No. 16-1262

IN THE

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA, *ex rel*. BENJAMIN CARTER,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Appeal from the United States District Court,
for the Eastern District of Virginia
Case No. 1:11-cv-602-JCC-JFA
Judge James C. Cacheris, Presiding

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

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] 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 before Congress, the Executive Branch, and the courts.

The Chamber 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"). The Chamber submitted an amicus brief to the U.S. Supreme Court in an earlier appeal in this case, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015) ("*Kellogg*"), and is currently participating as amicus in another appellate proceeding that addresses the first-to-file bar in light of *Kellogg*, *see United States ex rel. Shea v. Cellco Partnership*, Nos. 5-7135 & 15-7136 (D.C. Cir.) (brief filed May 18, 2016).

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[1] Pursuant to Federal Rule of Appellate Procedure 29, amicus curiae states that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this brief.

The proper interpretation of the first-to-file bar is of great importance to the Chamber and in particular, its members that contract with the government, participate in federal programs, or receive federal funds. A significant fraction of those members are potentially subject to suit under the FCA in this Circuit, facing the threat of treble damages and penalties. FCA claims offer relators a chance at a financial windfall, and as in this case, relators may persist in filing multiple suits over the span of a decade, at great defense costs to defendants and burden on the courts, but with little or no corresponding benefit to the government investigators and the public, who are supposed to benefit from information brought to light in *qui tam* actions. The first-to-file bar was intended to create a balance between incentives to bring forward information and limits on duplicative and burdensome litigation. The district court's interpretation of the first-to-file bar accomplishes that balance, and should be affirmed.

SUMMARY OF THE ARGUMENT

The first-to-file bar provides a straightforward rule that "[w]hen a person brings an action under th[e] [False Claims Act], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This "plain language" requires that courts "look at the facts as they existed when the [later-filed] claim was brought to determine whether an action is barred." *United States ex rel. Carter v. Halliburton*

Co., 710 F.3d 171, 183 (4th Cir. 2013), *aff'd in pertinent part, rev'd in part on other grounds*, 135 S. Ct. 1970 (2015). The district court correctly held that Carter's late-filed action should be dismissed, based on this Court's precedent and the law of the case, because related cases were pending when Carter originally filed his action. This action is forever barred due to the first-to-file bar, regardless of whether the first-filed actions that initially barred his claims are no longer "pending." When the dismissal motion is considered, the first-to-file bar is not reassessed or recalibrated based on events taking place in other FCA cases. Furthermore, the district court correctly rejected Carter's attempt to side-step the first-to-file bar by filing an amended complaint. The first-to-file bar is triggered by the filing of an "action," i.e., a lawsuit, related to the facts of other pending actions. Amending a complaint is not the same as filing a lawsuit.

The first-to-file bar, along with the FCA's statutes of limitations and repose, plays the role of gatekeeper, ensuring that the government can discover fraud through whistleblower suits while preventing rampant FCA *qui tam* suits that harass businesses, overburden the courts, and obscure the suits that bring to light actual instances of fraud. FCA *qui tam* actions have skyrocketed in recent years. The "punitive" forms of damages and civil penalties and the several reputational and practical consequences of allegedly defrauding the government exert severe pressure on defendants to settle even non-meritorious claims. The first-to-file bar,

as interpreted by the district court, is crucial in limiting the number of duplicative and non-intervened qui tam suits, which frequently provide the government no new information about fraud and historically have been overwhelmingly without merit.

ARGUMENT

I. THE FIRST-TO-FILE BAR LIMITS THE KIND OF DUPLICATIVE AND WASTEFUL *QUI TAM* CLAIMS AT ISSUE IN THIS CASE.

This case is an icon for the excesses in FCA litigation that Congress intended to control through the FCA's first-to-file bar, and statutes of limitations and repose. The relator, Mr. Carter, has now litigated his allegations for ten years (since 2006), filing four essentially identical complaints, which were the subject of three other prior *qui tam* actions. Every time, the Government has declined to intervene. This case could have been summarily dismissed years ago, as soon as the first-filed pending cases were made known by the government. Contrary to Carter's current arguments, the outcome should be no different merely because he has been able to forestall that result through multiple rounds of fruitless litigation. Carter's arguments are foreclosed by this Court's precedent and the FCA's clear framework, including both the first-to-file bar and statutes of limitations and repose, that incentivize suits that put the government on early and meaningful notice of fraud while precluding stale and duplicative claims.

A. Whether The First-To-File Bar Applies Depends Solely On Whether A Relator Brings An Action Related To The Facts Underlying Actions Pending At The Time Of Filing.

