No. _____

In the Supreme Court of the United States

BOYD & ASSOCIATES,
PETITIONER
V.
BRYAN K. WHITE, M.D., ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I.
QUESTIONS PRESENTED

The questions presented for review are:

A. **WHETHER** the *en banc* Court of Appeals and the panel erred in affirming the District Court's decisions dismissing Boyd & Associates' ("B&A") clients' claims for lack of jurisdiction under the First-to-File Bar of the False Claims Act ("FCA") and denying B&A's requests for attorneys' fees, costs, and expenses under the FCA and the Texas Medicaid Fraud Prevention Act ("TMFPA") on the basis of the dismissal, although the clients had settled their claims under those Acts with the Settling Defendants.

B. **WHETHER** the *en banc* Court of Appeals and the panel erred in affirming the District Court's decisions denying B&A's requests for attorneys' fees, costs, and expenses, based on the District Court's dismissal of B&A's clients' claims for lack of jurisdiction under the FCA's First-To-File Bar even though the First-To-File Bar does not unequivocally assert a jurisdictional nature as required by this Court's decisions in *Sebelius* and *Arbaugh*.

C. **WHETHER** the *en banc* Court of Appeals and the panel erred in affirming the District Court's decisions denying B&A's requests for attorneys' fees, costs, and expenses, based on the District Court's dismissal of B&A's clients for lack of jurisdiction under the FCA's First-to-File Bar even though the decision upon which the District Court relied, *U.S. ex*

rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371 (5th Cir. 2009), predated the *Sebelius* intervening authority and reflected no analysis of whether the First-To-File Bar is jurisdictional.

D. **WHETHER** the *en banc* Court of Appeals and the panel erred in affirming the District Court's decisions denying B&A's requests for attorneys' fees, costs, and expenses, based on the District Court's dismissal of B&A's clients for lack of jurisdiction under the FCA's First-to-File Bar even though the decision upon which the District Court relied, *U.S. ex rel. Branch Consultants v. Allstate Ins. Co*., 560 F.3d 371 (5th Cir. 2009), predated the *Carter* intervening authority, thus disregarding this Court's treatment of the First-to-File Bar in *Carter* where the Court addressed a non-jurisdictional issue before addressing the First-to-File issue.

E. **WHETHER** the *en banc* Court of Appeals and panel decisions affirming the District Court's decisions denying B&A's requests for attorneys' fees, costs, and expenses, based on the District Court's dismissal of B&A's clients for lack of jurisdiction under the FCA's First-to-File Bar reflect a significant split of authority among the circuits that must be resolved by this Court.

II.
PARTIES TO THIS PROCEEDING

Samuel L. Boyd and Boyd & Associates,
Petitioners,

v.

Bryan K. White, M.D., Individually; Be Gentle Home Health, Incorporated, doing business as Phoenix Home Health Care; Suresh Kumar, R.N., Individually; Goodwin Home Health Services, Incorporated; Vinayaka Associates, L.L.C., doing business as A&S Home Health Care; Goodwin Hospice, L.L.C.; North Texas Best Home Healthcare, Incorporated; Excel Plus Home Health, Incorporated; Phoenix Hospice, Incorporated; One Point Home Health Services, L.L.C., *formerly known as* One Point Home Health, L.L.C.; Home Health Plus, Incorporated; International Tutoring Services, L.L.C., *formerly known as* International Tutoring Services, Incorporated, *doing business as* Hospice Plus; Curo Health Services, L.L.C., *formerly known as* Curo Health Services, Incorporated; and Hospice Plus, L.P.

Marchand & Rossi, L.L.P., now known as Marchand Law, L.L.P.,

United States of America, ex rel,, Kevin Bryan and Franklin Brock Wendt,
Respondents.

III.
PROCEEDINGS BELOW AND RELATED PROCEEDINGS

A. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

United States of America ex rel. Kevin Bryan and Franklin Brock Wendt v. Hospice Plus, LP; International Tutoring Services, LLC, f/k/a International Tutoring Services, Inc., and d/b/a Hospice Plus; Curo Health Services, LLC f/k/a Curo Health Services, Inc., Suresh Kumar, R.N., Individually; and Bryan K. White, M.D., Individually, No. 3-13cv3392-B, filed August 23, 2013; consolidated with No. 3:12-cv-04457-N; final judgment entered under No. 3:12-cv-04457-N on June 2, 2020.

United States of America ex rel. Christopher Sean Capshaw, Relator v. Bryan K. White, M.D., Individually; Be Gentle Home Health, Inc. d/b/a Phoenix Home Health Care; Suresh Kumar, Individually; Hospice Plus, L.P.; Sabari Kumar, Individually; Remani B. Kumar, M.D. Individually; North Texas Best Home Health; A&S Home Health Care; Goodwin Home Health Services, Inc.; D. Yale Sage, Individually; Kirk Short, Individually; Sheila Halcrow a.k.a. Sheila Watley /Sheila Taylor, Individually, No. 3:12-cv-4457N, filed November 6, 2012; consolidated with No. 3-13cv3392-B; judgment entered under No. 3:12-cv-04457-N on June 2, 2020.

B. U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kevin Bryan and Franklin Brock Wendt, Plaintiffs/Appellants, Marchand & Rossi, L.L.P., Appellant v. Hospice Plus, L.P.; International Tutoring Services, L.L.C., f/k/a International Tutoring Services, Incorporated, d/b/a Hospice Plus; Curo Health Services, L.L.C., f/k/a Curo Health Services, Incorporated; Suresh Kumar, R.N., Individually; Bryan K. White, M.D., Individually, Defendants – Appellees, No. 18-11652, filed December 27, 2018; judgment entered April 9, 2019.

