No. 19-583

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

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. Shortly after it intervened in Respondent Mark McGuire's False Claims Act suit against Millennium Laboratories, a urinalysis laboratory, the United States reached a $227 million settlement. The settlement agreement expressly stated that the settlement was paid on account of two alleged fraudulent schemes: Millennium's use of standing orders (or "Custom Profiles") that caused physicians to order confirmatory urine drug tests ("UDT")[1] without an individualized assessment of patient need; and Millennium's provision of free point-of-care testing cups ("POC Cups"), in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, to induce physicians to order UDT. Pet.App.10a-12a. Both the First Circuit and the District Court acknowledged that Respondent was the first relator to file an FCA complaint which alleged these fraudulent schemes. Pet.App.24a-26a, 36a, 42a.

Subsequent to Respondent filing his action against Millennium, six FCA actions were brought against Millennium, three of which were brought by

[1] Urine drug testing is ordinarily performed in two stages. First, a qualitative test, sometimes called a screen, is performed to detect the presence or absence of 11 or 12 drugs, both licit and illicit. This testing can be performed in a physician's office using a point-of-care specimen cup. When a physician's office performs the testing, the office is entitled to modest reimbursement. If the screen reports an unexpected result—the presence of a drug not expected or the absence of a drug prescribed for the patient—confirmatory testing on particular substances can be performed to confirm the screen results. Confirmatory testing is complex, can only be performed by qualified laboratories and is reimbursed at a higher rate.

Petitioners Uehling, Doe (a/k/a Deligdish), Pesce and Omni Healthcare, Inc. These petitioners conceded below that they filed after Respondent. Pet.App.13a, n.8.

2. A fruitless FCA action against Millennium was also brought prior to Respondent filing his action. Robert Cunningham, a former compliance officer for one of Millennium's competitors, brought virtually identical FCA actions against five of his employer's competitors. Pet.App.6a. All of these complaints, including the one filed against Millennium, alleged that the competing UDT laboratory fraudulently employed a "Physician Billing Model" and then conspired with 10,000 John Doe physicians to defraud federal health care programs. According to Cunningham, Millennium (and the other competitors) encouraged the John Doe physicians to purchase POC Cups and then bill federal health plans for every class of drug tested, as opposed to billing a single claim for the single qualitative test.

Consequently, physicians were reimbursed multiple times for performing a simple test with a specimen cup that cost less than $10. Cunningham alleged that because the Physician Billing Model was so lucrative for the John Doe physicians, they also performed unnecessary drug screening and consequently ordered excessive confirmatory UDT. None of Cunningham's complaints refer to the use of standing orders or custom profiles. Nor did Cunningham allege that Millennium provided free testing cups to induce confirmatory UDT.

In March 2011, the United States declined to intervene and Cunningham's action against Millennium was unsealed.[2] Millennium moved to dismiss on the ground that Cunningham's allegations had been substantially disclosed in a prior defamation action filed by Millennium against Cunningham's employer in state court, and thus fell afoul of the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A).[3] The District Court agreed and dismissed Cunningham's case on January 30, 2012, less than a week after Respondent filed his FCA action under seal.

The First Circuit reversed in part and affirmed in part. *U.S. ex rel. Estate of Cunningham v. Millennium Laboratories of Cal., Inc.*, 713 F.3d 662 (1st Cir. 2013). It found that the misconduct alleged by Cunningham had three aspects. The conspiracy between Millennium and the John Doe physicians allegedly caused: (1) the United States to be billed excessively for the POC Cup testing; (2) the physicians to bill for more qualitative UDT testing than they would have otherwise ordered; and (3) the physicians to order more confirmatory

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[2] Cunningham voluntarily dismissed the actions against Millennium's competitors shortly thereafter.

[3] At the time Cunningham filed his actions, the public disclosure bar was indisputably a jurisdictional defense. Unlike § 3730(b)(5), the prior version of § 3730(e)(4) expressly stated that "[n]o court shall have jurisdiction over an action" that did not comply with the statutory requirement. The quoted language was removed when the FCA was amended in 2010. The amendment was not retroactive and does not apply to actions, such as Cunningham's, that were pending on the effective date. *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283, n.1 (2010).

UDT. *Id*. at 665-66. The First Circuit ruled that aspects 1 and 3 were based on transactions substantially disclosed in the previously filed state court action, but the allegation that Millennium caused excessive qualitative testing was not previously disclosed. *Id*. at 671-73, 675-76. The court further determined that the flaws in Aspects 1 and 3 could not be cured by amendment. *Id.* at 675. The court remanded the case back to the District Court on the narrow claim that Millennium had caused excessive qualitative testing claims to be presented.

On remand, Cunningham sought leave to amend his complaint. In the proposed amended complaint Cunningham laid out, for the first time, the claim that Millennium improperly employed standing orders to cause physicians to order expensive confirmatory UDT without an individualized assessment of patient need. Respondent's complaint had been filed 18 months earlier, but it was still under seal and was unknown to the parties and the Court. The District Court denied the motion to amend, finding, inter alia, Cunningham's attempt to add claims relating to the improper use of standing orders did not survive the Court of Appeals' ruling that Cunningham's excessive confirmation testing claims were jurisdictionally barred. Further, Cunningham improperly attempted to add new claims, which had arisen after his complaint had been filed, without complying with FCA filing requirements set forth in 31 U.S.C. § 3730(b). *U.S. ex rel. Estate of Cunningham v. Millennium Laboratories of Cal., Inc.*, 2014 WL 309374, *2 (D. Mass., Jan. 27, 2014). Judgment

entered against Cunningham on January 28, 2014, and has never been vacated.[4]

3. In October 2015, after the United States intervened in Respondent's action (and two of the later filed FCA actions brought by three of the Petitioners), Millennium, the United States, several states, and the relators in numerous FCA actions against Millennium (including Respondent and each of the Petitioners) entered into a settlement agreement. The agreement expressly defined the "Covered Conduct" for which the $227 million was being paid. All relators were required to dismiss all of their qui tam claims against Millennium with prejudice.[5]

The settlement agreement also provided that in exchange for the releases tendered by the relators, the United States would pay 15% of its recovery as a relator's share pursuant to 31 U.S.C. § 3730(d). The settlement agreement did not address which particular relator (or relators) was entitled to the award, but provided that the United States would pay when it received notice that the dispute between the relators was

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[4] Cunningham did appeal to the First Circuit, but in 2015 he requested the appeal to be stayed pending the settlement discussions with Millennium and then the post settlement proceedings in Respondent's FCA action. Cunningham's appeal is likely moot as Cunningham has dismissed all of his FCA claims against Millennium with prejudice pursuant to the settlement.

