17-2191-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN A. WOOD,

Plaintiff-Appellee,

ABC, COMMONWEALTH OF MASSACHUSETTS, STATE OF MONTANA, DISTRICT OF COLUMBIA, STATE OF INDIANA, STATE OF NEW YORK, COMMONWEALTH OF VIRGINIA, STATE OF LOUISIANA, STATE OF DELAWARE, STATE OF MINNESOTA, STATE OF OKLAHOMA, STATE OF MICHIGAN, STATE OF HAWAII, STATE OF NORTH CAROLINA, UNITED STATES OF AMERICA, EX REL., STATE OF CALIFORNIA, STATE OF GEORGIA,

(Caption continued on inside cover)

On Appeal from the United States District Court for the Southern District of New York (Furman, J.), No. 10-cv-5645

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

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September 19, 2017

STATE OF TENNESSEE, STATE OF FLORIDA, STATE OF WISCONSIN, STATE OF NEW MEXICO, STATE OF ILLINOIS, STATE OF NEVADA, STATE OF CONNECTICUT, STATE OF NEW JERSEY, STATE OF TEXAS, STATE OF COLORADO, STATE OF MARYLAND, STATE OF NEW HAMPSHIRE,

Plaintiffs,

—v.—

ALLERGAN, INC.,

Defendant-Appellant,

DEF, ALLERGAN PLC,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* certifies that it has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

Dated: September 19, 2017

/s/ *John P. Elwood*

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber 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 and its members have a substantial interest in the issues presented in this case. Businesses from all sectors of the American economy have been forced to defend scores of FCA cases arising out of government contracts, grants, and programs. The vast majority of those cases are brought by private relators under the FCA's *qui tam* provision. Where, as here, the United States elects not to intervene in relators' cases, those cases rarely result in a payout to taxpayers. But those cases nonetheless drag on for years, at first due to the government's almost inevitable requests to extend the period under which *qui tam*

[1] No party's counsel authored this brief. No party, party's counsel, or person other than *amicus curiae*, its members, or its counsel provided money for the brief's preparation or submission. All parties have consented to the filing of this brief.

cases remain under seal, and then later, after the government declines to intervene and the case is unsealed, for years of costly litigation and discovery. The already high cost of litigation and risk of stale evidence of old allegations are compounded when, as often happens, multiple relators bring separate lawsuits making essentially the same allegations against the same defendant. Congress mitigated the risk of such duplicative cases with the first-to-file bar and by providing protection from old allegations with statutes of limitations and repose.

The district court's opinion undermines those protections, exposing to duplicative and stale claims the myriad businesses, non-profit organizations, and even municipalities and state-affiliated entities that perform work or administer funds for the federal government in a broad array of sectors. The Chamber and its members have a substantial interest in the correct interpretation and application of the FCA's first-to-file bar and statutes of limitations and repose, and thus support reversal of the district court's ruling.

SUMMARY OF ARGUMENT

The decision below undercuts Congress's policy against duplicative claims that undergirds the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), and its policy against stale claims underlying the FCA's statutes of limitations and repose, *id.* § 3731(b). The district court's decision should be reversed.

I. To justify disregarding the FCA's text, the district court pointed to its belief that *qui tam* cases should be encouraged as a fraud-fighting mechanism. But *qui tam* cases where DOJ does not intervene, which are the only cases affected by the district court's decision, rarely result in a recovery for taxpayers. Yet these cases remain pending for years and impose huge defense costs and substantial litigation risks on businesses—problems multiplied by duplicative and stale cases. Contractors in turn pass those costs on to taxpayers. All the while, DOJ makes essentially no effort to police weak *qui tam* cases.

II. The district court erred in allowing an amended complaint to remedy a first-to-file defect. The district court has removed the incentive for relators to file detailed complaints to the government quickly, since they can instead file skeletal placeholder complaints and wait for the earlier-filed cases to be dismissed. It also defeats the purpose of the statute of limitations by allowing relators to maintain placeholder cases for years while each previously filed case gets its turn, sometimes only starting active litigation after the statute of limitations has run. The decision below will also lead to complex interpretive challenges in its application and interconnection with other rules.

