government's recovery when the Government has been put on notice of the fraud but has decided not to pursue it.

D. Adopting Petitioners' Argument Would Lead to a Variety of Significant Unintended Consequences

Petitioners speculate that reading the statute as it was plainly written will lead to "dire" consequences, but fail to offer concrete evidence to support their assertion.[74] However, it is Petitioners' position that will lead to improper consequences, in conflict with congressional intent. For example, if the act of filing a first *qui tam* complaint bars all

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[71] *Id.* at *1.
[72] *Id.*
[73] Brief for Petitioners at 53.
[74] Brief for Petitioners at 4.

subsequent related complaints, then a *qui tam* suit that is dismissed for purely procedural reasons – *e.g.* the complaint was filed by a *pro se* relator[75] – would forever block all future relators from assisting the Government and recovering stolen tax dollars.

In addition, some courts have held that the first-to-file rule applies even if the first complaint does not satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirement.[76] In that circumstance, adopting Petitioners' view could perversely incentivize those who commit fraud to immunize themselves by causing a sham *qui tam* complaint to be filed that is Rule 9(b)-deficient. Upon dismissal, the filing would prevent genuine relators from

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[75] *See, e.g., United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008) (holding that a private person may not bring an FCA *qui tam* action as a relator for the United States in a *pro se* capacity because FCA causes of action are not personal to relators.).

[76] *See United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011); *see also United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36 (1st Cir. 2013) (holding that "for the purposes of the first-to-file rule, the earlier-filed complaint need not meet the heightened pleading standard of Rule 9(b)"); *United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. Appx. 849, 851 (10th Cir. Apr. 4, 2012) (declining to decide the issue, but noting that "[t]he circuits are split regarding whether the first-to-file bar incorporates 9(b)'s particularity requirement," and stating that it would be "uneasy" applying Rule 9(b)'s pleading requirements to the first-to-file provision); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 379 (5th Cir. 2009) ("express[ing] no opinion on the as-yet unpresented question of whether a dismissal for lack of any factual basis or on Rule 9(b) grounds in the [first-filed] case would then permit a suit by [the relator] or any other person with knowledge of facts from suing [the defendant] without facing the first-to-file bar.").

subsequently coming forward and pursuing the Government's recovery.[77] True, once the first complaint is filed, the Government will have the ability to pursue the fraud on its own, but if the Government chooses not to file suit – in particular if the allegations in the first-filed complaint are not pled with particularity – then a subsequent, non-parasitic relator should be allowed to pursue those claims on behalf of the Government. This is the fundamental purpose of the *qui tam* law.

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[77] *See United States ex rel. Campbell,* 421 F.3d at 821 ("Congress sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention."); *United States ex rel. Folliard v. Synnex Corp.,* 798 F.Supp.2d 66, 76 (D.D.C. 2011) (holding that an exception to the first-to-file rule should cover "sham complaints" that are filed "in an effort to preclude future relators from sharing in any bounty eventually recovered," and are "worded ... in excessively general terms for the purpose of thwarting later claims.") (citing *United States ex rel. LaCorte* and *United States ex rel. Walburn*); James B. Helmer, Jr., False Claims Act: Whistleblower Litigation 133-35 (6th ed. 2012) (noting that fraudsters "could buy a cheap insurance policy" by filing sham *qui tam* complaints, and stating that "[i]n the Senate's debates over the 1943 Amendments to the FCA, Senator Frederick Van Nuys explained that lawyers were bringing cases to uncover the evidence that the government was planning on using against them in criminal cases. We know of at least one well-known serial corporate violator of the FCA that toyed with the idea of filing technically defective FCA cases against itself to head off having to deal with relators and their counsel.").

CONCLUSION

The Court should affirm the judgment below and hold that the FCA's first-to-file provision bars subsequent related *qui tam* actions only while an earlier-filed action is still pending.

Respectfully submitted,

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October 21, 2014