No. 17-1060

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
BENJAMIN CARTER, PETITIONER

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The False Claims Act ("FCA") provides that "[w]hen a person brings an action under th[e FCA], no person other than the Government may * * * bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). That provision is known as the "first-to-file" bar.

The questions presented are:

1. Whether the Fourth Circuit erred in concluding that an action barred because it was "br[ought]" when two earlier-filed related actions were pending is not automatically revived by the dismissal of the earlier-filed actions.

2. Whether the Fourth Circuit erred in holding that the district court did not abuse its discretion in denying petitioner leave to amend his complaint to include additional allegations of allegedly fraudulent conduct.

3. Whether the Fourth Circuit erred in "not attempt[ing] to revisit" circuit precedent describing the first-to-file bar as "jurisdictional," Pet. App. 5 n.2, based on an argument petitioner raised in a footnote.

PARTIES TO THE PROCEEDING

Petitioner was the plaintiff-appellant below. Respondents were defendants-appellees below.

RULE 29.6 STATEMENT

Respondent KBR, Inc. is a publicly held corporation that has no parent company, and is the ultimate parent of petitioner Kellogg Brown & Root Services, Inc. (KBR Holdings, LLC is an intermediate parent). KBR, Inc. is also the ultimate parent of respondent Service Employees International, Inc. (KBR Group Holdings, Inc. and KBR Holdings LLC are intermediate parents). Respondent Halliburton Company is a publicly held company that has no parent company. Other than as discussed above, no publicly held company owns 10% or more of the stock of any respondent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 866 F.3d 199. The opinion of the district court is reported at 144 F. Supp. 3d 869. The opinion of the district court denying petitioner's motion for reconsideration (Pet. App. 27-46) is reported at 315 F.R.D. 56.

An earlier opinion of the district court granting respondents' previous motion to dismiss with prejudice (C.A. App. JA230) is under seal and unreported; a redacted version of that opinion, is unreported, but available at 2011 WL 6178878. The court of appeals' previous opinion affirming dismissal without prejudice on first-to-file grounds, but reversing dismissal with prejudice, is reported at 710 F.3d 171. This Court's opinion affirming the court of appeals' dismissal without prejudice but reversing on other grounds is reported at 135 S. Ct. 1970. The opinion of the court of appeals on remand from this Court summarily affirming the district court's dismissal with prejudice except as to one claim, affirming dismissal without prejudice of that claim, and remanding to the district court, is unpublished, but is reprinted in 612 Fed. Appx. 180.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. A petition for rehearing was denied on August 28, 2017 (Pet. App. 47-48). On November 21, 2017, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including January 25, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In a case that has already dragged on for well over a decade, petitioner Benjamin Carter seeks to resuscitate claims that he has acknowledged violated the first-to-file bar, which "require[s], in express terms, the dismissal of a relator's action." *State Farm Fire & Cas. Co.* v. *U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016). But petitioner's current position that his later-filed claims are automatically revived upon the dismissal of earlier-filed actions (or can be revived by filing an amended complaint) is directly contrary to positions he has affirmatively embraced during most of this case's long history. His position is also impossible to square with the plain language of the FCA. And for all petitioner's talk of a "circuit split," a unanimous Fourth Circuit correctly concluded that petitioner would not be entitled to relief even under the decision that is most favorable to his position. See Pet. App. 23 (citing *U.S. ex rel. Gadbois* v. *PharMerica Corp.*, 809 F.3d 1 (2015)). That fact-bound conclusion warrants no further review. Petitioner's ever-changing positions provide no basis for reviving his stale and meritless claims.

A. Statutory Background

The FCA imposes liability for knowingly presenting false or fraudulent claims to the United States for payment or approval. 31 U.S.C. § 3729(a)(1). The Act's "essentially punitive" liability scheme imposes treble damages plus civil penalties of up to $22,363 per false claim. See *Vermont Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784-785 (2000); 31 U.S.C. § 3729(a); 28 C.F.R. 85.5 (as amended by 83 Fed. Reg. 3,944 (Jan. 29, 2018)). The Act's *qui tam*

provisions authorize private "relators" to bring FCA actions "in the name of the Government." 31 U.S.C. § 3730(b)(1). By granting relators a significant share of recoveries, see *id.* § 3730(d)(2), the FCA creates strong incentives for private suits.

Congress sought in the FCA to strike the "golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information." *Graham Cty. Soil & Water Conserv. Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010). "While encouraging citizens to act as whistleblowers, the [FCA] also seeks to prevent parasitic lawsuits based on previously disclosed fraud." *U.S. ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013). To that end, Congress enacted strict "limits on [the FCA's] qui tam provisions, including * * * [the] first-to-file bar." *Ibid.* Under that bar, "[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). The first-to-file bar serves Congress's "twin goals of rejecting suits which the government is capable of pursuing itself" because it is already on notice of the alleged fraud, "while promoting those which the government is not equipped to bring." *U.S. ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011).

The FCA also imposes statutes of limitations and repose. A relator "may not * * * br[ing]" a *qui tam* action "more than 6 years after the date on which the [FCA] violation * * * [was] committed." 31 U.S.C.

§ 3731(b)(1). The FCA also contains an "absolute provision for repose," see *Gabelli* v. *SEC*, 568 U.S. 442, 453 (2013), which directs that "in no event [may an action be brought] more than 10 years after the date on which the violation [was] committed," 31 U.S.C. § 3731(b)(2); accord *Kellogg Brown & Root Servs., Inc.* v. *U.S. ex rel. Carter*, 135 S. Ct. 1970, 1974 (2015).