III. Even if the district court's first-to-file rule stands, its statute of limitations decisions should not. First, the district court erred in allowing the operative complaint to relate back to the original sealed complaint. That result is

barred by binding circuit precedent and by the FCA's ten-year statute of repose. Further, denying relation back here would mitigate the harms of the district court's first-to-file ruling and would encourage DOJ to more efficiently investigate cases while they are under seal. Second, the district court erred in concluding that relators could benefit from the FCA's three-year tolling provision, contrary to the rulings of several circuit courts. That ruling incentivizes relators to keep DOJ in the dark while claims accrue, and leads to the strange situation where a *relator* will rely on an argument that might implicate *DOJ's* privilege.

ARGUMENT

I. Non-Intervened *Qui Tam* Cases Rarely Result in Recoveries for Taxpayers, But Impose Great Costs

The district court departed from the text of the first-to-file bar, with little regard for the statute of limitations and ordinary relation back principles, in furtherance of what it regarded as the FCA's "primary purpose": "[T]o permit the Government to recover for fraud inflicted upon it." JA052-55. But non-intervened *qui tam* cases—the only cases affected by its first-to-file and statute of limitations decisions—play a minor role in "recover[ing] for fraud" on behalf of the government. While the number of new *qui tam* actions has risen, they contribute little to public coffers. They also inflict significant costs upon American industry—*and* on taxpayers.

The False Claims Act was designed to "strike the appropriate balance between . . . encourag[ing] whistleblowers to come forward with allegations of fraud and to prevent copycat actions" that do not provide the government new information about suspected fraud. *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). Because not all *qui tam* cases serve the purpose of timely notifying the government of fraud in measures equal to their costs to defendants and society, Congress imposed strict limits, such as the first-to-file bar and statutes of limitations and repose, to place constraints on duplicative and stale cases. Those limitations naturally result in some relators' cases being dismissed on procedural grounds "through no fault of [their] own." *See* JA054-55. But the dismissal of stale and duplicative cases, even if ostensibly "unfair" to a given relator, is in keeping with the FCA's purpose, because "private [FCA] enforcement . . . is not meant to produce . . . multiple separate suits based on identical facts" that inflict a deadweight loss on society greater than any plausible benefit to the government. S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

A. Non-Intervened *Qui Tam* Cases Provide Little Public Benefit

The number of new *qui tam* actions filed annually has skyrocketed in recent years, but non-intervened *qui tam* actions return little to taxpayers. The median number of new *qui tam* suits filed annually has leapt from 395 per year during the

decade 2002-2011 to a median of 702 per year over the past five years. *See* Civil Division, U.S. Dep't of Justice, *Fraud Statistics – Overview: Oct. 1, 1987 - Sept. 30, 2016*, at 1-2 (2016) ("*Fraud Statistics*"), http://goo.gl/LXhywX. Greater access to litigation financing has thrown even more fuel onto the fire. Note, Mathew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422 (2014); Donald E. Vinson, *How Litigation Finance Funds Whistleblower Actions*, Law360 (Jan. 5, 2016), http://goo.gl/vM8dba.

But cases litigated by relators, as opposed to the government, are rarely meritorious. Non-intervened *qui tam* cases account for only about 4.8% of the FCA dollars contributed to government coffers over the past 15 years. *See Fraud Statistics*, *supra*, at 1-2. Data obtained from the Justice Department under a Freedom of Information Act ("FOIA") request show that only about 6.5% of non-intervened cases in the ten-year sample resulted in recovery; the remaining 2,086 cases had resulted in no recovery for the taxpayer.[2] *See* DOJ FOIA Data Spreadsheet (hosted by Vinson & Elkins, LLP), http://goo.gl/iaOgeG; *see also* Christina O. Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007) (concluding that less than

[2] The sample consisted of cases where the government made its intervention decision between DOJ fiscal years 2004 and 2013.

10% of non-intervened *qui tam* actions result in any recovery). Of the tiny fraction of those non-intervened cases during that period where there was *any* recovery, the median recovery was a mere $800,000—probably comparable to the litigation costs defendants incurred. *DOJ FOIA Data Spreadsheet*.

B. Non-Intervened *Qui Tam* Cases Impose Burdensome Defense Costs

Even meritless FCA lawsuits are costly and burdensome to litigate. *See Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"). Defending FCA cases requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). "Pharmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with FCA litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801 (2011). Discovery imposes heavy burdens on defendants, which can spend hundreds of thousands or even millions of dollars fielding discovery demands in a single case.