[5] The settlement reserved the rights of the relators to pursue their rights to a share of the relator's award, to seek reasonable costs, attorney's fees and expenses from Millennium under 31 U.S.C. § 3730(d), and to maintain claims for employment retaliation pursuant to 31 U.S.C. § 3730(h) and related state law claims.

resolved, "whether by agreement, final nonappealable judicial order, or binding alternative dispute resolution." To determine who was entitled to the relator's share, Respondent brought a crossclaim for a declaratory judgment in his FCA action, naming Petitioners as crossclaim defendants.

4. Each of the Petitioners moved to dismiss the crossclaim pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the ground that Cunningham, not Respondent, was the first to file an action that alleged that Millennium had engaged in the fraudulent schemes that were the basis for the settlement. Petitioners' motions did not rely on the allegations in Cunningham's complaint. Instead, Petitioners pointed to an 833 page appendix filed by Cunningham (the "Appendix"), which contained Cunningham's original written disclosure under 31 U.S.C. § 3730(b)(2), supplemental disclosures and other written communications between Cunningham's counsel and the U.S. Attorney's office. Petitioners asserted that within the Appendix were statements that put the Government on notice that Millennium encouraged physicians to place standing orders for confirmatory UDT for every patient, regardless of whether the screen results were positive or negative.

None of the documents contained in the Appendix were exhibits to the crossclaim, documents incorporated into the complaint by reference or matters of which a court could take judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Petitioners, however, contended that the

question of whether an action was barred by the FCA's first-to-file rule was jurisdictional, and argued, consequently, that materials outside the complaint could be reviewed. Where the asserted basis for a court's jurisdiction is subject to a "factual challenge," the district court can consider evidence outside the pleadings. *See U.S. ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 251 (1st Cir. 2016). Cunningham also moved to file the Appendix under seal on the basis that his disclosures to the United States were protected opinion work product, informing the District Court that he would not serve the Appendix on Respondent until his motion to seal was allowed. Pet.App.44a. The District Court did not rule on the Motion to Seal until it decided Petitioners' motions to dismiss. *Id.* Consequently, the Appendix was not served on Respondent until after the motions to dismiss were decided.

Respondent opposed the motions to dismiss because the evidence Petitioners relied upon—the Appendix—could not establish Cunningham was first to file. Respondent cited extensive authority that first-to-file analysis under 31 U.S.C. § 3730(b)(5) was conducted solely by comparing the complaint at issue to the earlier filed complaint. Respondent argued that the Appendix could not be considered in connection with Petitioners' Rule 12(b)(6) motions because the materials it contained were beyond the scope of the complaint. He opposed the Rule 12(b)(1) motions on the grounds that the Appendix was immaterial to the

first-to-file inquiry, and that § 3730(b)(5) was not a jurisdictional limitation.

The District Court rejected Respondent's position. Relying on *U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014), the District Court held that the first-to-file bar is jurisdictional. Pet.App.34a. It ignored *Ven-A-Care*'s holding that determination of first to file under the FCA raised a question of law, 772 F.3d at 938, ruling instead that the question warranted a factual review of material outside the scope of the crossclaim. Pet.App.36a. The District Court rejected that only complaints should be reviewed to determine first to file. Finding that the focus of the first-to-file test was whether the initial filer provided the government with sufficient notice of the alleged fraud, it reviewed Cunningham's written disclosures. Pet.App.37a. Summarizing some of the statements in the Appendix, it found that Cunningham had provided notice of the custom profile fraud. It also found that the POC cups provided by Millennium encouraged physicians "to bill in excess of their permissible value." Pet.App.39a-41a. The court acknowledged, however, that without the documents contained in the Appendix, Cunningham's argument that he was first to file failed. Pet.App.42a. It denied Petitioners' Rule 12(b)(6) motions. Pet.App.42a-43a.

The District Court was unaware that the Appendix had never been served on Respondent. Pet.App.44a-45a. Respondent brought the matter to the attention of the District Court in a motion to reconsider. The reconsideration motion also raised several other arguments

including that the First Circuit's decision in *Cunningham*, 713 F.3d 662, precluded the District Court's ruling on the scope of Cunningham's action; that an action jurisdictionally barred under the FCA's public disclosure bar, such as Cunningham's, did not bar a later filed action under § 3730(b)(5); that the decision was at odds with the District Court's prior decision (made by a different judge) to not permit Cunningham to amend his complaint to add the custom profile fraud; and that Cunningham's unsuccessful action had not put the United States on notice of the fraud. The District Court denied the reconsideration motion. Pet.App.50a-51a.

5. On appeal, the First Circuit separately analyzed the questions of whether § 3730(b)(5) is a jurisdictional restriction, Pet.App.14a-19a, and what materials are reviewed in determining first to file under that statute, Pet.App.22a-24a. Confirming its earlier precedents that determination of the first to file is a question of law, and finding that the "basic facts are uncontested," the First Circuit went beyond vacating the District Court's erroneous grant of Petitioners' motions to dismiss. It held, as a matter of law, that Respondent was first to file and that he was entitled to the relator's share. Pet.App.26a-27a.

The First Circuit ruled that "several compelling reasons" required it to overrule its prior rulings on whether the first-to-file rule is jurisdictional. Those "compelling reasons" were this Court's clear instructions in a series of recent decisions.

The First Circuit recognized that in order to "ward off profligate use of the term 'jurisdiction,'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), this Court had developed a "readily administrable bright line" rule in recent years which examined whether Congress had "'clearly state[d]' that the provision under review is jurisdictional." Pet.App.15a, *quoting Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006). The First Circuit concluded that applying this Court's "bright line rule leads to only one conclusion: that the first-to-file rule is nonjurisdictional." Pet.App.17a.

