No. ___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MARK MCGUIRE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, permits *qui tam* relators to sue on the United States' behalf to recover damages for frauds against the government. In a successful case, the relator keeps a share of the proceeds.

A provision of the FCA's private right of action, sometimes called the "first to file bar," 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). Under this provision, when multiple relators bring actions based on the same underlying facts, every action after the first must be dismissed while the first remains pending.

The circuits are split, five to three, over whether Section 3730(b)(5) is jurisdictional. Here, the First Circuit joined the minority, holding that because Section 3730(b)(5) is not jurisdictional, a court adjudicating a motion to dismiss may only consider pleadings and facts subject to judicial notice, as opposed to all of the "facts underlying" the relevant actions. Applying this rule, the First Circuit held that a relator who sued a defendant over two years after the first relator was nevertheless "first to file" because the two relators' complaints are different. The district court had reached the opposite conclusion after considering all the facts (not just the complaints).

The question presented is whether Section 3730(b)(5) is a jurisdictional provision that permits courts to consider all of the "facts underlying the pending action" to determine its application.

PARTIES TO THE PROCEEDING

Petitioners and respondent were relators for the United States, the District of Columbia, and the following States and Commonwealths: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin. These governments were not parties to the court of appeals proceeding.

Wendy Johnson, Allstate Insurance Co., and Lawrence K. Spitz were plaintiffs in the district court and relators for the above jurisdictions. These plaintiffs were not parties to the court of appeals proceeding (Johnson was listed as a non-party plaintiff on the docket, Allstate Insurance Co. and Spitz were listed as "interested parties"). Respondent reported to the First Circuit that he has "reached an agreement" with these parties, presumably to share the proceeds if he prevails. Pet. App. 13a n.8.

Millennium Laboratories, Inc.; Millennium Laboratories of California, Inc.; James Slattery; and Howard Appel were defendants in the district court and were not parties to the court of appeals proceeding.

CORPORATE DISCLOSURE STATEMENT

Omni Healthcare Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RELATED PROCEEDINGS

Proceedings directly on review:

United States ex rel. McGuire v. Millennium Labs., Inc., No. 17-1106 (1st Cir. May 6, 2019)

United States v. Millennium Labs., Inc., No. 1:12-cv-10132-NMG (D. Mass. Aug. 19, 2016)

Related proceedings:

United States ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc., No. 14-1911 (1st Cir.)

United States ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc., No. 12-1258 (1st Cir. Apr. 12, 2013)

United States v. Millennium Labs., Inc., No. 1:14-cv-14276-NMG (D. Mass.)

United States v. Millennium Labs., Inc., No. 1:14-cv-13052-RGS (D. Mass.)

United States v. Millennium Labs., Inc., No. 1:13-cv-10825-NMG (D. Mass.)

United States v. Millennium Labs., Inc., No. 1:12-cv-12387-NMG (D. Mass.)

United States v. Millennium Labs., Inc., No. 1:12-cv-10631-NMG (D. Mass.)

United States v. Millennium Labs. of Cal., Inc., No. 1:09-cv-12209-NMG (D. Mass.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners the Estate of Robert Cunningham (Cunningham), Ryan Uehling, Omni Healthcare Inc., Amadeo Pesce, and John Doe a/k/a Craig Deligdish respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The First Circuit's opinion (Pet. App. 1a-27a) is reported at 923 F.3d 240. The district court's opinion on petitioners' motions to dismiss (Pet. App. 28a-48a) is reported at 202 F. Supp. 3d 198. The district court's opinion on respondent's motion for reconsideration (Pet. App. 49a-51a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The court denied a timely petition for rehearing en banc on May 31, 2019 (Pet. App. 52a-53a). On August 20, 2019, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 27, 2019. On September 13, 2019, Justice Breyer further extended the time to October 25, 2019. No. 19A189. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The False Claims Act's private right of action, 31 U.S.C. § 3730(b), provides:

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be

brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) [*footnote 1: So in original. Probably should be a reference to Rule 4(i).*] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When 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.

STATEMENT OF THE CASE

1. This petition arises out of a successful case under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, against Millennium Laboratories, a urinalysis lab. In 2009, Robert Cunningham sued Millennium, alleging it had fraudulently billed the government for medically unnecessary lab tests.

The FCA's private right of action is unusual in that it requires relators to file their complaints under seal and serve them upon the government, but not upon the defendant. 31 U.S.C. § 3730(b)(2). It also requires the relator to serve on the government a separate "written disclosure of substantially all material evidence and information" in his possession. *Ibid*. The purpose of the sealed filing and the written disclosure statement is to enable the government to conduct an investigation before deciding whether to bring criminal charges, intervene in the FCA action, or pursue an alternate remedy against the defendant. During such investigations—which can take years—the government typically asks additional questions of, or re-

quests additional material from, the relator. Then, after the government reviews all of this information and makes its intervention decision, the action is unsealed by the district court, the complaint is served on the defendant, and the litigation begins.

