No. _____

In the
Supreme Court of the United States

MARCHAND & ROSSI, L.L.P., NOW KNOWN AS
MARCHAND LAW, L.L.P.,
Petitioner,

v.

BRYAN K. WHITE, M.D., INDIVIDUALLY; ET AL.,
Respondents.

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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QUESTIONS PRESENTED

The federal False Claims Act ("FCA"), 31 U.S.C. § 3730, includes an interrelated series of provisions intended to incentivize, through monetary awards, private reporting and prosecution of schemes to defraud the United States. The state of Texas has enacted a parallel statutory scheme to protect state interests.

Petitioner Marchand Law, L.L.P. investigated a fraudulent scheme and filed a lawsuit on behalf of its "whistleblower" clients pursuant to the FCA and parallel Texas enactment. Unbeknownst to them, another whistleblower previously had initiated a FCA lawsuit regarding a non-intersecting scheme, which had select actors in common, but discrete features and objectives.

There was no evidence either set of whistleblowers independently would have discovered or prosecuted both schemes for the benefit of the United States or state of Texas. There moreover was no evidence the United States or Texas would have discovered both schemes based on knowledge of only one. The district court nevertheless dismissed the suit filed by Marchand Law, L.L.P.'s clients based on the FCA "first-to-file" rule, which the district court treated as a jurisdictional bar to any subsequent federal *or* state lawsuit. The Fifth Circuit Court of Appeals affirmed based on circuit precedent.

The questions presented are as follows:

1. Whether the fundamental utility of the FCA—to incentivize private citizen investigation and

prosecution of fraud against the United States—is jeopardized by precedent that allows dismissal of "second-filed" suits even in the *absence* of evidence parallel schemes would have been discovered but for the second-filed suits.

2. Whether divergent standards of review utilized by circuits to evaluate first-to-file challenges contributes to lower courts' failures to allow independently viable FCA claims to proceed on the merits.

3. Whether in the absence of congressional intent, the FCA in any event can displace parallel state-law whistleblower remedies.

PARTIES TO THE PROCEEDING

Petitioner Marchand & Rossi, L.L.P. now known as Marchand Law, L.L.P. was a counsel of record for Relators Kevin Bryan and Franklin Brock Wendt in the district court and was an appellant in the court of appeals.

Co-Petitioner Boyd and Associates was a co-counsel of record for Relators Kevin Bryan and Franklin Brock Wendt in the district court and appellant in the court of appeals.

Respondents 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. were defendants in the district court and appellees in the court of appeals.

United States of America, ex rel, Kevin Bryan and Franklin Brock Wendt was the intervenor-plaintiff in the district court and an interested party in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Marchand & Rossi, L.L.P., now known as Marchand Law, L.L.P. is not a corporation. It does not have a parent company, and there is no publicly held company that owns 10% or more of the stock of Marchand Law, L.L.P.

STATEMENT OF RELATED PROCEEDINGS

- *Christopher Sean Capshaw, et. al., v. Bryan K. White, et al.*; Case No. 19-11309 (5th Cir.) (Judgment entered July 30, 2021; rehearing denied August 26, 2021)
- *United States of America ex rel., Christopher Sean Capshaw v. Bryan K. White, et al.*, Civil Action No. 3:12-cv-04457 (N.D. Tex.) (Judgment entered June 2, 2020)
- *United States of America ex rel. Kevin Bryan, et al. v. Hospice Plus LP, et al.*, Civil Action No. 13-CV-3392-N (N.D. Tex.) (consolidated into Civil Action No. 3:12-cv-04457, wherein Judgment was entered June 2, 2020)
- *Boyd & Associates v. Bryan K. White, M.D., et al.*, No. 21-626 (Pending before this Court)

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marchand & Rossi, L.L.P., now known as Marchand Law, L.L.P. ("Marchand L.L.P.") respectfully seeks a writ of certiorari to review the judgments of the United States District Court for the Northern District of Texas (the "District Court") and United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") barring recovery, including attorneys' fees, under the FCA and a Texas state analog.

OPINIONS BELOW

The Opinion of the Fifth Circuit in *Christopher Sean Capshaw, et al., v. Bryan K. White, et al.*; Case No. 19-11309 is not published in the Federal Reporter but is reproduced at Appendix ("App.") page 1. The Fifth Circuit's August 26, 2021 ruling denying a request for rehearing filed by Co-Petitioners Boyd & Associates is not published in the Federal Reporter but reproduced at App.63.

The District Court's January 23, 2017 Order dismissing underlying FCA and state-law claims as barred by the first-to-file rule is available at *Capshaw v. White*, No. 3:12-CV-4457, 2017 U.S. Dist. LEXIS 176075, *1 (N.D. Tex. January 23, 2017) and reproduced at App.15.

The District Court's June 13, 2017 Order denying a request to reconsider dismissal of the FCA and state-law claims is unreported but reproduced at App.45.

The District Court's July 10, 2017 Order denying motions filed by Relators and their counsel for attorneys' fees is available at *United States ex rel. Capshaw v.*

White, No. 3:12-CV-4457, 2017 U.S. Dist. LEXIS 200634, *1 (N.D. Tex. July 10, 2017) and reproduced at App.48.

The District Court's December 11, 2018 Order denying a request to reconsider the attorneys' fee ruling is unreported but reproduced at App.59.

The District Court's February 12, 2020 Memorandum Opinion and Order denying a standalone request to recover attorneys' fees filed by Co-Petitioner Boyd & Associates is not published in the Federal Supplement but is available at *United States ex rel. Capshaw v. White*, No. 3:12-CV-4457, 2020 U.S. Dist. LEXIS 24139, *1 (N.D. Tex. Feb. 12, 2020) and reproduced at App.6.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its merits opinion on July 30, 2021 and issued its ruling denying rehearing on August 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal False Claims Act, 31 U.S.C. § 3730(b), provides:

(b) Actions by private persons.