Examining the text of § 3730(b)(5), the First Circuit recognized that its language "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," *quoting Arbaugh* at 515, and *U.S. ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015), which also held the first-to-file rule was non-jurisdictional. Pet.App.17a. The First Circuit also observed that while jurisdictional language was missing from § 3730(b)(5), § 3730(e)(1) and (e)(2) expressly state that "[n]o court shall have jurisdiction over an action brought . . . " The different word choices Congress made within the same statute established that had Congress intended the first-to-file rule to operate as a jurisdictional restriction, it would have stated its intent explicitly. Pet.App.18a, *citing Heath* at 120.

Two other pronouncements by this Court led the First Circuit to overturn its prior authority and declare the first-to-file rule to be non-jurisdictional. First, in *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015) ("*Carter II*"), this Court

examined the bar on "decidedly nonjurisdictional terms," even though it believed that had the rule been a limitation on subject matter jurisdiction, this Court would have addressed the first-to-file issue before addressing a question concerning the FCA's statute of limitations. Pet.App.16a, *quoting Heath*, 791 F.3d at 121, n.4. And the First Circuit took seriously this Court's instruction in *Arbaugh*, 546 U.S. at 511, that "unrefined" dispositions that a provision was jurisdictional "should be accorded no precedential effect" if the earlier decision had failed to examine whether Congress intended the limitation at issue to be jurisdictional. In light of this instruction, the First Circuit concluded its earlier holdings on the jurisdictional nature of the first-to-file rule had to be accorded "no precedential effect." Pet.App.17a.

Finally, the First Circuit noted that the D.C. and Second Circuits had found that § 3730(b)(5) was nonjurisdictional because Congress had failed to state clearly that the first-to-file rule was jurisdictional. *Heath*, 791 F.3d at 120-21; *U.S. ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir. 2017). Based on *Carter II, Heath, Hayes* and this Court's clear statement rule, the First Circuit concluded the first-to-file rule was not jurisdictional. Pet.App.19a.

The First Circuit's jurisdictional decision was sufficient grounds to vacate the District Court's dismissal. Instead of remanding, however, the First Circuit elected to decide the underlying question of whether Respondent was the first to file. It did so because the issue was a matter of law that had been fully

briefed by the parties, neither party saw the need for remand and "because the basic facts are uncontested." Pet.App.20a. It observed that courts determine whether a later filed complaint is barred by § 3730(b)(5) by applying an "essential facts" test, which looks to see if the earlier filed complaint "contained all the essential facts" of the fraud alleged in the second action.[6] Pet.App.22a. The First Circuit, citing its earlier precedents, as well as authority from the D.C. and Tenth Circuits, stated that the essential facts test was performed by a side-by-side comparison of the relevant complaints, limiting analysis to the four corners of those documents. Pet.App.23a-24a.

According to the First Circuit, Cunningham claimed to be the first to file because his complaint, like Respondent's, alleged that Millennium performed excessive and unnecessary drug testing. But such an allegation of fraud, the First Circuit determined, was "too general." Pet.App.24a. The proper question was whether the actual mechanism of fraud—the essential facts—alleged by Cunningham was the same as the scheme alleged by Respondent. *Id.*

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[6] The First Circuit noted that some Courts of Appeals use different terms to describe the test—such as whether the first case alleges the "material elements of fraud" at issue in the second case and "equips the government to investigate,"—but there is no practical difference between the two standards. Pet.App.22a-23a, *citing U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011); *see U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009)(adopting both of the "essential facts" and "material elements" standards for first-to-file determinations).

The First Circuit found it was not. While Cunningham's case concerned overbilling for qualitative drug testing caused by the Physicians Billing Model, which in turn led to increased point-of-care testing and more confirmatory testing, the UDT fraud identified by Respondent focused on the improper use of standing orders and custom profiles. These were never discussed in Cunningham's action. *Id.* Nor did Cunningham describe the POC cup kickbacks identified by Respondent. He never alleged cups were provided to physicians at less than fair market value. Pet.App.25a. Whether Cunningham's action provided notice to the government of the fraud subsequently alleged by Respondent—the basis of the District Court's decision—was immaterial. As a matter of law, Cunningham's action did not allege the essential facts underlying Respondent's action, and the first-to-file bar did not apply. Pet.App.26a.

The First Circuit continued its analysis by finding that the claims settled by the United States were the claims originally brought by Respondent, not those brought by Cunningham. Thus, the government's recovery from Millennium constituted proceeds of the settlement of the claims brought by Respondent, and Respondent was the person entitled to payment of a relator's share. Pet.App.26a-27a.

REASONS FOR DENYING THE PETITION

The Petition does not raise an issue worthy of Supreme Court review. Whether 31 U.S.C. § 3730(b)(5) is jurisdictional is immaterial to the operation of the FCA's first-to-file rule or the First Circuit's reversal of the District Court. That is because federal courts uniformly administer the first-to-file test without reference to materials other than the relevant complaints. This methodology is used by courts that have stated (in dicta) that the requirement is jurisdictional, courts that have recognized that this Court's precedents preclude a jurisdictional finding, and courts that have not taken a position on the issue. Whatever disagreement exists regarding the rule's jurisdictional status has not prevented the federal courts from speaking in a single voice on how to perform a first-to-file analysis: the "facts" Petitioners seek to have district courts consider are not relevant to the test.

Given that the jurisdictional status of the statute is immaterial to its operation, judicial musing on the nature of the first-to-file requirement has frequently resulted in what this Court has labeled "drive-by jurisdictional rulings"—unrefined dispositions that have no precedential effect. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). In recent years, this Court has rigorously tried to invalidate these rulings by focusing on whether Congress clearly stated that it intended a statutory requirement to restrict jurisdiction. Courts that have applied these decisions to the first-to-file rule have unanimously determined that § 3730(b)(5) is not jurisdictional. To the extent any

conflict between the circuits exists, it is between those circuits which have applied these precedents and those circuits who have not yet addressed their legacy decisions.