United States of America, ex rel, Kevin Bryan and Franklin Brock Wendt, Plaintiffs/Appellants, and Boyd & Associates and Marchand & Rossi, L.L.P., n/k/a Marchand Law, L.L.P., Appellants v. Bryan K. White, M.D., Individually; Be Gentle Home Health, Incorporated, d/b/a Phoenix Home Health Care; Suresh Kumar, R.N., Individually; Goodwin Home Health Services, Incorporated; Vinayaka Associates, L.L.C., d/b/a A&S Home Health Care; Goodwin Hospice, L.L.C.; North Texas Best Home Healthcare, Incorporated; Excel Plus Home Health, Incorporated; Phoenix Hospice, Incorporated; One Point Home Health Services, L.L.C., f/k/a One Point Home Health, L.L.C.; Home Health Plus, Incorporated; International Tutoring Services, L.L.C., f/k/a International Tutoring Services, Incorporated, d/b/a Hospice Plus; Curo Health Services, L.L.C., f/k/a Curo Health Services, Incorporated; Hospice Plus, L.P., Defendants/Appellees No. 19-11309, filed December 2, 2019, Judgment entered July 30, 2021,

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V.
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PETITION FOR WRIT OF CERTIORARI

Petitioners Samuel L. Boyd and Boyd & Associates respectfully petition the Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these consolidated appeals from the decisions below in the United States District Court for the Northern District of Texas.

VI.
ORDERS AND OPINIONS ENTERED BELOW

A. COURT OF APPEALS FOR THE FIFTH CIRCUIT

The July 30, 2021 opinion in *Capshaw v. White*, No. 19-11309, affirming the decisions of the District Court (Appendix, A1) (finding "no reason to disturb or expound upon [the District Court's five] rulings") is not published in the Federal Reporter, but is reported at, 2021 U.S. App. LEXIS 22658, 2021 WL 3276480.

The August 26, 2021order denying rehearing en banc (Appendix, A63) is unreported.

B. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

The February 12, 2020 final Memorandum Opinion and Order in *United States ex rel. Capshaw v. White*, Civil Action No. 3:12-CV-4457-N, denying Relators Bryan and Wendt and counsel B&A's motion for attorneys' fees under the Texas Medicaid Fraud Prevention Act ("TMFPA") (Appendix, A5) is not published in the Federal Supplement but is reported at 2020 U.S. Dist. LEXIS 24139, 2020 WL 707815.

The October 2, 2019 Order dismissing all Remaining Claims (Appendix, A15) is unreported.

The July 10, 2017 opinion denying the motions of Relators Bryan and Wendt and Marchand & Rossi, LLP ("M&R") and B&A for attorneys' fees under the FCA and to enforce settlement agreement (Appendix, A17) is not published in the Federal Supplement but is reported at. 2017 U.S. Dist. LEXIS 200634.

The June 13, 2017 Order denying Bryan & Wendt's Motion to Reconsider Dismissal under First-to-File Bar (Appendix, A29) is unreported.

The January 23, 2017 District Court opinion dismissing Relators Bryan & Wendt on the basis of the First-to-File Bar (Appendix, A32) is not published in the Federal Supplement but is reported at 2017 U.S. Dist. LEXIS 176075.

VII.
JURISDICTIONAL FACTS

The judgment of the Court of Appeals affirming the decisions of the District Court was entered July 30, 2021.

The order of the Court of Appeals denying rehearing *en banc* was entered on August 26, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

VIII.
STATEMENT OF THE CASE

A. TRIAL COURT'S JURISDICTION

The District Court, the court of first instance in the consolidated cases:

(a) had federal question jurisdiction under 28 U.S.C. § 1331 over Bryan/Wendt's causes of action brought under the False Claims Act, 31 U.S.C. §§ 3729-3732 and an additional express grant of jurisdiction under § 3732(a); and

(b) had supplemental jurisdiction over Bryan/Wendt's causes of action under the Texas Medicaid Fraud Prevention Act pursuant to 28 U.S.C. § 1367 and § 31 U.S.C. § 3732(b).

B. RELEVANT FACTS

On **November 6, 2012,** Relator Capshaw filed his Complaint, No. 3:12-cv-04457N ("Capshaw Action"), ROA.56,[1] under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, alleging a kickback scheme in which Defendant Bryan White ("White") and related Medicare Part A Hospice and Home Healthcare entities in which he held interests ("H/HHs") propped up a "financially unviable"

[1] References to the District Court's Record prepared with pagination for the Court of Appeals are in the format used in Fifth Circuit Appeals: "ROA.NNN"—*i.e.*, "Record on Appeal," followed by a period and the page number.

Medicare Part B entity, APH, in exchange for Medicare patient referrals. ROA.57, ROA.61, ROA.64, ROA.75, ROA.76, ROA.80. The Capshaw Action was filed in camera and under seal, as required by the FCA to allow the U.S. to investigate and consider whether to intervene in the case. 31 U.S.C. § 3730 (b)(4).

Capshaw alleged specifically that White and the H/HHs gave infusions of cash disguised as loans, rent-free office space under a phony lease, and a free ownership interest in one of their Medicare Part A entities (Kickbacks) to APH in exchange for referrals. White was employed as a Medical Director of APH, ROA.58-ROA.69, ROA.73, in addition to his controlling ownership interests in the H/HH entities, and he facilitated the referrals and Kickbacks. ROA.63–64, ROA.75-ROA.76. White personally "loaned" APH $1.9 million for its operational costs, with no expectation or receipt of repayment. ROA.64, ROA.76, ROA.80. Thus, White and his H/HHs supported APH like owners and made self-dealing referrals, undetected. In addition to referring Medicare patients to H/HHs in exchange for kickbacks, APH provided Medicare certifications of hospice or home health eligibility for the referred patients, which in many cases were false. Upon expiration of Medicare duration limits on hospice and home health care, H/HH would refer the patients back to APH, which would subsequently re-certify, in many cases falsely, hospice or home health eligibility and refer the patients back to H/HH. ROA.61, ROA.80.

The participants in this scheme were the owners/investors in APH and H/HH and through them, multiple related entities. The referrals and certifications were made at the behest of the entities'

owners, who were the beneficiaries of the unlawful kickbacks and self-interested referrals. Evidence of these Kickbacks would likely have been located in loan, lease or sublease documentation, and share transfer or ownership documents regarding the entity in which APH's owners were given ownership interests. These allegations, however, would not likely draw attention to unrelated H/HH marketing programs or expense records.