> (1) A person may bring a civil action for a violation of section 3729 . . . for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to . . . the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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

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

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

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

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

Federal False Claims Act, 31 U.S.C. § 3730(d), provides:

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers

> appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
>
> (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

The Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE § 36.101(a), provides:

> (a) A person may bring a civil action for a violation of Section 36.002 [prohibiting

> Medicaid fraud] for the person and for the state. The action shall be brought in the name of the person and of the state.

Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE § 36.102(a) & (c), provides:

> (a) A person bringing an action under this subchapter shall serve a copy of the petition and a written disclosure of substantially all material evidence and information the person possesses on the attorney general in compliance with the Texas Rules of Civil Procedure.
>
> . . .
>
> (c) The state may elect to intervene and proceed with the action not later than the 180th day after the date the attorney general receives the petition and the material evidence and information.

Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE § 36.106(a), 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.

Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE § 36.110, further provides:

> (a) If the state proceeds with an action under this subchapter, the person bringing the action is entitled, except as provided by

Subsection (b), to receive at least 15 percent but not more than 25 percent of the proceeds of the action, depending on the extent to which the person substantially contributed to the prosecution of the action.

(a-1) If the state does not proceed with an action under this subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to receive at least 25 percent but not more than 30 percent of the proceeds of the action. The entitlement of a person under this subsection is not affected by any subsequent intervention in the action by the state in accordance with Section 36.104(b-1).

. . .

(c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving a payment under this section is also 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. The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the claim is settled. . . .

INTRODUCTION

The enforcement and deterrent effect of the FCA and state-law analogs depend in significant part upon "private attorneys general" and their counsels' willingness to identify and incur the burden to investigate and file lawsuits against wrongdoers who have defrauded the government. These presumptions are so fundamental to the enactments that they are memorialized in the § 3730(b)(1) directive that "[a] person may bring a civil action for a violation . . . for the person and for the United States Government . . ."; the § 3730(b)(2) directive that "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government . . ."; the § 3730(b)(4) directive that affords the United States the option to "proceed with the action" or yield to whistleblowers (commonly referred to as "Relators") "to conduct the action . . ."; and the § 3730(d) incentives whereby Relators are entitled to receive a percentage of "proceeds" as well as "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs[,]" all of which must be paid by defendants.

The Texas state analog mandates functionally equivalent directives to protect the state's parallel (though independent) interests. For instance, Texas Human Resources Code section 36.101(a) empowers citizens to serve as private attorneys general, section 36.102(a) & (c) mandates information sharing with the state to enable the state to elect whether to assume responsibility for prosecutions or defer to

whistleblowers to proceed with the prosecutions, and section 36.110 promulgates financial incentives for private citizens who assume the burdens to initiate proceedings and assist the state ferret out and prosecute fraud.

The plain language of the statutes therefore reflect Congress and the Texas Legislature took on faith monetary incentives were essential to encourage private individuals *and* their counsel to police the sprawling and sometimes unwieldy federal and state programs most susceptible to fraud and abuse, because neither the United States nor states reasonably could be expected to adequately police the programs without citizen participation. The Fifth Circuit nonetheless fundamentally has undermined these financial incentives through the application of its precedent, which injects considerable uncertainty and unfairness into the inquiry whether whistleblowers may be entitled to recover "proceeds" or "attorneys' fees" for their efforts.

It has done so because its precedent misperceives the first-to-file rule to be a jurisdictional principle that can be resolved at the pleading stage based on fact-findings by a court, as opposed to a "claims processing rule" that should be subject to deferential standards of review and factual development *before* viable FCA claims are susceptible to dismissal. There indeed is a circuit split as to whether the first-to-file rule is jurisdictional.

This case provides the Court the opportunity to resolve the jurisdictional split as well as more fundamentally important questions to ensure the FCA

continues to operate to incentivize private citizen efforts to prevent fraud against the United States and states that have enacted FCA analogs.

STATEMENT OF THE CASE

Circuit courts generally have held the statutory intent of the first-to-file rule, found in 31 U.S.C. § 3730(b)(5), is to prevent "parasitic" or "opportunistic" lawsuits, in contrast to actions based on independently discovered and discrete fraudulent schemes. *See, e.g.*, *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 326 (1st Cir. 1994); *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3rd Cir. 1998); *United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377 (5th Cir. 2009); *Wisconsin v. Amgen, Inc.*, 516 F.3d 530, 533 (7th Cir. 2008); *In re Natural Gas Royalties ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 961 (10th Cir. 2009).

In the District Court, Relators Kevin Bryan and Franklin Brock Wendt (the "Bryan/Wendt Relators") filed a FCA lawsuit to hold persons accountable for improperly remunerating *staff* of healthcare providers and utilizing other incentives to induce patient referrals to defraud the federal Medicare program. They simultaneously filed claims under the Texas Medicaid Fraud Prevention Act ("TMFPA"), TEX. HUM. RES. CODE § 36.101(a), to remedy efforts to defraud the Texas state "Medicaid" program. Marchand L.L.P. and Boyd & Associates were the Bryan/Wendt Relators' counsel of record in the District Court.

Unbeknownst to the Bryan/Wendt Relators or their counsel, another whistleblower (Relator Christopher Sean Capshaw) previously had initiated a FCA lawsuit against *investors* in some of the same healthcare providers, regarding self-interested and reciprocal uses of referrals he contended defrauded *only* the federal Medicare program. Both lawsuits were filed under seal, and there was no evidence of record either set of Relators, their counsel, the United States, or the state of Texas independently would have discovered the parallel fraudulent schemes based on the knowledge of only one scheme.

The District Court nevertheless dismissed the claims Marchand L.L.P. and Boyd & Associates filed on behalf of the Bryan/Wendt Relators and further denied the Bryan/Wendt Relators' right to statutory attorneys' fees authorized by the FCA and separately authorized by the TMFPA. The District Court erred in two respects by so doing.