All of that happened here. Cunningham brought his action by filing his complaint under seal and serving it on the government, together with an evidentiary "disclosure statement containing additional information and voluminous source materials to substantiate his allegations and to assist the government in investigating the alleged fraud." Pet. App. 30a. Then, throughout the government's investigation, "Cunningham continued to cooperate with the government and to provide additional materials until his death in December, 2010." *Ibid.* After that, his "estate and its attorneys . . . continued to respond to requests from the government pursuant to its ongoing investigation and to provide the government with additional materials." *Ibid*. Cunningham eventually filed an amended complaint in 2011.

As the district court explained, the complaint and the required written disclosure, together, described Millennium's fraud on the government. Specifically:

> Cunningham explained that Millennium convinced doctors to use its in-office, multi-panel, qualitative screening tests, which screened for eleven commonly tested drugs, to test urine samples for multiple drugs at the same time. Millennium then convinced physicians to implement "standing orders" which dictated that urine samples would be sent to Millennium for quantitative testing to confirm the results of the in-office screening tests. That

> confirmation testing was reflexive, requiring samples to be re-tested for all drugs, regardless of whether there was any reason a) to doubt the in-office results or b) to test the patient for that particular drug. Such testing without an individualized assessment of patient need was wasteful and contrary to the existing standard of care. Cunningham further alleged that Millennium profited from billing the government for such excessive drug testing.
>
> In order to convince doctors to participate in such a scheme, Cunningham alleged, Millennium encouraged them to bill for the in-office, multi-panel test in a manner which would garner them reimbursement "far in excess of the value of the test." Cunningham asserted that Millennium provided the multi-panel test kits at a low price (less than $10) and encouraged doctors to bill for miscellaneous clinical tests when they used the kits rather than for just one multi-panel test. Such a practice was, according to Cunningham, fraudulent and abusive and a violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, and the Stark Law, 42 U.S.C. § 1395nn. Millennium, nevertheless, informed doctors that it was a proper method of billing.

Pet. App. 39a-40a.[1]

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[1] The government ultimately declined to intervene in Cunningham's case, which was dismissed. That dismissal was successfully appealed; the complaint was dismissed again on remand;

In January 2012, respondent McGuire brought his own FCA action against Millennium. This "action also alleged that Millennium submitted claims for medically unnecessary testing and caused physicians to submit fraudulent claims." Pet. App. 31a. As summarized by the First Circuit:

> McGuire alleged that after a point-of-care test discloses an unexpected drug (or shows the lack of an expected drug), a physician can order confirmatory tests. These tests, which require sophisticated equipment and so can be expensive, determine how much of the substance is present (or not).
>
> McGuire alleged that Millennium engaged in a scheme that resulted in unnecessary confirmatory tests being performed and billed to the government after the point-of-care tests. Millennium persuaded physicians to execute "custom profiles," which are standing orders for a battery of confirmatory tests on every urine sample, regardless of whether the point-of-care testing showed a need. . . .
>
> . . .
>
> McGuire also alleged that Millennium provided free point-of-care cups (test kits) to physicians to induce them to send confirmation testing orders to Millennium. This tactic helped Millennium gain market share in a highly competitive and potentially quite lucrative business.

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and the second dismissal was appealed. That appeal has been stayed pending the outcome of these proceedings. Pet. App. 31a.

Id. at 9a-10a.

Other relators (some of them petitioners here) subsequently brought additional cases against Millennium, focused on medically unnecessary testing and kickbacks. "All told, eight FCA cases have been filed against Millennium by different relators and the government has chosen to intervene in three," including McGuire's. Pet. App. 31a.

The government's complaint in intervention focuses on two fraudulent schemes: "(1) Millennium's submission of claims for excessive and unnecessary urine drug testing ordered by physicians through standing orders without an individualized assessment of patient need; and (2) urine drug testing referred by physicians who received free point-of-care testing supplies, in violation of the Stark Act and the Anti-Kickback Statute." Pet. App. 10a-11a.

In October 2015, the government and several intervening States reached a settlement with Millennium, under which Millennium agreed to pay $227,000,000, plus interest. Pet. App. 12a, 31a. The settlement releases claims relating to the fraudulent schemes described in the preceding paragraph, which are defined in the agreement as the "covered conduct." *Id.* at 31a-32a. Seven of the eight relators joined the settlement agreement, which provides that 15% of the settlement is set aside for the relators—to be apportioned among them either by agreement, or by the district court if the relators could not agree. *Ibid*.

2. Respondent McGuire filed a cross-claim in the district court against petitioners seeking a declaratory judgment that he is entitled to the entire 15% share. Pet. App. 3a. His claim alleges that two of petitioners

(Cunningham and Pesce) did not allege conduct covered by the government's settlement, which renders them ineligible. As to the remaining relators, McGuire alleged that he brought an action alleging the covered conduct before them, and so their actions are barred and they are not entitled to any relief. In support of this allegation, McGuire relies on Section 3730(b)(5), colloquially known as the "first to file bar," even though the statutory text itself never mentions "filing." Instead, it provides, in full, 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). McGuire's cross-claim asserted that he was the first relator to bring a relevant action against Millennium, and that Section 3730(b)(5) therefore precluded any recovery for subsequent relators. *See* Pet. App. 3a.

