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 EX REL. BENJAMIN CARTER,

Respondent.

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

BRIEF FOR VERIZON AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Verizon is one of the nation's largest telecommunications service providers. This case implicates an issue of substantial importance to Verizon as a government contractor: the scope of the False Claims Act's "first-to-file" bar, which prohibits a private relator from filing a *qui tam* suit on behalf of the United States when a prior related *qui tam* action has already been filed. *See* 31 U.S.C. § 3730(b)(5).

Verizon has firsthand experience dealing with *qui tam* claims foreclosed by the first-to-file bar. The company and certain of its subsidiaries were named in related *qui tam* actions in the United States District Court for the District of Columbia. In those cases, a relator brought back-to-back suits against the company asserting precisely the same theory of alleged fraud. The district court dismissed the second-filed action with prejudice under the first-to-file bar. In a recent decision raising the same issue presented here, the D.C. Circuit affirmed that dismissal. *See United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 344 (D.C. Cir. 2014). The relator's petition for rehearing en banc was denied on July 16, 2014. The relator filed a petition for writ of certiorari with this Court on August 26, 2014.

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than Verizon made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act ("FCA") authorizes whistleblowers with insider information about fraud against the government to bring suit on behalf of the United States and, if successful, to retain a share of the recovery. The sizeable "cash bounties" available under the FCA can "supplement government enforcement," but they also create "the danger of parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress has thus sought to achieve "'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 County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010).

The FCA's first-to-file bar is an important check on such opportunistic suits. It provides that "[w]hen a person brings an [FCA action], 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). By precluding private follow-on suits based on information already presented to the government in an earlier case but permitting the government to bring such a suit, the bar "furthers the statute's 'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011); *accord Shea*, 748 F.3d at 343.

In this case, the Fourth Circuit held that "once a case is no longer pending[,] the first-to-file bar does not stop a relator from filing a related case." *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013). That interpretation reads a temporal limit into the first-to-file bar and thus permits relators to bring an unlimited number of FCA suits based on the same facts so long as they are filed seriatim. The plain text of the bar contains no such temporal limitation. Although the statute uses the word "pending," that word in context merely serves to distinguish between the two actions referenced in the bar, the initial action and the second, related action. Had Congress wished to impose an important temporal limitation, it would have said so in language more obviously directed to that end.

The Fourth Circuit's interpretation is also contrary to the core purpose of the first-to-file bar—rejecting *qui tam* claims that the government could have pursued on its own. Once a *qui tam* action puts the government on notice of the alleged fraud, the dismissal of that action does not somehow put the government "off notice." There is simply no reason to pay a *qui tam* bounty to a relator who does nothing to bring new allegations of fraud to the government's attention.

Nor does the bar's legislative history support the Fourth Circuit's reading. The relevant committee reports nowhere mention the significant limitation the Fourth Circuit would impose.

In reaching its interpretation, the Fourth Circuit simply followed two prior decisions by the Seventh and Tenth Circuits. Those decisions, however, contained almost no analysis. The Tenth Circuit's discussion of a temporal limit on the bar was pure dicta, and the Seventh Circuit's analysis is set forth in a single sentence.

The D.C. Circuit's opinion in *Shea* is the only circuit court decision to have carefully analyzed the bar's text and purpose. *See* 748 F.3d at 343-344. It reached the opposite conclusion of the Fourth Circuit, rejecting an invitation to read a temporal limit into the bar. One judge of the D.C. Circuit dissented from this aspect of the panel's decision, but the dissent's arguments are unpersuasive for the reasons explained in more detail below.

The facts in *Shea* provide a compelling illustration of how the FCA's *qui tam* provisions could be abused if the Fourth Circuit's interpretation were permitted to stand. In that case, the relator filed back-to-back "related" suits alleging the precise same theory of fraud against Verizon. The only difference between the two cases was that, after filing his first suit, the relator located additional Verizon government contracts on the Internet and added those contracts to the second suit. Under the Fourth Circuit's view, the second action could freely proceed as soon as the original action was closed.

In opposing certiorari in this case, the Solicitor General argued that the "ordinary language" of the first-to-file bar compels the Fourth Circuit's reading of the statute. In prior briefs, however, the government has taken a contrary position. It has argued that the bar contains no temporal limit. The government's recent change of heart should be given no weight.

