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

PETITIONERS' REPLY

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PETITIONERS' REPLY

Respondent McGuire's brief in opposition makes four arguments against certiorari. Each lacks merit.

Before we address those arguments, we emphasize that McGuire mischaracterizes the question presented. Throughout his brief in opposition, McGuire contends that the question is limited to whether 31 U.S.C. § 3730(b)(5) is jurisdictional—and has nothing to do with the materials that a court can consider when applying it. Not so. In full, 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." Pet. i.

As the wording makes clear, the jurisdictional nature of Section 3730(b)(5) is intertwined with its scope—and specifically with the materials that a court should consider to identify the "facts underlying the pending action." One of our strongest arguments in favor of treating the statute as jurisdictional is that such treatment is the best way to ensure that a court considers the right materials at the right time. And as the lower court decisions in this case illustrate, one natural consequence of treating the statute as jurisdictional (or not) is that a court will consider different materials in applying it. The scope of the relevant materials is accordingly fairly included within the question presented.

Consequently, we expect and hope that in the course of resolving the deep circuit split over whether Section 3730(b)(5) is jurisdictional, the Court will determine whether a court identifying the "facts under-

lying the pending action" is limited to reviewing complaints or should instead review statutorily required evidentiary disclosures, providing critical guidance to courts and litigants alike. The Court would also certainly have the option to hold that even if Section 3730(b)(5) is not jurisdictional, the First Circuit erred by refusing to consider Cunningham's disclosures.

We turn now to McGuire's arguments.

I. The Question Presented Was Outcome-Determinative Below.

McGuire argues that the question presented was not important to the First Circuit's disposition of the case, or to the operation of Section 3730(b)(5). BIO 15-21. That is wrong because the question presented was the entire ballgame. The district court ruled in petitioners' favor because it ruled their way on the question presented; the First Circuit reversed because it reached the opposite conclusion about the question presented.

Thus, the district court held that because Section 3730(b)(5) is jurisdictional, "the Court may consider evidence extrinsic to McGuire's complaint in resolving" which relator was first to file. Pet. App. 36a. The court then explained that "[a]fter considering Cunningham's complaint, first amended complaint . . . and the documents . . . which were provided to the government prior to the filing of McGuire's complaint, the Court finds that Cunningham did sufficiently allege the Covered Conduct so as to bar McGuire's claim." *Id*. at 39a. And the court further recognized that "once Cunningham's submissions are considered it becomes apparent that McGuire" was not the first to file. *Id*. at

42a-43a. The court considered those materials in adjudicating a motion under Federal Rule of Civil Procedure 12(b)(1), and therefore ruled in Cunningham's favor—but it refused to consider them in adjudicating Cunningham's motion under Federal Rule of Civil Procedure 12(b)(6), and therefore denied that motion. *See* Pet. App. 43a.

In reversing the district court's decision granting the Rule 12(b)(1) motion, the First Circuit relied on its determination that Section 3730(b)(5) is not jurisdictional. Thus, the court of appeals explained early in its opinion 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 (emphasis added). In the final section of its opinion, it reiterated that in assessing whether "McGuire is entitled to the relator's share of the government's settlement with Millennium," the court would "confine [its] review to the pleadings and to facts susceptible to judicial notice." *Id*. at 19a-20a (quotation marks omitted). It contrasted that approach with the district court's decision to "analyze[] Cunningham's motion to dismiss as a factual challenge under Rule 12(b)(1)," noting that the district court had "engaged its broad authority to look outside the pleadings to determine its own jurisdiction." *Id*. at 20a n.14 (quotation marks omitted).

McGuire says nothing about this critical language—*i.e.*, the actual holdings—in the decisions below. Instead, he argues that the First Circuit cited four cases reaching varying conclusions about whether Section 3730(b)(5) is jurisdictional, but all limiting their analysis to the complaints in the relevant actions. BIO

16-17. From these citations, McGuire extrapolates that the First Circuit would limit its analysis to the four corners of the complaints even if it deemed Section 3730(b)(5) to be jurisdictional.

McGuire's attempt to divine First Circuit law by reading the tea leaves of its citations conflicts with the explicit language of the First Circuit's holding, which expressly connected the determination that Section 3730(b)(5) is not jurisdictional to the scope of the inquiry: "[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. It is also inconsistent with prior First Circuit precedent, which recognized "that, in reviewing a dismissal for lack of jurisdiction [under Section 3730(b)(5)], we need not confine our jurisdictional inquiry to the pleadings, but may consider those other materials in the district court record." *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 33 (1st Cir. 2009) (quotation marks omitted). And it is inconsistent with district court decisions in the First Circuit, which had considered a relator's evidentiary disclosure statement while applying Section 3730(b)(5). *See United States ex rel. Lisitza v. Johnson & Johnson*, 765 F. Supp. 2d 112, 123 (D. Mass. 2011) (finding that even though the second relator's claim was the first to name a specific defendant, the first relator had referred to that defendant's conduct in an amended complaint and in his disclosure statement, and citing precedent holding that "an FCA complaint should be read in conjunction with its statutorily required disclosure statement").