Petitioners moved to dismiss the cross-claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Pet. App. 32a. They argued that Cunningham—who had sued more than two years before McGuire—was actually the first relator to bring an action against Millennium based on these underlying facts, or in the alternative that the other relators were first, such that McGuire's cross-claim should be dismissed under Section 3730(b)(5).

The district court granted Cunningham's motion to dismiss, concluding that Cunningham was the first relator to bring a qualifying action. Pet. App. 42a, 47a. Under First Circuit precedent at the time, Section 3730(b)(5) was treated as jurisdictional. The district court reasoned that, with respect to subject matter ju-

risdiction, "Cunningham's motion to dismiss constitutes a factual, rather than a sufficiency, challenge. Accordingly, the Court may consider evidence extrinsic to McGuire's complaint in resolving the motion." *Id.* at 36a.

Although McGuire argued that the district court should have restricted its analysis to the parties' complaints, the district court disagreed, explaining that "the statute itself provides no basis for such a restriction." Pet. App. 36a. Instead, the court explained, the statutory text, which bars any subsequent action that is "'based on the facts underlying the pending action' . . . does not restrict consideration to the complaints but rather focuses more broadly on the factual content of the action itself." *Id*. at 37a. The court also noted that its "analysis would be incomplete" if it did not consider "written disclosures outside the complaint," because the purpose of Section 3730(b)(5) is to determine "whether the relator provided the government sufficient notice that it was the potential victim of a fraud worthy of investigation," and the written disclosures a relator is statutorily required to provide "are a required component of the notice that a relator must provide for the government." *Ibid*. (quotation marks and citations omitted). The court further acknowledged that prior First Circuit precedent had recognized "that it is appropriate for a Court to consider extraneous materials when deciding a 12(b)(1) motion based upon the 'first to file' rule." *Ibid*. (citing *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 33 (1st Cir. 2009)).

Applying this rule, the district court found, "[a]fter considering Cunningham's complaint, first

amended complaint (which was filed prior to the commencement of McGuire's action) and the documents . . . which were provided to the government prior to the filing of McGuire's complaint," that Cunningham was the first relator to bring an action to redress the fraud that gave rise to the settlement in this case. Pet. App. 39a. Notwithstanding minor changes in the way Millennium carried out its fraud over time, the court concluded that "Cunningham's materials provided the government with sufficient notice to initiate an investigation into Millennium's allegedly fraudulent practices," which is all that Section 3730(b)(5) requires. *Id.* at 41a (cleaned up).

The jurisdictional nature of Section 3730(b)(5) was plainly dispositive to the motion, because the district court went on to consider Cunningham's alternative argument under Rule 12(b)(6)—a motion that is limited, by rule, to the sufficiency of the pleadings. The court denied that motion, explaining that "Cunningham's arguments rely extensively on documents outside of McGuire's complaint. Without such support, those arguments fail. McGuire's complaint states a plausible claim that he is the 'first to file' relator although, as explained above, the Court finds that once Cunningham's submissions are considered it becomes apparent that McGuire is not." Pet. App. 42a-43a.

Having dismissed McGuire's cross-claim, the court denied the remaining petitioners' motions to dismiss the cross-claim as moot. Pet. App. 47a.

3. The First Circuit reversed. The court of appeals held "that the first-to-file rule is not jurisdictional," and that "McGuire was the first-to-file relator and that he has stated a claim that he is entitled to the relator's share of the settlement." Pet. App. 3a.

In concluding that Section 3730(b)(5) is not jurisdictional, the First Circuit abrogated circuit precedent based on its reading of this Court's recent decisions, which warn against "profligate use of the term 'jurisdiction.'" Pet. App. 15a (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). The court of appeals also reasoned that in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), this Court discussed Section 3730(b)(5) after deciding a non-jurisdictional statute of limitations defense—thus suggesting that this Court would not regard the provision as jurisdictional. Pet. App. 16a. The First Circuit acknowledged, however, that even after *Carter*, the Fourth Circuit has "maintained that the first-to-file rule is jurisdictional." *Id*. at 16a n.12. Indeed, the Fourth Circuit did so on remand in *Carter* itself. The First Circuit disagreed with that holding.

As in the district court, the question whether Section 3730(b)(5) is jurisdictional was dispositive—such that the opposite answer produced the opposite result vis-à-vis the motion to dismiss. The First Circuit explained that "[b]ecause 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." Pet. App. 5a. The court accordingly limited its "background discussion to facts alleged in Cunningham's amended complaint, McGuire's original complaint, and in the government's complaint in intervention and settlement agreement." *Id*. at 6a. The court noted that "[t]he district court analyzed Cunningham's motion to dismiss as a factual challenge under Rule 12(b)(1) and so engaged its broad authority to

look outside the pleadings to determine its own jurisdiction." *Id*. at 20a n.14 (quotation marks omitted). But the First Circuit took a narrower approach, and excluded from consideration the statutorily mandated evidentiary disclosures that Cunningham had provided to the government. *See id.* at 5a-6a, 19a-20a; *see also id.* at 23a-24a ("First-to-file analysis is limited to the four corners of the relevant complaints.").