In sum, this Court should adopt the D.C. Circuit's interpretation of the first-to-file bar. When the government has already been put on notice of potentially fraudulent conduct by an earlier-filed FCA suit, a related action adds nothing—and thus should be precluded—regardless of whether the first-filed suit has been finally resolved.

ARGUMENT

I. THE FIRST-TO-FILE BAR PROHIBITS RELATED FOLLOW-ON *QUI TAM* SUITS EVEN AFTER THE EARLIER-FILED ACTION HAS BEEN RESOLVED

A. The Bar's Text, Purpose, And Legislative History Confirm That The Provision Contains No Temporal Limitation

1. The first-to-file bar provides that "[w]hen a person brings an action under" the 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). The bar thus specifies the time when the bar commences—"[w]hen a person brings an action"—and provides that from that time forward, no person other than the United States may bring an action related to the one that is "pending" when the bar attaches. The word "pending" merely serves to distinguish between the two suits referenced in the statute—the first-filed action (which, by definition, is "pending" "when" it is filed) and any subsequent action (which is not). *See United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014).

The Fourth Circuit's contrary interpretation, which reads the word "pending" as a substantive, temporal limitation, treats the statute as if it provided: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action *while the first action remains pending*." This approach requires a court to read additional words into the statute and is inconsistent with the placement of the word "pending" in the statute. As the D.C. Circuit has observed, the phrase "'based on the facts underlying the pending action' merely clarifies 'related action.'" *United States ex rel. Batiste* v. *SLM*

Corp., 659 F.3d 1204, 1208 (D.C. Cir. 2011). The Fourth Circuit's interpretation would be clearly incorrect if the statute omitted this "clarif[ying]" phrase and simply read: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action." And there is no basis to believe that Congress meant to impose a significant limit on the first-to-file bar using a clarifying adjective in a clause that was merely intended to define what constitutes a "related" action.

Had Congress wanted to bar suits only while the first-filed action remained pending, it knew how to do so. For example, 28 U.S.C. § 1500 bars suits in the Court of Federal Claims only while the plaintiff "*has pending* in any other court any suit or process against the United States" based on the same claim. (Emphasis added.) Similarly, 42 U.S.C. § 300aa-11(a)(5)(B) precludes a person from bringing a vaccine-related claim in the Court of Federal Claims if he or she "*has pending* a civil action for damages for a vaccine-related injury or death." (Emphasis added.) As the D.C. Circuit explained, "[t]he simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *Shea*, 748 F.3d at 344; *see also United States ex rel. Powell* v. *American InterContinental Univ., Inc.*, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012); *cf. United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 32-34 (1st Cir. 2009) (applying first-to-file bar even though the first-filed complaint was dismissed before the second relator filed suit).

2. The Fourth Circuit's interpretation also conflicts with a core purpose of the first-to-file bar: "discouraging opportunistic behavior" by barring serial *qui tam* actions once the government has been notified of potential fraud. *See United States ex rel. Hampton* v.

Columbia/HCA Healthcare Corp., 318 F.3d 214, 217 (D.C. Cir. 2003). By prohibiting follow-on actions "based on the facts underlying" an earlier action, the first-to-file bar helps "reject[] suits which the government is capable of pursuing itself." *Batiste*, 659 F.3d at 1208; *accord Shea*, 748 F.3d at 343 ("The plain-text reading of the statute" makes clear that a primary goal of the bar is to "'reject[] suits which the government is capable of pursuing itself[.]'"). "Once the government is put on notice of its potential fraud claim"—*i.e.*, when the first action is filed—then "the purpose behind allowing qui tam litigation is satisfied." *United States ex rel. Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *see also* 31 U.S.C. § 3730(b)(2) (requiring relator to make a "written disclosure of substantially all material evidence and information" when he or she files suit). After all, "resolution of a first-filed action does not somehow put the government *off* notice of its content." *Shea*, 748 F.3d at 344 (emphasis added). Whether or not it is dismissed, the first-filed "action promptly alert[s] the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001).[2] This commonsense view has also been adopted by the leading treatise on the FCA,

[2] Respondent's suggestion that Petitioners' and the D.C. Circuit's interpretation of the bar "would result in permanent immunity from suit for any defendant based upon the filing of an inadequate, frivolous, or jurisdictionally defective complaint" (Respondent's Br. in Opp. ("BIO") 19 & n.10) thus misses the point. The first-to-file bar does not apply to the government, which would be free to pursue a suit against the entity named in the relator's complaint—if warranted—after the complaint gave the government notice of the wrongdoing. *See* 31 U.S.C. § 3730(b)(5) (bar applies *only* to "person[s] other than the Government"); *see also* Pet. Reply 9.

which observes that the bar's rationale "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b] (4th ed. Supp. 2014).