On August 23, 2013, while the Capshaw Action was under seal and unknown to them, Relators Bryan and Wendt ("Bryan/Wendt") filed a lawsuit under the FCA *and the Texas Medicare Fraud Prevention Act* ("TMFPA"), No. 3:13-cv-03392-N. Bryan/Wendt ROA.7646. ("Bryan/Wendt Action"). Bryan/Wendt asserted claims against White, his co-owner, and some of the H/HH entities.

These Defendants conducted the kickback scheme alleged in the Bryan/Wendt Action through the efforts of marketing employees, including Bryan and Wendt. Bryan/Wendt alleged that Hospice/Home Health and its owners defrauded the United States and state of Texas by "'buying' terminally ill Medicare and Medicaid patients from area nursing homes, assisted living facilities, doctors, and hospitals[,] with . . . gifts . . . , as well as with free services of skilled nursing staff[,] . . . in return for . . . [specific numbers of] hospice and home health patient referrals." ROA.7649; see also ROA.7668-ROA.7669. This kickback scheme, unlike the one alleged by Capshaw, used marketing employees to provide small gifts, such as gift cards and lunches or happy hours, to staff employees of scores of entities to induce them to refer patients for Part A hospice and Home Healthcare services. This scheme *was*

unlike the *structural business combination that hid self-referrals among* AHC and H/HHs' owners. ROA.7646, ROA.7649, ROA.7660-ROA.7663, ROA.7674-ROA.7675, ROA.7685, ROA.7689. In this scheme the APH entities' continuing existence was secretly funded for the primary or sole purpose of disguising self-interested and fraudulent referrals of Medicare patients, by large infusions of cash made by the corporate owner/investors individually and through owned entities to a single corporate entity and its parent corporation through their nominal owner/investors. ROA.7646, ROA.7649, ROA.7660-ROA.7663. Additionally, some physicians and other professionals were given staff positions, with limited or no responsibilities, in exchange for referrals. ROA.7670-7672, ROA.7674-ROA.7675, ROA.7685, ROA.7689.

The record and the two complaints reflect nothing suggesting that the Capshaw Complaint alone would have put the Government on the trail of the fraud alleged by Bryan/Wendt, ROA.291, ROA.297, despite nine months of investigation by the Government between the filing of the two complaints. ROA.56, ROA.7646.

C. RELEVANT PROCEDURAL HISTORY

On January 4, 2013, prior to the filing of the Bryan/Wendt Complaint, the Government requested a 180-day seal extension to continue its investigation. ROA.291. The United States advised the District Court that it continued to evaluate Capshaw's claims, had interviewed Mr. Capshaw, and intended to interview other persons and request

additional documents and information. ROA.292. The Court extended the seal, and on June 19, 2013, the Government requested another extension; the Government advised the Court that it had opened a criminal inquiry into Capshaw's allegations and wished to coordinate the criminal and civil investigations. ROA.301. The District Court granted the motion and extended the seal to January 2, 2014.

After Bryan/Wendt filed their Complaint on **August 23, 2013**, the Government filed its Ex Parte Application for Partial Lifting of the Seal, on **November 4, 2013**, to enable it to disclose the existence of each lawsuit to the other Relators. ROA.307. On **December 4, 2013,** the District Court granted the motion to partially unseal. ROA.411.

After reviewing the two complaints and discussing with the Government attorneys the Government's preferences, Relators Capshaw, and Bryan and Wendt filed, with the Government's consent, their Joint Motion to Consolidate, "although the two complaints allege two distinct fraudulent schemes." ROA.323, ROA.326-ROA.327. The Government requested additional extensions to investigate and did not in any way suggest that its Capshaw investigation was a sufficient exploration of the Bryan/Wendt allegations. ROA.993 ("Because of the . . . complexity of the relators' allegations, the government requires additional time to investigate . . . ."); ROA.1069 ("This is an unusually complex matter involving multiple consolidated cases (and relators), an enormous number of defendants and entities, and [due to] the complexity of the relators' allegations, the government requires additional time to investigate . . . ."). The Court subsequently

granted the Relators' motion and consolidated the two actions. ROA.667.

After the consolidated actions were unsealed, several defendants filed motions to dismiss the Bryan/Wendt Action for lack of subject matter jurisdiction based on 31 U.S.C. § 3730(b)(5), the FCA's "First-To-File Bar." ROA.2578; ROA.2594; ROA.2627; ROA.2669; ROA.2711; ROA.2757; ROA.2802; ROA.2843; ROA.2892; ROA.2929; ROA.2976; ROA.3014. Bryan/Wendt emphasized in their Response that the two schemes involved different actors and kickback schemes. See, e.g., ROA.3284, ROA.4454.

While the motions to dismiss were pending, Relators Capshaw, Bryan and Wendt, the United States, and some Defendants ("Settling Defendants") reached a settlement agreement. ROA.5000.

Before the settlement was reduced to writing and executed, the District Court on **January 23, 2017** granted the motions and dismissed Bryan/Wendt as relators. ROA.4087.

Capshaw, Bryan/Wendt, the Government and Settling Defendants nonetheless completed and executed their written Settlement Agreement dated March 2017. A settlement ensured that the Settling Defendants would be finished with the allegations in the two actions and not face an appeal and potential revival of Bryan and Wendt's claims. The Settlement Agreement expressly treated the allegations from both actions as "Covered Conduct" resolved by the Settlement Agreement. ROA.5002. The Agreement also reflected Bryan and Wendt's position that their claims had been dismissed inappropriately and the Agreement did not foreclose their right to request

attorneys' fees, expenses and costs provided by the FCA to relators who recover by judgment or settlement. ROA.5000, ROA.5004. Pursuant to the Agreement, the Settling Defendants paid a settlement amount to the United States from which the Government awarded a Relator's Share as required by the FCA. Because the Government obtained a recovery from the Settling Defendants to resolve Bryan and Wendt's claims, they were prevailing parties entitled to recover statutory attorneys' fees, expenses, and costs pursuant to the FCA. The Settlement Agreement reserved the Bryan/Wendt Relators' right to seek statutory litigation fees, expenses and costs, and the settling defendants reserved the right to contest any such fee request. ROA.5004.