Such a conflict fails to raise an issue worthy of review, especially given that this Court has already provided adequate guidance to lower courts to differentiate jurisdictional bars from other statutory restrictions, and that the First Circuit indisputably decided the presented question correctly.

I. THE QUESTION PRESENTED IS NOT IMPORTANT TO THE FIRST CIRCUIT'S DISPOSITION OF THE CASE OR THE OPERATION OF THE FIRST-TO-FILE RULE

1. Petitioners ask this Court to review a question that was not dispositive of the case below, and could never have been dispositive; all federal courts perform first-to-file analyses under 31 U.S.C. § 3730(b)(5) without resort to materials beyond complaints. The First Circuit ruled in Respondent's favor because Cunningham's Appendix was immaterial to the determination of who was first to file.

Yet, Petitioners do not present a question to this Court about the proper materials to be considered when applying the first-to-file rule. Instead, they ask this Court to review the statute's jurisdictional status, which serves little purpose. Labeling a rule non-jurisdictional does not mean that it is not mandatory. *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012).

Regardless of whether the statute is jurisdictional in nature, the relator must still satisfy the rule's requirements. *See U.S. ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1251 (10th Cir. 2017) ("If the first-to-file rule were non-jurisdictional, Little and Motaghed's violation of the rule would nevertheless afford a basis for dismissal."); *Heath*, 791 F.3d at 119 ("Even if the district court wrongly characterized its dismissal as jurisdictional, we could sustain that judgment for failure to state a claim under Rule 12(b)(6)."). Where the question presented is not dispositive of the present case or any other dispute regarding the operation of the first-to-file rule, it is not substantial enough to merit review.

2. Petitioners argue that the First Circuit's determination that the first-to-file rule was non-jurisdictional affected the scope of the evidence the court reviewed when it examined the merits of the parties' first-to-file dispute. The contention is baseless; in fact, in each of the five Circuit Courts of Appeals offered by Petitioners as representing the "Majority View" that the first-to-file rule is jurisdictional, analysis was nonetheless restricted to complaints.[7] Pet. at 13-16.

The clearest evidence that the First Circuit's decision on the jurisdictional nature of the rule had no

[7] *See U.S. ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017); *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1131-32 (9th Cir. 2015); *In re Natural Gas Royalties Qui Tam Litig. (CO_2 Appeals)*, 566 F.3d 956, 964 (10th Cir. 2009); *Branch Consultants*, 560 F.3d at 378 (5th Cir. 2009); *U.S. ex rel. Poteet v. Medtronic, Inc*., 552 F.3d 503, 516 (6th Cir. 2009).

effect on its ultimate ruling is the authority the court cited in support of its determination that first-to-file analysis is limited to the four corners of the relevant complaints. It cited four cases. One of the cases, *Natural Gas Royalties*, 566 F.3d at 964, was from the Tenth Circuit, a court which has stated that the first-to-file rule is jurisdictional. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004) (describing § 3730(b)(5) as "a jurisdictional limit on the courts' power"). Two earlier First Circuit decisions were cited, both of which expressly stated that the first-to-file rule is jurisdictional. *Ven-A-Care*, 772 F.3d at 936; *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 16 (1st Cir. 2009). The fourth decision was the D.C. Circuit's *Heath* decision, 791 F.3d at 121, but although that court determined that the first-to-file rule was not jurisdictional, it based its "material facts" analysis of the relevant complaints on one of its earlier precedents, *Batiste*, 659 F.3d at 1207-09, yet another case which had characterized the first-to-file rule as jurisdictional. In every case, the first-to-file rule's status as jurisdictional or non-jurisdictional has not made a difference in terms of the cases' holdings that first-to-file analyses should be restricted to complaints.

District Courts have universally recognized that first to file is determined by only reviewing the relevant complaints, regardless of whether the rule was

considered jurisdictional[8] or non-jurisdictional.[9] Many courts have simply relied on complaints without discussing the materials to be used in a first-to-file analysis,[10] yet many District Courts have specifically held

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[8] *See United States v. Berkeley Heartlab, Inc.*, 225 F. Supp. 3d 487, 495, 506-07 (D.S.C. 2016); *United States v. Cephalon, Inc.*, 159 F. Supp. 3d 550, 561 (E.D. Pa. 2016); *U.S. ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc.*, 157 F. Supp. 3d 1311, 1327 (N.D. Ga. 2015), *reversed on other grounds*, 841 F.3d 927 (11th Cir. 2016); *U.S. ex rel. Scharber v. Golden Gate Nat'l Senior Care LLC*, 135 F. Supp. 3d 944, 968 (D. Minn. 2015); *U.S. ex rel. De Souza v. AstraZeneca PLC*, 72 F. Supp. 3d 561, 565 (D. Del. 2014); *U.S. ex rel. Ryan v. Endo Pharmaceuticals, Inc.*, 27 F. Supp. 3d 615, 626-27 (E.D. Pa. 2014); *United States v. Sanford-Brown, Ltd.*, 27 F. Supp. 3d 940, 947 (E.D. Wis. 2014); *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 848 (D. Md. 2013); *U.S. ex rel. Sandager v. Dell Marketing, L.P.*, 872 F. Supp. 2d 801, 807-08 (D. Minn. 2012); *U.S. ex rel. Harris v. Lockheed Martin Corp.*, 905 F. Supp. 2d 1343, 1350 (N.D. Ga. 2012); *U.S. ex rel. Bartz v. Ortho-McNeil Pharmaceutical, Inc.*, 856 F. Supp. 2d 253, 268-69 (D. Mass. 2012); *U.S. ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 72-73 (D.D.C. 2011).