The FCA provides that "[w]hen a person brings an action under th[e] [FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This Court has already determined when and how that determination should be made: a court looks to "the facts as they existed when the claim was brought." *Carter*, 710 F.3d at 183. The district court correctly dismissed this case because Carter brought this action when cases relating to the same facts were pending and the first-to-file bar therefore deprived the court of jurisdiction over Carter's new action. *United States ex rel. Carter v. Halliburton*, 144 F. Supp. 3d 869, 877 (E.D. Va. 2015), *modified on reh'g*, 315 F.R.D. 56 (E.D. Va. Feb. 17, 2016); Appellees' Br. 10-11.[2]

Contrary to Carter's arguments, nothing in the Supreme Court's decision in *Kellogg* authorizes a relator to continue with a case, like this one, that was filed

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[2] Although the district court dismissed the complaint without prejudice, any new complaint would be barred by the FCA's six-year statute of limitations and "absolute" ten-year statute of repose. *See* 31 U.S.C. § 3731(b); *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013). The district court did not decide whether a newly-filed *qui tam* suit based on the same allegations would be barred by either the statutes of limitations or repose. *See* 144 F. Supp. 3d at 883; 315 F.R.D. at 65. But as appellees have explained, Carter's claims, which are based on conduct that allegedly happened in 2005, are now all barred. *See* Appellees' Br. 8; *see also* Appellant's Br. 28 (acknowledging that refiling a new case would present "substantial challenges under the statute of limitations").

while related cases were pending. The Supreme Court held that the Wartime Suspension Limitations Act did not suspend the FCA's statute of limitations, and that all of the claims in Carter's 2011 complaint were time barred except for a single false billing claim of $673.56. *See* Appellees' Br. 11-12; *see also Carter*, 710 F.3d at 188 & n.1 (Wynn, J., concurring). As to the first-to-file bar, the narrow question considered was whether Carter's "claims must be dismissed with prejudice," *Kellogg*, 135 S. Ct. at 1978, which involved the related question of whether the first-to-file bar "keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity," *id.* at 1973. The Supreme Court's answer was "that the dismissal with prejudice of respondent's one live claim was error" because a case is no longer "pending" once it has been dismissed. *Id*. at 1978-79. The Supreme Court did not, however, comment on or displace this Court's conclusion that a court must "look at the facts as they existed *when the claim was brought* to determine whether an action is barred by the first-to-file bar." *Carter*, 710 F.3d at 183 (emphasis added).[3]

Carter now contends that even though this case was indisputably filed while related cases were pending, the first-to-file bar no longer precludes his case

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[3] On remand from *Kellogg*, this Court concluded that "'dismissal with prejudice of [Carter's] one live claim' was 'not called for' under the first-to-file rule," but remanded to the district court "for further proceedings consistent with the Supreme Court's opinion." *United States ex rel. Carter v. Halliburton*, 612 F. App'x 180, 181 (4th Cir. 2015) (quoting *Kellogg*, 135 S. Ct. at 1978-79).

because the district court was required to "reassess the bar's application upon certain subsequent events," including the end of the pending actions that initially barred his suit. Appellant's Br. 11. The district court correctly rejected these arguments, concluding that "*Kellogg* did not alter the law of this case or the law in the Fourth Circuit." *Carter*, 144 F. Supp. 3d at 876. Because "[t]he temporal focus of the first-to-file bar remains the time a later suit is filed," a court "considers whether Relator's case was barred at the time he filed suit." *Id*. at 877. Because it is uncontested that other actions were pending when Carter filed this suit, dismissal is warranted "even though the first-filed suit was no longer pending." *Id*. The dismissal of the earlier filed related actions does *not* automatically revive Carter's case. *Id*. at 876-77.

After *Kellogg*, the first-to-file bar's "essence remains well-defined: Plaintiffs, other than the Government, may not file FCA actions while a related action is pending." *United States ex rel. Shea v. Verizon Comm'ns, Inc*., 160 F. Supp. 3d 16, 28-30 (D.D.C. 2015), *on appeal*, Nos. 15-7135 & 15-7136 (D.C. Cir.). Under the law of this Circuit, which was undisturbed by *Kellogg*, the threshold jurisdictional inquiry requires a court to examine "the facts as they existed when the claim was brought." *Carter*, 710 F.3d at 182-83. Statutes such as the first-to-file bar "are understood to forbid the commencement of a suit," and, an action "'brought while the condition precedent is unsatisfied must be dismissed

rather than left on ice.'" *Shea*, 160 F. Supp. 3d at 29 (quoting *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010)); *see also Carter*, 710 F.3d at 183 (citing "left on ice" language from *Chovanec* in holding that this "proceeding should have been dismissed without prejudice").[4]