Even meritless no-recovery cases frequently drag on for years, accruing legal fees and discovery costs along the way. Justice Department data show that of

the 2,086 declined cases that ended with zero recovery (of which, DOJ provided an election date and case-closing date for 1,805), 203 remained under seal more than three years before the government's election, and twenty of those remained under seal for more than six years before the government elected not to intervene—exceeding the FCA's six-year statute of limitations period, 31 U.S.C. § 3731(b)(1). *See DOJ FOIA Data Spreadsheet.* The costs of litigation do not stop when the government declines to intervene. The data shows that 278 declined *qui tam* cases dragged on for three or more years after declination. *Id.* Of those, 110 extended for more than five years after declination, and one case for more than ten years. Those cases represent an unnecessary burden on the court system and an enormous deadweight loss to the economy. *Id.*

Discovery costs for long-running FCA cases are particularly high because many, and perhaps most, FCA cases turn on complex allegations of reckless violations of highly technical regulations or contract terms. These cases require discovery about knowledge, materiality, and damages as they relate to those requirements. To establish knowledge in these cases, relators must show at a minimum the defendant recklessly disregarded its alleged violation of the relevant requirement. *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-91 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 625 (2017); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 & n.20 (2007). As for materiality, many FCA cases demand in-depth

discovery to determine whether and when the government learned of the alleged misconduct, whether the government decided to withhold or rescind payment as a result, whether the government in the "mine run of cases" "consistently" and "routinely" "refuses to pay" where similar misconduct is alleged, and whether the defendant knew that the government refused to pay in other cases where there were violations. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2003-04 (2016). Damages present another source of costly discovery. It is difficult to determine the value of (for instance) recreational services allegedly provided with inaccurate usage records, *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1028-29 (D.C. Cir. 2017); jet engines that perform as specified but allegedly had their prices negotiated based on inaccurate data, *United States v. United Techs. Corp.*, 782 F.3d 718, 721-23 (6th Cir. 2015); or, as in this case, safe and effective pharmaceutical products provided while allegedly not in compliance with regulations governing the provision of information and incentives to prescribing physicians. The end result is enormous deadweight loss to the economy, as even meritless cases that will end without recovery require years of costly discovery.

C. Non-Intervened *Qui Tam* Cases Impose Costs on Taxpayers

The costs of such suits are passed on to taxpayers in at least two ways. To begin with, taxpayers bear a significant part of the cost of such suits *directly*. For

instance, cost-based contractors are allowed to pass on to the government up to 80% of their legal expenses from litigating non-intervened *qui tam* cases when they prevail. FAR 31.205-47(a)(3), (e).

But taxpayers also bear the burdens of the FCA indirectly, because of effects on the marketplace from the risks of FCA liability. The FCA's "essentially punitive" liability scheme, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000), imposes risks of catastrophic liability. The FCA imposes treble damages, 31 U.S.C. § 3729(a), as well as civil penalties of between $10,957 and $21,916 per false claim for FCA violations after November 1, 2015, 31 U.S.C. § 3729(a), and relators often claim the entire value of a contract or amount billed under it as damages, even if the alleged fraud affected only a small portion of billings. *But cf. U.S. ex rel. Wall v. Circle C Constr., LLC*, 813 F.3d 616, 617-18 (6th Cir. 2016) (rejecting this theory of FCA damages). Relators regularly seek penalties even where the government suffered no actual injury. *E.g.*, *U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012).

In addition, the existence of allegations (no matter how tenuous) that a company "defraud[ed] [the] country sends a message" that is harmful to contractors, and "[r]eputation[,] . . . once tarnished, is extremely difficult to restore." Canni, *supra*, at 11; *accord* Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub.

Cont. L.J. 813, 824 (2012). 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." Canni, *supra*, at 11; *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105-06 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm . . . ."), *cert. denied*, 136 S. Ct. 49 (2015). A finding of FCA liability can result in suspension and debarment from government contracting, *see* 2 C.F.R. § 180.800—"equivalent to the death penalty" for government contractors. 3 Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, Nash & Cibinic Rep. ¶ 24 (Mar. 1989); *see also* 34 C.F.R. § 600.7(a)(3)(ii) (declaring ineligible for funding educational institutions that "[have] been judicially determined to have committed fraud involving title IV, HEA program funds").

FCA allegations also generate ancillary risks regardless of their underlying merit. For instance, FCA allegations can precipitate shareholder derivative suits. *E.g.*, Dani Kass, *Community Health Execs to Pay $60M Over Investor Suits*, Law360 (Jan. 18, 2017), http://goo.gl/1iSLlY. DOJ might also demand individual company employees be given up for prosecution as a condition of settlement. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), http://goo.gl/qc2YTK (noting emphasis on holding individuals liable).