Applying that non-jurisdictional rule, the First Circuit "conclude[d], based on those two complaints, that Cunningham and McGuire do not allege similar frauds, but allege different frauds with different mechanisms." Pet. App. 24a. Specifically, the court of appeals determined that Cunningham's complaint focused on medically unnecessary *initial* urine tests, while McGuire's complaint focused on medically unnecessary *confirmatory* tests—and that Cunningham's allegations about point-of-care urine cups merely alleged that the cups were provided on the cheap in order to encourage doctors to perform the tests, while McGuire alleged that they were provided for free in exchange for referrals, and therefore constituted an illegal kickback. *See id*. at 25a. Because "Cunningham's allegations do not include the essential elements of the fraud McGuire alleged," and because the government pursued and settled the fraud alleged by McGuire, the court reversed the district court's decision dismissing McGuire's cross-claim under Section 3730(b)(5). *Id*. at 25a-26a.[2]

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[2] The court of appeals did not discuss the other relators' motions to dismiss McGuire's complaint, which had been denied by the district court as moot, and were not at issue in the appeal.

4. Petitioners timely sought rehearing en banc, which was denied. Pet. App. 53a. This petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for four reasons. First, the question presented implicates a deep, acknowledged, and entrenched circuit split over whether Section 3730(b)(5) is jurisdictional. Second, the question is important and recurring. It implicates weighty concerns regarding the separation of powers, and will have practical import in many FCA cases because Section 3730(b)(5) is potentially relevant whenever multiple relators might sue over the same fraud (*i.e.*, every large fraud case). Third, this case presents an ideal vehicle to address the question, as the district court and the court of appeals reached opposite results in this case based on their differing answers to the question. Finally, the First Circuit's legal conclusion was incorrect.

I. The Circuits Are Split Five to Three.

The circuits are divided over whether Section 3730(b)(5) is jurisdictional or not. The split is entrenched and unlikely to resolve itself without this Court's intervention.

1. The majority of circuits that have considered the question (five) hold that Section 3730(b)(5) is jurisdictional.

In *United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2674 (2018), the Fourth Circuit, on remand from this Court, reiterated circuit precedent holding that "'[i]f a

court finds that the particular action before it is barred by the first-to-file rule, the court lacks subject matter jurisdiction over the later-filed matter,' and dismissal is therefore required." *Id*. at 203 (quoting *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017)). The court acknowledged that at the time, two circuits had "held that a first-to-file defect bears only on the merits of a relator's action, rather than on a district court's jurisdiction over it." *Id*. at 203 n.1. But, the court explained, "[w]e have previously held otherwise, and we do not attempt to revisit this Circuit's rule here." *Ibid*. (citation omitted).

In *United States ex rel. Little v. Triumph Gear Systems, Inc.*, 870 F.3d 1242 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1298 (2018), the Tenth Circuit treated Section 3730(b)(5) as "a jurisdictional limit on the courts' power." *Id*. at 1246 (quoting *United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004)). In that case, a relator (named Blyn) sued the defendant in 2012. *Id.* at 1245. A few months later, the relator's lawyer (named Little) filed an amended complaint in the same action, naming himself and a third party (named Motaghed) as the sole relators, and excising the original relator. *Ibid.* The defendant moved to dismiss the second complaint under Section 3730(b)(5), the district court denied the motion, and the Tenth Circuit reversed, holding that the filing of the amended complaint constituted a prohibited intervention in a pending action. *Ibid.*

The jurisdictional nature of Section 3730(b)(5) was important: the court rejected the relators' attempt to further amend the complaint to re-add the original plaintiff, reasoning that because the district court lacked jurisdiction over the amended complaint, the

problem could not be cured by further amendment. The Tenth Circuit also declined to overrule circuit precedent holding that Section 3730(b)(5) was jurisdictional. *See Little*, 870 F.3d at 1251 (citing *Grynberg*, 390 F.3d at 1278, and refusing to reconsider the validity of that decision).

The Ninth Circuit also "treat[s] the first-to-file bar as jurisdictional." *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015). District courts in that circuit have relied on its precedents, as well as the Tenth Circuit's holding in *Little*, to dismiss second-filed FCA claims for lack of jurisdiction. *See, e.g.*, *United States ex rel. Doe v. Janssen Pharm. N.V.*, 2018 WL 5276291, at *2 (C.D. Cal. Apr. 19, 2018).

In *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, 560 F.3d 371, 376 (5th Cir. 2009), the Fifth Circuit explained that "Congress has placed a number of jurisdictional limits on the FCA's *qui tam* provisions, including § 3730(b)(5)'s first-to-file bar." The court explicated that "[u]nder this provision, if [the plaintiff's] claim had already been filed by another, the district court lacked subject matter jurisdiction and was required to dismiss the action." *Id*. at 376-77.

The Sixth Circuit agrees with the majority view that Section 3730(b)(5) is a "jurisdictional limit on the courts' power to hear certain duplicative qui tam suits," which "furthers the policies animating the FCA by ensuring that the government has notice of the essential facts of an allegedly fraudulent scheme while, at the same time, preventing opportunistic plaintiffs from bringing parasitic lawsuits." *United States ex rel.*

Poteet v. Medtronic, Inc., 552 F.3d 503, 516 (6th Cir. 2009) (quotation marks and citations omitted).