B. Factual Background

Kellogg Brown & Root Services, Inc. and related entities (collectively, "KBR") provided logistical services to the U.S. military in Iraq. Between mid-January and April 2005, petitioner Benjamin Carter briefly worked for KBR in Iraq as a water purification operator. Pet. App. 5. On February 1, 2006, petitioner filed a *qui tam* complaint, which he subsequently amended, alleging FCA violations involving contaminated water. *U.S. ex rel. Carter* v. *Halliburton Co.*, No. 1:11-cv-602, 2011 WL 6178878, at *2 (E.D. Va. Dec. 12, 2011); *U.S. ex rel. Carter* v. *Halliburton Co.*, 144 F. Supp. 3d 869, 871-872 (E.D. Va. 2015). The government investigated and declined to intervene.[1]

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[1] Petitioner dramatically block quotes from a report written at the time to suggest that KBR was responsible for water purification issues. Petitioner fails to note, however, that elsewhere the report states that the "[w]ater supplied * * * came from [the] Army [water purification system]." Wil Granger 3, 5, 18, *Report of Findings & Root Cause Water Mission B4 Ar Ramadi* (May 13, 2005), http://goo.gl/BLDE8b; accord Carter First Am. Compl. ¶ 10 (E.D. Va.) (No. 08-cv-1162) [Dkt. 5] ("At Camp Ramadi, the [water purification] unit was operated by Army military personnel.").

The district court dismissed that complaint for failure to plead fraud with particularity. Petitioner amended again in January 2009 ("*Carter I*"), this time alleging not a failure to purify water, but false billing for labor costs between January and June 2005. *Carter*, 710 F.3d at 175. Shortly before trial (but before KBR had filed its summary judgment motion), Pet. 5-6, the government notified the parties about an earlier-filed *qui tam* action in California, in which the relator was represented by the same lawyer who filed *Carter I*, Mem. Op. 6 n.2 (E.D. Va. May 10, 2010) (No. 08-cv-1162) [Dkt. 306]), alleging similar timekeeping fraud. Concluding that the claims in the earlier-filed suit were "related" to petitioner's suit, the district court granted KBR's motion to dismiss under the first-to-file bar, analyzing "the facts as they existed at the time th[e] action was brought." *Id.* at 11, 15. Petitioner noticed an appeal; two weeks later, the California case was dismissed. *Carter*, 2011 WL 6178878, at *2.

In August 2010, petitioner refiled in a new docket what he concedes was "an identical copy" of his earlier complaint ("*Carter II*")—while also maintaining his *Carter I* appeal. See Tr. Mot. Hr'g at 22 (E.D. Va.) (No. 10-cv-864) [Dkt. 49]. Petitioner voluntarily dismissed the *Carter I* appeal in February 2011, 710 F.3d at 176, to clear the way for *Carter II*, without suggesting that *Carter I* might be revived automatically (or saved through amendment) when the California case was dismissed.

The district court dismissed *Carter II* without prejudice on the ground that petitioner's own *Carter I* appeal was pending when *Carter II* was filed, trigger-

ing the first-to-file bar. *Carter*, 710 F.3d at 176. Petitioner did not suggest that *Carter II* was automatically revived when his earlier appeal was dismissed, and did not seek leave to amend his complaint, nor did he appeal.

C. Procedural History

1. ***2011 District Court Decision***. On June 2, 2011, petitioner brought the current action, filing a third copy of his complaint ("*Carter III*"), the allegations of which were "identical to the complaint[s] filed in [*Carter II*] and * * * [*Carter I*]." *Carter*, 2011 WL 6178878, at *3. The government again declined to intervene. *Ibid.* On the day *Carter III* was filed, two "related cases were pending: *United States ex rel. Duprey* [filed in the District of Maryland in 2007] * * * and another action that is under seal filed in Texas in [2004]."[2] *Carter*, 710 F.3d at 176. *Duprey* was dismissed in October 2011, before petitioner filed his opposition to KBR's motion to dismiss; the Texas case was dismissed in 2012, before the Fourth Circuit's 2013 decision. Pet. App. 6.

In November 2011, the district court dismissed *Carter III*, holding that it was "related" to *Duprey*, and thus barred by first-to-file. *Carter*, 2011 WL

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[2] The Fourth Circuit stated that the Texas action was filed in 2007. *Carter*, 710 F.3d at 176; Pet. App. 5-6. While the docket for the Texas action is sealed, the case number, C.A. App. JA236, as well as the clerk's stamp and a fax header on the complaint, Ex. 3, KBR Mot. to Dismiss (E.D. Va.) (No. 11-cv-602) [Dkt. 11], all show the matter was actually filed in 2004, well before petitioner brought his first action in 2006, *Carter*, 710 F.3d at 175, and before the California action that barred *Carter I*.

6178878, at *6-8. The court "concluded that it need not decide [whether the Texas action was pending at the time of filing] because at least one case—*Duprey*—was pending." *Carter*, 710 F.3d at 176. In resisting dismissal, petitioner did not argue that the October 2011 dismissal of *Duprey* allowed his suit to move forward without refiling, nor did he seek leave to amend. Nor did petitioner suggest that his lawsuit had precedence over *Duprey* or the Texas action.

The district court found (and all parties agreed) that with the exception of two labor charges totaling $673.56 that KBR submitted for payment on June 15, 2005, all of the claims included in petitioner's *Carter III* action were untimely under the FCA's six-year statute of limitations, absent tolling. *Carter*, 2011 WL 6178878, at *8-12 & n.11; *Carter*, 710 F.3d at 188 n.1 (Agee, J., concurring in part and dissenting in part). After concluding that neither the Wartime Suspension of Limitations Act ("WSLA") nor equitable tolling extended the six-year limitations period, the district court held that "Carter's claims are time-barred except for the [June 15, 2005] voucher for $673.56." *Carter*, 2011 WL 6178878, at *12. But the district court also concluded that because "Carter's complaint as a whole [is] independently barred by operation of the first-to-file bar," and because every claim in his complaint (including the one for $673.56) "would be untimely were Carter to again file a new action," "dismissal is with prejudice." *Ibid.*; *Carter*, 710 F.3d at 176.

2. ***2013 Court of Appeals Decision***. The Fourth Circuit unanimously held that *Carter III* must be dismissed under the first-to-file bar, because both

Duprey and the Texas action had been pending when it was brought. *Carter*, 710 F.3d at 181-183. The court held that "the plain language of the first-to-file bar" "look[s] at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Id.* at 183. The court concluded that dismissal should be without prejudice, because "once a case is no longer pending," "the first-to-file bar allows a plaintiff to bring a claim later." *Ibid.* But the Fourth Circuit emphasized that dismissal was mandatory: "[I]f a case is brought while the original case is pending it must be dismissed 'rather than left on ice.'" *Ibid.* (quoting *U.S. ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010)). Petitioner did not suggest that dismissal of the earlier-filed cases might revive *Carter III* automatically or through amendment, although both prior cases had been dismissed. Nor did petitioner argue against dismissal without prejudice. See Carter C.A. Br. 33-46, 48-49, 54 (4th Cir.) (No. 12-1011) [Dkt. 29].

