Nos. 21-626 and 21-796

In the Supreme Court of the United States

BOYD & ASSOCIATES,
Petitioner,
v.
BRYAN K. WHITE ET AL.,
Respondents.

MARCHAND & ROSSI, L.L.P.,
Petitioner,
v.
BRYAN K. WHITE ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are two separate law firms who jointly represented two *qui tam* relators in a False Claims Act lawsuit. They filed that suit on behalf of their (now-former) clients in 2013, nine months after another relator filed a similar FCA suit alleging the same basic fraud. The District Court accordingly dismissed petitioners' action under the FCA's first-to-file rule, 31 U.S.C. § 3730(b)(5), which requires the dismissal of a second-filed FCA suit that alleges the same essential elements of fraud as an earlier-filed complaint. Following that dismissal, the remaining relator, the United States, and the State of Texas settled all the underlying claims and allowed petitioners' clients to participate in one of the settlements. Despite the pre-settlement dismissal of their action, petitioners insist they are entitled to recover statutory attorney's fees for the prosecution of their dismissed claims.

The questions presented are:

1. Whether, after the dismissal of their *qui tam* action under the FCA's first-to-file rule, two former law firms for the dismissed relators are entitled to statutory attorney's fees under the FCA or its Texas analog merely because the losing clients joined a post-dismissal settlement.

2. Whether, on the particular facts of this case, the lower courts erred in their case-specific application of the first-to-file rule, a splitless question that turns on the same legal test applied in courts across the country.

3. Whether the dismissal of this case under a timely and proper assertion of the first-to-file rule was a jurisdictional dismissal or a merits dismissal, a question that has no bearing on the outcome of this now-settled case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Goodwin Hospice, LLC was a wholly owned subsidiary of Curo Texas Hospice, LLC before being dissolved. No publicly held company owned 10% or more of its stock.

Phoenix Hospice, Inc. did not have a parent company before being dissolved, and no publicly held company owned 10% or more of its stock.

International Tutoring Services, LLC, f/k/a International Tutoring Services, Inc., d/b/a Hospice Plus is a wholly owned subsidiary of Curo Texas Hospice, LLC. No publicly held company owns 10% or more of its stock.

Curo Health Services, LLC, f/k/a Curo Health Services, Inc. is a wholly owned subsidiary of Curo Health Services Holdings, Inc. No publicly held company owns 10% or more of its stock.

Hospice Plus, LP was a wholly owned subsidiary of Curo Texas Hospice, LLC before being dissolved. No publicly held company owned 10% or more of its stock.

Bryan K. White, M.D. is an individual.

Suresh Kumar, R.N. is an individual.

Goodwin Home Health Services, Inc. does not have a parent company, and no publicly held company owns 10% or more of its stock.

Vinayaka Associates, LLC d/b/a A&S Home Health Care does not have a parent company, and no publicly held company owns 10% or more of its stock.

North Texas Best Home Healthcare, Inc. does not have a parent company, and no publicly held company owns 10% or more of its stock.

One Point Home Health Services, LLC, f/k/a One Point Home Health, LLC does not have a parent company, and no publicly held company owns 10% or more of its stock.

Excel Plus Home Health, Inc. does not have a parent company, and no publicly held company owns 10% or more of its stock.

Be Gentle Home Health, Inc. d/b/a Phoenix Home Health Care does not have a parent company, and no publicly held company owns 10% or more of its stock.