Bryan and Wendt moved for reconsideration of their dismissal, which was denied on June 13, 2017. ROA.5749.

The Bryan/Wendt Relators were represented by two law firms in the District Court, Boyd & Associates ("B&A"), ROA.4633, and Marchand & Rossi LLP (n/k/a Marchand Law, LLP) ("M&R"), ROA.4837. B&A moved to recover its litigation fees, costs and expenses on **April 13, 2017**, ROA.4633, and M&R moved to recover its litigation fees, costs, and expenses on **April 27, 2017**. ROA.4837. The District Court denied both motions on **July 10, 2017**, premised on its prior ruling the Bryan/Wendt Relators' underlying claims were barred by the First-To-File Bar. ROA.6198, ROA.6200-ROA.6202. The District Court denied by order dated **December 11, 2018**, ROA.6958.

The litigation between Capshaw and the remaining Defendants proceeded until a settlement

was reached and Capshaw requested that the District Court dismiss all remaining claims, which the Court did by order entered on **October 2, 2019**. (ROA.7056). Although the District Court had dismissed Bryan and Wendt as Relators, it purported to dismiss claims brought by them—including claims brought under the TMFPA that Capshaw could not move to dismiss because he was not first to file them and thus had no authority to settle them.

B&A filed a motion to correct the **October 2, 2019** Order, to preserve the Court's jurisdiction to consider fee requests as had been memorialized after the previous settlement and partial dismissal. B&A also filed a new request for statutory fees, expenses, and costs pursuant not, as previously, to the FCA but instead under the TMFPA. ROA.7058, ROA.7100, ROA.7138.

Before the District Court ruled on B&A's motions, Bryan, Wendt, and M&R filed a Notice of Appeal on **December 2, 2019**. ROA.7169.

On **February 12, 2020,** the lower court entered a Memorandum Opinion and Order disposing of B&A's motions and denying its fee request under the TMFPA. ROA.7181. The denials of both firms' fee requests were affirmed by the Court of Appeals in separate appeals, ROA.7169, ROA.8166, in a short *per curiam* decision on **July 30, 2021** B&A's Petition for Rehearing *en banc* was denied **August 26, 2021** and Judgment entered on **September 3, 2021**.

IX.
ARGUMENT

A. SUMMARY

The Court of Appeals erroneously affirmed the District Court's holdings that the Bryan/Wendt Action was jurisdictionally barred by 31 U.S.C. § 3730 (e)(5), the FCA's "First-To-File" Bar. These decisions were erroneous because Bryan/Wendt's Action was not "based on the facts underlying the pending (Capshaw) action" with which Relators' action was consolidated, and because the First-To-File Bar is not jurisdictional.

B. RELEVANT LEGAL BACKGROUND

The Federal False Claims Act, 31 U.S.C. §§ 3729-3732 ("FCA" or "the Act"), contains a "*qui tam*" provision authorizing private persons to bring actions on behalf of the United States against persons who are alleged, generally, to have presented to the Government false or fraudulent claims for payment, made or used false or fraudulent records or statements material to false or fraudulent claims for payment, retained overpayments, or conspired to commit such violations. The FCA and similar State laws provide for rewards to such whistleblowers, called "relators," from the proceeds of a settlement or judgment in a successful action.

The FCA includes some provisions limiting the jurisdiction of any court over actions brought under the Act, and additional provisions limiting a person's right to bring an action under the Act. The

provisions that have, at least at some time, expressly limited jurisdiction include the Public Disclosure Bar, 31 U.S.C. § 3730(e)(4), which Congress amended in 2010 to eliminate jurisdictional language; an action by "a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces," 31 U.S.C. § 3730(e)(1); and "an action . . . against a Member of Congress, . . . the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought," 31 U.S.C. § 3730(e)(2).

Prior to:

(a) this Court's guidance in *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013) ("*Sebelius*") and *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 515, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) ("*Arbaugh);*

(b) the Court's opinion in *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 191 L. Ed. 2d 899 (2015) ("*Carter"),* and

(c) the 2010 amendment of the Public Disclosure Bar,

some federal courts held 31 U.S.C. § 3730(b)(2), the First-to-File Bar, to deprive all courts of jurisdiction over an action based on the same facts as a pending action, despite the absence of jurisdictional language.

Since the 2010 amendments and the decisions in *Sebelius*, *Arbaugh* and *Carter*, some courts have revisited earlier decisions that had held the First-to-

File Bar was jurisdictional without the analysis required by *Sebelius* and *Arbaugh*. Such courts also found support for reconsideration in this Court's action in Carter, which addressed a non-jurisdictional issue before addressing a First-to-File issue, thus treating as, or at least implying that the First-to-File Bar is not jurisdictional.

Finally, courts of appeals, including the Fifth Circuit have recognized after the 2010 amendments in which Congress deleted jurisdictional language from the FCA's Public Disclosure Bar, that Public Disclosure is now rendered indisputably non-jurisdictional. This created an awkward post-amendment inconsistency, with courts acknowledging that the FCA's Public Disclosure Bar is clearly now non-jurisdictional while some, including the Fifth Circuit, continued to insist that the FCA's First-to-File Bar, which has never contained jurisdictional language, remains jurisdictional absent an *en banc* Court of Appeals decision to the contrary or guidance from this Court. This Court has, however, provided the necessary guidance expressly in *Arbaugh* and *Sebelius*, and implicitly in *Carter*. Some of the courts that have now acknowledged the First-to-File Bar as non-jurisdictional noted that the initial circuit precedent included little or no analysis, as is the case in the Fifth Circuit.