The court of appeals agreed that all of petitioners claims (save the $673.56 claim) were outside the six-year statute of limitations and thus untimely absent tolling. See *Carter*, 710 F.3d at 177, 181; *id.* at 188 & n.1 (Agee, J., concurring in part and dissenting in part). The majority held, however, that WSLA tolling was available. *Id.* at 710 F.3d at 178-181. The court of appeals "remanded with instructions to * * * dismiss[] without prejudice." Pet. App. 14; C.A. App. JA142; *U.S. ex rel. Carter* v. *Halliburton Co.*, 973 F. Supp. 2d 615, 630 (E.D. Va. 2013). At petitioner's urging, the district court dismissed without prejudice.

3. ***2015 Decision by this Court***. KBR petitioned for certiorari, seeking review of the Fourth Circuit's WSLA holding and without-prejudice first-to-file dismissal, but "never question[ing] th[e] [court of appeals' 2013] holding that the first-to-file analysis depends on the set of facts in existence at the time an FCA action is filed." Pet. App. 8. Indeed, KBR's first-to-file question was predicated on the understanding that the first-to-file analysis occurs "at the time of filing."[3]

Petitioner filed no cross-petition and "did not question [the Fourth Circuit's] decision to conduct its first-to-file analysis based on the facts in existence at the time that the Carter Action was brought." Pet. App. 8. Indeed, petitioner argued that "[t]he panel *correctly decided* that the district court's *jurisdictional dismissal* of the case should have been without prejudice." See Br. in Opp. 17 (U.S.) (No. 12-1497) (emphasis added); accord *id.* at 25 ("The panel's decision was correct * * * ."). After this Court granted review, petitioner's merits brief assured this Court that his (incorrect) argument that the WSLA tolls civil FCA actions would not "open the door to an endless stream of parasitic lawsuits," because "[a] related action based on the facts underlying the pending action *must be dismissed*." Carter Resp't Br. 59-60 (U.S.) (No. 12-1497) (emphasis added) (quoting *Chovanec*, 606 F.3d at 362).

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[3] See KBR Pet. I (U.S.) (No. 12-1497) (presenting question whether first-to-file bar "allow[s] an infinite series of duplicative claims so long as no prior claim is pending at the time of filing").

This Court affirmed the Fourth Circuit's dismissal without prejudice on first-to-file grounds, holding that "the [FCA's] first-to-file bar keeps *new claims* out of court only while related claims are still alive," 135 S. Ct. at 1973 (emphasis added), and thus "ceases to bar * * * suits" that are filed after the earlier filed case "is dismissed." *Id.* at 1978. As a result, this Court concluded that "dismissal with prejudice was not called for" "under the first-to-file rule" for any of petitioner's timely claims, which he "*had the right to refile*." *Id.* at 1975, 1978 (emphasis added). This Court "did not reject, or even comment on, [the court of appeals'] holding 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.'" Pet. App. 15; contra Pet. 2-3, 13-14, 23-25.[4] The Court also agreed with KBR that the WSLA "applies only to criminal offenses" and has no application to the FCA. *Carter*, 135 S. Ct. at 1975.

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[4] While the *Carter III* certiorari petition was before this Court, petitioner filed a fourth copy of his complaint ("*Carter IV*"). *U.S. ex rel. Carter* v. *Halliburton Co.*, 19 F. Supp. 3d 655, 658-59 (E.D. Va. May 2, 2014). In seeking to avoid another dismissal on first-to-file grounds, petitioner argued that *Carter III* was no longer pending, notwithstanding KBR's then-live certiorari petition. Petitioner argued that "the issues presented to the Supreme Court *could not* result in an opinion that would revive [*Carter III*] as *neither issue challenges [the district court's] dismissal of the [Carter III] complaint*." Mem. in Opp. 2-3 (E.D. Va.) (No. 13-cv-1188) [Dkt. 28] (emphasis added); see also *id.* at 3 ("[T]he petition for certiorari could never result in the revival of the complaint that the district court dismissed."). The district court dismissed *Carter IV* without prejudice, holding that *Carter III* was pending when *Carter IV* was filed. Petitioner did not appeal.

4. ***2015 Court of Appeals Decision***. On remand, the court of appeals received briefing on "[t]he only issue left for [appellate] resolution," namely, whether petitioner was entitled to equitable tolling of the six-year statute of limitations. *U.S. ex rel. Carter* v. *Halliburton Co.*, 612 Fed. Appx. 180, 180 (4th Cir. 2015). The court held that "equitable tolling is * * * unavailable." *Ibid.* Petitioner conceded that this Court had "reversed" the district court's first-to-file ruling, by changing dismissal with prejudice "to without prejudice." Carter C.A. Resp. to Mot. for Summ. Aff. 3 (4th Cir.) (No. 12-1011) [Dkt. 93]. The court of appeals concluded that "'dismissal with prejudice * * * was 'not called for' under the first-to-file rule," *Carter*, 612 Fed. Appx. 181 (quoting *Carter*, 135 S. Ct. at 1978-1979), and remanded "for further proceedings consistent with the Supreme Court's opinion." *Ibid.*

5. ***2015 and 2016 District Court Decisions***. Before the district court on remand, KBR sought leave to brief whether petitioner's claim should be dismissed with prejudice, given that his entire case was to be dismissed under the first-to-file bar, and if refiled, all the claims would be untimely under the FCA's statutes of limitations and repose. KBR Mot. (E.D. Va.) (No. 11-cv-602) [Dkt. 95]. Petitioner responded that the court of appeals "unequivocally direct[ed] [the district court] to dismiss this action without prejudice, in accordance with the * * * Supreme Court's [o]pinion in this matter." Carter Ltr. 1-2 (E.D. Va.) (No. 11-cv-602) [Dkt. 96]. Petitioner insisted, "*the District Court is obligated to follow the Supreme Court and Fourth Circuit's direc-*

tives to dismiss the matter without prejudice." *Ibid.* (emphasis added).