[9] *See U.S. ex rel. Bernier v. Infilaw Corp.*, 347 F. Supp. 3d 1075, 1082-83 (M.D. Fla. 2018); *U.S. ex rel. Hanks v. U.S. Oncology Speciality, LLP*, 336 F. Supp. 3d 90, 115 (E.D.N.Y. 2018); *U.S. ex rel. Savage v. CH2M Hill Plateau Remediation Co.*, 2015 WL 5794357, *9 (E.D. Wash., Oct. 1, 2015); *see also U.S. ex rel. Phillips v. Stephan L. LaFrance Holdings, Inc.*, 2018 WL 4839057 *3-4 (N.D. Okla., Oct. 4, 2018) (applying first-to-file test to complaints although "the Tenth Circuit has declined to determine whether the FCA's first-to-file rule is jurisdictional" in *Little*).

[10] To Respondent's knowledge, in the 33 years since the FCA was extensively revised, whether a court should consider allegations set forth in a disclosure but not disclosed in the original relator's complaint in determining who was the first to file has arisen on only two other occasions. In *Duxbury*, 579 F.3d at 33-34, the first relator relied on a disclosure he provided the U.S. attorney to establish that his earlier filed action intended to cover

that the analysis is performed by comparing complaints side by side.[11] Together, these cases not only demonstrate that the First Circuit's ruling was correct, but establish that the materials a court examines to determine who was the first to file does not vary depending on whether the review is jurisdictional.

The decision itself also evidences that the First Circuit's review of the merits of the first-to-file controversy was not influenced by its jurisdictional holding. Plainly, the First Circuit understood that having reversed an erroneous dismissal of the crossclaim, it did not necessarily follow that the crossclaim plaintiff would prevail on the merits. Had there been any possibility that the Petitioners could have prevailed on a

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the frauds revealed in the second relator's complaint. The court refused to consider the information, stating that had the relator intended to include the allegations in the original action, "he had his opportunity to do so when he filed the Original Complaint seven months earlier." In an unpublished opinion, the District Court for the Eastern District of Pennsylvania refused to consider information contained in first filed relator's written disclosure under § 3730(b)(2), *citing Duxbury*. *See United States v. Pfizer, Inc.*, 2016 WL 807363, *8 (E.D. Pa., Mar. 1, 2016).

[11] *See Bernier*, 347 F. Supp. 3d at 1083; *United States v. Shire Regenerative Medicine, Inc.*, 2017 WL 6816615, *5 (M.D. Fla., Nov. 20, 2017); *United States v. Pfizer, Inc.*, 2016 WL 807363, *6, *8 (E.D. Pa., Mar. 1, 2016); *Cephalon*, 159 F. Supp. 3d at 561; *Saldivar*, 157 F. Supp. 3d at 1327; *U.S. ex rel. Moore v. Pennrose Properties, LLC*, 2015 WL 1358034, *4 (S.D. Ohio, Mar. 24, 2015); *U.S. ex rel. LaPorte v. Premier Educ. Group, L.P.*, 2014 WL 5449745, *10 (D.N.J. Oct. 27, 2014); *Ryan*, 27 F. Supp. 3d at 626-27; *United States v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 2013 WL 9583076, *4 (S.D. Tex., Mar. 29, 2013); *Palmieri*, 928 F. Supp. 2d at 848; *U.S. ex rel. Denenea v. Allstate Ins. Co.*, 2011 WL 231780, *3 (E.D. La., Jan. 24, 2011).

more expansive record, the First Circuit would have remanded, as usually occurs in such cases. But the First Circuit recognized remand was unnecessary; the case could be decided because "the basic facts are uncontested." Pet.App.20a. This is consistent with the position of the First Circuit and other courts that the determination of who is the first to file raises a question of law. *Ven-A-Care*, 772 F.3d at 938; *Hartpence*, 792 F.3d at 1130.

The First Circuit's decision to not review the Appendix was therefore mandated by the substantive law relating to § 3730(b)(5), not the procedural posture of the case at bar. Yet Petitioners do not ask this Court to review the propriety of using the essential facts test to determine first to file under § 3730(b)(5) or how the test should be conducted, undoubtedly because there is no dispute among the federal courts as to how first to file should be determined. The fact that Petitioners have deliberately chosen not to ask this Court to review the questions that actually caused them to lose the proceeding below demonstrates that the question they actually seek to present is not material.

3. This Court generally confines its grants of certiorari to important questions of federal law, but the jurisdictional status of § 3730(b)(5) is not determinative of anything in most instances. Since little turns on whether the statute is jurisdictional or not, courts have often found it unnecessary to address the jurisdictional status of the first-to-file bar or other procedural limitations unique to the FCA, underscoring its lack of importance. *See U.S. ex rel. Gadbois v. PharMerica Corp.*

809 F.3d 1, 6, n.2 (1st Cir. 2015) (holding that because first-to-file defect could be cured by supplementation, there was "no need to consider the relator's back-up argument that the first-to-file bar is not jurisdictional"); *Little*, 870 F.3d at 1251 (unnecessary to decide if *Gonzalez v. Thaler* overturned Tenth Circuit's prior holdings that first to file was jurisdictional because relators failed to satisfy the rule in any event); *see also U.S. ex rel. Reed v. KeyPoint Government Solutions*, 923 F.3d 729, 737, n.1 (10th Cir. 2019) (with respect to the False Claims Act's public disclosure bar, holding that the difference between an affirmative defense and a jurisdictional prerequisite is only important when the defendant has waived or forfeited the defense, and finding the distinction "immaterial" where such a situation is not present).

4. Petitioners suggest that the lower courts need guidance on how the first-to-file bar should operate because the bar is frequently raised in FCA litigation. But if that were the case, this Court would seek a case which raises questions relating to the operation of the first-to-file bar or the propriety of the essential facts test, not a case that only concerns the jurisdictional status of the statute. Moreover, Petitioners ignore that numerous circuit court decisions regarding the operation of § 3730(b)(5) already provide consistent guidance to the district courts. Petitioners have wholly failed to present to this Court any meaningful distinction among the circuits regarding how first-to-file disputes should be resolved, much less sought review of such an issue.

