App. No. ___

In the Supreme Court of the United States

ESTATE OF ROBERT CUNNINGHAM; RYAN UEHLING; OMNI HEALTHCARE INC.; AMADEO PESCE; JOHN DOE A/K/A CRAIG DELIGDISH,
Petitioners,

v.

MARK MCGUIRE,
Respondent.

APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI FROM AUGUST 29, 2019 TO SEPTEMBER 27, 2019

To the Honorable Justice Breyer, as Circuit Justice for the United States Court of Appeals for the First Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, petitioners the Estate of Robert Cunningham, Ryan Uehling, Omni Healthcare Inc.,[*] Amadeo Pesce, and John Doe a/k/a Craig Deligdish respectfully request that the time to file a petition for a writ of certiorari in this case be extended for 29 days to and including September 27, 2019. The court of appeals issued its opinion on May 6, 2019. *See* App. A, *infra*. The court denied a timely petition for rehearing and rehearing en banc on May 31, 2019. *See* App. B, *infra*. Absent an extension of time, the petition would be due on August 29, 2019. Petitioners are filing this application more than

[*] Omni Healthcare Inc. hereby states that it has no parent corporation, and that there is no publicly held corporation that owns 10% or more of its stock.

ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

BACKGROUND

This case presents significant questions of national importance relating to the False Claims Act (FCA), 31 U.S.C. §§ 3729-33, and implicates a deep circuit split over the meaning of the statute.

This controversy began with Robert Cunningham's 2009 lawsuit against Millennium Laboratories, a lab testing company that defrauded the government by submitting claims for medically unnecessary testing. *See United States ex rel. Cunningham v. Millennium Labs., Inc.*, 202 F. Supp. 3d 198, 201 (D. Mass. 2016). As required by the FCA, Cunningham filed his complaint under seal, and also served the United States with a disclosure statement containing additional information and evidence to substantiate his allegations and assist the government in investigating the alleged fraud. 31 U.S.C. § 3730(b)(2). Cunningham cooperated with the government until his death in 2010, at which point his estate continued his action, and his attorneys continued to provide information to the government. *See Cunningham*, 202 F. Supp. 3d at 201. The estate is one of the petitioners before this Court. The government elected not to intervene in Cunningham's case, and the case is awaiting an appeal that has been stayed pending the outcome of these proceedings. *Id*. at 202.

In 2012, respondent Mark McGuire filed his own FCA action against Millennium, also alleging the submission of claims for medically unnecessary testing.

Cunningham, 202 F. Supp. 3d at 202. The government intervened in McGuire's case, as well as two other actions against Millennium. *Ibid*.

In 2015, the government reached a settlement agreement with Millennium under which Millennium agreed to pay $227 million, plus interest, in exchange for releases of claims relating to medically unnecessary tests and kickbacks. App. A, at 3; *Cunningham*, 202 F. Supp. 3d at 202. The agreement provides that 15% of the settlement amount is set aside for the *qui tam* relators that sued Millennium to split among themselves, either by agreement, or by judgment of the district court if the relators cannot agree. *See* App. A, at 3; *Cunningham*, 202 F. Sup. 3d at 202.

McGuire sought the relator's share. In the district court, McGuire asserted a cross-claim against the other relators (petitioners here) seeking the entire award. App. A, at 3. Petitioners filed motions to dismiss the cross-claim, arguing that McGuire's claim is barred by the FCA's "first to file" provision, which provides that "[w]hen a person brings an action under this subsection, 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) (emphasis added). The Cunningham estate's motion argued principally that Cunningham, who filed three years before McGuire, was first to file—and that this could easily be determined by examining the statutorily required evidentiary disclosure statement containing the underlying facts—and so McGuire's claim is barred. App. A, at 3-4.