The district court allowed briefing on whether dismissal should be with prejudice. Reversing course, petitioner argued for the first time in any court that dismissal of the earlier-filed actions automatically revived his complaint as a matter of law. Alternatively, petitioner argued that he should be allowed to amend his complaint under Federal Rule of Civil Procedure 15(a)(2), and that he first-to-file analysis should look to the time of amendment. Petitioner's proposed amended complaint included new "damages theories" dating from March and July 2005, but did not mention the dismissal of the earlier-filed actions. Pet. App. 10; C.A. App. JA269-308. Petitioner did not seek leave to supplement his complaint under Rule 15(d). See Pet. 12.

The district court dismissed without prejudice, rejecting petitioner's new theories. Petitioner's "automatic-first-filer" theory, the district court held, was "contrary" to both "[t]he law of th[e] case and Fourth Circuit precedent." *Carter*, 144 F. Supp. 3d at 874-875. Based on its review of "prior proceedings in this case," the district court found it "clear [that] this Court applied the first-to-file bar at the time a complaint was filed," *id.* at 875, and "[t]he Fourth Circuit endorsed this view on appeal," *ibid.*

"The district court also rejected Carter's efforts to sidestep the first-to-file rule through amendment." Pet. App. 11. The court held that "[a]mending the complaint would not cure the first-to-file bar and therefore is futile," because "the law in this case and the Fourth Circuit requires this Court to '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*, 144 F. Supp. 3d at 880 (quoting *Carter*, 710 F.3d at 183). The district court reasoned that amendment was irrelevant because, under the plain statutory text, "[a] plaintiff does not 'bring an action' [for purposes of the first-to-file bar] by amending a complaint," but rather "brings an action by commencing suit." *Id.* at 880 (quoting *Chovanec*, 606 F.3d at 362). While emphasizing that its conclusion "would not change" even if the bar were non-jurisdictional, the district court noted that its reading accorded with the rule that federal court jurisdiction "must exist as of the time the action is commenced." *Carter*, 144 F. Supp 3d at 873 n.1, 881 (quoting *Morongo Band of Mission Indians* v. *California State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988)).

Petitioner sought reconsideration, citing the First Circuit's intervening decision in *United States ex rel. Gadbois* v. *PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015). See generally Fed. R. Civ. P. 59(e). The district court held that such out-of-circuit authority did not constitute an "intervening change in controlling law" as Rule 59(e) requires. Pet. App. 30. The district court also considered *Gadbois* unpersuasive, noting that the First Circuit's discussion of this Court's *Carter* opinion was "very brief," "failed to consider the [decision's] context," and did not "give[] sufficient weight to the plain [statutory] language." Pet. App. 31-33. Finally, whereas requiring the *Gadbois* relator to re-file would have been a "pointless formality," 809 F.3d at 6, in petitioner's case, "dismissal and re-

filing could implicate significant statute of limitations and repose problems." Pet. App. 32-33.

6. ***2017 Court of Appeals Decisions***. The Fourth Circuit affirmed. The court rejected petitioner's argument that the first-to-file bar was "automatically cure[d]" by the dismissal of the earlier-filed action. Pet. App. 21. The court reasoned that under the FCA's plain text, "the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time that the FCA action *** is commenced," Pet. App. 13, and "the dismissals of earlier-filed, related actions *** do not factor into this analysis." *Ibid.* Citing this Court's statement in *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby* that the first-to-file bar "require[s], in express terms, *** the dismissal of a relator's action," the court held that "the only appropriate response for a first-to-file rule violation is dismissal." Pet. App. 18 (quoting *Rigsby*, 137 S. Ct. at 442-443 (2016)).

The court "decline[d] to comment on the other reasons the district court identified" to reject petitioner's effort to circumvent dismissal through amendment. Pet. App. 22 n.7. The court concluded that "*Gadbois* is factually distinguishable" from this case because while *Gadbois* "addressed a situation where the relator sought to revise an FCA complaint with information pertaining to the related action that gave rise to the first-to-file defect," petitioner's "situation is different," because "[r]ather than address any matters potentially relevant to the first-to-file rule," his proposed amendment "simply adds details to Carter's damages theories." *Id.* at 22. Thus, the

court "s[aw] no reason why that proposal would have cured the first-to-file defect," under *Gadbois*. *Ibid.*

Judge Wynn filed a concurring opinion to "emphasize the narrow scope" of the court's decision, stating that "the majority opinion does not address, much less adopt, the district court's reasoning that an amendment or supplement to a complaint cannot, as a matter of law, cure a first-to-file defect." Pet. App. 25-26 (Wynn, J., concurring).

The Fourth Circuit denied petitioner's request for rehearing en banc with no judge requesting a vote. Pet. App. 47-48. The court also denied petitioner's motion for leave to file an amended and supplemental complaint under Federal Rule of Civil Procedure 15. Order (4th Cir. Aug. 31, 2017) (No. 16-1262) [Dkt. 74].

REASONS FOR DENYING THE PETITION

The court of appeals correctly held that petitioner's complaint was barred by the first-to-file doctrine and that petitioner had not made an adequate showing for leave to file an amended complaint. That decision was correct and conflicts with no decision of this Court or any other court of appeals. Further review is not warranted.

A. Petitioner's Issues Are Not Properly Before This Court

As an initial matter, petitioner has either forfeited or affirmatively waived each of the issues set forth in his petition. See generally *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a

known right." (citations omitted)). None is properly before this Court.

1. Petitioner has waived any argument that a first-to-file violation can be cured—either automatically by dismissal of earlier-filed actions, or by filing an amended complaint. When it suited his litigation position, petitioner repeatedly and emphatically embraced the position that a first-to-file violation at the time of filing requires dismissal even after earlier-filed actions are dismissed.