II. NO SIGNIFICANT SPLIT BETWEEN THE CIRCUITS EXISTS

Petitioners ask this Court to review an ostensible split between the Courts of Appeals as to whether the FCA's first-to-file rule is a jurisdictional limitation. However, none of the circuits that currently label § 3730(b)(5) a jurisdictional bar have considered such statements in light of the bright line test this Court established for jurisdictional restrictions in *Arbaugh v. Y&H Corp.* and its progeny. And every court that has reviewed the first-to-file rule in light of those decisions has found the rule to be non-jurisdictional. *See Heath*, 791 F.3d at 120-21; *Hayes*, 853 F.3d at 85. To the extent any split exists, it is between those circuits which have applied this Court's recent precedents and those that have not yet done so.

1. As the First Circuit recognized, analysis as to whether Congress intended to create a jurisdictional limitation begins with recent jurisprudence from this Court that sought "to bring some discipline" to the use of the term "jurisdictional," *Gonzalez*, 565 U.S. at 141. This Court has been concerned that statutory requirements labeled "jurisdictional" permit procedural objections be raised at any time, by any person, resulting in a waste of adjudicatory resources and unfair prejudice to the litigants. *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Thus, this Court sought to limit the use of that label beyond those requirements where Congress plainly "imbued a procedural bar with jurisdictional consequences." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015). As a result, in recent years

several limitations courts had previously deemed "jurisdictional" have been re-examined by this Court and found to be non-jurisdictional. *See Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849-50 (2019) (setting forth cases).[12]

When this Court set forth its "clear statement" rule in *Arbaugh*, 546 U.S. at 515-16, it acknowledged that the federal courts had reflexively characterized procedural requirements as "jurisdictional" without any substantive analysis. *Id.* at 510-11. Such determinations had been labeled "drive-by jurisdictional rulings." *Steel Co.*, 523 U.S. at 91. Regardless of where such rulings originated, this Court directed that such "unrefined" dispositions "should be accorded 'no precedential effect' on the question of whether the federal court had authority to adjudicate the claim in suit." *Arbaugh* at 511, *quoting Steel Co.*, 523 U.S. at 91.

Thus, when this Court instructed the lower courts to re-examine the status of procedural requirements presumed to be jurisdictional it was aware that the "jurisdictional" label had frequently been applied without reflection. And it understood that until the lower

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[12] Since this Court articulated its "clear statement" rule for determining the validity of "jurisdictional" defenses in *Arbaugh*, 546 U.S. at 516, on only two occasions have statutory requirements been found to be jurisdictional in the absence of express language. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-36 (2008) (interpreting 28 U.S.C. § 2501); *Bowles v. Russell*, 551 U.S. 205, 209-11 (2007) (interpreting 28 U.S.C. § 2107(a)). In both cases, decades of this Court's precedents had defined these statutes (or their predecessors) as jurisdictional. *Fort Bend*, 139 S. Ct. at 1849.

courts had applied the "clear statement" standard to the myriad of statutory provisions previously labeled "jurisdictional," facial conflicts would exist between those circuits that had applied the new rules to a particular statute and those that had not. But not every statute erroneously labeled jurisdictional merited Supreme Court review because this Court had also identified how to distinguish decisions that still had precedential value from those which did not.

The "conflict" Petitioners ask this Court to review is not substantive. It is merely a disparity between those circuits that have had the opportunity to apply *Arbaugh's* bright line test to the FCA's first-to-file rule, and those courts that have not. *Compare Hayes*, 853 F.3d at 85-86 and *Heath*, 791 F.3d at 120-21 (both holding that recent Supreme Court precedent requires finding that first-to-file rule is non-jurisdictional) *with Little*, 870 F.3d at 1246, n.3, 1251 (recognizing prior rulings' possible conflict with recent Supreme Court precedent, but finding it unnecessary to decide jurisdictional issue) and *U.S. ex rel. Carter v. Halliburton Co.*, 866 F.3d 199, n.1 (4th Cir. 2017) ("*Carter III*") (noting *Hayes* and *Heath* disagree with prior circuit precedent, but not finding it necessary to examine the issue). More importantly, it is a conflict between recent decisions that have faithfully followed this Court's recent rulings and legacy decisions which, according to this Court's instruction, have no precedential effect.

2. The first Court of Appeals decision to characterize the first-to-file bar as jurisdictional was *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183

(9th Cir. 2001). The Ninth Circuit, however, simply assumed that the first-to-file bar was jurisdictional, like the former version of the FCA's public disclosure bar,[13] and performed no analysis.[14] The Tenth and Sixth Circuits relied on *Lujan* and its progeny when they made comparable statements relating to the jurisdictional status of the first-to-file rule. *See Grynberg*, 390 F.3d at 1278; *Poteet*, 552 F.3d at 516 (*citing Grynberg*). Those decisions provided no additional analysis.

The other circuits that have stated that the first-to-file rule is jurisdictional arrived at their position by briefly describing the unique limitations Congress placed on qui tam actions, and deeming all such limitations to be "jurisdictional." *See Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *Branch Consultants*, 560 F.3d at 376; *see also U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013) ("*Carter I*"), *reversed on other grounds, Carter II*, 135 S.Ct. 1970 (*citing Walburn* as authority that a later filed case must be dismissed for lack of subject matter jurisdiction). These decisions, like those derived from *Lujan*, are "drive-by jurisdictional rulings." They contain no substantive analysis.

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[13] As noted in footnote 3, *infra*, until 2010, 31 U.S.C. § 3730(e)(4) expressly withheld jurisdiction from actions that had been "publicly disclosed."

[14] The court merely stated "[w]e affirm the district court's dismissal of Lujan's qui tam action for lack of subject matter jurisdiction under § 3730(b)(5)," 243 F.3d at 1183, and "[d]ismissal for lack of subject matter jurisdiction is reviewed de novo," *id.* at 1186.

Later decisions from these circuits, which Petitioners reference as evidence of a circuit split, merely cite the decisions identified above, and add no additional analysis. *See Manor Care*, 851 F.3d at 303 (*citing Carter I*); *Carter III*, 866 F.3d at 203 (*citing Manor Care* and *Carter I*); *Hartpence*, 792 F.3d at 1130 (*citing Lujan*); *Little*, 870 F.3d at 1246 and 1251 (*citing Grynberg*).[15] These jurisdictional rulings, devoid of any substance, also have no precedential effect.