First, it construed the first-to-file rule as a "jurisdictional" bar, which purportedly was subject to fact findings by the District Court *at the pleading stage* pursuant to Federal Rule of Civil Procedure 12(b)(1). But the first-to-file rule should be treated as a "claims-processing rule" subject to deferential Rule 12(b)(6) review standards.

The Court further erred by denying the Bryan/Wendt Relators' derivative claims for attorney's fees under the FCA *and* TMFPA. This was error because even assuming *arguendo* the FCA claim properly could have been dismissed at the pleading stage on the present record (it could not), there is no

legal precedent that warranted circumvention of the parallel enforcement scheme Texas has implemented through the TMFPA to protect *state* interests.

A. The Bryan/Wendt Relators and their Counsel Identified a Discrete Fraudulent Scheme that Had Not Been Previously Discovered

The text of § 3730(b)(5) prohibits successive lawsuits "based on the facts underlying [a] pending action" in order to prevent opportunistic or parasitic lawsuits. But no reasonable interpretation of the text commands dismissal of a second-filed lawsuit in the absence of a definitive basis to conclude parallel sets of Relators, the United States, or a state would have discovered distinct schemes *without* the valuable assistance of the second set of Relators.

Had the district court engaged in a first-to-file analysis faithful to this precept, it could not have dismissed the Bryan/Wendt Relators' complaint at the pleading stage or denied their derivative requests for attorneys' fees. There was absolutely no basis to infer from the record that the Bryan/Wendt Relators' acted with "opportunistic" or "parasitic" intent when they filed their second lawsuit.

Nothing in the record suggested they even were *aware* of the previously filed and *sealed* lawsuit filed by Relator Capshaw, or the scheme averred therein. There likewise was no basis to infer the United States had sufficient information to discover both schemes.

The record indeed reflects that in a more than nine-month gap from filing of the first FCA action, (ROA.56), until the Bryan/Wendt Relators filed the

second action, (ROA.7646), the United States actively investigated the averments in the first lawsuit; yet there has been no basis to infer that investigation revealed the distinct scheme that was the focus of the Bryan/Wendt Relators' eventual claims. *See, e.g.*, (ROA.291); (ROA.297). There was no plausible basis to presume the United States discovered or reasonably could have been expected to discover the distinctive characteristics of the two schemes. The averments in the two lawsuits therefore made first-to-file dismissal of the Bryan/Wendt Relators' claims improper.

B. Comparison of Averments in the "First" and "Second" Actions

Two FCA actions ultimately were consolidated to constitute the action for which review is sought. (ROA.667). The first matter was initiated by a pleading filed in the District Court on November 6, 2012 (hereafter, the "First Action"). (ROA.56). The second matter was initiated by the Bryan/Wendt Relators' Complaint filed on August 23, 2013 (hereafter, the "Second Action"). (ROA.7646).

Both Actions in a general sense were premised on the manner in which healthcare providers seek reimbursement for patient services through federal "Medicare" or related state "Medicaid" programs. But the averred schemes did not intersect in a manner that justified the District Court's first-to-file dismissal of the Bryan/Wendt Relators' claims. In fact, the patients referred and source facility at issue in the Scheme Relator Capshaw disclosed were entirely unrelated to the patients referred and different source facilities at

issue in the Scheme the Bryan/Wendt Relators disclosed.

1. The "First Action" and Capshaw's Averments of Clandestine Financial Incentives

Relator Capshaw discovered the facts that were the basis for the First Action, because he worked as the Finance Director for the entity Sage Physician Partners, Inc., which did business as American Physician House Calls (herein "APH"). (ROA. 56, 57, 60). Based on that work, Relator Capshaw had personal knowledge, and in turn averred APH in essence served as the management arm for a separately incorporated physician service known as American Physician House Calls Health Services, Inc. ("APH Services"). (ROA.60 – 61). APH Services was a "Part B" Medicare Participant, which employed doctors and other care providers. (ROA.57, 61). Whereas those doctors and care providers provided Medicare Part B services—if their patients required services covered by Medicare "Part A," the doctors had to refer patients to other caregivers. (ROA.61).

Although there is nothing inherently improper about Part B Participants making referrals of the kind, Relator Capshaw alleged he had direct knowledge that from 2006 to 2012, APH and APH Services's owners and investors devised a sophisticated form of self-dealing to financially benefit from cross-referrals prohibited by the Medicare program. (ROA.61, 80). APH Services employed, for instance, a physician named Dr. Bryan K. White ("Dr. White"), who eventually was a named

defendant in the District Court, and who was the "Medical Director" of APH Services. (ROA.58).

Dr. White exploited the influence he exerted over APH Services to in part benefit the owners and investors in APH and APH Services—but also to benefit a series of Part A Participant entities Dr. White *himself* partially owned. Specifically, Dr. White partially owned: (1) Be Gentle Home Health, Inc. d/b/a Phoenix Home Health Care; (2) North Texas Best Home Healthcare, Inc.; (3) A&S Home Health Care; (4) Goodwin Home Health Services, Inc.; (4) Hospice Plus, L.P.; and (5) Goodwin Hospice, Inc.—all of whom were named as defendants in the First Action. (ROA.58 – 59, ROA.73).

All of the entities were Part A Medicare Participant companies, (ROA.58 – 59); thus, precisely the type of entities that needed to cultivate a referral network with entities like APH Services, which exclusively provided Part B services. For ease of reference, Dr. White's Part A Participant entities collectively will be referred to as the "White Part A Entities."

Dr. White's business partner, Suresh Kumar ("Mr. Kumar"), was a part owner or manager in all of the White Part A Entities and investor in APH—and also named as a defendant in the First Action. (ROA.58, 74). Dr. White and Mr. Kumar—as co-owners of the White Part A Entities—conspired to use their relationships with the owners of APH and APH Services to create a steady stream of Part A referrals to the White Part A Entities and financially incentivized the scheme through sham loans made to the APH owners (which never were intended to be repaid), improper arrangements for cost-free commercial lease space, and transfers of equity

interests in an entity participating in the fraudulent scheme. (ROA.75 – 76).