The Fourth Circuit's contrary interpretation would have the bar's applicability turn on the fortuity of when the first-filed case is resolved, which makes no sense in this context. Worse, the Fourth Circuit's reading hinders the United States' interest in maximizing recoveries of taxpayers' money. It forces the government to pay a 15 to 25 percent bounty to follow-on relators who bring cases the government was fully equipped to bring itself. *See* 31 U.S.C. § 3730(d)(1) (providing range for bounties in cases where the government intervenes to pursue the claim). Permitting relators to bring case after related case with a new bounty attached to each successive suit also incentivizes relators to disclose information in a piecemeal manner, rather than presenting everything to the government at once as is required by statute. *See* 31 U.S.C. § 3730(b)(2); *see also Shea*, 748 F.3d at 344 ("[R]eading the bar temporally would allow related *qui tam* suits indefinitely[.]").

3. The Fourth Circuit's reading finds no support in the legislative history. The House Report accompanying the False Claims Amendment Act of 1986 described the bar as follows: "When an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The Report omits any reference to a requirement that the initial action remain pending or to an exception for cases filed after the initial suit is resolved. Indeed, the Report's discussion of § 3730(b)(5) does not even mention the word "pending." Nor does the relevant section of the Senate Report, which mere-

ly states that the bar is meant to clarify that *qui tam* "enforcement … is not meant to produce … multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986). Had the word "pending" been meant as a substantive limit on the first-to-file bar—as opposed to mere shorthand for "first-filed action"—the House and Senate Reports surely would have mentioned it.

B. The Fourth Circuit's Reliance On Other Circuits' Case Law Is Misplaced

The Fourth Circuit did not independently analyze the statutory text: it simply adopted two other circuits' conclusory interpretations of the first-to-file bar. *See United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013) (citing *United States ex rel. Chovanec* v. *Apria Healthcare Group, Inc.*, 606 F.3d 361 (7th Cir. 2010), and *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956 (10th Cir. 2009)). Neither of the decisions relied upon by the Fourth Circuit, however, offered a meaningful analysis of the first-to-file bar's text, purpose, or legislative history.

The Tenth Circuit case did not even decide the question at issue in this suit. The court discussed the temporal scope of the first-to-file bar only in dicta while explaining its view of when two actions are "related." *See In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 964. And the Seventh Circuit's decision simply stated—in a single sentence—that the first-to-file bar ceases to operate once the original suit is resolved. *Chovanec*, 606 F.3d at 365; *see generally Shea*, 748 F.3d at 344 (noting that other circuits have offered minimal analysis on this question and that *Chovanec*'s and *Natural Gas Royalties*' discussions are essentially dicta).

The D.C. Circuit's opinion in *Shea* is the only circuit court decision that thoroughly analyzes the question presented in this case. It concluded that the bar applies even after the first-filed action has concluded.

C. The *Shea* Dissent Is Not Persuasive

Although the D.C. Circuit's opinion in *Shea* drew a partial dissent from Judge Srinivasan, *Shea*, 748 F.3d at 346-351, the dissent's arguments are not persuasive.

1. The dissent misconstrues the first-to-file bar's plain language. It contends that the meaning of the phrase "facts underlying the pending action" is clear even without the word "pending." 748 F.3d at 347. But without the word "pending," the "action" referenced at the end of the first-to-file bar might refer to the "related action" mentioned immediately beforehand (rather than the first-filed action alluded to at the beginning of the provision). *See* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under" the False Claims Act, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."). In any event, it was surely reasonable for Congress to conclude that including the adjective "pending" would add clarity. Additionally, the dissent makes no attempt to explain why Congress would have buried such an important limitation on the bar in a clarifying phrase at the provision's tail end.

