No. 17-1060

In The
Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. BENJAMIN CARTER,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Despite Respondents' Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc., (collectively, "Defendants") inaccurate representations, three federal courts of appeals have adopted two conflicting positions regarding the proper application of 31 U.S.C. § 3730(b)(5) (the "first-to-file bar"). Defendants' attempt to exploit distinctions without differences does not diminish the fact that the appellate courts are divided on a critical question concerning the implementation of the False Claims Act ("FCA"): whether a later action may proceed following the dismissal of all prior actions, or if the first-to-file bar requires the later action to be refiled regardless of intervening events. Now, after successfully convincing the Fourth Circuit to split from the First Circuit, Defendants have inverted their own position and claim that the First, Fourth, and D.C. Circuits are not in conflict.[1]

The Fourth Circuit's decision directly conflicts with the First Circuit, and the D.C. Circuit has separately split with the First Circuit. Moreover, district courts throughout the country remain without guidance on this vital provision necessary for the proper operation of the FCA. The Fourth and D.C. Circuits fail to follow this Court's instruction concerning the first-to-file bar, and fully disregard Congressional intent.

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[1] Further highlighting the need for certiorari, Defendants provide three more questions for review in the opposition brief, in addition to the two questions Carter presents in the petition.

While the circuit courts of appeals are split, fraudulent actors cheer this confusion as it only helps to immunize them from liability – Defendants, for example, have avoided liability for providing non-potable water to American troops while profiteering to an obscene degree.

Additionally, this case presents the opportunity to address the circuit split on whether the first-to-file bar is jurisdictional. The Fourth Circuit persists in applying the first-to-file bar as if it were jurisdictional, once again ignoring this Court's guidance and instruction.

This case presents the optimal vehicle for the Court to resolve these important and recurring questions of federal law and Congressional intent. Unless reversed, the Fourth Circuit's interpretation will fuel this existing circuit split. This Court's guidance is necessary to help relators return improperly procured funds to the government, and to prevent culpable defendants from prevailing by running out the clock on otherwise meritorious *qui tam* actions.

To resolve these pressing questions, Petitioner Benjamin Carter ("Carter") respectfully requests that this Court grant certiorari to resolve this ever-widening circuit split and to establish a uniform, national rule regarding proper application of the first-to-file bar.

ARGUMENT

I. The Fourth Circuit's Decision Contributes to a Widening Circuit Conflict

The split between the circuit courts regarding proper application of the first-to-file bar is readily-apparent, yet Defendants claim that no such conflict exists. Opp. 21-26. This disingenuous attempt to downplay the significant divide between the Fourth and D.C. Circuits' decisions and the decision of the First Circuit fails as a matter of law, as evidenced by the practical implications of this divide. Tellingly, district and circuit courts themselves acknowledge this conflict, necessitating this Court's intervention.

A. The Circuit Courts Are in Open Conflict

1. The First Circuit Properly Accounts For This Court's Guidance

The First Circuit holds that, in light of this Court's decision in *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015) ("*Carter*"), later *qui tam* actions may proceed without interruption even if filed while prior but since-dismissed actions were pending. *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 3 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2517 (2016) ("*Gadbois*") (finding that "the tectonic plates shifted" post-*Carter*). The First Circuit's position is clear: later actions need not be dismissed and refiled, regardless of the existence of prior actions at time of filing. *Id*. at 6. Explicitly, the First Circuit found no reason to shackle the first-to-file bar with a "time-of-filing rule[.]" *Id.* at 5.

Therefore, courts within the First Circuit need not necessarily dismiss meritorious, later actions merely because a prior action existed. The First Circuit concluded, after weighing the costs and benefits of allowing later actions to continue uninterrupted, that allowing relators to proceed without refiling will

> [P]romote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action. . . . [Whereas requiring refiling] would needlessly expose the relator to the vagaries of filing a new action.

Id. at 4-6. Importantly, *Gadbois* accounts for any statute of limitations concerns through its focus on fairness and prevention of prejudice to the parties. Despite Defendants' suggestion to the contrary, defendants face no prejudice from ongoing litigation commenced prior to the running of the statute of limitations. Opp. 28. Defendants inappropriately claim that *Gadbois* only applies where the statute of limitation is not implicated. Opp. 21-23. Yet, the First Circuit never suggests this outcome, and never so much as mentions the statute of limitations during its analysis. Thus, Defendants' interpretation lacks merit.