Accordingly, critical to the first-to-file analysis regarding the First Scheme, is the practical means by which it would have been detected by a whistleblower (or the government) would have been:

1) Loan documentation (if any) between Dr. White on one hand, and APH and APH Services on the other;

2) Lease or sub-lease documentation (if any) regarding APH or APH Services; and

3) Transfer and ownership documentation (if any) regarding shares in the co-conspiring entity.

These mechanisms for discovering the First Scheme are near dispositive with respect to the District Court's flawed first-to-file analysis, because there is no basis to infer a review of documentation of the kind, or interviews with persons knowledgeable of the scheme, also would have prompted an investigation into the *distinct* kickback scheme the Bryan/Wendt Relators independently alleged in their Second Action. The mechanisms and means by which various persons facilitated that "Second Scheme" were far different in character, yet no explanation was proffered by the District Court (or Fifth Circuit) regarding what specifically regarding either scheme necessarily, or even probably, would have pointed to the other.

2. The "Second Action" and the Bryan/Wendt Relators' Averments of Conventional Remuneration to Induce Referrals

Unlike the sham loans, sham lease, and equity transfers that facilitated the First Scheme—the Second Scheme was facilitated through far different means. Representatives of the White Part A Entities quite simply made cash or in-kind gifts to *staff* of referral sources (and other professionals), to induce Part A referrals. (ROA.7646, 7649).

The Bryan/Wendt Relators learned of, and eventually averred this kickback scheme, because they worked as marketing personnel for one or more of the White Part A Entities. (ROA.7649). Relator Bryan, for instance, worked as the "Director of Marketing" for "Hospice Plus, LP" (hereafter "Hospice Plus") from 2006 to November 2012 and in other capacities through 2013. (ROA.7649).

Relator Wendt likewise worked for Hospice Plus, but in the capacity of "nurse marketer." (ROA.7649). He held the position from 2009 to 2013. (ROA.7649).

Both Bryan/Wendt Relators witnessed a "pay-for-patients" scheme, averred to have been masterminded by Dr. White and Mr. Kumar. (ROA.7649). In the Second Action, the Bryan/Wendt Relators therefore averred the following:

- "[Relator Bryan] would go to nursing homes where he marketed for Hospice Plus. . . . Bryan would give *staff* members a Dillard's or Macy's gift card, or do a lunch for the *staff*. . . . The purpose of these efforts was to induce the

facilities or responsible *personnel* to refer patients to Hospice Plus." (ROA.7660 – 7661) (emphasis added).

- "March is Social Work Month. . . . At the beginning of March, 2006, Dr. White, [another Hospice Plus employee], and [Relator] Bryan purchased gifts, and Visa gift cards, to distribute throughout the month to *personnel* at various facilities. They gave gift cards to [employees or physicians] at Laurenwood Nursing and Rehabilitation, . . . Mesquite Tree Nursing Center, and . . . Treemont Nursing Home, to name a few . . . ." (ROA.7661) (emphasis added).

- "At Dr. White's instruction, Hospice Plus's marketing employees also [gave out gift cards] during National Nursing Home Administrator's Week (March), Nurse's Week (May), and Certified Nurse's Aide Week (June) of 2006." (ROA.7661).

- "Dr. White had the marketers deliver[] the more expensive cards to the various *administrators* and *directors* of nursing, and less expensive cards to the charge *nurses* and nursing *staff* of these facilities. The purpose of giving all of these cards and gifts was to induce the recipients and the facilities for which they worked to refer patients . . . ." (ROA.7661) (emphasis added).

- "In the summer of 2006, [Relator] Bryan began assisting . . . with hosted lunches at nursing facilities where Dr. White was the medical director. . . . The intent of hosting these lunches for the *staffs* of the nursing facilities was to

induce them to refer patients . . . ." (ROA.7662) (emphasis added).

- "Dr. White also had the Hospice Plus marketing employees host free 'happy hours' and sponsor parties for referral sources . . . including a Cinco de Mayo party . . . for the *administrators*, *directors* of nursing, and *social workers* of the nursing homes from whom Hospice Plus was getting patient referrals, including . . . Red Oak Nursing Home, . . . Avante Rehabilitation Center in Irving, . . . [and] several Lexington Independent Living facilities." (ROA.7662) (emphasis added).
- "a woman . . . at Treemont Nursing Home told [Relator] Bryan that Dr. White took her and some *co-workers* to Ocean Prime. The purpose of hosting these dinners was to induce the guests to refer patients . . . ." (ROA.7663) (emphasis added).

The Complaint in the Second Action provided copious additional details regarding gifts and remuneration of the foregoing varieties, consistent with the practices described above. The Complaint likewise showed the absence of substantive overlap between the litigants, forms of remuneration, targeted facilities or the goals of the respective Schemes. For instance, of the approximately sixty-five natural persons and business entities averred to have been either defendants in the District Court *or* participants in the Schemes—only *nine* were averred to have a shared connection of some kind to both Schemes.

And notwithstanding that exceedingly limited identity of interests, the averments regarding the characteristics, targets, and objectives of the respective Schemes did not substantively intersect. It consequently was far from probable the United States (or Texas) had sufficient information to discover both Schemes prior to the information provided by the Bryan/Wendt Relators.

This is not a matter of inference or conjecture, because both the United States and state of Texas participated in some form in the District Court litigation, but neither remotely suggested they perceived they could have discovered the discrete Schemes averred by the Bryan/Wendt Relators on one hand, versus Relator Capshaw on the other—*or* that either Action should have been dismissed based on the other. The state of Texas indeed was so alarmed by the prospect the FCA first-to-file rule was being used as a basis to circumvent the Bryan/Wendt Relators' parallel TMFPA claim that it filed a "Statement of Interest" in the District Court. It therein advised: "the very language of the statutes *prevents* a first-filed action brought solely under the FCA from precluding an action asserting TMFPA claims for the first time based on the same or similar facts." (ROA.7140, 7141) (emphasis added).