2. In contrast with the majority view, three circuits hold that Section 3730(b)(5) is not jurisdictional.

In *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015), the D.C. Circuit became the first court of appeals to break with the consensus view and hold that Section 3730(b)(5) is not jurisdictional. The court reasoned that the provision is not clearly phrased in jurisdictional terms, while certain other provisions of the FCA are—and it therefore inferred that the provision is not a jurisdictional limit on courts' power. *See ibid*.

In *United States ex rel. Hayes v. Allstate Insurance Co.*, 853 F.3d 80, 85 (2d Cir. 2017) (per curiam), the Second Circuit "join[ed] the D.C. Circuit in holding that the first-to-file rule is not jurisdictional and instead bears on the merits of whether a plaintiff has stated a claim." The court acknowledged, however, that "[s]everal circuits have stated or assumed that the first-to-file rule is jurisdictional." *Ibid*.

In this case, the First Circuit changed its position, shifting from the majority view to the minority one, and deepening the circuit split while acknowledging that the Fourth Circuit has gone the other way.

3. This split is unlikely to resolve itself without this Court's intervention. Courts of appeals on both sides of the split have acknowledged it, yet declined to join the other side. *See* Pet. App. 16a & n.12; *Carter*, 866 F.3d at 203 n.1; *Hayes*, 853 F.3d at 85. These include recent decisions in both directions. Moreover, the scope of the circuit split makes it unlikely to self-correct: three circuits adopted the minority view *after*

a consensus among the circuits had developed, and now five circuits would have to abandon their settled precedents to achieve uniformity with the First Circuit's decision in this case—a feat that is unlikely, to say the least.

4. The circuit split is also particularly untenable because it is now possible that if an action were brought in a court that deems Section 3730(b)(5) jurisdictional, and a subsequent action against the same defendant were brought in a jurisdiction that deems Section 3730(b)(5) non-jurisdictional, district courts in those two circuits might consider different evidence and reach opposite conclusions regarding which action was brought first. This potential is well-illustrated by the district court and First Circuit's disagreement in this case, which turned on the district court treating Section 3730(b)(5) as jurisdictional, while the court of appeals refused to. FCA actions regarding nationwide schemes frequently are brought in different districts, and so the risk is real.

II. The Question Presented Is Important and Recurring.

Whether Section 3730(b)(5) is jurisdictional is both important and recurring. In this case, the question was important for a very practical reason: its answer dictated the evidence courts were able to consider in applying Section 3730(b)(5)—to dispositive effect. The question is important for myriad other reasons, too, including that jurisdictional objections bear on the separation of powers; they cannot be waived by litigants; they typically are not subject to equitable exceptions; the plaintiff bears the burden at the pleading stage to establish jurisdiction, while a defendant must

establish that dismissal is warranted under Rule 12(b)(6); and actions dismissed for jurisdictional reasons ordinarily can be re-filed (whereas dismissals on the merits typically are with prejudice).

Recognizing the importance of these concerns, this Court has frequently granted certiorari to decide whether particular provisions are jurisdictional when, as here, the lower courts diverge. *See, e.g.*, *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (granting certiorari "to resolve a conflict among the Courts of Appeals over whether Title VII's charge-filing requirement is jurisdictional"); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16, 19 (2017) (deciding whether time to appeal, set forth in Federal Rule of Appellate Procedure 4, was jurisdictional); *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (granting certiorari to determine whether statute of limitations in 18 U.S.C. § 3282 is jurisdictional); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630 (2015) (granting certiorari "to resolve a circuit split about whether" the time limits in 28 U.S.C. § 2401(b) are jurisdictional, and therefore not subject to equitable tolling, or not); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 152 (2013) (granting certiorari "to resolve a conflict among the Courts of Appeals over whether the 180-day time limit in 42 U.S.C. § 1395*oo*(a)(3) constricts the Board's jurisdiction"). It should grant certiorari in this case, too.

The question presented is also likely to recur. Section 3730(b)(5) comes up all the time in cases involving large-scale frauds, because it is highly likely that multiple potential relators will know about the fraud and bring their own actions to redress it. Courts evaluating whether a particular action is first should know

whether they are adjudicating a jurisdictional matter or a merits-based one—and of course should know which evidence they can consider in adjudicating a motion to apply Section 3730(b)(5).

Even in cases in which the question never actually comes up, the application of Section 3730(b)(5) matters because any relator will want to know whether facts set forth in a disclosure statement, but not in a complaint, will trigger Section 3730(b)(5)'s bar. If the answer is "yes," then relators will be more comfortable filing a concise pleading, and may not feel compelled to file amended complaints every time new evidence comes to light. If the answer is "no," then relators will want to err on the side of caution by filing prolix complaints detailing every known or potentially knowable fact about the defendant's conduct—and by updating the complaint as frequently as possible when new information comes in to prevent a later relator from poaching the action.