Because of the risks of FCA liability and litigation, some firms may decline even to bid on contracts to avoid unpredictable but potentially catastrophic FCA risk, sometimes including serial lawsuits for the same alleged conduct. A former head of federal acquisition policy noted that potential contractors are wary of "the reputational risk and the very onerous application of [a] remedy for something that is certainly unintentional" when engaging in business with the government. Michael Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), http://goo.gl/TaqwDO. It is not just a theoretical possibility that people will decline to perform needed services for the government: For example, doctors have exited Medicare in droves, due partly to concerns about "fraud" liability based on auditors' subjective assessment of deviations from program requirements. See David Hogberg, *The Next Exodus: Primary-Care Physicians and Medicare*, Nat'l Policy Analysis (Aug. 2012), http://goo.gl/9uLxe. The reduction in qualified entities willing to do business with the government deprives the government of choice, and reduced competition likely means the government will pay higher prices. In addition, companies have little choice but to charge the government higher prices to compensate for potentially catastrophic FCA liability and litigation costs. *See supra* pp. 9-12; *cf. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, C.J.)

("[S]ignificantly increasing competitive firms' cost of doing federal government business[] could result in the government's being charged higher . . . prices.").

D. The Government Does Little to Reduce the Costs of Abusive *Qui Tam* Suits

Despite the high cost these cases impose on American businesses and agencies, the government rarely exercises its authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss even serial, duplicative *qui tam* actions. At a January 2017 FCA conference in New York City, one Civil Division chief acknowledged that the government is reluctant to dismiss FCA cases because there are sometimes "big recoveries" in declined *qui tam* cases, and the government wishes to make relators "feel[] comfortable" bringing cases to the Justice Department. That is a priority because as the Justice Department's Civil Division acknowledged, the FCA makes litigation a "profit center for the US Treasury." U.S. Dep't of Justice Civil Division, FY2013 Budget & Performance Plans (Feb. 2012) (capitalization deleted), http://goo.gl/rr6I3N.

In fact, the government routinely lets relators "proceed with[] thousands of non-meritorious qui tam suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008). Most often, the government is only too happy to wait it out, reaping the bounty if a defendant elects to settle or the relator is ultimately successful. *Id.* at

1265-66; *accord* 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) (noting that 460-case subsample of *qui tam* actions "revealed exactly *none* in which DOJ exercised its termination authority"). In fact, in some cases, DOJ pursues cases where the contracting agency itself does not believe the case has merit. *See, e.g.*, *United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-cv-12225, 2017 WL 1457493, at *2 (E.D. Mich. Apr. 25, 2017) (noting the Army withdrew underlying contract claim while DOJ persisted in the FCA action). DOJ is thus unlikely to rein in relators (or itself) when there is money on the table.

II. Allowing Relators to Sidestep the False Claims Act's First-to-File Bar Through Amendment Defies the Statute's Plain Text and Purpose

As Appellant Allergan, Inc. explains, *see* Allergan.Br.13-24, recent decisions by the D.C. Circuit, *U.S. ex rel. Shea v. Cellco P'ship*, 863 F.3d 923 (D.C. Cir. 2017) (Srinivasan, J.), and by the Fourth Circuit, *U.S. ex rel. Carter v. Halliburton Co.*, 866 F.3d 199 (4th Cir. 2017), demonstrate that the plain text of the FCA supports the conclusion that the first-to-file bar compels dismissal without leave to amend. *Amicus* endorses Allergan's thorough analysis. *Amicus* writes to emphasize that the district court's first-to-file ruling undermines the purposes of the FCA in general and of the first-to-file bar in particular, and creates an unworkable procedural scheme for courts and defendants.

A. The District Court's Rule Encourages Skeletal Filings That Do Not Provide the Government Prompt Notice of Fraud

The district court's interpretation of the first-to-file bar would render it a nullity once an earlier-filed case is dismissed or reduced to judgment, JA050-56, such that copycat complaints would move forward either automatically or upon amendment. The district court wrote that the "primary, if not sole, purpose of the first-to-file rule is to help the Government uncover and fight fraud" by encouraging relators to file quickly. JA054. But the district court's rule disserves that objective in two ways. First, it reduces the incentive for a relator to promptly file a detailed complaint that would put the government on notice of the fraud, because a later-filing relator can always amend his complaint to add details once earlier-filed actions are dismissed. Second, it reduces the incentive to race to file, because the district court's relation-back decision means that even a later-filing relator will be able to revive his case without worrying about statutes of limitations or repose.