Thus, there is no substantive split for this Court to review. A conflict between circuit decisions which follow this Court's recent precedents and other decisions which have no precedential value does not raise an issue worthy of this Court's resources.

[15] Petitioners contend that the Tenth Circuit's ruling that § 3730(b)(5) was a jurisdictional requirement was the basis for that Court's finding in *Little* that the plaintiffs' complaint was incurable by amendment. Pet. at 14-15. Petitioners mischaracterize the discussion in *Little*. The jurisdictional defect that precluded post judgment amendment was the fact that the original plaintiff had disappeared from the case and two strangers to the original complaint substituted themselves in. The court lacked jurisdiction over the unnamed parties because the action had not been commenced with respect to them. 870 F.3d at 1249-50. As noted above, the Tenth Circuit declined to examine whether the first-to-file rule was jurisdictional because the plaintiffs were unable to meet the rule's substantive requirements regardless of the rule's jurisdictional status. *Id.* at 1251.

III. THIS COURT HAS ALREADY PROVIDED SUFFICIENT GUIDANCE TO THE LOWER COURTS ON THE QUESTION PRESENTED

In recent years, this Court has examined whether various statutory limitations are jurisdictional on numerous occasions.[16] If the Court granted the writ sought by Petitioners, this case could scarcely add to the Court's existing jurisprudence.

1. This Court has instructed that jurisdictional status is discerned by examining the requirement's "text, context, and relevant historical treatment." *Reed Elsevier*, 559 U.S. at 166; *Kwai Fun Wong*, 135 S. Ct. at 1632-33. This Court has provided clear guidance, which the First Circuit followed, on how these elements should be examined.

When examining statutory text, this Court frequently looks to see if relevant statutory provisions "speak in jurisdictional terms" (or "speak to a court's authority") or if they "refer in any way to the jurisdiction of the district courts." *See Kwai Fun Wong*, 135 S. Ct. at 1633; *EME Homer*, 572 U.S. at 512; *Gonzalez*, 565 U.S. at 143; and *Arbaugh*, 546 U.S. at 515. This was

[16] *See Bowles*, 551 U.S. at 209-211; *Sand & Gravel*, 552 U.S. at 133-36; *Union Pacific R. Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 82 (2009); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-63 (2010); *Henderson*, 562 U.S. at 434-36; *Gonzalez*, 565 U.S. at 141-43; *Sebelius*, 568 U.S. at 153-56; *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014); *Kwai Fun Wong*, 135 S. Ct. at 1631-33; *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17-18 (2017); and *Fort Bend*, 139 S. Ct. at 1848-51.

the primary basis for the First Circuit holding that under this Court's bright line rule, the first-to-file rule could not be jurisdictional. Pet.App.17a, *citing Arbaugh* at 515. Moreover, although this case was decided before *Fort Bend*, the same analysis was used by this Court one month later to hold that the provision at issue was non-jurisdictional. *See* 139 S. Ct. at 1850-51.

This Court has also found strong evidence of congressional intent when express jurisdictional language is found in neighboring statutory provisions, but is missing from the relevant provision. *See Gonzalez*, 565 U.S. at 143 ("the unambiguous jurisdictional terms of §§ 2253(a), (b), and (c)(1) show that Congress would have spoken in clearer terms if it intended § 2253(c)(3) to have similar jurisdictional force."); s*ee also Kwai Fun Wong*, 135 S.Ct. at 1633 ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional."). This important signifier was also used by the First Circuit when it noted that Congress declined to use jurisdictional language in § 3730(b)(5), but that other subsections of the very same statute expressly stripped courts of jurisdiction when other procedural requirements of the FCA were not met. Pet.App.18a, comparing § 3730(b)(5) with §§ 3730(e)(1) and (e)(2). This Court has already spoken clearly on how to use statutory context and no further elucidation is necessary.

This Court has also instructed that while legislative history alone cannot provide a clear statement,

absence of congressional intent from such history is confirming evidence that the provision is non-jurisdictional. *See Kwai Fun Wong*, 135 S. Ct. at 1633. The First Circuit performed the same type of analysis here, finding nothing in the history that was inconsistent with the textual and contextual evidence. Pet.App.18a-19a. Again, the guidance this Court has already provided is sufficient to instruct the lower courts.

2. This Court's existing precedents also make it plain that the grounds Petitioners propose for finding § 3730(b)(5) jurisdictional in the absence of a clear congressional statement cannot succeed. As Petitioners concede, § 3730(b)(5) "is not phrased in express jurisdictional terms—and under this Court's most recent precedents, that fact cuts against treating it as jurisdictional." Pet. at 27.

Petitioners' argument that the first-to-file rule would operate best if it was jurisdictional, Pet. at 27, is plainly undercut by this Court's precedents that hold that merely because a procedural requirement promotes important congressional objectives and might work well as a jurisdictional requirement are insufficient to justify a jurisdictional barrier where Congress failed to make a clear statement. *Fort Bend*, 139 S. Ct. at 1851; *Reed Elsevier*, 559 U.S. at 169, n.9. Similarly, this Court has repeatedly held that a rule should not be deemed jurisdictional merely because it is mandatory. *Fort Bend*, 139 S. Ct. at 1852; *see also Henderson*, 562 U.S. at 435 (holding that statutory rules may be both important and mandatory, but that does not

determine whether they are jurisdictional). These holdings defeat Petitioners' claim that first-to-file bar functions more like a jurisdictional hurdle than a merits defense because the bar has been held to be "exception-free." Pet. at 28.

Petitioners also suggest that when Congress amended the FCA in 2009 and 2010, it acquiesced in lower court rulings that the first-to-file rule was jurisdictional. But once again, this Court has already limited the role of historical precedent in determining jurisdictional status. Only where there has been "a long line of this Court's decisions left undisturbed by Congress" that attached a jurisdictional label will the Court infer that Congress intended to follow the Court's lead. *Henderson*, 562 U.S at 436, *quoting Union Pacific*, 558 U.S. at 82. Indeed, this Court has previously deemed Congress's failure to add a jurisdictional statement when a statute has been amended multiple times as confirmation that the provision was not jurisdictional. *Kwai Fun Wong*, 135 S. Ct. at 1633. It is not necessary to reiterate this point in a new case.