The United States, by comparison, unquestionably investigated the First Scheme before the Bryan/Wendt Relators filed their Second Action. Yet there is no basis to infer the United States discovered the Second Scheme, or plausibly could have been expected to without the valuable assistance provided by the Bryan/Wendt Relators. Never has the United States suggested otherwise, nor did its litigation conduct

provide any basis for a contrary conclusion or even inference.

C. The United States' Investigation and the Eventual "Consolidation" of the Two Actions

As discussed above, the First Action was filed November 6, 2012. (ROA.56). Pursuant to the sixty-day intervention deadline mandated by 31 U.S.C. § 3730(b)(4); January 7, 2013 was the United States' deadline to either intervene in the First Action or request additional time to make an intervention decision. On January 4, 2013, the United States requested "additional time to investigate" and sought "180 days" to do so before taking a position on intervention. (ROA.291).

To substantiate its request for additional time, the United States advised the lower court, *inter alia*:

- "The Government continues to evaluate [Relator Capshaw]'s claims." (ROA.292).
- "The Government has *interviewed* [Relator Capshaw] . . . ." (ROA.292) (emphasis added).
- "within the anticipated extension period, the Government will interview *other* persons with relevant knowledge of [Relator Capshaw]'s allegations, and request *additional* documents and information." (ROA.292) (emphasis added).

Notwithstanding the United States, by that time, actually had "interviewed" Relator Capshaw, and should have received (by statutory mandate) "all material evidence and information [he] possesse[d]," *see* 31 U.S.C.

§ 3730(b)(2); the United States did not imply the scope of its investigation implicated a broader scheme than what had been averred in the First Action. The court below, based on the United States' request to continue investigating the First Scheme, extended the intervention deadline until July 6, 2013.

Before that extended deadline expired, on June 19, 2013, the United States yet again moved for "additional time to investigate . . . ." (ROA.300). And yet again, the United States advised it had "interviewed [Relator Capshaw]" and during an extension "intend[ed] to interview other persons" and "request additional documents"; but by that time, the United States also had "opened a criminal inquiry into [Relator Capshaw's] allegations." (ROA.301). During a second extension, the United States therefore wished to "coordinate the [civil] investigation with the criminal attorneys to avoid duplicating or wasting resources." (ROA.301).

Notwithstanding seven months by that time had elapsed since Relator Capshaw filed the First Action, and the United States was pursuing both a civil and criminal inquiry into the matters averred in the First Action—there still was no suggestion the investigation revealed details of the Second Scheme eventually pleaded by the Bryan/Wendt Relators. Based on the United States' representations regarding the scope of its inquiry, and need for additional time to continue its investigation in *that* regard, the District Court granted the second extension request and extended the United States' intervention deadline to January 2, 2014.

Before expiration of that extended intervention deadline; on August 23, 2013, the Bryan/Wendt Relators

filed their Complaint, whereby they initiated the Second Action. (ROA.7646). When they did so, they had no knowledge of Relator Capshaw's parallel filing or the United States' investigation premised on that filing, because the only facts of record reflect: "At the time Bryan and Wendt's Complaint was filed, they were *unaware* of the [prior] complaint . . . .". (ROA.323, 326) (emphasis added). But because the Bryan/Wendt Relators were obligated by § 3730(b)(2) to serve a copy of the Complaint on the United States—as well as "substantially all material evidence and information . . ."—the United States for the first time was provided information regarding the Second Scheme.

The United States therefore elected to file an "*Ex Parte* Application for Partial Lifting of the Seal" on November 4, 2013—to enable it to disclose the existence of the parallel FCA lawsuits to both sets of Relators. (ROA.307). The "*Ex Parte*" request was not, however, disclosed to either set of Relators in advance (because presumably it could not have been).

In the filing, the United States explained it wished to disclose the two actions to the respective Relators to enable *them* to consider whether to "consolidate their case and/or reach an accord regarding which case should be pursued." (ROA.309). On December 4, 2013, the lower court granted the United States' request to partially unseal and disclose the two Complaints. (ROA.311).

Upon viewing the pleadings in both cases, and discussing the United States' preference, the two sets of Relators agreed "although the two complaints allege two *distinct* fraudulent schemes[,]" they would consent to

consolidation of their two suits under case number 3:12-cv-04457. (ROA.323, ROA.326 – 327) (emphasis added). Notably, although the Bryan/Wendt Relators and Relator Capshaw conferred with the United States before filing a "Joint Motion to Consolidate," and even obtained the United States' assent to consolidate the actions, (ROA.327)—the United States did not then register, nor has it since registered any disagreement that "the two complaints allege[d] two *distinct* fraudulent schemes." (emphasis added).

Indeed, in a series of additional extension requests, the United States' commentary reflected how expansive its investigation became only *after* the contribution from the Bryan/Wendt Relators. (ROA.993) ("Because of the number of defendants involved and 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 the complexity of the relators' allegations, the government requires additional time to investigate . . . .").

D. Respondents' § 3730(b)(5) First-to-File Motions and Opposition to Fee Recovery

Notwithstanding the absence of any facts of record suggesting the Bryan/Wendt Relators were aware of the First Scheme before the lower court unsealed the two Complaints, that the Bryan/Wendt Relators otherwise acted with "parasitic" or "opportunistic" intent, or that the United States (or Texas) independently had detected the Second Scheme—the defendants in the District Court filed § 3730(b)(5) first-to-file dismissal or

equivalent motions. *See* (ROA.2578); (ROA.2594); (ROA.2627); (ROA.2669); (ROA.2711); (ROA.2757); (ROA.2802); (ROA.2843); (ROA.2892); (ROA.2929); (ROA.2976); (ROA.3014).