Petitioner's two-page summary of the twelve-year history of this case (see Pet. 7-8) neglects to mention that when the *Carter III* certiorari petition was before this Court, petitioner filed in the district court another identical complaint, styled as *Carter IV*. Petitioner assured the district court that the pending petition in *Carter III* did not bar the newly filed *Carter IV* under the first-to-file rule because "the issues presented to the Supreme Court *could not result in an opinion that would revive [Carter III]* as neither issue challenges the dismissal of the [*Carter III*] complaint," Mem. in Opp. 2-3 (E.D. Va.) (No. 13-cv-1188) [Dkt. 28] (emphasis added), and "the petition for certiorari *could never result in the revival of the complaint* that the district court dismissed," *id.* at 3 (emphasis added). This was at a time when *both* earlier-filed actions (*Duprey* and the Texas action) already had been dismissed.

Petitioner's brief in opposition to KBR's *Carter III* petition likewise took the position that the Fourth Circuit "correctly decided that the district court's jurisdictional dismissal of the case should have been without prejudice." See Br. in Opp. 17 (U.S.) (No. 12-

1497); accord *id.* at 25 ("The panel's decision was correct * * * ."). After this Court granted review, petitioner's merits brief assured this Court that his argument that the WSLA tolls the statute of limitations in civil cases (which the Court rejected) would not "open the door to an endless stream of parasitic lawsuits," because "[a] related action based on the facts underlying the pending action *must be dismissed*." Carter Resp't Br. 58-60 (U.S.) (No. 12-1497) (emphasis added) (quoting *Chovanec*, 606 F.3d at 362). And on remand from this Court's ruling in 2015, petitioner told the district court that this Court and the Fourth Circuit had issued "directives to dismiss * * * without prejudice." Carter Ltr. 1-2 (E.D. Va.) (No. 11-cv-602) [Dkt. 96].

By repeatedly and affirmatively embracing the position that the first-to-file bar requires dismissal of *Carter III* when it suited his litigation position, petitioner has affirmatively waived his current argument that first-to-file violations may be cured, extinguishing any claim of error and rendering the matter "not reviewable." *United States* v. *Coppedge*, 490 Fed. Appx. 525, 531 (4th Cir. 2012). This Court has consistently stated that when a party's position before this Court conflicts with its position below, that is a "considerable prudential objection" to granting relief. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); cf. *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (even after this Court has granted review, "an inconsistency between a party's" position in lower courts "and its position before this Court" is a valid "consideration[] bearing on whether to decide a question on which we granted certiorari").

2. At the very least, as the district court concluded, "[t]he law of th[e] case," *Carter*, 144 F. Supp. 3d at 874-875, together with the related doctrine of the appellate mandate rule, would prevent this Court from affording petitioner relief. The district court held that it was "clear" that it had "applied the first-to-file bar at the time a complaint was filed" and "the Fourth Circuit endorsed this view on appeal." *Id.* at 875. Petitioner did not challenge that position on his initial appeal or before this Court, although the earlier filed cases barring his action had then been dismissed. *Carter*, 710 F.3d at 176. Nor did petitioner seek to file an amended complaint until this case was back in district court on remand from this Court's decision. The district court thus ruled that petitioner's current theory that his case could be revived after dismissal of earlier-filed suits (either automatically or by amendment), was "contrary" to "[t]he law of th[e] case," *Carter*, 144 F. Supp. 3d at 874-875; accord *id.* at 875, 880 (Fourth Circuit had been "explicit in this analysis" and its judgment was "law of this case"). See generally *TFWS, Inc.* v. *Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) ("[O]nce the decision of an appellate court establishes the law of the case, it 'must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal.'"). Petitioner failed to challenge that conclusion in its opening brief on appeal, forfeiting any challenge to the holding that law of the case foreclosed his current position. See KBR C.A. Br. 34 (4th Cir.) (No. 16-1262) [Dkt. 32]; see also *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 n.2 (2014) (arguments only in replies forfeited).

3. Moreover, the Fourth Circuit did not reach petitioner's contention that a first-to-file violation can be cured by an amended or supplemental pleading. The court of appeals specifically "decline[d] to comment" on whether an amendment could *ever* remedy a first-to-file violation; it simply concluded that petitioner's proposed amendment was insufficient under any theory. Pet. App. 22 n.7. The Fourth Circuit concluded that, even "assuming for the sake of argument that [*United States ex rel.*] *Gadbois* [v. *PharMerica Corp.*, 809 F.3d 1 (2015),] was correctly decided," petitioner's proposed amended complaint did not make the requisite showing to overcome the first-to-file bar even under the reasoning of that case, because it made no reference to the dismissal of the earlier-filed action and simply added detail to his previously filed causes of action. Pet. App. 23. Judge Wynn's concurrence "emphasize[d] the narrow scope" of the majority's ruling, which turned "*solely* on [the] grounds that [petitioner's] proposed amendment did not 'address any matters potentially relevant to the first-to-file rule, such as the dismissals of the [earlier-filed, related actions]." Pet. App. 25-26 (Wynn, J., concurring) (citation omitted). In short, "the majority opinion d[id] not address" whether "an amendment or supplement to a complaint cannot, as a matter of law, cure a first-to-file defect." *Id.* at 26.

Petitioner conceded as much in his extraordinary motion in the Fourth Circuit for leave to file an amended and supplemental complaint pursuant to Federal Rule of Civil Procedure 15. But see Fed. R. Civ. P. 1 ("These rules govern * * * proceedings in the United States district courts * * *."). There, petition-

er acknowledged that "[t]he Panel did not reach the question of whether a proposed amendment referencing dismissals of earlier-filed, related actions could cure the jurisdictional deficiency here." Pet. C.A. Mem. of Law in Supp. of Mot. for Leave to File an Am. & Suppl. Compl. 5 (4th Cir.) (No. 16-1262) [Dkt. 67-1]. Moreover, petitioner conceded that the Fourth Circuit had not reached that issue "because [petitioner] had not proposed such an amendment previously." *Ibid.*[5] Because this Court "ordinarily do[es] not decide in the first instance issues not decided below," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (citation omitted), that is alone sufficient basis to deny review on that issue.