Unambiguous rules this Court has already established leave no question that the first-to-file rule is not jurisdictional, and those guidelines were followed by the First Circuit. Petitioners present no arguments as to why these cases would not apply and do not contend that the First Circuit failed to follow these precedents. This Court has already spoken to all of the jurisdictional issues this case raises.

IV. THE FIRST CIRCUIT'S DECISION WAS CORRECT

1. The First Circuit correctly decided the only question Petitioners present: whether § 3730(b)(5) is a jurisdictional provision. As made clear above, Petitioners do not argue that this Court's recent jurisdictional precedents do not apply or that the First Circuit misapplied those precedents. They have not pointed to any authority from this Court that suggests that the decisions of the First, Second and D.C. Circuits on the non-jurisdictional nature of the first-to-file rule were decided incorrectly, or why the unconsidered decisions from the other circuits are not drive-by jurisdictional rulings.

2. Much of the petition, however, is devoted to a different question than the one presented: whether courts performing a first-to-file analysis should consider factual allegations presented to the Government but not contained in the relator's complaint. That question is not properly before the Court, and not worthy of review because there is no conflict on the issue. Further, it was decided correctly.

Petitioners argue that information contained in a written disclosure should be considered "facts underlying the pending action" for the purposes of the first to file rule because 31 U.S.C. § 3730(b)(2) requires a relator to serve "a written disclosure of substantially all material evidence and information" on the Government. Petitioners emphasize that § 3730(b)(5) employs the term "facts" in connection with the first-to-file rule,

not "allegations," and disclosures report to the United States the facts that support the relator's qui tam action.

If § 3730(b)(5) looked to the "material evidence" or "information" underlying a first filed action to determine who was the first to file, Petitioners' argument might have force. But it does not. It employs a term, "facts," that the statute does not connect to the content of a relator's written disclosure. Instead, when facts "underlying" an action must be determined, the document to be reviewed would be the one that provides notice to courts, litigants and the public of the claims brought in the existing action: the first relator's complaint. *See* Fed. R. Civ. P. 8(a)(2) (requiring a pleading to include a "plain statement of the claim" that shows "pleader is entitled to relief"). As discussed in Section I.2 *infra*, no court has ever looked at anything else.

Petitioners' statutory argument fails because the FCA simply does not make a relator's disclosure the repository of the facts that define a qui tam action. While § 3730(b)(2) requires a disclosure to include "substantially all material evidence and information" the relator relies upon, it does not limit disclosures to such material. Facts, allegations and material that are not relevant to the frauds identified in relator's qui tam complaint can be placed in a disclosure—there are no standards. *See U.S. ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 556 (observing substantial inconsistency among relators' counsel in their different levels of effort preparing disclosure statements). Merely because a document is included in a disclosure does not mean

it is connected to the fraud that is the subject of the relator's action.

Further, the disclosure is not directed to courts, defendants or subsequent relators to determine whether the requirements of § 3730(b)(5) have been met. The statutorily intended beneficiary of the disclosure is the United States, which uses the information to determine whether government resources should be devoted to the action. *U.S ex rel. Woodard v. Country View Care Ctr., Inc.*, 797 F.2d 888, 892 (10th Cir. 1986) (interpreting prior version of the statute); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1236 (D. Wyo. 2006). Indeed, because the disclosure is directed to whether the United States should pursue the fraud claims identified in the relator's complaint, most courts hold that written disclosures are protected from disclosure by the work product doctrine. *See Bagley*, 212 F.R.D. at 559-63; *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 683-84 (S.D. Cal. 1996). It is inconceivable that a document immune from discovery could somehow be determinative as to whether a later filed action, which to all appearances described a completely different fraud, could be barred. Petitioners seek to use written disclosures for a purpose Congress never intended.

Nor should there be any need to resort to disclosures to determine the first to file. A relator who intended to bring a particular fraud to the attention of the United States would naturally include the essential facts of that scheme in his or her complaint. The requirement is not onerous. To be the first to file, a

relator's complaint only needs to identify elements of the fraud sufficient to permit a court to determine that a later case is based on those same elements. *Duxbury*, 579 F.3d at 32. The first relator does not have to provide details sufficient to comply with the particularity requirements of Fed. R. Civ. P. 9(b). *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36-37 (1st Cir. 2013). Petitioners state no reason why the essential facts of a fraud Cunningham supposedly presented the United States could not have been disclosed in his pleadings.

Cunningham never filed a complaint which contained allegations that were the basis of the settlement with Millennium, and consequently such facts did not underlie the frauds he did identify in his qui tam action. For that reason, the First Circuit properly ruled that Respondent was the first to file and correctly decided the case below.

V. THIS CASE IS A POOR VEHICLE TO EXAMINE THE QUESTION PRESENTED

If the Court was interested in examining the jurisdictional status of first-to-file rule, the fact that Cunningham's claim is not justiciable makes this case a particularly poor choice. A valid qui tam claim is a threshold requirement for obtaining a share of an FCA recovery under § 3730(d)(1). *Donald v. University of California Board of Regents*, 329 F.3d 1040, 1044 (9th Cir. 2003). Cunningham's claim, however, was barred by res judicata. The District Court dismissed his FCA

action and entered judgment against him in January 2014. That judgment has never been vacated. Claim preclusion bars Cunningham from ever receiving a relator share.[17]

Another issue expressly not reached by the First Circuit that makes this case a poor vehicle is that the complaint at issue is not a qui tam complaint, but a crossclaim for declaratory judgment. Pet.App.14a, n.10. Thus, in order to use this case to reach the question presented about whether 31 U.S.C. § 3730(b)(5) is jurisdictional, this Court must also determine whether it applies to actions other than actions filed pursuant to § 3730(b).

[17] Cunningham's appeal of the second dismissal did not vitiate the res judicata effects of the District Court's judgment. In federal courts, the filing of an appeal does not arrest the preclusive effects of a judgment. *See* 18A Wright & Miller, Federal Practice & Procedure, § 4433 (3rd ed. 2017).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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