In initial opposition, and then through a request for reconsideration, the Bryan/Wendt Relators emphasized the two Schemes involved different actors and different remuneration schemes, and there was no basis to infer the United States or Texas had sufficient information to detect both Schemes independent of the Bryan/Wendt Relators' contributions. *See, e.g.,* (ROA.3284); (ROA.4454). The lower court nonetheless dismissed the Bryan/Wendt Relators' claims on January 23, 2017 and reaffirmed that dismissal on June 13, 2017. App.15; App.45.

But before the lower court's first dismissal ruling on January 23, 2017; the Relators, the United States, and several Respondents had begun negotiating a resolution of the respective Relators' claims. *See generally* (ROA.5000). That resolution ultimately was memorialized in a "Settlement Agreement" dated March 2017, which expressly treated the allegations from *each* Action as discrete "Covered Conduct" by stating as follows:

> Settling Defendants provided: (1) kickbacks under the guise of sham loans, a free equity interest . . ., stock dividends, and free rental space to . . . APH . . . and . . . APH [Services], its owners . . ., and at least one employee in exchange for patient referrals or patient recertifications . . .; *and*, (2) kickbacks to doctors, nurses, and administrators, and to hospitals,

> group homes, and long-term care facilities, such as nursing homes and assisted living facilities, in exchange for patient referrals . . . .

(ROA.5002) (emphasis added).

The Settlement Agreement also memorialized the Bryan/Wendt Relators' position that their claims inappropriately had been dismissed under the first-to-file rule, and that the Settlement Agreement did not foreclose their right to request litigation fees and costs. *See* (ROA.5000, 5004). Based on those reservations, the Bryan/Wendt Relators and Marchand L.L.P. filed a "Motion for Approval and Award of Reasonable Expenses, Attorney's Fees, and Costs." (ROA.4837, the "Fee Request"). The lower court denied the Fee Request on July 10, 2017, and reaffirmed that denial by Order dated December 11, 2018. App.48; App.59.

In both respects, the lower court concluded its prior ruling the Bryan/Wendt Relators' claims purportedly were barred by the first-to-file rule operated to preclude derivative fee recovery. The breadth of the lower court's ruling was such that it did *not* differentiate between the fee recovery available through provisions found in the FCA, in contrast to independent rights to relief provided under the TMFPA, which *also* had been averred by the Bryan/Wendt Relators.

For instance, in its initial ruling dismissing the Bryan/Wendt Relators' substantive claims for relief, the lower court held: "Nor does the fact that the . . . Complaint alleged the [TMFPA] claims for *the first time* alter the Court's conclusion. The TMFPA false claims provisions encompass the same fraudulent scheme as

Capshaw's original FCA claims." App.25 (emphasis added).

In response, the Bryan/Wendt Relators requested the lower court reconsider, in part advising: "The Court concluded that the fact that the . . . Complaint alleged the TMFPA claims for the **first time** was irrelevant because the underlying scheme was the same, despite the fact that the scheme violated **different** law, resulting in a **different** cause of action, on behalf of a **different** injured party, the **State of Texas, none** of which was ever part of the Capshaw allegations." (ROA.4454, 4465) (emphasis in original).

The lower court responded that "[t]he dismissed relators have not advanced any new argument in their motion to reconsider to alter the Court's judgment in this regard." App.46 – 47. And with rulings of the kind as its predicate, the lower court denied the Bryan/Wendt Relators' Fee Request in its entirety as well as a separate request for fees eventually filed by Boyd & Associates. Appx.48; Appx.6. The Fifth Circuit Court adopted the reasoning of the District Court and affirmed through a summary invocation of its circuit precedent. App.1.

REASONS FOR ALLOWING THE WRIT

A. Certiorari is Warranted to Address Jeopardy to the Fundamental Utility of the FCA to Incentivize Citizen Investigation and Prosecution of Schemes to Defraud the United States

It is impossible for even earnest FCA Relators, operating ethically and in good faith, to know in advance whether a separate set of Relators will have averred a parallel, even if non-intersecting fraudulent scheme. The District Court's and Fifth Circuit's rulings nevertheless operate to unfairly penalize earnest FCA Relators of the kind, regardless how valuable the United States or state governments consider the information discovered and disclosed by the "second filed" Relators. This imposes far too much uncertainty and risk for Relators and their counsel to fulfill the essential role of private attorneys general, although that is the precise opposite of Congress's intent.

This case indeed is paradigmatic of the type of private citizen intervention that is necessary to identify fraud in federal programs most ripe for fraud and abuse, because of the considerable cost and expense required to investigate and prosecute claims on behalf of the government. Millions of dollars of attorney time and expense were committed to the investigation and prosecution of the FCA claims filed and prosecuted on behalf of the Bryan/Wendt Relators, yet even in the absence of any evidence remotely suggesting collusion by the respective sets of Relators—or even a hint from the United States that it questioned the value of contributions made by both sets of Relators to enable the

United States to extract a settlement from Respondents—the Fifth Circuit construed its precedent to preclude the Bryan/Wendt Relators' ability to recoup fees.

If this treatment of the first-to-file rule is left unchecked, there will be no incentive for FCA Relators and the experienced cadre of practitioners who focus on FCA claims to continue to bear the risk and uncertainty on which robust enforcement of the FCA depends. The corresponding public policy implications are not trivial.