This rule is based on the FCA's plain language. *See Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). The statute provides that "no person other than the Government may . . . bring a related action," 31 U.S.C. § 3730(b)(5), yet that is exactly what Carter did when he filed this case. As this Court stated the last time it considered this case, "[f]ollowing the plain language of the first-to-file bar, Carter's action will be barred by [earlier cases] if either case was pending when Carter filed suit." *Carter*, 710 F.3d at 183. Likewise, in a post-*Kellogg* case, the U.S. District Court for the District of Columbia similarly stated that "the language of § 3730(b)(5) itself ... requires the Court to look to the moment when Plaintiff filed his initial Complaint." *Shea*, 160 F. Supp. at 29.

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4 Although this Circuit holds that the first-to-file bar is jurisdictional, *Carter*, 710 F.3d at 181, the first-to-file bar would apply the same way if it were not jurisdictional. *See Shea*, 160 F. Supp. 3d at 29, 32 (granting motion to dismiss and dismissing action without prejudice).

The district court also reached the correct corollary conclusion that Carter cannot side-step the first-to-file bar by amending his complaint after the first-filed actions are no longer pending. The bar, as applied, prohibits a person from "bring[ing] a related *action*." 31 U.S.C. § 3730(b)(5) (emphasis added). A relator does not "bring an action" by amending a complaint, "[o]ne brings an action by commencing suit." *Carter*, 144 F. Supp. 3d at 880-81 (citing *Chovanec*, 606 F.3d at 362). "What offends the first-to-file bar is the bringing of the action (i.e., filing an initial complaint), not the failing to amend a complaint or litigating the case." *Shea*, 160 F. Supp. 3d at 29. Thus, "[t]he first-to-file bar prohibits bringing a 'related action,' not a related complaint." *Id.* at 30 (citing 31 U.S.C. § 3730(b)(5) and *Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) (distinguishing between an "action" and a "complaint," which may be dismissed without terminating the action)). In short, "[n]o matter how many times Plaintiff amends his Complaint, it will still be true that he "br[ought] a related action based on the facts underlying the [then] pending action." *Shea*, 160 F. Supp. 3d at 30. And "[t]he only way to cure this particular defect is for the Court to dismiss Plaintiff's action—not merely his Complaint[.]" *Id.*[5] That is exactly what the district court did here.

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5 *See also United States ex rel. Moore v. Pennrose Props., LLC*, No. 3:11–cv–121, 2015 WL 1358034, at *13 (S.D. Ohio Mar. 24, 2015); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259–64 (E.D. La. 2011) (holding that amended complaint could not cure first-to-file bar).

B. The District Court's Rule Enables The First-To-File Bar To Function As A "Bar," And The FCA To Function As Congress Intended.

The FCA's *qui tam* procedure is not an end in itself, but rather a means of "put[ting] the government on notice of potential fraud." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). Thus, "the primary function of a *qui tam* complaint is to notify the investigating agency, i.e., the Department of Justice" of the allegations and to disclose evidence of the alleged fraud. *United States ex rel. Folliard v. CDW Tech. Servs., Inc*., 722 F. Supp. 2d 37, 41-42 (D.D.C. 2010); *cf.* S. Rep. No. 99-345, at 25 (1986) ("private [FCA] enforcement . . . is not meant to produce . . . multiple separate suits based on identical facts").

That purpose is served only where relators have an incentive to expeditiously bring forward information not already known to the government. "[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). Once the government is put on notice of its potential fraud claim—which happens when the first action is filed—"the purpose behind allowing *qui tam* litigation is

satisfied." *Grynberg v. Koch Gateway Pipeline Co*., 390 F.3d 1276, 1279 (10th Cir. 2004).

Congress has repeatedly amended the FCA in recognition that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," imposing costs on the public, potential defendants, the courts and the government, all for "information that was already in the government's possession." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). In the 1986 amendments to the FCA, which enacted the first-to-file bar in its current form, Congress sought "the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *Springfield Terminal*, 14 F.3d at 649).

Embodying the principle that "[a] whistleblower sounds the alarm; he does not echo it," *United States ex rel. Green v. Northrop Corp*., 59 F.3d 953, 966 n.11 (9th Cir. 1995), the first-to-file bar is intended to create a race to the courthouse, and the statute "awards 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 (D.C. Cir. 2011). The first-

to-file bar "strike[s] the appropriate balance between . . . encourag[ing] whistleblowers to come forward with allegations of fraud and [preventing] copycat actions that do not provide additional material information to the government." *Batiste*, 659 F.3d at 1210.