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." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). "[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). Beyond meeting procedural requirements to

initiate suit and properly communicating claims to the defendant, "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. *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41-42 (D.D.C. 2010). That purpose is served only where relators have an incentive to expeditiously bring forward information not already known to the government.

The district court's reading of the first-to-file bar would defeat that statutory purpose. If a relator can evade the first-to-file bar by amendment, he "could neglect to inform the government of the information upon which the allegations are based before filing his or her action. Instead, the relator could provide that information to the government at a later time"—a time chosen to maximize the relator's benefit, not to facilitate the government's investigation. *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259-64 (E.D. La. 2011). Duplicative skeletal complaints also "wast[e] government resources," as the government must "review the claims in each action"—even duplicative claims that have previously been reviewed in connection with earlier suits. Such filings increase the likelihood that new, valid claims will be lost in a crush of redundant suits. *U.S. ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012).

The district court was not persuaded that allowing amendments would discourage the race to the courthouse; in its view, if amendments could not revive barred claims, relators would be discouraged from filing by the possibility that their suits would be barred by earlier-filed cases that were still under seal. JA054. But as Judge Srinivasan explained in *Shea*, the prospect of amendment down the road does nothing to address that risk because "any would-be relator already faces the risk that 'someone else ha[s] beaten her to the courthouse door.'" 863 F.3d at 931. After all, "district courts already must dismiss suits that infringe the first-to-file bar, at least as long as the first-filed suit remains pending. That is the very object of the bar." *Id.*

B. Relator's First-to-File Rule Would Undermine the Statutes of Limitation and Repose, Subjecting Defendants to Endless Copycat Suits

Under the district court's understanding, an action "br[ought]" when an earlier-filed related case is pending can escape the first-to-file bar through amendment once earlier-filed cases are dismissed or reduced to judgment. That theory provides a roadmap for evading the FCA's statute of limitations, as relators could file their complaints—however skeletal or duplicative—while a first-filed case remains "pending," and simply bide their time until the earlier case is dismissed. Relators will doubtless assert, as Wood has in this case (JA062-66), that their initial complaints were filed within the statutes of limitations and repose,

and that amendments should relate back under Federal Rule of Civil Procedure 15(c) to the original complaint's date of filing. *Contra infra* pp. 23-27. Relators could (and will) let cases sit for years, slow-rolling them or, if dismissed, nursing them along through motions for reconsideration, appeals, and certiorari petitions. If, as some courts have held, relation-back can evade the statute of repose, *see U.S. ex rel. Carter v. Halliburton Co.*, No. 11-cv-602, 2016 WL 634656, at *7 (E.D. Va. Feb. 11, 2016), *aff'd on another ground*, 866 F.3d 199 (4th Cir. 2017)—and as the district court held here, relation back can apply to sealed complaints (JA062-66)—there is literally *no* end-point until a defendant settles with all potential plaintiffs or obtains both a judgment on the merits and a ruling from later courts that the judgment has preclusive effect.

Such a rule would benefit *no one* except bounty-hunting relators and their counsel who seek to recover on duplicative, stale claims. Allowing such old claims to proceed is antithetical to "the basic policies of all limitations provisions," by allowing "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 568 U.S. 442, 447 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). More than two centuries ago, addressing one of the Republic's earliest *qui tam* statutes, Chief Justice John Marshall wrote that it "would be utterly

repugnant to the genius of our laws" if "an individual would remain forever liable" under it. *Adams v. Woods*, 6 U.S. 336, 342 (1805).

It is no answer that allowing amendment would permit a relator to avoid a statute of limitations that has expired "through no fault of his own." JA054-55. There is no need to supplement the already ample limitations period Congress established—a generous six-year statute of limitations subject to a three-year discovery rule for suits by the government and an "absolute" ten-year statute of repose. *See* 31 U.S.C. § 3731(b); *Gabelli*, 568 U.S. at 453. As Judge Srinivasan explained, "there may be cases in which the statute of limitations blocks a relator's claim 'through no fault of his own,'" but "that possibility . . . inheres to the False Claims Act's design." *Shea*, 863 F.3d at 932. "Congress evidently considered the marginal value of additional" lawsuits that relators filed untimely "to be outweighed by other considerations," such as repose. *Id.*