C. THE DECISIONS BELOW CONFLICT WITH SUPREME COURT PRECEDENT.

The Fifth Circuit erroneously affirmed the District Court decisions, which conflict with Supreme

Court decisions including *Sebelius; Arbaugh,* and *Carter*. The courts below failed to follow the analysis and the bright-line rule established by *Sebelius* and *Arbaugh* in determining whether the FCA's First-To-File Bar, 31 U.S.C. § 3730 (b)(5), deprived the District Court of jurisdiction, and failed to recognize the example of the Supreme Court in *Carter*, where the Court considered a non-jurisdictional issue *before* a First-To-File issue, reflecting recognition that the latter is non-jurisdictional. Additionally, the courts failed to recognize that the Fifth Circuit decision in *U.S. ex rel. Branch Consultants v. Allstate Ins. Co*., 560 F.3d 371 (5th Cir. 2009) predated *Sebelius* and *Carter,* which constitute intervening authorities permitting the panel to disregard contrary in-circuit opinions.

1. A jurisdictional statute must unequivocally assert its jurisdictional nature.

Arbaugh in 2006 and *Sebelius* in 2013 expressed in no uncertain terms the Supreme Court's concern over the careless use of the term "jurisdiction," and adopted its bright-line rule for determining whether a statute is jurisdictional.

a. *Arbaugh*

In *Arbaugh*, the Court distinguished federal-subject-matter jurisdiction from failure to state a claim, in the context of Title VII, Civil Rights Act of 1964. 546 U.S. at 503. At issue was whether the Act's limited definition of "employer," 42 U.S.C. § 2000e(b),

affects subject-matter jurisdiction or simply delineates an element of a claim for relief. *Id*. The Court concluded the latter*, id.* at 504, rejecting the Fifth Circuit holding that the definition of "employer" limited the district court's subject-matter jurisdiction. *Id*. at 509. The Court elaborated:

> "Jurisdiction," this Court has observed, "is a word of many, too many meanings." . . . This Court . . . , has sometimes been profligate in its use of the term. . . . We have described such unrefined dispositions as "***drive-by jurisdictional rulings***" *that should be accorded "no precedential effect"* on the question whether the federal court had the authority to adjudicate the claim . . . .

Id. at 510-11 (citations omitted, emphasis added). The Court established a "readily administrable bright line" rule that courts should only read such a provision as jurisdictional if the legislature has clearly stated it is jurisdictional. *Id.* at 515.

The Court recognized significant implications of the correct choice, including that: subject-matter jurisdiction cannot be waived; contested facts regarding subject-matter jurisdiction may be resolved by the judge but *fact issues regarding elements of a claim are for the jury*; and, where *the federal court* lacks subject-matter jurisdiction, it must dismiss the entire action, but *may continue to exercise supplemental jurisdiction when granting a motion to dismiss for failure to state a federal claim*. *Id*. at 514. Thus, Bryan/Wendt correctly argued that

the District Court could exercise its supplemental jurisdiction to award attorneys' fees under the TMFPA and its decision refusing to do so was based on its erroneous belief that it lacked jurisdiction.

b. *Sebelius*

In *Sebelius,* this Court held a regulatory deadline was not jurisdictional, 568 U.S. at 149, 153, reiterating the *Arbaugh* bright-line rule. *Id*. at 153-54 (citing *Henderson v. Shinseki*, 562 U.S. 428, 435, 436, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011); *Arbaugh*, 546 U. S. at 514; *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); and *Gonzalez v. Thaler*, 565 U.S. 134, 137, 132 S. Ct. 641, 181 L. Ed. 2d 619, 631 (2012)).

Because the courts below failed to follow *Arbaugh* and *Sebelius*, they erroneously held FCA's First-To-File Bar, 31 U.S.C § 3730 (b)(5), jurisdictional despite its lack of assertion of a jurisdictional nature.

2. Jurisdictional questions must be resolved first.

A federal appellate court normally must "satisfy itself both of its own subject-matter jurisdiction and of the subject-matter jurisdiction of the trial court before proceeding further." *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 143 (1st Cir. 2007) (citing *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)). Thus:

> Before considering [non-jurisdictional issues], it is appropriate to restate . . . basic principles . . . . Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *See, e. g., Marbury v. Madison*, 1 Cranch 137, 173-180 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," . . . . [When the lower federal court] [lacks] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender, 475 U.S. at 541 (citation omitted).

a. *Carter*

In *Carter*, this Court considered whether the Wartime Suspension of Limitations Act ("WSLA") applies only to criminal charges and whether the FCA First-To-File Bar keeps new claims out of court permanently or only while the first-filed claims are pending. The Court began its analysis with the non-jurisdictional WSLA. Had it considered the First-To-File Bar jurisdictional, the Court would have addressed it first. The First, Second, Third and D.C Circuits have all considered this choice significant in reaching their conclusions that the First-To-File Bar

is not jurisdictional, as discussed, *infra*. To hold the contrary requires assuming the Court forgot to make this important threshold determination.

Additionally, the courts below in the instant matter neglected to recognize that *Branch,* the first Fifth Circuit opinion referring to the First-To-File Bar as jurisdictional, predated both *Carter* and *Sebelius,* which constitute intervening Supreme Court authorities permitting the panel to disregard contrary opinions.

D. THE DECISIONS BELOW CONFLICT WITH AUTHORITATIVE DECISIONS OF OTHER COURTS OF APPEALS.

The Court of Appeals' affirmations of the District Court decisions dismissing, on erroneous jurisdictional grounds, Bryan/Wendt and denying B&A's motions for attorneys' fees conflict with *U.S. v. Sanofi-Aventis U.S. LLC (In re Plavix Mktg.)*, 974 F.3d 228, 231-35 (3d Cir. 2020); *U.S. v. Millennium Labs., Inc*., 923 F.3d 240, 243-44 (1st Cir. 2019), *cert. denied sub nom., Estate of Cunningham v. McGuire*, No. 19-583, 2020 U.S. LEXIS 338 (Jan. 13, 2020); *U.S. ex rel. Hayes v. Allstate Ins. Co*., 853 F.3d 80, 85 (2d Cir. 2017); and *U.S. ex rel. Heath v. AT & T, Inc*., 791 F.3d 112, 121 n.4 (D.C. Cir. 2015), which have held the FCA's First-To-File Bar is non-jurisdictional.