4. Petitioner also has waived any claim of error in the Fourth Circuit's characterization of the first-to-file rule as jurisdictional by affirmatively endorsing that description. Petitioner's briefing before the district court characterized first-to-file as a "jurisdictional" inquiry. Carter Opp. 3, 5-6 & n.3 (E.D. Va.) (No. 11-cv-602) [Dkt. 21]. After the district court in 2011 ruled that "Section 3730(b)(5) is jurisdictional in nature," *Carter*, 2011 WL 6178878, at *5, petitioner's appellate briefing did not challenge that ruling. After the court of appeals in 2013 affirmed that "Section

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[5] Petitioner did not seek to file a supplemental complaint referencing the dismissal of earlier actions even though the First Circuit's *Gadbois* opinion suggested supplementation in just that manner in December 2015, while petitioner was still litigating the issue in the district court. But petitioner's counsel proposed precisely such an amendment—noting the settlement of an earlier-filed action—in another case. See Fourth Am. Compl. ¶ 206, *U.S. ex rel. Denis* v. *Medco Health Sols., Inc.*, (D. Del.) (No. 11-cv-684) [Dkt. 111].

3730(b)(5) is jurisdictional," *Carter*, 710 F.3d at 181, petitioner's brief in opposition to KBR's petition for certiorari did not object to that characterization, but rather stated that *"[i]t is well settled* that the first-to-file provision * * * is jurisdictional." Br. in Opp. 17 (U.S.) (No. 12-1497) (emphasis added). Petitioner first contested the first-to-file bar's jurisdictional nature only well into proceedings in the district court on remand, in his 2015 *reply* in support of his motion to amend, Pet. Reply Mot. Amend 3, 12 (E.D. Va.) (No. 11-cv-602) [Dkt. 118], and raised the issue in his Fourth Circuit opening brief only in a footnote, see Pet. C.A. Br. 24 n.1 (4th Cir.) (No. 16-1262) [Dkt. 23]. But see *United States* v. *Dairy Farmers of Am., Inc.*, 426 F.3d 850, 856 (6th Cir. 2005) (arguments only in footnotes waived). At a minimum, petitioner's belated adoption of that position is foreclosed by the law of the case and the appellate mandate rule. See pp. 18-19, *supra*.

B. The Decision Below Implicates No Conflict Of Authority

Petitioner contends that the decision of the Fourth Circuit below, and the D.C. Circuit in *Shea*, conflicts with the First Circuit's decision in *Gadbois*. Pet. 9-17. There is no conflict that warrants this Court's review.

1. Petitioner has shown no disagreement between the courts of appeals about whether a first-to-file defect is automatically cured by the dismissal of the earlier-filed action. Pet. 9-17. Only the Fourth Circuit has addressed that issue; *Shea* and *Gadbois*, as well as district court cases petitioner identifies, reached only the question whether an amendment or

supplement could remedy the first-to-file defect. See *Gadbois*, 809 F.3d at 8 ("go[ing] no further" than "remand[ing] the case so that the relator may file * * * a motion to supplement"); *U.S. ex rel. Shea* v. *Cellco P'ship*, 863 F.3d 923, 928 (D.C. Cir. 2017) ("address[ing] whether the district court erred in * * * [not] allowing him to continue the action based on his amended complaint"); *U.S. ex rel. Boise* v. *Cephalon, Inc.*, 159 F. Supp. 3d 550, 558 (E.D. Pa. 2016) (same); *U.S. ex rel. Brown* v. *Pfizer, Inc.*, No. 05-cv-6795, 2017 WL 1344365, at *1, 3 (E.D. Pa. Apr. 12, 2017) (same); *U.S. ex rel. Wood* v. *Allergan, Inc.*, 246 F. Supp. 3d 772, 799-800 (S.D.N.Y. 2017) (same).

2. Petitioner is likewise mistaken that the decision below conflicts with *Gadbois* on whether an amended or supplemental complaint can cure a first-to-file defect. Pet. 11-15. *Gadbois* addressed the narrow question of whether a supplemental complaint under "Federal Rule of Civil Procedure 15(d) is available to cure" a first-to-file defect by pleading the fact that earlier-filed actions had been dismissed since the filing of the original complaint, 809 F.3d at 3, under what the First Circuit emphasized was the "[t]he peculiar posture of th[at] case," *id.* at 4; accord *id.* at 6 ("curious posture"). The court emphasized that a supplemental complaint filed under Rule 15(d) was the proper mechanism for pleading "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented," *id.* at 4 (quoting Fed. R. Civ. P. 15(d)); accord *id.* at 6. The court distinguished such facts from where "the referenced events occurred *before* the filing of the original complaint," which Rule 15(d) does not address. *Id.* at 7

(emphasis added). *Gadbois* pointedly did not address whether an *amended* pleading adding such facts would overcome the first-to-file bar.

The Fourth Circuit's decision is completely consistent with *Gadbois*. The additional facts petitioner sought to plead in his proposed amendment "simply add[ed] detail to [petitioner's] damages theories" (Pet. App. 22)—facts that necessarily "occurred before the filing of the original complaint," and which would not have been appropriate subjects for a Rule 15(d) supplement under *Gadbois*. 809 F.3d at 7. And petitioner explicitly declined to invoke Rule 15(d), instead proposing a "Rule 15(a)-based proposed amendment." Pet. App. 21-22; accord Pet. 10 (noting that while petitioner sought to amend "under [Rule] 15(a)," *Gadbois* sought to supplement "under [Rule] 15(d)"). As petitioner conceded, "[t]he [Fourth Circuit] Panel did not reach the question of whether a proposed [supplement] referencing dismissals of earlier-filed, related actions could cure the jurisdictional deficiency here * * * because P[etitoner] had not proposed such a [supplement]." Pet. C.A. Mem. of Law in Supp. of Mot. for Leave to File an Am. & Suppl. Compl. 5 (4th Cir.) (No. 16-1262) [Dkt. 67-1]; see also Pet. 10 n.1 (conceding "the Panel declined to overtly split with the First Circuit").