The district court also suggested that "[i]n light of the sealing requirement . . . and the public disclosure bar," the first-to-file bar itself did no "work . . . [to] combat[] parasitic" copycat lawsuits that could continue indefinitely under the court's rule. JA054. But that analysis is mistaken. The seal does not last forever. *See supra* pp. 7-8. Once a case is unsealed, an FCA action might (and frequently does) inspire other relators to bring copycat suits in the hope that the earlier-filed case will be dismissed. Some of those relators might fall into the "original source"

exception that would allow them to continue their suit despite the public disclosure of the unsealed case. *See* 31 U.S.C. § 3730(e)(4). Enforcing the first-to-file bar as written would prevent such duplicative suits from springing back to life upon the dismissal of the earlier-filed case, sometimes years after the statute of limitations has run. Allowing such relators to bypass the first-to-file bar by amending their complaint would mean that such suits could continue *indefinitely*. FCA litigation is already notorious for dragging on for years, *see supra* pp. 7-8; adopting the district court's rule could ensure that defendants are routinely subjected to serial duplicative lawsuits lasting more than a decade.

C. The District Court's Rule Is Neither Clear Nor Easily Administrable and Will Spawn Additional Litigation

The district court's first-to-file rule is difficult to administer and will spawn extensive satellite litigation, requiring judges—beginning with this Court, if it affirms the district court's first-to-file ruling—to create a new body of law about the interaction between the first-to-file rule, amendment, and relation back. *See infra* pp. 23-27.

The first-to-file bar's text compels a straightforward inquiry that can be undertaken by comparing the face of two complaints. If an earlier-filed "action" is "pending" at the time any "related action" is "br[ought]," that later-filed action must be dismissed without prejudice. 31 U.S.C. § 3730(b)(5). This rule does not require comparing multiple generations of later-filed complaints; all that matters is

the date the first complaint was filed. "[K]eeping the emphasis on the time the initial complaint was filed 'has the advantage of simplicity.'" *U.S. ex rel. Carter v. Halliburton Co.*, 144 F. Supp. 3d 869, 883 (E.D. Va. 2015) (quoting *Branch Consultants*, 782 F. Supp. 2d at 264), *aff'd on other grounds*, 866 F.3d 199 (4th Cir. 2017).

By contrast, the district court's rule generates needless complexity. Under its approach, follow-on *complaints* are dismissed without prejudice while a first-filed case is pending, but the underlying action remains alive. If the first-filed case is dismissed, relators may attempt to move forward with their original complaints, or amend—and there is no reason to believe such amendments would occur in the order the original cases were filed. If the third-in-line relator amends his complaint before the second-in-line relator, which case can proceed under the first-to-file bar? If a second-filing relator seeks leave to amend and a third-filing relator then amends as-of-right before the first motion is granted, which complaint should have priority? If two copycat relators seek leave to amend, does the date of their motions (or the date the court grants leave) control?

The difficulty of resolving these questions is compounded by the district court's decision to ignore the first-to-file bar's statutory text. Once a court discards the ordinary meaning of the statutory words "bring a[n] . . . action"—i.e., to file a lawsuit—courts will be left to decide these subsidiary questions without

their primary interpretative tool of statutory text. What courts must look to instead to resolve these questions is unclear. These complexities are easily avoided by giving the bar its ordinary and natural meaning, by prohibiting subsequent relators from "bring[ing]" any related action while the first-filed case is "pending"—that is, by requiring dismissal.

The district court's rule also has the disadvantage of leading to arbitrary and "anomalous results," such as where the fate of a later-filed case is determined by whether it was brought in a fast-moving "rocket docket" or one that moves more slowly. Thus a second-filing relator could find his suit in a fast-moving court dismissed on first-to-file grounds, while a third-filed suit in a slower docket could receive the windfall of being permitted to amend to cure his first-to-file bar if the court delays sufficiently long that the first action is dismissed. *See Shea*, 863 F.3d at 930. "Congress presumably would not have intended a relator's fate to depend on chance considerations such as the extent of a particular court's backlog and the timeliness of a particular court's entry of a dismissal." *Id.*

III. If Later-Filing Relators Are Allowed to Cure First-to-File Through Amendment, They Should Not Also Reap the Benefit of Relation Back to the Sealed Complaint and the Three-Year Tolling Provision