Based on these authorities, and on the First Circuit's reasoning below, if this Court holds that Section 3730(b)(5) is jurisdictional, the First Circuit would not limit its analysis to the parties' complaints, but would look as well to Cunningham's evidentiary disclosure to identify the "facts underlying" his action. McGuire does not dispute that if Cunningham's evidentiary disclosures are considered, Cunningham would properly be deemed first to file, such that McGuire's cross-claim would fail. The question presented is accordingly outcome-determinative in this case.

At most, McGuire has articulated an alternate ground for affirmance by pointing out that even if this Court holds that Section 3730(b)(5) is jurisdictional, it could also hold that the statute prohibits a court from looking beyond the parties' complaints. But the fact that a respondent may have an alternative argument for affirmance is not a reason to deny certiorari when, as here, the lower court did not rule on that basis. Moreover, if McGuire advances that argument at the merits stage, it will fail. As explained in the petition (at 21-27) and in the district court's opinion (Pet. App. 36a-38a), McGuire's alternative ground rests on a flawed interpretation of the phrase "facts underlying the pending action" and ignores relators' statutory duty to submit evidentiary disclosures to the government. Such a flawed merits argument does not weigh against certiorari.

II. There Is a Deep Circuit Split About an Important Question of Federal Law.

McGuire does not dispute that there is an acknowledged circuit conflict over whether Section 3730(b)(5) is jurisdictional, with the majority of circuits disagreeing with the decision below. Instead, he argues that the precedents of the five courts in the majority do not count because they are "drive-by" rulings entitled to no weight. BIO 23 (citation omitted). He speculates that when the majority of courts apply this Court's precedents, specifically *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), they will reverse themselves and conclude that Section 3730(b)(5) is not jurisdictional. BIO 22.

McGuire's argument is implausible. *Arbaugh* was decided in 2006. All five courts in the majority have held that Section 3730(b)(5) is jurisdictional after that date. *See United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1246 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1298 (2018); *United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199, 203 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2674 (2018); *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009). Two of these courts—the Fourth and the Tenth Circuits—refused requests by litigants to overrule their precedents deeming Section 3730(b)(5) jurisdictional. *See Little*, 870 F.3d at 1251; *Carter*, 866 F.3d at 203 n.1. If

McGuire were correct that the circuit courts would reverse themselves *en masse* after *Arbaugh*, it should have happened by now.

McGuire's prediction that courts will freely ignore their own precedents is also belied by the First Circuit's approach in this case. Here, the First Circuit did reverse its own precedents—but it did not do so lightly, and it did not characterize them as "drive-by" holdings not entitled to weight. Instead, the court acknowledged that it would "ordinarily" be "constrained by prior panel decisions directly . . . on point," but changed course because it believed it had identified a "compelling reason for believing that the former panel, in light of new developments, would change its collective mind." Pet. App. 15a (quotation marks omitted). The First Circuit is perhaps uniquely well-situated to pivot in this manner, as it has only six active (non-senior) judges—which means that a panel need only persuade a single judge to achieve a majority of the entire court. Other courts would likely have to take the question en banc to overrule their panel holdings—and it is highly unlikely that five courts would do so. Indeed, respondent does not identify an instance in which so many courts have reversed themselves.

McGuire's argument also presumes that he is so obviously right about the merits that no court of appeals could ever disagree with him—even in the face of circuit precedent to the contrary. His confidence is unwarranted. While *Arbaugh* and its progeny provide an argument that Section 3730(b)(5) is not jurisdictional, there are good arguments in support of the majority view, too. We sketched out some of those arguments briefly in the petition (at 21-29), and will say more at the merits stage. For present purposes, the

key point is that McGuire's prediction of self-actualizing unanimity is implausible—which means that only this Court can create uniformity on this important question of federal law.

On the topic of importance, McGuire says very little. He argues that whether a rule is jurisdictional does not matter "in most instances." BIO 20. But he does not answer the arguments in the petition, *i.e.*, that the question is sometimes outcome-determinative (as it was here), that jurisdictional issues bear on the separation of powers, that jurisdictional defenses cannot be waived, that jurisdiction determines the placement of the burden of proof at the pleading stage, etc. *See* Pet. 17-18. He also does not answer the argument that in literally every False Claims Act case in which two or more individuals may know of the fraud (hundreds of cases per year), Section 3730(b)(5) will shape how relators draft their complaints and evidentiary disclosures. McGuire does not dispute that the issue arises often, but he urges the Court to await a case "which raises questions relating to the operation of the first-to-file bar or the propriety of the essential facts test." BIO 21. McGuire's argument ignores that *this is such a case* because the operation of the statute is fairly included within the debate about its jurisdictional nature. *See supra* pp. 1-2. This case is uniquely desirable because it provides an opportunity to resolve a deep circuit split *and* provide essential guidance about how an important federal statute works.