Citing 25 U.S.C. § 1300d-27(b)(2), the dissent also notes that Congress could have used a different phrase than "pending action"—such as "first action"—as a shorthand reference for first-filed action. 748 F.3d at 347-348. But 25 U.S.C. § 1300d-27(b)(2) involves circumstances where more than two actions might be at issue. And even if Congress could have used the modi-

fier "first" instead of "pending," the selection of one of two similar terms over the other ought not fundamentally change the scope of the bar.

The *Shea* dissent contends that the first-to-file bar's prohibition on *both* bringing a related action and intervening in the first-filed action suggests that Congress intended the first-to-file bar to operate only when the first-filed suit remains active because intervention is not possible once an action has been dismissed. 748 F.3d at 348. The fact that one cannot intervene in a suit that is no longer pending, however, says nothing about whether Congress intended the bar on bringing a subsequent action to expire upon dismissal of the first-filed case. Indeed, the dissent joined the panel majority in rejecting a very similar statutory argument that the first-to-file bar does not apply to the same relator who filed the original action because a litigant cannot intervene in his own action. *Id.* at 342-343 ("The statute is written in the disjunctive. A second relator need not be capable of both forms of prohibited behavior to be eligible for the prohibition. On Shea's reasoning, a statute that provided that 'no vehicles may fly over or drive through a field' could only apply to vehicles that could both fly and drive."); *id.* at 345 (Srinivasan, J., concurring in part and dissenting in part). That the bar on bringing a related action necessarily lasts longer than the bar on intervention is beside the point.

2. The dissent in *Shea* suggests that claim preclusion principles and the public disclosure bar obviate the need for the first-to-file bar to prohibit follow-on *qui tam* suits after the first-filed action is resolved or dismissed. 748 F.3d at 349; *see also* BIO 20-21.[3] But neither is an

[3] 31 U.S.C. § 3730(e)(4)(A) requires dismissal of an action or claim if it rests on "allegations or transactions" that have already

adequate substitute for a properly interpreted first-to-file bar. Claim preclusion applies only in a limited set of circumstances. It extends only to causes of action arising out of the same "transaction, or series of connected transactions," not all "related" cases. *See Restatement (Second) of Judgments* § 24, at 196 (1982). It also applies only when there is a final judgment on the *merits* of the first action. *See, e.g.*, *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011); *see also Shea*, 748 F.3d at 349 (Srinivasan, J., concurring in part and dissenting in part) (conceding that "a follow-on action" may "sidestep[] claim preclusion" if "for instance … the initial action was dismissed without prejudice").

Similarly, the public disclosure bar fails to capture certain actions properly foreclosed by the first-to-file bar. The public disclosure bar does not apply if the earlier suit remains under seal and thus has not been made public. The public disclosure bar also contains an exception for relators who qualify as an "original source" of the information at issue. *See* 31 U.S.C. § 3730(e)(4)(A).

The *Shea* dissent asserts that the D.C. Circuit's reading of the first-to-file bar "undermine[s]" the "original source" exception to the public disclosure bar by prohibiting litigants who would fall under that exception from bringing suit. *See* 748 F.3d at 349-350 (emphasis omitted). This argument misconstrues the scope of the two bars. The public disclosure bar applies to a wide variety of circumstances where information about a fraud has been made public, including by the "news media,"

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been "publicly disclosed," such as in a government hearing or report or in the news media. The bar does not apply if, among other things, the litigant bringing the suit qualifies as an "original source" of the information. *See id.* § 3730(e)(4)(A)-(B).

but has not necessarily come to the attention of the Department of Justice. In these circumstances, Congress allowed an "original source" of the allegations to bring suit on them despite their having been made public.

The first-to-file bar, in contrast, applies only in the narrow circumstance where a *qui tam* action has been filed and the Department of Justice is put on *actual notice* of the filing. When a *qui tam* action is filed, the relator has a statutory duty to serve on the government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2). And within a set period of time after receiving the complaint and accompanying information, the government must either step in or "notify the court that it declines to take over the action." *Id.* § 3730(b)(4). Moreover, the Department of Justice is statutorily bound to "diligently … investigate" the alleged fraud. *Id.* § 3730(a). There is no reason to think that Congress intended even an original source to be able to pursue a second related *qui tam* action under these circumstances when allowing such a claim to proceed would dramatically reduce the incentive for an "original source" to promptly file suit and would unnecessarily dilute any recovery by the government.