The order and restraint imposed by this Court's and the district court's interpretation of the first-to-file bar is essential to the proper functioning of the FCA—it allows the first-to-file bar to function as a legitimate "bar" to duplicate, wasteful suits that are counterproductive to the government's interests in fighting fraud, and that subject American businesses to lengthy and invasive lawsuits and burden the courts. Upon a mere review of a newly filed *qui tam* complaint, a court can determine whether the action relates to the facts of a pending action, and dismiss the case immediately before the litigation incurs further and unnecessary harm on litigants and burdens on the courts.

By contrast, Carter's view would allow a relator to avoid the first-to-file bar by reviving his claims or amending midstream based on events in previously "pending" cases. Such a rule would likely prevent the timely resolution of meritorious claims. *See Carter*, 144 F. Supp. 3d at 882 ("allowing a relator to avoid the first-to-file bar by amending would interfere with the efficient operation of *qui tam* suits."). If the first-to-file bar is to have any meaning at all, it must "bar" something. Allowing relators to file *qui tam* actions with the expectation

that they can keep duplicative actions alive indefinitely by repeatedly trying to amend their complaints would pervert the FCA's incentive structure. For instance, a relator may "file[] a skeletal complaint to secure a place in the 'jurisdictional queue . . . only to then file an amended complaint after actually becoming an original source, and thereby trump any meritorious, related actions that were filed in the meantime."' *Id.* (quoting *Branch*, 782 F. Supp. 2d at 263).

Permitting such practices encourages gamesmanship by incentivizing relators to file duplicative placeholder complaints in the hope that a related case will be dismissed before theirs is. And that hope will often be borne out, as it was here. Because *qui tam* actions are filed under seal, 31 U.S.C. § 3730(b)(2), they are never subject to immediate dismissal motions but instead remain under seal while the government investigates. And given its limited resources, the government routinely obtains extensions of the seal, such that the average *qui tam* case remains under seal for 13 months. *See* Jan. 24, 2011 Letter from DOJ & HHS to Hon. Charles E. Grassley at 14 (www.taf.org/DOJ-HHS-joint-letter-to-Grassley.pdf). If parasitic relators are given the ability to file related actions in the hope that a pending action will be dismissed earlier, the government will have to investigate duplicative claims at the same time. Such actions will "wast[e] government resources," as the government must "review the claims in each action"—even duplicative claims that have already been reviewed. *United States*

ex rel. Powell v. Am. Intercontinental Univ., Inc., No. 08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012). Such filings increase the likelihood that new, valid claims will be lost in a crush of redundant suits.

The district court's rule, by contrast, is straightforward and easy to apply: if related cases are pending when the initial action is filed, then the initial action must be dismissed, regardless of when the dismissal motion is considered. It does not matter whether the related cases are subsequently dismissed. All that matters is the date the first complaint was filed and what its facts allege. As the district court aptly noted, "keeping the emphasis on the time the initial complaint was filed 'has the advantage of simplicity.'" *Carter*, 144 F. Supp. 3d at 883 (quoting *Branch*, 782 F. Supp. 2d at 264).

Moreover, if relators such as Carter can keep duplicative actions alive simply by amending their complaints—thereby transforming later-filed claims into pending first-filed actions—they will prevent any other relators who may legitimately provide new information from filing suit after a related case has been dismissed. By contrast, the district court's rule facilitates another potentially productive "race to the courthouse" among relators with similar factual allegations, restoring Congress's original purpose for the first-to-file bar. *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377-78 (5th Cir. 2009)

("once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds").

Carter's alternative, by removing the first-to-file bar's discipline, would encourage relators across the Nation to file cases and allow their cases to simmer on the dockets of the Nation's courts, with the expectation that they can amend their complaints to relate back to the original filing date. Dismissal of a pending action with related facts would set off a frenzy of attempts to amend complaints to achieve first-filed status. That is likely to result far more in litigation about which relator has priority, than to accomplish the FCA's *qui tam* goals of bringing new information about fraud to light, multiplying the work of the courts and the burdens placed on defendants, with no corresponding benefit.