III. McGuire's Merits Arguments Do Not Weigh Against Certiorari.

Parts III and IV of the brief in opposition are essentially merits arguments. In Part III, McGuire argues that this Court's precedents establish that Section 3730(b)(5) is not jurisdictional because it does not use jurisdictional language.[1] In Part IV, McGuire argues that the First Circuit correctly looked only to the complaints in this case in applying Section 3730(b)(5).

For the reasons given in the petition, McGuire's merits arguments are unpersuasive. The best reading of the statute, by far, is that the phrase "facts underlying the pending action" requires a court applying Section 3730(b)(5) to identify all of the underlying facts, and not only the subset highlighted in the complaint—and it follows from that reading that the statute should be treated as jurisdictional because that is the only way to ensure its proper application at the pleading stage. Moreover, Congress acquiesced in that interpretation when it declined to amend the statute in 2009 and 2010, a time when every court of appeals to have considered the question had decided that Section 3730(b)(5) was jurisdictional.

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[1] McGuire does not cast Part III as a merits argument. Instead, he argues that certiorari is unnecessary because this Court has already provided sufficient guidance to determine when a statute is jurisdictional. He then goes on to describe, under his view of this Court's precedents, why Section 3730(b)(5) is not jurisdictional. At its core, that is a merits argument. To the extent McGuire is actually arguing that further guidance from this Court is unnecessary, that argument is addressed in the split section above: if there were already enough guidance in this Court's decisions to resolve this question, the circuits would not be divided five to three.

We need not say more at this time because none of McGuire's merits arguments weigh against certiorari. The circuits are split, and the question presented matters in a large number of cases. Thus, whoever is right about the merits (of course we believe that we are), this Court should rule in that person's favor *after* it grants certiorari.

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

McGuire asserts two vehicle problems, both of which are illusory because neither would prevent this Court from reaching the question presented.

First, McGuire argues that Cunningham's claim to the relator's share is barred by res judicata because Cunningham's complaint was dismissed, and the appeal from that dismissal was not resolved before the settlement took effect. BIO 34-35. This argument appears to have been forfeited. McGuire's briefs before the First Circuit do not use the phrase "res judicata," nor otherwise argue that Cunningham's motion to dismiss is barred by claim preclusion. In any event, McGuire's argument does not suggest a vehicle problem: even if the argument were not forfeited, the Court would not need to reach it because it is neither jurisdictional in nature nor necessarily antecedent to the question presented.[2]

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[2] This argument is similar to, but distinct from, the argument McGuire actually made on appeal, which was that Cunningham's action is not "pending" for purposes of Section 3730(b)(5) because it had been dismissed and the appeal had not been resolved. The district court rejected that argument (Pet. App. 35a), and the First Circuit declined to reverse that holding. *See id.* at 8a n.6.

McGuire argues second that his own claim is a cross-claim for declaratory judgment, and not a *qui tam* claim, such that the Court would have to determine whether Section 3730(b)(5) applies to his action in order to reach the question presented. BIO 35. The phrasing of this argument is puzzling, as McGuire does not go so far as to argue that Section 3730(b)(5) does *not* apply to his cross-claim, or contend that this is an alternative ground for affirmance; he merely suggests that the Court would have to decide the question.

McGuire is wrong because this separate issue is not jurisdictional, is not logically antecedent to the question presented, and is not encompassed within it, either. Petitioners are not asking this Court to apply Section 3730(b)(5) to the facts of this case and determine which relator was first to file; they are merely asking this Court to decide whether the statute is jurisdictional, and to determine which materials a court may consider in identifying the facts underlying a *qui tam* action. Both of those determinations can be made without deciding whether Section 3730(b)(5) applies to cross-claims, because the answers will not vary based on whether a cross-claim is involved.

McGuire's argument is also strained, as the gravamen of his specific cross-claim is that he is the only person with a valid *qui tam* action, and therefore the only person entitled to the relator's share. To prove that, he must show that his *qui tam* claim is not barred

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Because McGuire has not flagged his argument about the word "pending," that argument should be deemed waived at the merits stage. Moreover, as explained in the petition (at 20), the argument does not create a vehicle problem, and the First Circuit can address it on remand to the extent necessary.

by Section 3730(b)(5). It is unsurprising, therefore, that the district court determined that Section 3730(b)(5) applies to the cross-claim, Pet. App. 34a-35a, and the First Circuit concluded that it did not have to reach this argument because Section 3730(b)(5) concededly applies to McGuire's *qui tam* action—the validity of which determines whether his cross-claim has merit, *id.* at 14a n.10.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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