II. THE *SHEA* CASE ILLUSTRATES THE NEED TO REJECT A TEMPORAL LIMIT ON THE FIRST-TO-FILE BAR

Stephen Shea, a private telecommunications consultant, filed a *qui tam* action in 2007 alleging that Verizon was improperly billing the government for certain taxes and surcharges in connection with two federal telecommunications contracts. *Shea*, 748 F.3d at 339. The U.S. intervened, and the parties negotiated a settlement without admission of liability. *Id.* Shea received a bounty of roughly $19 million. *Id.*

Two years after filing his original suit, Shea speculated that Verizon might be billing the same or similar taxes and surcharges on other federal contracts. He received no new "inside" information that spurred this suspicion. Instead, he relied on information he found on the Internet to file a new suit that "closely mirror[ed]" his first complaint. *Shea*, 748 F.3d at 340; Verizon Response To Petition for Rehearing 2-3, *Shea*, 748 F.3d 338 (No. 12-7133) (filed June 13, 2014).[4] "The only changes between the 2007 complaint and the [second action] is that the [second action] expands Shea's allegations to more contracts, more charges, and more governmental agencies." *Shea*, 748 F.3d at 340-341; *see also id.* at 342 (Shea's second action "is indistinguishable from [the first] except as to its scope"). In short, Shea tried to secure an additional *qui tam* bounty without identifying any new theory of fraud or offering any new nonpublic information.

The district court dismissed Shea's second suit with prejudice under the first-to-file bar because the two cases "clearly" involved the "same material facts" and the earlier-filed case thus "suffice[d] to put the U.S. government on notice" of the fraud alleged in the second case. *United States ex rel. Shea* v. *Verizon Bus. Network Servs., Inc.*, 904 F. Supp. 2d 28, 36 (D.D.C. 2012). On appeal, citing the Fourth Circuit's interpretation, Shea contended that because his first-filed action was settled during the pendency of his current suit, he was entitled to a dismissal without prejudice, permitting him to "file an identical complaint the next day." Appellant Br. 9, 10, *Shea*, 748 F.3d 338 (No. 12-

[4] The 2007 suit remained pending at the time the second suit was filed, but Shea chose not to amend his complaint.

7133), *available at* 2013 WL 3488484. The D.C. Circuit correctly rejected this argument.

As the district court and the D.C. Circuit concluded, Shea's second action was exactly the type of opportunistic suit that the first-to-file bar was intended to prohibit. The government received notice about the purported fraud when Shea filed suit in 2007, and Shea failed to provide any new information in the second action that merited a new bounty. The United States declined to intervene in Shea's second suit, but had it wished to pursue the claims asserted, the first-to-file bar would have ensured that it did not have to pay Shea a second bounty for having done nothing more than seek to extend to new contracts the same theory of fraud he had already brought to the government's attention. There was no sound reason to allow the second action to go forward merely because Shea's earlier suit was no longer pending. *See Shea*, 748 F.3d at 342.

III. The United States' Current Interpretation Is Inconsistent With Positions It Has Previously Taken

In opposing certiorari in this case, the Solicitor General argued that the "ordinary meaning" of the text of the first-to-file bar supports the Fourth Circuit's interpretation. U.S. Br. Opposing Cert. 18-19. Notably, however, the government has previously supported the D.C. Circuit's (and Petitioners') interpretation.

In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the United States cited the first-to-file bar in support of its effort to counter the argument that "a *qui tam* suit is an Article III Case or Controversy insofar as the relator seeks money for himself, but is not a Case or Controversy insofar as he seeks money for the government."

