

No. 21-626

In the Supreme Court of the United States

BOYD & ASSOCIATES,
PETITIONER

V.

BRYAN K. WHITE, ET AL.

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

**PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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II. TABLE OF CITED AUTHORITIES

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Petitioner Boyd & Associates respectfully submits this Supplemental Brief to call to the Court's attention a new case, which was unavailable at the time of filing Petitioner's Petition for Writ of Certiorari.

**III.
ARGUMENT**

On January 25, 2022, the Court of Appeals for the Sixth Circuit joined the Courts of Appeals for the Third, First, Second, and D.C. Circuits, holding that the False Claims Act's First to File Bar is not jurisdictional. *See, United States ex rel. Kathleen A.*

Bryant v. Cmty. Health Sys., Nos. 20-5460, 20-5462/5469, 20-5463, 20-5637, 2022 U.S. App. LEXIS 2162 (6th Cir. Jan. 25, 2022); *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).

The Court of Appeals significantly held further that Relators who brought a False Claims Act case under the statute’s qui tam provisions, participated in a settlement, and received a portion of the Relator’s share from the proceeds of the settlement—even if the share was received pursuant to a sharing agreement among relators and not directly from the Government—are entitled to recover attorneys’ fees from the Defendant pursuant to 31 U.S.C. § 3730d. Moreover, the Court of Appeals held that section 3730(d), which provides for the award of attorneys’ fees to a successful relator, does not incorporate and is not subject to the Public Disclosure Bar or the First to File Bar, 31 U.S.C. § 3730(b)(5). *Bryant*, 2022 U.S. App. LEXIS 2162, *17-28-29.

In reaching these conclusions, the Court of Appeals carefully parsed the language of sections 3730(d) (awarding attorneys’ fees to successful relator who recovers a relator’s share of the proceeds), 3730(e)(5) (first to file bar), and 3730(e)(4) (public disclosure bar). *Id.* at *17-28.

Like the other courts of appeals holding that the first to file bar is not jurisdictional, the Court of

Appeals noted that its prior references to the first to file bar as jurisdictional had never examined the basis for that designation. *Id.* at *29.

Following the *Sanofi-Aventis*, *Millennium Labs*, *Hayes*, and *Heath* courts, the Bryant court noted that intervening decisions of the Supreme Court allowed a panel of the court of appeals to revisit prior precedent. *Id.* at *29. Following those courts, the Sixth Circuit panel relied on the Supreme Court's handling of the first to file issue in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015). *Bryant*, 2022 U.S. App. LEXIS 2162, at *29-30 (6th Cir. Jan. 25, 2022).

IV. CONCLUSION

The Court of Appeals rulings present questions of substantial importance that warrant 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).

U.S. ex rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371 (5th Cir. 2009) 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 v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) 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.

Boyd & Associates, Petitioners v. Bryan K. White, M.D., et al.

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