Gadbois is also distinguishable on other grounds. *Gadbois* considered dismissal and re-filing a "pointless formality" because a re-filed complaint in that case would have been timely. 809 F.3d at 4. By contrast, petitioner concedes that any case he refiled would be untimely. Pet. 12-13; Carter C.A. Br. 26-28, 40-41 (4th Cir.) (No. 16-1262) [Dkt. 23]. Moreover,

Gadbois sought to supplement *promptly* after the dismissal of the earlier-filed case, 809 F.3d at 4, while the case was on its initial appeal and before the appellate court had ruled. Petitioner, by contrast, waited *three years* after the dismissal of Texas action and four years after the dismissal of *Duprey* to seek to amend, and only did so after the case was in the district court on remand from this Court and respondent's motion to dismiss had been largely briefed. See pp. 6, 12, *supra*; cf. *Gadbois*, 809 F.3d at 7 (noting that "unreasonable delay in attempting to supplement" a complaint "may suffice to ground a denial" of such a motion).

3. Petitioner also contends that the D.C. Circuit's decision in *Shea* conflicts with *Gadbois*. But *Shea* likewise involved a relator's effort to "*amen[d]* his existing complaint," 863 F.3d at 928 (emphasis added), not to supplement the complaint.[6] Moreover, in *Shea*, as here, dismissal and refiling was no "pointless formality," because Shea's case would have been untimely if refiled. 863 F.3d at 928. And even to the extent there is disagreement between the reasoning of *Shea* and *Gadbois*, this case—where the issue was

[6] *Shea* states in passing that "[a] supplemental or amended complaint * * * could not remedy Shea's violation of the first-to-file bar." 863 F.3d at 929. But that lone reference to supplemental filings was dicta in a decision that concerned relator Shea's request to *amend* a complaint, and the opinion did not have occasion to thoroughly discuss the effect of supplemental complaints.

neither properly presented nor passed on below—does not present an opportunity to resolve it.[7]

Even if the Court concludes there is significant disagreement between *Shea* and *Gadbois*, it should allow the subject further time to develop in the courts of appeals, particularly in light of criticisms of *Gadbois* by other courts. See, *e.g.*, *Shea*, 863 F.3d at 930-932; Pet. App. 23-24, n.8 (collecting decisions that had criticized *Gadbois*' reasoning).[8]

4. Petitioner is correct that courts of appeals have disagreed about whether the first-to-file bar is properly characterized as jurisdictional. See Pet. 31-33. This case does not present a suitable opportunity

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[7] Petitioner alleges disagreement among district court cases, Pet. 17-20, but such disagreement does not justify this Court's review. S. Ct. Rule 10(a).

[8] Petitioner is correct that *United States ex rel. Wood* v. *Allergan, Inc.* (2d Cir.) (No. 17-2191) raises the issue whether a relator can remedy a first-to-file violation by amending his complaint, although the case may be resolved on other grounds. See Order, *U.S. ex rel. Wood* v. *Allergan, Inc.* (2d Cir. July 17, 2017) (No. 17-1583) [Dkt. 60] (requesting briefing on whether relation back would be barred for an amended complaint). The amendment issue also might be raised in *United States ex rel. Denis* v. *Medco Health Solutions, Inc.* (3d Cir.) (No. 17-3562), although the district court in that case ultimately dismissed the action with prejudice based on the FCA's public disclosure bar.

There is no reason to hold this case pending the disposition in *Wood* or *Denis*. Those cases may be decided on other grounds, and are unlikely to be decided for months yet. *Wood* is scheduled for oral argument on February 7, 2018, and will take at least a few months to resolve. The briefing process has only begun in *Denis*; relator's opening brief is due February 12, 2018. The Fourth Circuit took more than four months after oral argument to resolve this case, and *Shea* took nine months.

to review that issue because "[e]ven if the first-to-file bar were to sound in non-jurisdictional terms * * * the result * * * would not change." *Carter*, 144 F. Supp. 3d at 873 n.1. The decisions below turned on the first-to-file bar's plain language and the specific allegations in petitioner's proposed amended complaint, not the jurisdictional nature of the first-to-file bar. See pp. 8, 13-14, *supra*. The decision in *Shea* likewise turned on the FCA's plain language rather than its conclusion that the first-to-file bar was not jurisdictional. See Gov't Br. *Amicus Curiae* 15, *U.S. ex rel. Wood* v. *Allergan, Inc.* (2d Cir.) (No. 17-2191) [Dkt. 57] ("U.S. *Wood* Br.") (dismissal is required "regardless of whether the first-to-file bar is jurisdictional"). Because there is no indication the lower court's characterization of the bar changed the outcome, there is no basis for this Court's review. Cf. *Johnson* v. *DeGrandy*, 512 U.S. 997, 1003 (1994) ("Any conflict in these two formulations is of no consequence here. This Court reviews judgments, not statements in opinions." (citation omitted)).

C. The Fourth Circuit's Decision Is Correct

The Fourth Circuit's decision accords with the plain text of the FCA, this Court's understanding of the first-to-file bar, and the purpose of the FCA.

1. The plain language of the first-to-file bar requires dismissal of petitioner's complaint because earlier-filed related cases "w[ere] pending when [petitioner] filed suit." *Carter*, 710 F.3d at 183. The FCA provides that "no person other than the Government may * * * bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). "[T]he relevant statutory text" thus "im-

poses a restriction on the 'bring[ing] of an 'action,'" which "[i]n ordinary parlance" happens "by commencing suit." Pet. App. 13 (quoting *Black's Law Dictionary* 231 (10th ed. 2014) and *U.S. ex rel. Chovanec*, 606 F.3d at 362) (alterations in original). "'[B]rought' and 'bring' refer to the filing or commencement of a lawsuit, not to its continuation.'" *Ibid.* (quoting *Harris* v. *Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065 (2001)). "Accordingly, the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time that the FCA action under review is commenced." *Ibid.* "Facts that may arise after the commencement of a relator's action, such as the dismissals of earlier-filed, related actions * * * do not factor into this analysis." *Ibid.*[9]

Even though the "first-filed suit is no longer pending," "the filing of an amended complaint * * * cannot alter when [petitioner] brought his action—i.e., at a time when a related suit was pending." *Shea*, 863 F.3d at 929-930. That reading is consistent with "[t]he 'general rule'" that "'if an action is barred by the terms of a statute, it must be dismissed' rather

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[9] Petitioner suggests that under the Fourth Circuit's first-to-file bar rule, the California action or *Carter I* were pending when *Duprey* and the Texas actions were brought, and thus the *Duprey* and Texas actions were themselves barred by the first-to-file bar and could not have barred *Carter III*. Pet. 28-29. Petitioner failed to preserve this argument because he did not make it to the district court in 2011, the court of appeals during the 2013 decision, this Court, or the district court on remand in 2015, and no lower court has ruled on it. In any event, the Texas action was filed in 2004 before *Carter I*, and it remained pending when *Carter III* was filed, see note 2, *supra*.

than left on ice." *Id.* at 929 (quoting *Hallstrom* v. *Tallmook Cty.*, 493 U.S. 20, 31 (1989)). "The Supreme Court recently confirmed" (*ibid.*) this reading in *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436 (2016), where it noted that a violation of the first-to-file rule "require[s], in express terms, the dismissal of a relator's action." 137 S. Ct. at 438. Petitioner identifies nothing in the language of the first-to-file bar that would permit an amendment to cure a first-to-file violation.