A. Allowing Relation Back to a Sealed Later-Filed Complaint Is Contrary to Circuit Precedent and Removes an Incentive for the Justice Department to Promptly Investigate Fraud Allegations

The district court also erred in allowing a private relator to evade the statute of limitations by relating back to his original sealed complaint. Allergan.Br.29-37; JA063-66. As Allergan explains, Allergan.Br.29-30, Wood's case was barred by first-to-file at the moment it was brought, and so the district court erred in allowing Wood's operative complaint to relate back to a complaint that was not lawfully filed. JA064-66. As Appellant also has explained, Allergan.Br.30-37, the district court erred in disregarding this Court's binding decision in *United States v. The Baylor University Medical Center* that a complaint-in-intervention cannot relate back to the relator's original sealed complaint because relation back applies only where the defendant had notice of the original allegations, and a sealed complaint deprives the defendant of notice. 469 F.3d 263, 270 (2d Cir. 2006). While Congress, in its 2009 amendments after *Baylor*, provided that a *government complaint in intervention* would relate back to the sealed period, *see* 31 U.S.C. § 3731(c), it did not in provide for *private relators' complaints* to relate back. This Court should not "rewrite[e] rules that Congress has affirmatively and specifically enacted" to add an "absent word." *Lamie v. United States Trustee*, 540 U.S. 526,

538 (2004). *Baylor* thus remains binding precedent in this circuit. *See Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977) (refusing to overturn precedent where "Congress has not amended the Act to provide for a different rule"). *Amicus* suggests three additional reasons to refuse to allow relation back in this case:

1. The FCA's ten-year statute of repose bars relation back. The FCA's statute of repose provides that a claim may be brought "in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). That language—"in no event"—"admits no exception and on its face creates a fixed bar against future liability." *Cal. Pub. Emps. Ret. Sys. v. Anz Secs., Inc.*, 137 S. Ct. 2042, 2049 (2017). "[S]tatutes of repose are enacted to give more explicit and certain protection to defendants" than statutes of limitation. *Id.* At least some of relator's allegations date back to more than 10 years before his amended complaint was filed, *compare* JA035 (operative complaint filed May 2016), *with* JA032 (allegations dating back to 2003), and thus at least for those claims, relation back should be barred by the FCA's statute of repose.

This Court has ruled that "statutes of repose create[] a substantive right . . . ." (internal quotation marks omitted). *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013); *see also Goad v. Celotex*, 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of repose make the filing of suit

within a specified time a substantive part of plaintiff's cause of action."). A federal rule of civil procedure, such as Rule 15(c) relation back, cannot alter a substantive right because "[p]ermitting" Rule 15(c) to allow the relator to file a complaint "after the repose period set forth in" the FCA statute of repose "has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *See IndyMac MBS, Inc.*, 721 F.3d at 109; *see* 28 U.S.C. § 2072(b) ("[The Federal Rules] shall not abridge, enlarge or modify any substantive right."). As a result, courts in this circuit have concluded that "relation back . . . cannot save a claim . . . brought outside the period specified in a statute of repose" because doing so would alter a substantive right. *Bensinger v. Denbury Res. Inc.*, 31 F. Supp. 3d 503, 510 (E.D.N.Y. 2014); *In re Lehman Bros. Sec. & Erisa Litig.*, 800 F. Supp. 2d 477, 483 & n.27 (S.D.N.Y. 2011); *see also Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991). Also, "it is familiar law that a specific statute"—in this case the FCA's statute of repose—"controls over a general one"—here, Rule 15(c). *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *cf. Anz Secs.*, 137 S. Ct. at 2050 ("[W]here the legislature enacts a general tolling rule in a different part of the code . . . courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls.").

2. If this Court affirms the district court's first-to-file ruling, reversing the district court's relation back decision for any of these reasons would mitigate some of the harms caused by having very old placeholder complaints suddenly spring to life, long after the statute of limitations has run and evidence has gone stale, when earlier-filed actions are dismissed. *See supra* pp. 17-20. "The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baylor*, 469 F.3d at 270 (internal quotation marks omitted). That is, notice to gather evidence before it goes stale. *Rotella v. Wood*, 528 U.S. 549, 555 (2000). But if a defendant is deprived of notice because the action is under seal, the defendant *cannot* protect itself and prepare for litigation when the evidence is fresh.