Since January 1, 2020, for instance, there have been twenty-five identifiable FCA complaints filed in district courts within the Fifth Circuit. Every single one of the cases was initiated by private citizens—not the United States. *See Strawn, et al. v. Harris Health Sys.*, No. 4:20-cv-00296 (S.D. Tex. filed Jan. 23, 2020); *United States et al. v. Cornerstone Reg'l Hospital, L.P., et al.*, No. 7:20-cv-00022 (S.D. Tex. filed Jan. 24, 2020); *Calhoun et al. v. Pulte Grp., Inc. et al.*, No. 4:20-cv-00092 (E.D. Tex. filed Feb. 7, 2020); *United States et al. v. The Boeing Co.*, No. 3:20-cv-00057 (S.D. Tex. filed Feb. 24, 2020); *Sealed v. Sealed*, No. 4:20-cv-00177 (N.D. Tex. filed Feb. 26, 2020); *United States et al. v. Am. All. Health Servs. LLC et al.*, No. 3:20-cv-00615 (N.D. Tex. filed Mar. 11, 2020); *Patient L v. Compass Behav. Ctr of Houma Inc. et al.*, No. 6:20-cv-00334 (W.D. La. filed Mar. 13, 2020); *Mitchell, ex rel., et al. v. Bergman, et al.*, No. 4:20-cv-01272 (S.D. Tex. filed Apr. 9, 2020); *Amin et al v. Oliver Street 5.01(A) Inc. et al.*, No. 3:20-cv-01021 (N.D. Tex. filed Apr. 24, 2020); *United States, et al. v. Internal Revenue Serv., et al.*, No. 1:20-cv-00530 (W.D. Tex. filed May 15, 2020); *United States v. Muniz*

Concrete & Contracting, Inc. et al., No. 1:20-cv-00530 (W.D. Tex. filed May 15, 2020); *United States, et al. v. Reliant Rehab. Holdings, Inc., et al.*, No. 4:20-cv-00409 (E.D. Tex. filed May 19, 2020); *United States ex rel. Glen Jameson v. WBI Energy Transmission, Inc., et al.*, No. 3:20-cv-00172 (S.D. Tex. filed May 21, 2020); *United States, et al. v. Senseonics Holdings, Inc., et al.*; No. 5:20-cv-00657 (W.D. Tex. filed May 29, 2020); *United States, et al. v. Rio Grande Valley Orthopedic, P.A., et al.*, No. 7:20-cv-00142 (S.D. Tex. filed June 1, 2020); *United States, et al. v. The State of Texas, et al.*, No. 5:20-cv-00661 (W.D. Tex. filed June 2, 2020); *Harrington, et al. v. Art Institutes Int'l LLC, et al.*, No. 4:20-cv-02445 (S.D. Tex. filed July 8, 2020); *United States v. Daybreak Ventures, LLC*, No. 4:20-cv-00546 (E.D. Tex. filed July 16, 2020); *Dr. Garcia, et al. v. Syal, et al.*, No. 4:20-cv-02670 (S.D. Tex. filed July 30, 2020); *Briseno, et al v. Hillcroft Med. Clinic Ass'n*, No. 4:20-cv-02871 (S.D. Tex. filed Aug. 14, 2020); *Quesenberry, et al. v. Quality Mat Co., et al.*, No. 1:20-cv-00356 (E.D. Tex. filed Aug. 25, 2020); *Hayes, et al. v. HD and Assoc, LLC*, No. 2:20-cv-02657 (E.D. La. filed Sept. 30, 2020); *Aldridge v. Cain, et al.*, No. 1:20-cv-00321 (S.D. Miss. Filed Oct. 8, 2020); *United States, et al. v. Moayedi, et al.*, No. 3:20-cv-03474 (N.D. Tex. filed Nov. 23, 2020); *Garry, et al. v. First Choice Ambulance Serv., Inc.*, No. 4:21-cv-00934 (S.D. Tex. filed Feb. 12, 2021).

The United States intervened in only *one* of these cases. *See United States v. Muniz Concrete & Contracting, Inc.* et al., No. 1:20-cv-00530 (W.D. Tex. filed May 15, 2020). It consequently is beyond peradventure private FCA litigants not only in principle—but practice—play a near-definitive role in

the FCA enforcement regime, which is precisely what Congress intended:

> This system is designed to benefit both the relator and the Government. A relator who initiates a meritorious *qui tam* suit receives a percentage of the ultimate damages award, plus attorney's fees and costs. §3730(d). In turn, "'encourag[ing] *more* private enforcement suits'" serves "'to strengthen the Government's hand in fighting false claims.'"

State Farm Fire & Cas. Co. v. United States ex rel. Rigsby, 137 S. Ct. 436, 440 (2016) (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, 298 (2010)) (emphasis added).

Yet Relators now have no reasonably sound means to anticipate whether a court may strip them of their statutorily mandated right to recover attorney's fees and costs, irrespective of the valuable contributions they make to identify and prosecute fraud—even in cases where the United States does not question the value of the contributions. It is unreasonable to presume FCA enforcement, which is disproportionately dependent upon private citizen and counsel incentives, can endure under such circumstances. Review by this Court is warranted.

B. Certiorari is Warranted to Clarify the First-to-File Rule is a "Claims-Processing Rule," not a Jurisdictional Bar

The above-discussed jeopardy to the policy impetus for the FCA in significant part would be mitigated, if not eliminated, by clarification that the rule is *not* a

jurisdictional bar; thus, not subject to the mode of evaluating challenges to subject matter jurisdiction. Whereas district courts are allowed to weigh and resolve disputed issues of fact in context of jurisdictional challenges, non-jurisdictional claims-processing rules are subject to deferential pleading standards established by this Court's Rule 12(b)(6) jurisprudence. *Compare Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."), *with Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own.").

Yet at present, there is a split between the circuits regarding the proper characterization of the first-to-file rule—which even the District Court in this matter acknowledged. *See, e.g.*, App.52. The inconsistent treatment is unwarranted, because unlike the "jurisdictional" provisions found and expressly characterized as such in subsection (e) of 31 U.S.C. § 3730, the first-to-file rule is located in § 3730(b)(5) and includes *no* reference to "jurisdiction." The sub-section reads: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."