Petitioner contends that this Court should "avoid[] interpreting the FCA in literal * * * ways" on the grounds that conflicts with the "purpose of the overall statute." Pet. 26. But petitioner's proposed reading is difficult to square with the FCA's purposes. It would "give rise to anomalous outcomes." *Shea*, 863 F.3d at 930. For example, "if a relator brings suit while a related action is pending, her ability to proceed with her action upon the first-filed suit's completion could depend on the pure happenstance of whether the district court reached her case while the first-filed suit remained pending." *Ibid.* But "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." *Ibid.* Thus, the Fourth Circuit's reading "level[s] the playing field among relators consistent with the ordinary operation of the first-to-file bar as conceived by Congress." *Ibid.* Petitioner's contention that reading the first-to-file bar in accordance with its plain terms would "grant [d]efendants immunity" (Pet. 5) is fanciful. The FCA's "generous statute-of-

limitations period—[allowing filing] within six years of the violation or three years after the time at which U.S. officials knew or should have known of the violation, whichever occurs last," *U.S. ex rel. Grupp* v. *DHL Express (USA), Inc.*, 742 F.3d 51, 54 (2d Cir. 2014), provides ample time to pursue such claims.

Moreover, the real party in interest in FCA litigation, the United States, has strongly endorsed the reading of the first-to-file bar embodied in the decisions below. In an *amicus* brief the United States recently filed, the government explained that "a relator can cure a first-to-file violation only by initiating a new suit," not amending the complaint. U.S. *Wood* Br. 17. That view is consistent with the United States' traditional reading of the first-to-file bar. See Gov't Br. *Amicus Curiae* 26, *Chovanec*, 606 F.3d 361 (7th Cir. 2010), http://goo.gl/uscYwn ("[A] first-in-time qui tam complaint * * * which is subsequently dismissed prevents a second-in-time complaint from proceeding.") . Thus, even the real party in interest is unconcerned by the policy arguments petitioner raises. Pet. 25-31.[10]

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[10] The United States is equally unconcerned about what petitioner breathlessly calls "the ultimate act of hubris," Pet. 6-7, KBR's successful application for a performance bonus. The government has long known of petitioner's allegations but has never chosen to rescind KBR's payments or otherwise sanction KBR. Petitioner's claims would therefore likely fail on the merits. See *U.S. ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) ("[That] [the Defense Contract Audit Agency] investigated [relator]'s allegations and did not disallow any charged costs * * * is 'very strong evidence' that the requirements * * * are not material." (quoting *Universal Health Servs., Inc.* v. *U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)).

2. Petitioner's argument that first-to-file violations are automatically revived upon dismissal of the earlier-filed action turns almost exclusively on a single statement in this Court's 2015 decision that an earlier-filed suit "ceases to bar" later suits "once it is dismissed." *Carter*, 135 S. Ct. at 1978, cited at Pet. i, 3, 11, 14, 15, 20, 23, 24, 30-31. As the court below explained, petitioner's argument is "based on [an] unreasonable reading[]" of that decision. Pet. App. 15. That decision addressed only "whether [petitioner's] claims must be dismissed with prejudice under the first to file rule," and concluded that "the [FCA's] first-to-file bar keeps *new claims* out of court only while related claims are still alive." *Carter*, 135 S. Ct. at 1973, 1978 (emphasis added). The first-to-file bar thus "ceases to bar suit[s]" that are filed *after* the earlier filed case "is dismissed." *Id.* at 1978. This Court "did not reject, or even comment on, [the court of appeals'] holding 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.'" Pet. App. 15 (citations omitted). Petitioner's strained reading of this Court's opinion is belied by his own earlier description of the decision as a "directive[] to dismiss the matter without prejudice." Carter Ltr. 1-2 (E.D. Va.) (No. 11-cv-602) [Dkt. 96].[11]

Moreover, for all petitioner's current emphasis on improper water purification, those claims were dismissed in 2009 and he did not seek to revive them. See *Carter*, 710 F.3d at 175. His current claim is *time-card* fraud.

[11] Petitioner errs in contending that the first-to-file bar is not jurisdictional. Congress's direction that no private relator "may intervene or bring a related action," 31 U.S.C. § 3730(b)(5), is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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"an absolute, unambiguous, exception-free rule" barring access to court. *Carter*, 710 F.3d at 181. *United States* v. *Wong*, 135 S. Ct. 1625 (2015), called into question only whether certain statutes of limitations were jurisdictional; there is "no reason to believe" *Wong* "calls into question the jurisdictional character of requirements other than statutes of limitations." *Bennally* v. *United States*, No. 13-cv-604, 2015 WL 10987109, at *3 (D.N.M. Oct. 22, 2015). Nor "d[id] [*Wong*] * * * mean 'Congress must incant magic words,'" but only that "traditional tools of statutory construction" must show Congress imbued a procedural bar with jurisdictional consequences. 135 S. Ct. at 1632. Tellingly, Congress explicitly made the FCA's public disclosure bar non-jurisdictional, compare 31 U.S.C. § 3730(e)(4)(A) (2006) ("No court shall have jurisdiction * * * ."), with 31 U.S.C. § 3730(e)(4)(A) (2012) ("This court shall dismiss * * * ."), but left the first-to-file bar unchanged, though courts had treated it as jurisdictional. 144 F. Supp. 3d at 881 n.6.