III. This Case Is an Excellent Vehicle to Resolve the Question.

This case presents a pure question of law that was outcome-determinative below. The district court determined that Cunningham's complaint, alone, did not demonstrate that McGuire's was duplicative, but that the statutorily mandated evidentiary disclosures submitted alongside Cunningham's complaint did. *See* Pet. App. 42a-43a. The court accordingly determined that while Cunningham's motion to dismiss failed under the narrow merits rubric of Rule 12(b)(6), it easily succeeded under the broader subject-matter jurisdiction analysis of Rule 12(b)(1), which allowed consideration of those materials. *Ibid*. Applying this rule, the

court granted judgment to Cunningham as a matter of law. *Id*. at 47a.

The First Circuit did not fault the district court's assessment of the evidence. It did not dispute, for example, that Cunningham's evidentiary disclosures described the fraudulent scheme that McGuire alleged in his complaint. Instead, the First Circuit held, as a matter of law, that a court conducting the analysis could not consider evidentiary disclosures at all "[b]ecause . . . the first-to-file rule is to be addressed under Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1)," and so the court was required to "confine" its review to the pleadings and facts subject to judicial notice. Pet. App. 5a. Limiting its analysis accordingly, the First Circuit reached the opposite result.

It is also a virtue that in this case, the dispute over the application of Section 3730(b)(5) arises between two relators, as opposed to a putative second relator and a defendant. The relators are in the best position to advocate for the primacy of their respective actions, and each of the parties here has a strong interest in his position.

Finally, there are no other issues that would prevent this Court from interpreting Section 3730(b)(5). Although McGuire raised some alternative arguments below, the First Circuit did not reach them, and all can be addressed on remand to the extent necessary. *See, e.g.*, Pet. App. 8a n.6 (McGuire's argument that Cunningham's claim does not count as a "pending" claim); *id.* at 14a n.10 (McGuire's argument that his cross-claim is not subject to Section 3730(b)(5)). Thus, this case presents a clean vehicle to adjudicate the question presented.

IV. The First Circuit's Decision Is Wrong.

Certiorari should also be granted because the First Circuit's decision is wrong. Section 3730(b)(5) should be treated as a jurisdictional provision, under which a court is required to consider all of the facts underlying a pending action to determine whether a subsequent action is barred. At a minimum, that consideration necessarily includes facts described in evidentiary disclosures in addition to the relator's complaint.

1. Start with the statutory text. Section 3730(b)(5) provides, in full, that: "When 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). The relevant "subsection" is subsection (b), entitled "actions by private persons." It provides that "[a] person may bring a civil action for a violation of [the FCA] for the person and for the United States Government." *Id*. § 3730(b)(1). The subsection also expressly requires the written evidentiary disclosure in addition to the complaint: it provides that in any private action under the subsection, "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government." *Id*. § 3730(b)(2). The service of "*both* the complaint and the material evidence and information" triggers a clock for the government to make an intervention decision. *Ibid.* (emphasis added).

The plain text of subsection (b) establishes that to "bring" an "action" under the FCA, a relator must do

more than merely file a complaint; he must also provide a written disclosure of all material evidence and information in his possession to the government. Indeed, courts have recognized that failure to submit the required evidentiary disclosure "would defeat the relator's authority to pursue the *qui tam* action." *United States ex rel. Woodard v. Country View Care Ctr., Inc.*, 797 F.2d 888, 891-92 (10th Cir. 1986); *United States ex rel. Doe v. CVS Corp.*, 1999 WL 33912815, at *3 (D.S.C. June 14, 1999); *United States ex rel. Made in the USA Found. v. Billington*, 985 F. Supp. 604, 608 (D. Md. 1997) (bare bones disclosure does not satisfy the statute).

It follows, then, that in deciding whether a later-brought action is "based on the facts underlying [a] pending action" that was brought "under this subsection," courts should consider not only the complaints, but also the required evidentiary disclosures—which were key to "bringing" the action in the first instance.

Other features of the text confirm that Congress did not intend for the analysis under Section 3730(b)(5) to be limited to complaints alone. Specifically, Section 3730(b)(5) says "facts"; it does not say "allegations"—and the two are not synonyms. Facts are the actual circumstances underlying a lawsuit. Allegations in a complaint are claims that the defendant did something wrong based on a summary of the most legally relevant facts. Moreover, nobody thinks that complaints (even complaints subject to Federal Rule of Civil Procedure 9(b)) must allege *all* of the underlying facts; they must only allege enough to enable the defendants to respond. *See, e.g.*, *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 503-04 (6th Cir. 2008). Thus, while a complaint is the logical

starting point for an inquiry into the facts underlying a lawsuit, there is no sound reason to treat it as the end-point—and Congress certainly did not mandate such a narrow inquiry when it enacted Section 3730(b)(5).

The structure of the statute confirms that Congress understands the distinction between allegations and facts. Another provision, known as the "public disclosure bar," provides that a court shall dismiss an action or claim "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in an enumerated forum. 31 U.S.C. § 3730(e)(4)(A). There, Congress expressly based dismissal on allegations. Elsewhere, in the statute of limitations, the statute refers to "facts"—and there, the word means underlying facts, and not only allegations. *See* 31 U.S.C. § 3731(b)(2) (starting the limitations clock "when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances").