1. D.C Circuit: *Heath*

The D.C. Circuit in *Heath* also placed significant emphasis on the Supreme Court's

reaching the First-To-File issue after the WSLA question in *Carter*. *Carter*, it noted "addressed the operation of the First-To-File Bar on decidedly nonjurisdictional terms, raising the issue after it decided a nonjurisdictional statute of limitations issue." 791 F.3d at 121 n.4. Citing *Arbaugh* 46 U.S. at 515, the D.C. court held that the statutory language of 31 U.S.C. § 3730(b)(5), "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action" . . . "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 791 F.3d at 120. The court further noted that Congress knew how to refer to jurisdiction expressly, as it did, for instance, in the Public Disclosure Bar, and that nothing in the structure or text of the First-to-File Bar suggests that it is jurisdictional. *Id.* at 120-121.

2. Second Circuit: *Hayes*

In a brief opinion relying on *Sebelius*, *Arbaugh* and *Heath,* the Second Circuit in *Hayes* held the First-To-File Bar is not jurisdictional. 853 F.3d at 85-86.

3. First Circuit: *Millennium Labs*

In *Millennium Labs*, the First Circuit reversed its prior precedents that held the First-To-File Bar jurisdictional, relying heavily on *Carter* and its own

previous lack of the analysis required by *Arbaugh* and *Sebelius*:

> In 2015, the Supreme Court decided [*Carter*], a *qui tam* case. *Carter* "addressed the operation of the first-to-file bar on decidedly nonjurisdictional terms, raising the issue after it decided a nonjurisdictional statute of limitations issue." [*Heath*] 791 F.3d [at 121 n.4]. The clear implication is that the Court did not consider the first-to-file rule to be jurisdictional. Interpreting *Carter,* the D.C. Circuit and the Second Circuit have both held that the first-to-file rule is nonjurisdictional. . . .
>
> * * *
>
> Second, this circuit's prior cases labeling the first-to-file rule as jurisdictional, all of which predate *Carter,* devoted no substantive analysis to this issue. [*United States ex rel.*] *Duxbury* [*v. Ortho Biotech Prods., L.P.,* 579 F.3d 13 (1st Cir. 2009)], the oldest case, listed the first-to-file rule among the FCA's "jurisdictional bars" only in passing as *dicta.* 579 F.3d at 16. But it did not ask, and no later First Circuit decision has asked, if Congress clearly stated that the first-to-file rule was jurisdictional. **Because these rulings failed to apply the *Arbaugh* clear-statement test, they should be "accorded 'no precedential effect'** on the question whether the federal court

> had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 . . . .
>
> And third, applying the bright line rule leads to only one conclusion: the first-to-file rule is nonjurisdictional. Neither statutory text nor context nor legislative history suggests otherwise. . . Paragraph 3730(b)(5) provides that "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). As the D.C. Circuit recognized, this "language 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" . . . For the same reasons, we now hold that the first-to-file rule is not jurisdictional.

Millennium Labs., 923 F.3d at 248-51 (citations omitted).

4. Third Circuit: *Sanofi-Aventis*

Recently, the Third Circuit joined the First, Second and D.C, Circuits, holding the Bar is not jurisdictional, following *Sebelius's* clear-statement rule. "The contrary circuit cases," the court noted, like *Branch*, and *Millennium Labs*., "mostly predate these Supreme Court cases and do not apply the Court's clear-statement rule." The court opined that had Congress intended to make the Bar jurisdictional, it would have placed the Bar in one of

the two sections that mention jurisdiction, which it did not. *Sanofi-Aventis,* 974 F.3d at 231-35.

E. THE TMFPA IS NOT PREEMPTED BY THE FCA.

The Court of Appeals erroneously upheld the District Court's holding that the FCA's express grant of jurisdiction over state-law claims is limited by the FCA's First-To-File Bar and state false claims acts are pre-empted by the FCA. But nothing in the Texas statute prevents the accomplishment of any federal law purpose. More consistent with the statute and its history is to understand the jurisdictional grant as an exception to the first-to-file rule.

Moreover, in the Deficit Reduction Act ["DRA"] of 2005, Congress created incentives for states to enact their own anti-fraud legislation. *See, e.g., Blanchard v. Impact Cmty. Action*, No. 2:19-cv-746, 2020 U.S. Dist. LEXIS 8369, at *9 (S.D. Ohio Jan. 17, 2020) ("Rather than amending the FCA to preempt state law claims, Congress has incentivized states to enact legislation modeled after the federal FCA. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72 (2005), 42 USCS § 1396h. It would make little sense for Congress to do so if it had intended to preempt similar state law claims in their entirety.").

The few courts that have considered the apparent tension between these two provisions of the FCA, however, have reached the opposite conclusion to that of the District Court. The District Court in *Illinois v. Abbott Labs., Inc. (In re Pharm. Indus. Average Wholesale Price Litig.),* 509 F. Supp. 2d 82

(D. Mass. 2007) concluded that section 3732(b) should be read as an exception to section 3730(b)(5)'s First-to-File Bar, as this interpretation is supported by the legislative history, since the jurisdictional grant was intended to provide a means for states to join in "*pending federal actions* to recover state funds lost in the same transactions." *Id*. at 92-93 (emphasis added). *See also United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc*, 173 F.3d 870, 880 (D.C. Cir. 1999) ("the more obvious reading of 3732(b) . . . is that it *authorizes* permissive intervention by states for recovery of state funds (creating what is in effect an exception to 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States).").

Because Bryan and Wendt settled their claims against Defendants, they are entitled to attorneys' fees (which they have assigned to their attorneys) under the FCA and the TMFPA. TEX. HUM. RES. CODE § 36.110(c) (person bringing an action under chapter is "entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred" if the defendant is found liable or the claim is settled).

It is undisputed that Bryan and Wendt were parties to the settlement agreements entered among the United States, the State of Texas, and the Defendants. For this reason, pursuant to the express language of both statutes, they and their attorneys are entitled to statutory fees, costs, and expenses in bringing these actions on behalf of (1) the United States and (2) the State of Texas.