2. The Fourth and D.C. Circuits Split from the First Circuit

In contrast, the Fourth and D.C. Circuits have staked out an inapposite interpretation: under the

first-to-file bar, later actions must be dismissed if they were filed while a prior action was pending. *United States ex rel. Carter v. Halliburton*, 866 F.3d 199, 207 (4th Cir. 2017); *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 931 (D.C. Cir. 2017). These circuits ask only one question: was a prior action pending at the time of filing? *Carter*, 866 F.3d at 208 (holding that "the reference point for a first-to-file analysis is the set of facts in existence at the time that the action under review is commenced"); *Shea*, 863 F.3d at 930. If the answer is yes, according to the Fourth and D.C. Circuits, the later action must be dismissed and refiled, without any concern for the equities of so doing.

This split is clear and decisive. When applying the first-to-file bar, the First Circuit looks to facts as they currently exist. In the opposite corner, the Fourth and D.C. Circuits look only at the circumstances that existed on the date of filing. The latter application ignores explicit directives of this Court, and frustrates Congressional intent.

3. The Fourth Circuit Irreconcilably Conflicts with the First Circuit

Even though the Fourth Circuit's holding directly conflicts with the First Circuit's, Defendants and the Fourth Circuit attempt to conceal this split by exaggerating factual distinctions between Carter's action and *Gadbois*. Opp. 19; *Carter*, 866 F.3d at 211.

The Fourth Circuit's position fails for three reasons. First, the Fourth Circuit incorrectly claims that

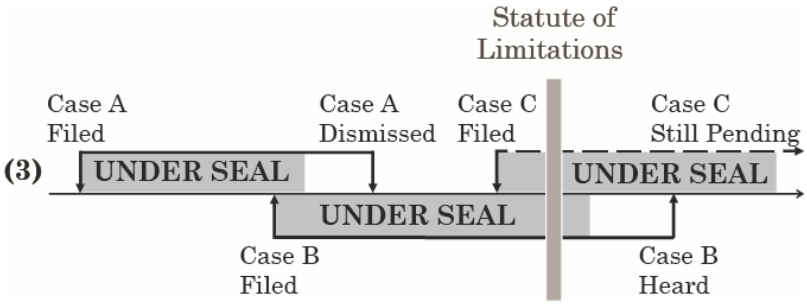
"*Gadbois* only addressed a situation where the relator sought to revise an FCA complaint with information pertaining to the related action that gave rise to the first-to-file defect." *Id.* This is false: *Gadbois* held that the dismissal of the prior action "dissolved" the first-to-file bar, regardless of how the relator proposed to amend its complaint or what the proposed amendment contained. *Gadbois*, 809 F.3d at 6. Second, the Fourth Circuit claims that Carter "makes no mention" of the dismissed prior actions. *Carter*, 866 F.3d at 211. This is false: Carter continuously referenced the dismissal of the prior actions throughout his briefing to the District Court and to the Fourth Circuit. Moreover, Carter provided the Fourth Circuit with the opportunity to correct its mistake by moving to amend his complaint with explicit reference to the prior actions, an opportunity which Fourth Circuit also denied. Last, and most importantly, the First and Fourth Circuits are split on the question presented here: whether later actions are forever barred if they were filed while a prior action was pending, regardless of the later actions' merit or the outcome of the prior action. *See Carter*, 866 F.3d at 210.

B. The Circuit Split Will Result In Disastrous Practical Consequences Absent This Court's Intervention

This circuit split poses grave concerns for relators, defendants, and courts. As *qui tam* actions can be brought in any district court, the lack of a national standard will produce highly chaotic results. Parties

will engage in forum shopping, and district courts will struggle to apply first-to-file bar in a consistent manner, leading to fractured results.

Carter has already provided the Court with the following scenario in his petition for certiorari, but it bears repeating as a demonstration of the existing circuit split, one that Defendants have provided no insight on how to resolve.



> Case B is filed while Case A is under seal. Case C is filed while Case B is under seal. Case A is eventually dismissed without ever reaching its merits.