Reading the word "facts" in Section 3730(b)(5) to include facts set forth in evidentiary disclosures is also the most consistent with Section 3730(b)(5)'s core purpose, which "is to provide incentives to relators to promptly alert the government to the essential facts of a fraudulent scheme." *Carson*, 851 F.3d at 302 (quotation marks omitted). Courts have accordingly recognized that "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds," so that Section 3730(b)(5) applies. *Id.* at 303 (quotation marks omitted).

This raises the question: how does the government actually learn "the essential facts of a fraudulent scheme"? The answer is not that the government only reviews the allegations in a relator's complaint. It also reviews the evidentiary disclosures to shape its own investigation. *See, e.g.*, *In re Nat. Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1233 (D. Wyo. 2006) ("The well-recognized purpose of the disclosure requirement is to provide the government with ample information to investigate and permit an informed decision on intervention."), *aff'd in part*, 562 F.3d 1032 (10th Cir. 2009); *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 235 F.R.D. 661, 663 (N.D. Ill. 2006); *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 555 (C.D. Cal. 2003); *CVS Corp.*, 1999 WL 33912815, at *3. As the district court explained, evidentiary disclosures "are a required component of the 'notice' that a relator must provide for the government." Pet. App. 37a. And they usually contain information about the fraud that is not contained in the complaint. That is why the Section 3730(b)(5) "analysis would be incomplete" if a court did not consider "written disclosures outside the complaint." *Ibid*.

The foregoing establishes that the purpose of the evidentiary disclosure requirement in subsection (b)(2) overlaps significantly with the purpose of the bar in subsection (b)(5): both are designed to ensure that the relator timely communicates the facts in his possession to the government. The best way to ensure that these two statutory provisions accomplish their common purpose is to read them in harmony with each other, using the disclosure submitted pursuant to subsection (b)(2) during the application of subsection (b)(5).

Reading the phrase "facts underlying the pending action" to include all of the facts—and not only the allegations in the complaint—also resolves a number of practical problems. First, it relieves the relator of having to file prolix complaints setting forth every jot and tittle of every false claim. Imagine, for example, that a relator had good information relating to hundreds, or thousands, of false claims (which is not uncommon in health care cases). The relator could lard up the complaint with anecdotes and data about each claim—but that would serve little purpose. It would be far more elegant to plead the details of representative example false claims, and to provide the more comprehensive descriptions to the government in the evidentiary disclosure. But if courts cannot consider facts outside the complaint, that approach risks allowing an opportunistic subsequent relator to file a complaint based on false claims that the first relator's complaint did not mention.

Second, a rule that goes beyond the pleadings acknowledges that not all of the useful information a relator gives to the government will necessarily be allegations about the defendant's conduct. For example, a relator may not have firsthand knowledge of the contents of certain records in the defendant's possession—but may have good reason to suspect that they contain incriminating information, and may be able to tell the government where to look for the records or who to ask for them. Those disclosures may lead the government to new facts underlying the relator's claims—but an analysis focused solely on complaints would miss them.

Similarly, a rule that focuses on the plain meaning of the word "facts" makes far more sense once a

case gets past the pleading stage. Consider a hypothetical that is slightly different from this case, but illustrative. Assume that a case was brought, survived a motion to dismiss, and went into discovery. In the course of discovery, evidence was uncovered revealing that the fraud was broader than originally alleged in the relator's complaint (for example, that it included an additional form of kickback)—and that evidence was used in the summary judgment briefing. Nobody would think that a second relator was entitled, at that moment, to file a new claim based on the fraud described in the summary judgment record of a pending case. But that outcome is the natural consequence of reading Section 3730(b)(5) narrowly to include only allegations in a complaint.

This case provides another good illustration. Cunningham sued Millennium in 2009 alleging that it was billing the government for medically unnecessary tests. In the course of the government's investigation, Cunningham disclosed that Millennium was not only billing the government for initial tests, but unnecessary confirmatory tests as well, which were ordered without regard to patient need. McGuire's complaint, which came after Cunningham's disclosures, focuses on those confirmatory tests. By considering all of the facts that Cunningham conveyed to the government, the district court correctly determined that McGuire's complaint was based on the same facts underlying Cunningham's action. The First Circuit's blinkered application of the statute, by contrast, led it to conclude that even though the government had been informed, by a *qui tam* relator with a pending action, of

Millennium's confirmatory testing fraud, that was irrelevant because that information was not the focus of the relator's complaint.

2. It follows from the foregoing that Section 3730(b)(5) should be interpreted as a jurisdictional provision. To be sure, the provision is not phrased expressly in jurisdictional terms—and under this Court's most recent precedents, that fact cuts against treating it as jurisdictional. But Section 3730(b)(5), which was added to the FCA in 1986,[3] predates those recent precedents, and there is good reason to think that Congress intended it to function as a jurisdictional provision.