There consequently is no textual mention, or even suggestion the first-to-file rule is jurisdictional in character. Nevertheless, the majority of circuit courts, including the Fifth Circuit, treat the rule as a jurisdictional bar. *See, e.g., U.S. ex rel. Carter v. Haliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 373 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

By contrast, several circuits, including the First Circuit, Third Circuit, and DC Circuit, have held the first-to-file rule is non-jurisdictional. For instance, in *United States ex rel. Heath v. AT&T, Inc.*, the DC Circuit concluded because the rule does not explicitly state it is jurisdictional in nature, it was not within that court's province to deviate from Congress's intent. 791 F.3d 112, 119 (D.C. Cir. 2015) ("Courts should not lightly attach such drastic consequences to a procedural requirement. Instead, such rules will be held to 'cabin a court's power only if Congress has "clearly state[d]" as much.'")) (quoting *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015)). *See also United States v. Millenium Labs., Inc.*, 923 F.3d 240, 248 (1st Cir. 2019), cert denied by *Estate of Cunningham v. McGuire*, No. 19-583, 2020 U.S. LEXIS 338 (Jan. 13, 2020) ("On de novo review, . . . we hold that the first-to-file rule . . . is nonjurisdictional . . . .");[1] *In re Plavix Marketing, Sales*

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[1] In *Millenium Labs*, the First Circuit found compelling the plain language of the first-to-file rule omits any suggestion of

Practices and Products Liability Litigation (No. II), 974 F.3d 228, 232 (3rd Cir. 2020) ("If Congress had meant to make the first-to-file bar jurisdictional, it would have logically placed the bar in one of two other sections that mention jurisdiction . . . .").

Indeed, without expressly reaching the proper characterization of the first-to-file rule, this Court implied the rule was non-jurisdictional in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015). In that case, the Court held the viability of a second-filed lawsuit can be *revived* notwithstanding the first-to-file rule, if a previously "pending" suit is dismissed. *Id.* at 663 – 64. The prospect that a once barred, second-filed lawsuit could regain viability upon abandonment of a once preclusive, earlier suit is incompatible with the prejudicial effect generally associated with "jurisdictional" proscriptions—which are treated as absolute.

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jurisdictional import, in contrast to other FCA defenses that expressly speak in jurisdictional terms:

> Paragraph 3730(b)(5) does not speak in jurisdictional terms; nearby provisions, by contrast, explicitly do so. . . . For instance, paragraph 3730(e)(1) provides, "No court shall have *jurisdiction* over an action brought by a former or present member of the armed forces . . . ." . . . And paragraph 3730(e)(2) states, "No court shall have *jurisdiction* over an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official . . . ." . . . So, . . . "[w]hen Congress wanted limitations on False Claims Act suits to operate with jurisdictional force, *it said so explicitly*."

923 F.3d at 250 (emphasis added).

Indeed, to illuminate the illogic of holding otherwise, Justice Alito rhetorically queried as follows in *Kellogg Brown & Root Services, Inc.*: "Why would Congress want abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?" *Id*. at 663. With little editorial license, a similar query can be adapted to the present record: "Why would Congress want [filing] of an earlier suit to bar a later potentially successful suit that might [reveal valuable new information and] result in a large recovery for the Government?"

The United States extracted precisely such a "large recovery" based on the "Covered Conduct" it discerned from reviewing the contributions from *both* sets of FCA Relators in this matter and in so doing never questioned the independent value of the respective contributions. Yet the current state of FCA jurisprudence in the Fifth Circuit provides no satisfactory response to the inquiry regarding why Congress would have intended the FCA first-to-file rule to be construed as a bar (jurisdictional or otherwise) to desirable outcomes of the kind. Review by this Court is warranted.

C. Certiorari is Warranted because in No Event does the FCA Prevent Parallel State Enforcement Remedies

The state of Texas has devised its own scheme to incentivize private citizen enforcement to prevent and redress fraud in state programs such as Medicaid. That scheme in no way is tethered to conditions for recovery under the FCA.

The pertinent provision in the TMFPA provides as follows: "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(a) (emphasis added). Accordingly, only an action previously filed under the pertinent "subchapter" in the TMFPA can preclude another TMFPA claim—or the derivate right to "reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred." TEX. HUM. RES. CODE § 36.110.

And as discussed above, the state of Texas went to the extraordinary lengths of filing a "Statement of Interest" in this matter to make clear it does *not* construe the TMFPA to preclude a right to relief based on parallel FCA claims. (ROA.7140). Yet neither the District Court nor Fifth Circuit showed deference to the absence of language in the TMFPA contradicting the state of Texas's position regarding the intent of the Texas Legislature.

In so doing, neither court proffered an explanation to justify the disregard. The District Court made only passing reference to generic "conflict preemption" principles, App.12, but cited no precedent whereby the FCA has been construed to preempt the rights of *states* to protect themselves against fraud that adversely affects the *states*.

The District Court nevertheless treated the matter as if it could be resolved merely because the FCA first-to-file rule generically purports to preclude "a related action": "Nothing in the FCA first-to-file bar limits its

language to later-filed FCA actions alleging FCA claims. Rather, the FCA language is global in scope and bars 'a *related action*' — not just other FCA actions — premised on the same core facts underlying a pending FCA action." App.11. The Fifth Circuit in turn treated the matter as if satisfactorily addressed by its precedent. App.1.

Yet it is difficult to discern how a generic reference to "a related action" in the FCA comports with this Court's jurisprudence that conflict preemption applies *only* if "compliance with both federal and state regulations is a physical impossibility . . . and [in] those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . .'"—all circumscribed by the caveat that "courts should assume that 'the historic police powers of the States' are *not* superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona v. United States*, 567 U.S. 387, 399 – 400 (2012) (emphasis added).

The federal government's interests in identifying and prosecuting fraud in federal programs is not in tension with the state of Texas's parallel interests in identifying and prosecuting fraud in state programs. Moreover, the state of Texas's interest in identifying and enforcing relief against persons who defraud *Texas* is paradigmatically a "police" power—and there is no discernible basis under this Court's precedent for treating generic language in the FCA as if preclusive of state interests and remedies of the kind. Review by this Court consequently is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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