In its Order dismissing Relators Bryan and Wendt, the District Court did not expressly dismiss

the claims brought by Relators Bryan and Wendt, with or without prejudice, but stated that Bryan and Wendt were dismissed as Relators. The District Court did not state whether the claims were dismissed with or without prejudice. Capshaw, who was the remaining relator, however, could not pursue the claims brought by Relators Bryan and Wendt on behalf of the State of Texas, because he was barred from bringing them pursuant to *the TMFPA's first-to-file and public disclosure rules*.To the extent, if any, Bryan and Wendt's TMFPA claims were dismissed with prejudice at this time, the District Court erred, because *such a dismissal must be made without prejudice to refiling in state court. Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999). The District Court therefore erroneously retained jurisdiction over Bryan and Wendt's first-filed TMFPA while dismissing them personally as relators rather than dismissing the claims without prejudice so that the claims could be refiled in a Texas State District Court.

1. The FCA's Express Grant of Jurisdiction Over State-Law Claims Is Not Negated by the Federal First-To-File Rule.

In its February 12, 2020 Memorandum Opinion and Order refusing to award Bryan/Wendt's counsel, B&A, attorneys' fees pursuant to the TMFPA ("TMFPA Order"), ROA.7181, the District Court reiterated that Bryan/Wendt's first-filed TMFPA claims "were based on the same material elements of fraud alleged in Capshaw's first-filed

action." ROA.7185. B&A will address the error of that conclusion of law (or combined finding of fact and conclusion of law) hereinafter.

The District Court concluded that state laws that are similar to the FCA are pre-empted by the FCA unless state-law actions are brought *at the same time and in the same proceeding* as an FCA action *by the same relator* in federal court, *despite the absence of such limitations in the FCA's grant of jurisdiction over state-law claims arising from the same material or essential elements of fraud.* ROA.7186. Moreover, it contradicts the express language of the FCA's grant of jurisdiction over "*any* action brought under the laws of any State for recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730." 31 U.S.C. § 3732(b). The District Court opined that

> Permitting a later-filed action alleging the same core facts as a prior-filed FCA action to continue merely because it involves state law claims would create a run-around the FCA's first-to-file bar and frustrate "the accomplishment and execution of the full purposes and objectives of Congress" evidenced by the FCA's text. . . . The Court thus declined to impose an atextual limit on the FCA and dismissed Relators Bryan and Wendt.

ROA.7186, ROA.7187 (citation and footnote omitted).

But nothing in the Texas statute prevents the accomplishment of any federal law purpose, and the Court did, in fact, "impose an atextual limit on the

FCA" by drastically limiting its grant of subject matter jurisdiction over State-law claims based on the same conduct as the federal law claims rather than, more consistently with the statute and its history, imposing the statute's express and narrowly tailored limit on its first-to-file bar. As the District Court noted, the first-to-file bar is aimed at preventing "parasitic" actions alleging the same violations of the federal FCA, ROA.7185, for good reasons. Allowing for a multiplicity of parasitic FCA actions to proceed on behalf of the United States would increase the number of whistleblowers entitled to a share of the statutory reward—a relator's share of between 15 and 30 percent of the Government's recovery by settlement or verdict. This could force the federal Government to award multiple relators' shares of at least 15%, reducing the recovery of the federal Government's damages and penalties, or divide one relator's share among multiple relators, diminishing the incentive the FCA creates for whistleblowers to come forward.

Claims under the Texas statute, however, do not present this problem because *they do not provide for a recovery of the federal Government's damages or penalties or impede any other purpose of the FCA.* Instead, Texas imposes its own penalties and incentives with its own relator's award. There is, for example, no double jeopardy for the defendant in such an action even if brought separately because the federal and state statutes are civil, not criminal laws, and actions under each law are brought by different sovereigns—*i.e.,* the cases are not duplicative. *See Gamble v. United States,* -- U.S.--, 139 S. Ct. 1960, 1964, 204 L. Ed. 2d 322 (2019) ("We have long held that a crime under one sovereign's laws is not 'the

same offence' as a crime under the laws of another sovereign."); *Helvering v. Mitchell,* 303 U.S. 391, 398-400, 58 S. Ct. 630, 82 L. Ed. 917 (1938) (Double Jeopardy Clause only applies to criminal penalties, not civil ones); *cf., e.g., United States v. Witte*, 25 F.3d 250, 254 (5th Cir. 1994) ("more than one prosecution by the same sovereign for the same offense, always violate[s] double jeopardy . . . .") (emphasis added).

The TMFPA unambiguously provides: "A person other than the state may not intervene or bring a related action based on the facts underlying a pending action brought under this subchapter." TEX. HUM. RES. CODE§ 36.106. That is, only an action brought under the TMFPA is precluded by the TMFPA's first to file rule. *The* ***Texas Attorney General filed a Statement of Interest*** *on behalf of Texas reiterating Bryan and Wendt's arguments that an FCA claim cannot preclude a TMFPA claim based on the same facts, stating*:

> By its plain language, the TMFPA's first-to-file rule precludes a party other than Texas from filing a separate TMFPA action based on the same facts as an earlier-filed TMFPA complaint: "A person other than the state may not intervene or bring a related action based on the facts underlying ***a pending action brought under this subchapter."*** Tex. Hum. Res. Code § 36.106. The phrase "under this subchapter" applies only to an action brought under the TMFPA, as the language of § 36.106 specifically references Chapter 36 of the Texas Human Resources Code.

ROA.7140 (emphasis added). *See also, e.g., United States ex rel. Poonam Rai, D.D.S. v. KS2 TX, P.C.,* No. 3:17-cv-834, 2019 U.S. Dist. LEXIS 53147 at *18-19 & n.2 (D. Conn. March 27, 2019) (In action under federal FCA, and Connecticut, Texas and nine other State FCAs, in language virtually identical to that of Texas ("For example, Connecticut's FCA's first-to-file bar provides that '[i]f a person brings an action under this section, no person other than the state may intervene or bring a related action based on the facts underlying the pending action.' Conn. Gen. Stat. § 4-277(d)", because of the phrase "under this section," State FCAs only bar subsequent related actions where a previous action has already been filed under the same State FCA.).