First, it clearly makes sense for Section 3730(b)(5) to be applied as early as possible in a second-filed action, in order to save party and judicial resources if the action must be dismissed. Indeed, the vast majority of cases apply Section 3730(b)(5) at the pleading stage. If, as argued above, the word "facts" in Section 3730(b)(5) encompasses all of the relevant facts, and not just allegations in complaints, then a motion on the pleadings under Rule 12(b)(6) is manifestly not the right way to address Section 3730(b)(5). A motion to dismiss for lack of jurisdiction under Rule 12(b)(1), which permits consideration of all pertinent jurisdictional facts, is a far better procedural mechanism because it would permit early consideration of Section 3730(b)(5), while also allowing courts to consider all of the pertinent evidence.

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[3] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3155.

Second, Section 3730(b)(5) functions more like a jurisdictional provision than it does like a defense on the merits. For example, as this Court held in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015), dismissals under Section 3730(b)(5) should be without prejudice, so that cases can be brought again if and when a pending action ceases to be "pending." That, of course, is the same relief that would apply if a case were dismissed for lack of subject matter jurisdiction—and is not the relief that ordinarily would apply to a dismissal for failure to state a claim. Moreover, as the Fourth Circuit has explained, Section 3730(b)(5) is "an absolute, unambiguous exception-free rule." *Carson*, 851 F.3d at 305 (quotation marks omitted). That description more closely resembles a limitation on subject matter jurisdiction than an element of a claim.

Third, Congress has acquiesced in the jurisdictional interpretation of Section 3730(b)(5). In 2009 and 2010, Congress significantly amended the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). At the time, every circuit court to have considered the question had concluded that Section 3730(b)(5) was jurisdictional. *See, e.g.*, *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009); *Branch Consultants*, 560 F.3d at 378; *Poteet*, 552 F.3d at 516; *Grynberg*, 390 F.3d at 1278; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001). But Congress made no changes to Section 3730(b)(5)—strongly suggesting that it did not intend to change its jurisdic-

tional character. That stands in contrast with amendments Congress made to the "public disclosure bar" provision, 31 U.S.C. § 3730(e)(4), to remove references to jurisdiction—making it clear that Congress did not intend for that provision to be jurisdictional. *See* Patient Protection and Affordable Care Act, tit. X, § 10104, 124 Stat. at 901.

3. Respondent will likely argue that even if a court should consider facts outside the pleadings to apply Section 3730(b)(5), it does not necessarily follow that the provision must be jurisdictional. Or, he may argue the converse: that even if Section 3730(b)(5) is jurisdictional, it does not follow that courts should consider materials outside the pleadings to identify the facts underlying the pending action. For the reasons given above, this argument is unpersuasive; the scope of the statute informs the inquiry into its jurisdictional character, and vice versa.

For certiorari purposes, the point that matters most is that the First Circuit clearly believes that whether Section 3730(b)(5) is jurisdictional informs its scope and application in important ways. The court of appeals stated, unequivocally and more than once, that it was "confin[ing its] review to the pleadings and to facts subject to judicial notice," precisely "*[b]ecause* . . . the first-to-file issue is to be addressed under Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1)." Pet. App. 5a (emphasis added); *see also id.* at 19a-20a & n.14 (reiterating that "we confine our review to the pleadings and to facts susceptible to judicial notice," and contrasting that approach with the district court, which "analyzed Cunningham's motion to dismiss as a factual challenge under Rule 12(b)(1) and so engaged its broad authority to look outside the

pleadings to determine its own jurisdiction") (quotation marks omitted). To the court of appeals, then, Section 3730(b)(5)'s scope followed as a matter of course from its non-jurisdictional character.

Prior First Circuit precedent also supports the argument that when Section 3730(b)(5) is treated as jurisdictional, courts should apply it more broadly. In *Duxbury*, the First Circuit stated "that, in reviewing a dismissal for lack of jurisdiction, we need not confine our jurisdictional inquiry to the pleadings, but may consider those other materials in the district court record." 579 F.3d at 33 (quotation marks omitted). The court declined to consider the evidentiary disclosures in *Duxbury* because they had been provided to the government *after* the other relator's complaint. Here, Cunningham's pertinent disclosures were provided to the government *before* McGuire's complaint—and so were eligible for consideration if the First Circuit had adhered to its precedent holding Section 3730(b)(5) jurisdictional (which, of course, is exactly why the district court considered them).

Consequently, even if respondent shows that it is *logically possible* for a court to hold that Section 3730(b)(5)'s jurisdictional character is a separate issue from Section 3730(b)(5)'s scope, it is plain that at least some courts (including most importantly, the lower courts here) regard these issues as inextricably intertwined. *See United States ex rel. Lisitza v. Johnson & Johnson*, 765 F. Supp. 2d 112, 123 (D. Mass. 2011) (considering a relator's evidentiary disclosure statements to determine which facts count for purposes of Section 3730(b)(5)). Thus, even if the Court agrees with respondent that the statute's jurisdictional character and its scope are independent questions, the only

way to establish that rule is to grant certiorari in this case and say so. If the Court goes that route, it should hold that whether Section 3730(b)(5) is jurisdictional or not, it should be applied according to its plain text to require consideration of all of "the facts underlying the pending action"—and not only the allegations in the complaint—to determine whether a second action is "related" to the first.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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