II. APPLYING THE FIRST-TO-FILE BAR AS CONGRESS INTENDED WILL REDUCE WASTEFUL AND PARASITIC LITIGATION.

The first-to-file bar, along with the FCA's statutes of limitations and repose, play the role of gatekeeper, allowing useful, meritorious *qui tam* actions but eliminating actions based on stale or duplicitous claims. The number of *qui tam* actions is skyrocketing, and therefore the gatekeeper role is essential to limiting the number of baseless claims.

Since 1986, an "army of whistleblowers, consultants, and, of course, lawyers" has kept American businesses in courts defending FCA claims and subjecting them to the perpetual concern that such claims will arise. 1 John T.

Boese, *Civil False Claims and Qui Tam Actions*, at xxi (4th ed. 2011). Serial relators have been commonplace in FCA suits ever since Congress raised the percentages of damages recoverable to relators and authorized treble damages in the 1980s. More than two dozen people or groups have filed five or more *qui tam* suits since 1986, with one entity bringing at least 35 qui tam suits against health care companies. *See* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014. The number of *qui tam* actions increased from around 400 annually to more than 700 in each of 2013 and 2014, and over 630 in 2015. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2015*, at 1-2 (2015) (www.justice.gov/opa/file/796866/download). Even with the slight dip in 2015, that is still over 12 lawsuits per week brought under a single federal statute.

The potential to recover such penalties is highly inviting to private relators, who are allowed a share of recovery even when the government has suffered no injury, and may recover attorney's fees and reasonable expenses. 31 U.S.C § 3730(d)(1)-(2); 28 U.S.C. § 2461; *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012). The FCA's financial sanctions are "essentially punitive." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Businesses face the specter of treble damages and civil penalties that are now adjusted for inflation to a maximum of over

$21,500 per false claim. *See* Dep't of Justice, *Civil Monetary Penalties Inflation Adjustment*, 81 Fed. Reg. 42,491 (June 30, 2016); 31 U.S.C. § 3729(a), 28 C.F.R. § 85.3(a)(9).

But those financial consequences are only the tip of the iceberg. Defending an FCA case requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). The mere existence of allegations, no matter how tenuous, that a company "defraud[ed] [the] country sends a [harmful] message" and "[r]eputation[,] . . . once tarnished, is extremely difficult to restore." *Id*. at 11. For companies that do significant government work, "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices." *Id*.; *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc*., 772 F.3d 1102, 1105-08 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm."). A finding of FCA liability can result in suspension and debarment from government contracting, *see* 2 C.F.R. § 180.800, that is "equivalent to a death penalty" for many government contractors. Ralph C. Nash & John Cibinic, *Suspension of Chiropractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24, at 4 (Mar. 1989).

Given this "perfect storm" of financial and practical pressures, relators are keenly aware that the mere allegations, regardless of their merit, can "be used to

extract settlements." Sean Elamanto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L. J. 813, 824 (2012). "Punitive" liability and the potential that lawsuits will drag on for years creates intense pressure on defendants even to "settl[e] questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

The district court's ruling restores some order to FCA litigation by holding that relators cannot bring an action related to a pending action regardless of when a motion to dismiss is considered. This interpretation accords with Congress's intent to incentivize true whistleblower activity while preventing excessive copycat actions. As noted above, it prevents relators from filing duplicative cases in the hope that a related action will be dismissed earlier and preserves the "race to the courthouse" that the first-to-file bar was intended to create.

The first-to-file bar, moreover, only bars private relator suits, not suits by the government. It therefore limits the kinds of filings that are least likely to succeed, but are nonetheless costly to American businesses and the resources of the courts. According to one study, less than ten percent of private *qui tam* actions result in any recovery. Christina Orsini Broderick, Note, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007); Canni, *supra*, at 9. But those figures do not prevent even non-meritorious *qui tam* suits from inflicting high litigation costs on defendants.

Although the United States can dismiss any *qui tam* action, 31 U.S.C. § 3730(c)(2)(A), it rarely does so, allowing relators to "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 False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008). And while the government can intervene in *qui tam* actions, it is commonly content to "wait it out," reaping the bounty if a defendant elects to settle or the relator is ultimately successful. *Id*. at 1265-66; *see also* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013) (study of 460 sampled *qui tam* actions "revealed exactly *none* in which DOJ exercised its termination authority"). Because the government almost never exercises its discretion to dismiss a case, the first-to-file bar plays a key role in reducing the number of meritless, copycat, bounty-hunter suits that are filed in pursuit of financial recovery, with no real government oversight or potential to contribute to providing the government with new information to investigate fraud.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on September 16, 2016, the foregoing brief was electronically filed via the Court's CM/ECF system, and an electronic copy of the brief was served on counsel for the parties. All counsel of record in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,730 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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