In the First Circuit, Case B would be allowed to proceed despite having been filed while Case A was pending. In the event Case B is dismissed without reaching its merits, Case C would be allowed to proceed. Alternatively, in the Fourth and D.C. Circuits, neither Case B nor Case C could ever succeed, regardless of their merits, as each would be barred by the previous action and each would bar the subsequent action, while the statute of limitations would prevent both from refiling. This is an absurd and inequitable result which Congress could not have intended.

C. District Courts and Third Parties Recognize This Circuit Split

Defendants' absurdly narrow reading of relevant circuit court decisions does not distract from this clear, well-documented circuit split. Opp. 21. Each circuit squarely dealt with *qui tam* actions commenced after a prior action was filed, but heard after the prior action was dismissed without reaching its merits. As several district courts have acknowledged, there are two conflicting positions on this central issue.

Over the past two years, multiple district courts have confronted this question. Some agree with the Fourth and D.C. Circuits' position and require dismissal. *See*, *e.g.*, *United States ex rel. Denis v. Medco Health Sols., Inc.*, No. 11-684-RGA, 2017 U.S. Dist. LEXIS 1357 (D. Del. Jan. 5, 2017); *United States ex rel. Soodavar v. Unisys Corp.*, 178 F. Supp. 3d 358 (E.D. Va. 2016). Most district courts, however, have followed the First Circuit's lead, allowing meritorious claims to proceed. *See*, *e.g.*, *United States ex rel. Boise v. Cephalon, Inc.*, 159 F. Supp. 3d 550 (E.D. Pa. 2016); *United States ex rel. Brown v. Pfizer, Inc.*, No. 05-6795, 2016 U.S. Dist. LEXIS 25723 (E.D. Pa. Feb. 29, 2016); *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772 (S.D.N.Y. 2017). Given the frequency with which this question arises, immediate intervention is warranted.

Not only have lower courts examined these developments and identified this circuit split, so too have many unbiased third parties, including numerous, well-respected members of the defense bar. These

sources, a small sampling of which are included here, find that the circuits are in conflict on this very issue.

When it serves their purposes, as it does here, Defendants and the defense bar claim that there is no circuit split. Opp. 21-25. This position is belied by statements to their clients and the public, where they correctly identify the existing circuit split and the havoc it is creating among litigants. In an update to clients regarding this very issue, Gibson, Dunn & Crutcher LLP analyzed the decisions from the First, Fourth, and D.C. Circuits and found that their holdings create a "split of authority *that may eventually reach the Supreme Court*." (*2017 Year-End False Claims Act Update*, GIBSON, DUNN & CRUTCHER LLP (Jan. 5, 2018), https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-false-claims-act-update.pdf) (emphasis added). Likewise, Haynes & Boone LLP found the question of whether a later action could proceed following the dismissal of the earlier action "*remains an issue that divides courts across the country*." (*2017 Year in Review – The False Claims Act*, HAYNES AND BOONE, LLP (Jan., 2018), http://www.haynesboone.com/~/media/files/practice%20group%20pdfs/fca_2017_review.ashx) (emphasis added). Wilmer Cutler Pickering Hale and Dorr LLP published a similar report surveying the confusion resulting from this split, finding that some courts hold "amendment impermissible, and others permit amendment." (*False Claims Act: 2017 Year-in-Review*, WILMERHALE LLP (Jan. 9, 2018), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/

Publications/WH_Publications/Client_Alert_PDfs/2018-01-09-FCA-Year-in-Review.pdf). It is clear to everyone but Defendants that a circuit split exists and that immediate intervention by this Court is necessary to restore uniformity of application to the first-to-file bar. Ironically, the only source that does not believe a circuit split exists is Defendants themselves. *See* John P. Elwood and Ralph C. Mayrell, *A Bad Week for Copycat Relators* (Aug. 3, 2017), https://www.velaw.com/Blogs/FCA-Blog/A-Bad-Week-for-Copycat-Relators-Fourth-and-D-C-Circuits-Say-First-to-File-Bars-Cases-Brought-While-Earlier-Filed-Cases-Were-Pending-Even-After-Earlier-Case-Is-Dismissed/.