Moreover, nothing in the FCA or its legislative history evidences any antipathy toward state analogue statutes. To the contrary, in the Deficit Reduction Act of 2005 ("DRA"), Pub.L. No. 109-171, § 7601, 120 Stat. 4, 154 (Feb. 8, 2006) (effective Oct. 1, 2007), codified at 42 USCS § 1396h, Congress created incentives for states to enact their own anti-fraud legislation. Section 6031 of the DRA, effective January 1, 2007, encourages states to legislate liability for the submission of false or fraudulent claims to state Medicaid programs, which are jointly funded by the federal Government and the States. *See, e.g., Blanchard v. Impact Cmty. Action*, No. 2:19-cv-746, 2020 U.S. Dist. LEXIS 8369, at *9 (S.D. Ohio Jan. 17, 2020) ("***Rather than amending the FCA to preempt state law claims, Congress has incentivized states to enact legislation modeled after the federal FCA***. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72 (2005), 42 USCS § 1396h**. *It would make little***

sense for Congress to do so if it had intended to preempt similar state law claims in their entirety.").

To qualify for the incentives, the State FCA analogue must meet statutory requirements, with compliance to be determined by the Office of the Inspector General ("OIG") of the Department of Health and Human Services ("HHS") in consultation with the Attorney General. The State FCA analogue must establish liability to the state for false or fraudulent claims as described by the federal FCA; contain provisions at least as effective in rewarding and facilitating qui tam actions as those in the FCA; require that a state FCA action be filed under seal for at least 60 days for review by the State Attorney General; and ***contain a civil penalty that is not less than the federal FCA civil penalty***. 42 U.S.C. § 1396h. ***Moreover, the DRA expressly provides that nothing in §1396h should be construed to prohibit broader state laws***. 42 USCS § 1396h(d). Thus, while the District Court's unsupported assertion that "[a] state law cannot shield the parties from an applicable, more restrictive federal law," ROA.7186 n.2, may prove generally correct, it would appear irrelevant here, where *Congress has expressly provided incentives to states for enacting broader state FCA analogues and forsworn any attempt to prohibit such broader laws*. Far from indicating a desire to substantially pre-empt such state-law FCA cases, *Congress enacted provisions to encourage and reward similar state statutes*.

The District Court acknowledged, in a footnote, that "the FCA grants 'jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government

if the action arises from the same transaction or occurrence as an action brought under section 3730.' 31 U.S.C. 3732(b)." ROA.7186 n.2 (emphasis added). Although this grant of jurisdiction contains no limitation, but to the contrary applies to "any" state-law action arising from the same transaction or occurrence, the District Court concluded without analysis or citation to authority that "section 3730(b)(5), which declares without limitation that any 'related actions' sharing the same core fraud as a prior-filed FCA action are barred, should be read to modify the grant of jurisdiction [in section 3732(b)] to cover only state law claims brought in conjunction with an FCA action." *Id.*

The few courts that have considered the apparent tension between these two provisions of the FCA, however, have reached the opposite conclusion. The District Court in *Illinois v. Abbott Labs., Inc. (In re Pharm. Indus. Average Wholesale Price Litig.),* 509 F. Supp. 2d 82 (D. Mass. 2007) concluded that *section 3732(b) should be read as an exception to section 3730(b)(5)'s bar, as this interpretation is supported by the legislative history, since the jurisdictional grant was intended to provide a means for states* ***to join*** *in "pending federal actions to recover state funds lost in the same transactions." Id.* at 92-93 (emphasis added). The *Abbott Labs* court noted that the National Association of Attorneys General ("NAAG") "was instrumental in lobbying for section 3732(b) as part of the 1986 Amendments to the FCA" and that the Senate Report accompanying the 1986 Amendments explained:

> And finally, in response to comments from the National Association of [State] Attorneys

> General, the subcommittee adopted a provision allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.
>
> S. Rep. No. 99-345, at 16 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5281.

See Abbott Labs., 509 F. Supp. 2d at 93 (also citing *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc*, 173 F.3d 870, 880 (D.C. Cir. 1999) ("the more obvious reading of 3732(b) . . . is that it ***authorizes permissive intervention by states*** for recovery of state funds (creating what is in effect an exception to 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States)."). *See also, e.g., United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195, 205 (2d Cir. 1998) ("another 1986 amendment, . . . ***permits the joinder***, in an FCA suit, of related state-law claims where those claims are 'for the recovery of funds paid by a State.'") (quoting 31 U.S.C. 3732(b)), overruled on other grounds, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)); *United States ex rel. McCoy v. Madison Ctr.*, No. 3:10-CV-259 RM, 2011 U.S. Dist. LEXIS 49917, at *13-14 (N.D. Ind. May 9, 2011) (§3732(b) properly read to create exception to §3730(b)(5) first-to-file bar; citing *Long*).

X.
CONCLUSION

The Court of Appeals rulings present a question of substantial importance that warrants this Court's review.

Relators Bryan and Wendt settled their claims and are entitled to attorneys' fees under the FCA and the TMFPA. [ROA.7181, 452 ROA.6198]

Because Bryan and Wendt settled their claims against Defendants, they are entitled to attorneys' fees (which they have assigned to their attorneys) under the FCA and the TMFPA. ROA.4493-ROA.4497, ROA.4612-ROA.4613; 31 U.S.C. §3730(d); TEX. HUM. RES. CODE § 36.110(c) (person bringing an action under chapter is "entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred" if the defendant is found liable or the claim is settled).

Branch and the Fifth Circuit authorities following it do not undertake the required analysis on whether the First-to-File Bar is jurisdictional. Moreover, they are superseded by the Supreme Court decisions in *Arbaugh* and *Carter*.

For these reasons, B&A requests that this Court grant this Petition for Writ of Certiorari, reverse the decisions in the courts below, grant B&A's request for statutory attorneys' fees, costs, and expenses under both the FCA and the TMFPA, and resolve the circuit split on the FCA First-to-File Bar by holding the First-to-File Bar is not jurisdictional.

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Respectfully submitted,

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