U.S. Supp. Cert. Br. 7, *Stevens*, 529 U.S. 765 (No. 98-1828), *available at* 1999 WL 1086464 (brackets and internal quotation marks omitted). The government explained that "while the relator and the government share the recovery in any successful *qui tam* action, the proceeds are derived from a single, indivisible *judgment* on a single, indivisible *claim*." *Id.* To support this conclusion, the government—citing the first-to-file bar—noted that "the judgment in a *qui tam* suit is preclusive of any subsequent suit on the same cause of action, either by the United States or *by another relator*. *See* U.S. Br. 41 n.26; *31 U.S.C. § 3730(b)(5)*." *Id.* (emphases added). This interpretation is unavoidably inconsistent with the Fourth Circuit's holding that "an action that is no longer pending cannot have a preclusive effect for all future claims." *Carter*, 710 F.3d at 183. Under the Fourth Circuit's view, a "judgment" in a *qui tam* action is never preclusive under the first-to-file bar. Only a pending suit—one that has not gone to judgment—has preclusive effect.

Additionally, the United States' brief in *Taylor* v. *Sturgell*, 553 U.S. 880 (2008), characterized the first-to-file bar as prohibiting all future suits based on the same fraudulent conduct. There, the issue was whether the judgment in a FOIA action should be given preclusive effect in the case of another FOIA requester seeking the same information. The United States argued that the due process concerns that would often arise if a person were bound by a judgment to which he or she was not a party are diminished in the context of "public rights" cases like those brought under FOIA. It cited § 3730(b)(5) as one example of a statutory scheme in which the result in one litigant's case binds others. *See* U.S. Br. 47, *Taylor*, 553 U.S. 880 (No. 07-371), *available at* 2008 WL 782551 ("Notably, several federal statutory

schemes contemplate that one individual's right to litigate can be displaced as a result of litigation by another. … *cf.* … *31 U.S.C. 3730(b)(5) (first-filed qui tam suit bars further qui tam suits based on the same facts)*…." (emphasis added)). Both the *Taylor* brief's parenthetical description of § 3730(b)(5) and the context of the citation make clear that the government viewed the first-to-file bar as a complete prohibition on "further *qui tam* suits based on the same facts"—not just a requirement that other relators wait to file their suits until after the first-filed action is resolved.

In *Chovanec*, the United States similarly endorsed the interpretation of the bar subsequently adopted by the D.C. Circuit in *Shea*. It urged the court of appeals to affirm the dismissal of an FCA complaint with prejudice on first-to-file grounds and took the position that the subsequent settlement of the earlier-filed cases "was legally irrelevant to the first-to-file analysis" and "did not provide a basis for altering or amending the prior dismissal" of the relator's complaint. U.S. Br. 23, *Chovanec*, 606 F.3d 361 (No. 06-1619), *available at* 2006 WL 3223990; *see also id.* at 17-21 & n.5.

Finally, although the government now claims that "the rationales for precluding follow-on *qui tam* suits" do not apply "after the first-filed action has been dismissed" (U.S. Br. Opposing Cert. 19), it has previously explained that the FCA is structured to preclude *qui tam* actions "when the federal government already was, or was likely to be, on the trail of the fraud," U.S. Amicus Br. 27, *Graham Cnty.*, 559 U.S. 280 (No. 08-304), *available at* 2009 WL 3439202; *see also, e.g.*, U.S. Reply Br. 24-25 n.8, *Rille* v. *United States*, 748 F.3d 818 (8th Cir. 2014) (No. 11-3514), *available at* 2012 WL 1965542 ("[The first-to-file bar] furthers the statute's twin goals of rejecting suits which the government is

capable of pursuing itself, while promoting those which the government is not equipped to bring on its own. Therefore, the rule bars actions alleging the same material elements of fraud as an earlier suit, even if the allegations incorporate somewhat different details." (brackets, citations, and internal quotation marks omitted)); U.S. Br. 31, *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (Nos. 98-1497 *et al.*), *available at* 1998 WL 34082080 ("The underlying assumption running through [the first-to-file bar, the public-disclosure bar, and § 3730(e)(3)] is that, once the government is on notice of a possible fraud, as evidenced by government-issued reports or reports in the media, or a previously-filed *qui tam* complaint, the United States has the tools available to investigate it. *Qui tam* suits in these circumstances are unnecessary and counterproductive, and the Act bars them."). This rationale is better served by the D.C. Circuit's (and Petitioners') interpretation than the Fourth Circuit's.

CONCLUSION

This Court should reject the Fourth Circuit's interpretation of the first-to-file bar.

Respectfully submitted.

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