II. Carter Neither Waived Nor Forfeited Any Arguments

Carter preserved the positions advanced in his petition and acted diligently to present these issues at the appropriate time. Forfeiture "is the failure to make the *timely* assertion of a right," whereas "waiver is intentional relinquishment of a *known* right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added). Carter never abandoned or failed to assert a legal right, nor has Carter delayed in asserting his rights, despite Defendants' increasingly shrill insistence that this Court is somehow barred from hearing his claims. Opp. 15-21.

Prior to this Court's decision in *Carter*, there was no precedent establishing that the first-to-file bar dissolved following the dismissal of an earlier filed

complaint; nor was there precedent establishing that amendments or supplemental pleadings cured a first-to-file defect. *Carter*, 135 S. Ct. at 1979 (2015); *Gadbois*, 809 F.3d at 1 (concluding "as a matter of first impression"). Therefore, Carter could not have waived a *known* right, as the right had not yet been established. Opp. 16. Indeed, it was Carter who first presented these issues to the Court, and this Court's decision in *Carter* that established both of these principles. Therefore, Carter did not waive or forfeit his right to pursue these topics before this Court.

Defendants' attempt to muddy the waters by relying on out-of-context quotes from distinguishable actions is of no import. Similarly, Defendants' reliance upon *United States. v. Coppedge*, 490 F. Appx. 525, 531 U.S. App. LEXIS 15830 (4th Cir. 2012) (per curiam) is misplaced. Opp. 17. *Coppedge*, an unreported and non-precedential decision, dealt with a party's knowing waiver of a legal right clearly settled under the law at the time of its waiver. *Coppedge*, 490 F. Appx. at 531. *Coppedge* does not apply here where the legal right alleged to be waived – the ability to cure first-to-file defects – did not yet exist when Carter supposedly waived it.

As evidenced by the procedural history of this case, Carter did not waive or forfeit his opportunity to raise first-to-file issues, having consistently maintained that, should he be barred from proceeding under the first-to-file bar, amendment and relation back was the appropriate remedy. *See* Carter Letter, *United States ex rel. Carter v. Halliburton*, No. 11-cv-602 (E.D.

Va. Aug. 11, 2015), ECF No. 96. ("The most appropriate relief would be to (1) permit Carter to amend his Complaint, treat the amendment as a filing for first-to-file purposes, and order that such filing relates back to Carter's previous filings; or (2) dismiss this case without prejudice and permit Carter to re-file and relate back that filing to the date of the filing of the Complaint in this action."). Carter did indeed move to so amend on September 8, 2015, and, on reconsideration asked the District Court to enunciate its position on the merits of relating the proposed pleading back to the original date of his initial Complaint;[2] the District Court directly addressed this issue, deciding it in

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[2] Carter moved to amend on September 8, 2015, but by the time *Gadbois* was decided, the District Court had dismissed his case, *see United States ex rel. Carter v. Halliburton*, 144 F. Supp. 3d 869 (E.D. Va. 2015), and Carter had already briefed his motion for reconsideration. *See* Motion for Reconsideration, 11-cv-602 (E.D. Va. Dec. 10, 2015) [Dkt. 129]. It would have been duplicative and unnecessary, post-*Gadbois*, to file a second motion under Rule 15(d) while Carter's motion to amend under 15(a) was still pending and on appeal to this Court. It was not until this Court's decision on July 31, 2017, that Carter was in a position to move under Rule 15(d), and did so promptly. Moreover, not only would it have been unnecessarily confusing to file a new motion under 15(d), but courts apply the same analysis under 15(a) as under 15(d). *See, e.g., Franks v. Ross*, 313 F.3d 184, 199 n. 15 (4th Cir. 2002) ("the standards used by a district court in ruling on a motion to amend or on a motion to supplement are nearly identical"); *see also Ohio Valley Envt'l Coalition v. U.S. Army Corps. of Engineers*, 243 F.R.D. 253, 255-256 (S.D. W. Va. 2007) (holding same and that "any mislabeling by a party does not prevent [a] court from construing a motion to amend as a motion to supplement").

Carter's favor. *United States ex rel. Carter v. Halliburton*, 315 F.R.D. 56, 63-65 (E.D. Va. 2016).

As demonstrated by the aforementioned procedural history, Carter has properly preserved the issues and questions contained in his petition, and those issues are properly before this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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