3. Looking to the date of the first unsealed complaint to determine whether claims are timely would also encourage the Justice Department to speed up its often lackadaisical pace of investigating cases under seal. The median FCA case remains under seal for more than a year. *See DOJ FOIA Data Spreadsheet*, *supra*; Ltr. from Jim Esquea (HHS) & Ronald Weich (DOJ) to Hon. Charles E. Grassley 14 (Jan. 24, 2011), http://goo.gl/ySdqPT (average case is under seal for 13 months). That is many times longer than the 60 days provided by statute, and far longer than the Committee on the Judiciary, during the enactment of the FCA,

concluded is in the "vast majority of cases" "an adequate amount of time to allow Government coordination, review and decision" regarding intervention. S. Rep. 99-345, at 24-25. "A number of courts have been critical of the length of time *qui tam* actions have remained under seal and the government's handling of the actions while deciding whether to intervene" and refused to grant the government further extensions. *United States v. Creekside Hospice II, LLC*, No. 13-cv-167, 2015 WL 9581743, at *6 (D. Nev. Dec. 30, 2015); *accord In re: All* Qui Tam *Actions Filed Under the Federal False Claims Act Pending on the Docket of United States District Judge Joseph F. Anderson, Jr.*, 3:13-mc-452 (D.S.C. Nov. 18, 2013); *U.S. ex rel. Martin v. Life Care Ctrs. of Am.*, 912 F. Supp. 2d 618 (E.D. Tenn. 2012); *U.S. ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997). If the Justice Department knew that it risked making claims untimely, it would be far more likely to devote the resources necessary to act with dispatch in investigating allegations.

B. Allowing Relators to Rely on the Three-Year Tolling Provision Further Reduces the Incentive to File Quickly and Will Result in Side-Bar Discovery Disputes with a Non-Party Government

The district court also erred in allowing a relator the benefit of the FCA's three-year tolling provision, 31 U.S.C. § 3731(b)(2). JA059-60. Although the district court did not note this issue in its certification order, JA195-98, this Court "may address any issue fairly included within the certified order." *Yamaha Motor*

Corp. v. Calhoun, 516 U.S. 199, 205 (1996). The availability of the tolling provision for relators would have been an appropriate question to certify because courts have disagreed on the question, JA58-59, and many circuit courts have concluded that only the government can rely on the tolling provision. *U.S. ex rel. Jackson v. Univ. of N. Tex.*, 673 F. App'x 384, 387 (5th Cir. 2016) (per curiam); *U.S. ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 293 (4th Cir. 2008); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006). It would thus be appropriate for this Court to correct the district court's error.

Under 31 U.S.C. § 3731(b)(2), an allegation based on a violation of the FCA that occurred more than six years before the filing of the complaint might still be timely if brought within three years of when an "official of the United States" "knew or should have known" of relevant facts, up to ten years after the alleged violation. Courts have interpreted this language to limit the reach of the tolling provision to the government. A contrary reading would "produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *Sanders*, 546 F.3d at 293. If that "bizarre scenario" reaches discovery, both relators and defendants will pursue discovery from the government about its knowledge. *Id.* That is problematic because the "official" whose knowledge is relevant is often a Justice Department Civil Division

attorney. *See* JA059 n.18. As a result, DOJ's "invocation of the discovery rule waives the relevant privileges." *United States v. Kellogg Brown & Root Servs., Inc.*, No. 12-cv-04110, 2016 WL 5344419, at *3 (C.D. Ill. Sept. 16, 2016). But it is a far stickier issue where it is a *relator*, and not the Justice Department itself, invoking a rule that implicates *DOJ*'s privileges. Either DOJ loses control of its own privilege, or defendants cannot obtain discovery to fairly defend themselves against tolling.

The district court's rule also creates a perverse incentive for relators "to sit on their claims for up to ten years before filing an action and informing the government of the material facts. Indeed, relators would have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Sanders*, 546 F.3d at 295. That is antithetical to the FCA's primary purpose, which is promptly providing information to the government about fraud. While the district court might be right that there are other policies that would still encourage quick action by relators, the public disclosure bar is limited by the original source doctrine, *see supra* pp. 19-20, and by the district court's erroneous conclusion that a disclosure to DOJ is not a public disclosure, JA040, and the first-to-file rule is weakened by the district court's decision that it can be overcome through an amendment. Summed

together, the district court's rulings leave little incentive for quick actions by relators to put the government on notice of fraud.

CONCLUSION

This Court should reverse the decision of the district court.

Dated: September 19, 2017

Respectfully submitted,

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on September 19, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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