Under First Circuit precedent when the motion was filed, the "first to file" provision was jurisdictional, and a court considering a motion to dismiss on first to

file grounds was therefore entitled to consider not only the allegations in the pleadings, but any relevant fact. *See Cunningham*, 202 F. Supp. 2d at 204-05. Applying this rule, the district court granted Cunningham's estate's motion to dismiss McGuire's claim. The court acknowledged that "McGuire's complaint states a plausible claim that he is the 'first to file' relator," such that a Rule 12(b)(6) motion arguing otherwise would fail. *Id*. at 207. The court also recognized that Cunningham's complaint against Millennium, standing alone, did not set forth all of the allegations that later formed the basis for the government's complaint in intervention and the settlement. But the court held that "Cunningham's motion to dismiss constitutes a factual, rather than a sufficiency, challenge" to the court's jurisdiction under Rule 12(b)(1). *Id*. at 204. In that procedural posture, the district court was not confined to the pleadings, but was permitted also to consider the evidentiary disclosures containing the underlying facts that Cunningham had provided to the government with his complaint. And, the court held, "once Cunningham's submissions are considered it becomes apparent that McGuire [was] not" the first relator to file because Cunningham's disclosures provided significant additional facts about the defendant's fraud that enabled the government to investigate and prosecute it. *Id*. at 207.

McGuire appealed, and the First Circuit reversed. The court of appeals overturned its own precedent holding that the first to file provision is jurisdictional. The court of appeals believed that this Court's decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), cast doubt on its

prior precedents by discussing the first to file provision in non-jurisdictional terms. App. A, at 18. It also determined that under this Court's other precedents regarding when a statute will be treated as jurisdictional, the first to file rule does not qualify. *Id*. at 19.

The First Circuit explained that its holding regarding the nature of the first to file provision limited the evidence it could consider. "Because we hold that the first-to-file issue is to be addressed under Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1), we confine our review to the pleadings and to facts subject to judicial notice." App. A, at 6. After excluding Cunningham's evidentiary disclosures from consideration, the First Circuit held that McGuire was the first to file because Cunningham's complaint did not cover the same frauds that McGuire's complaint covered, and the government proceeded against the fraud McGuire identified. *Id*. at 28-30.

The First Circuit denied petitioners' timely petition for rehearing. *See* App. B.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended for 29 days, to September 27, for several reasons.

First, Petitioners only recently retained undersigned counsel for the filing of a petition for a writ of certiorari before this Court. Additional time is necessary for counsel to review the substantial record in the case as well as the decisions of other courts of appeals in order to prepare a clear and concise petition for the Court's review.

Second, the press of other matters makes the submission of the petition difficult absent an extension. Petitioners' counsel is currently responsible for numerous pending matters in the courts of appeals and this Court. These include:

- August 23: An opening brief in *Federal Trade Commission v. Qualcomm Incorporated*, No. 19-16122 (9th Cir.);
- August 28: A response brief in *Danziger & De Llano, LLP v. Morgan Verkamp, LLC*, No. 19-1986 (3d Cir.);
- September 9: Oral argument in *Shatsky v. Palestine Liberation Organization*, No. 17-7168 (D.C. Cir.); and
- A certiorari-stage amicus brief relating to a petition currently due on August 30.

Third, no prejudice would result from the extension. Whether the extension is granted or not, the petition will be considered during this Term—and, if the petition were granted, the case could be heard and decided during this Term.

Finally, the petition is likely to be granted. This case implicates an acknowledged circuit split over whether the "first to file" provision is jurisdictional. A majority of the circuits that have considered the question disagree with the First Circuit's decision in this case. *Compare United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1246 (10th Cir. 2017) (treating the first to file bar as "a jurisdictional limit on the courts' power") (quotation marks omitted), *cert. denied*, 138 S. Ct. 1298 (2018); *United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199, 203 n.1 (4th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 2674 (2018); *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015) (same); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009) (same); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516

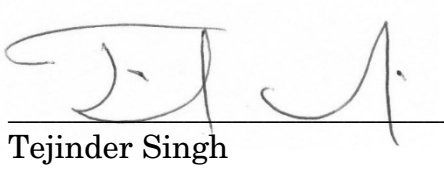
(6th Cir. 2009) (same), *with United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir.) (first to file bar not jurisdictional), *cert. denied*, 138 S. Ct. 199 (2017); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015) (same), *cert. denied*, 136 S. Ct. 2505 (2016).

Moreover, as the decisions below illustrate, this question is important. The proper construction of the first to file bar was outcome-determinative here: by construing the bar as a merits provision limited to the pleadings, the First Circuit excluded evidence that the district court relied upon to reach the opposite result. Of course, whether the first to file provision is jurisdictional is important for other reasons too, including establishing the proper separation of powers, and determining whether first to file issues can be waived.

CONCLUSION

For the foregoing reasons, the time to file a petition for a writ of certiorari should be extended for 29 days to and including September 27, 2019.

Respectfully submitted,



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