V

RELATED PROCEEDINGS

The Marchand Petition (No. 21-796) identifies all directly related proceedings; the Boyd Petition (No. 21-626) leaves out only the Marchand Petition because it had not yet been filed at the time of the Boyd Petition. To put it all in one place, there are two proceedings currently pending before this Court that arise from the same judgment:

> *Boyd & Associates v. Bryan K. White, M.D., et al.*, No. 21-626
>
> *Marchand & Rossi, L.L.P. v. Bryan K. White, M.D., et al.*, No. 21-796

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

Although it is hard to tell from these overlapping petitions, this is an appeal about the denial of attorney's fees—nothing more—in a case where the merits of the underlying claims are settled. In challenging the unpublished decisions below, petitioners raise a series of splitless, fact-bound questions that have no bearing on any case besides their own. The only arguable exception is a question about whether the "first-to-file rule" in the False Claims Act is a jurisdictional bar—but that question is irrelevant to the outcome here. There is no dispute that the first-to-file defense was timely asserted, and dismissal would have been required whether the rule is jurisdictional or not, a point that petitioners all but conceded at

the Fifth Circuit. Because this case fails to raise any substantial legal issues—and is an exceedingly poor vehicle for review in any event—the petitions should be denied.

Petitioners are two separate law firms who jointly (and formerly) represented two dismissed *qui tam* relators in an FCA lawsuit. Before petitioners filed that suit, another relator had already filed a similar FCA suit against a similar group of defendants alleging the same basic fraud. This was a paradigmatic case for applying the FCA's first-to-file rule, 31 U.S.C. § 3730(b)(5), which provides that when one person brings an action under the FCA, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The District Court thought so too and dismissed petitioners' action on the merits. The remaining relator, the United States, and the State of Texas later settled all the underlying claims. The merits of this case are closed and cannot be re-opened.

Nevertheless, the late-coming relators—and now that they have dropped from the litigation, their former lawyers (petitioners)—insisted that they were entitled to recover statutory attorney's fees for the prosecution of their dismissed claims. The District Court rejected this argument three times in unpublished decisions. The Fifth Circuit affirmed "for essentially the reasons stated by the district court," and again in an unpublished, per curiam decision. Pet.App.4.[1] The Fifth Circuit thought the questions presented in this case were so insignificant—and the District Court's rulings so clearly correct—that it "s[aw] no reason to disturb or expound upon [the District Court's] rulings." Pet.App.5.

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[1] All references to the "Pet.App." will be to the Appendix in the Marchand Petition, No. 21-796.

None of that would be immediately clear from reading the petitions. In seeking certiorari, petitioners try to make this case about the merits of the first-to-file dismissal, though they don't actually challenge the substantive test the lower courts applied or identify any conflict over that issue. Petitioners focus instead on whether the first-to-file rule should be characterized as a jurisdictional bar, which is a wholly academic question here. Because each point petitioners raise is either insignificant or immaterial to this case's outcome, review is plainly unwarranted.

First, there is no reason to review the lower courts' case-specific application of the first-to-file rule. Petitioners make no attempt to challenge the substance of the test applied by the District Court and affirmed by the Fifth Circuit—likely because that is the same test applied by courts across the country. In any event, the lower courts correctly applied this splitless legal test to the facts of this particular case, and this Court need not waste its time reviewing that narrow, non-precedential disposition. That is especially so because the underlying claims here are settled, and the only issues left are petitioners' meritless claims for attorney's fees. It would make little sense to review this fact-bound question even on direct review of the actual dismissal; it makes even less sense to review the question *indirectly*, in a collateral fee dispute belatedly brought by two sets of former lawyers (not the parties) in a settled lawsuit.

Second, for simple and obvious reasons, this case is an unsuitable vehicle for resolving the asserted disagreement over the jurisdictional character of the first-to-file rule—because that question has no conceivable bearing on the outcome of this case. The result here will be the same whether the first-to-file rule is jurisdictional or not: the claims brought by petitioners' now-former clients were properly dismissed and their fee claims were

properly denied. Petitioners don't even argue that this question makes a difference. While each petition grasps onto the alleged split, neither explains how the result would have changed if the first-to-file rule were deemed non-jurisdictional. If the Court wants to address this question at some point, it would be better to do so in a case where the answer affects the outcome—not here, where dismissal and denial of fees is required no matter what.

Aside from these dispositive flaws, this case is a procedural mess, with jurisdictional defects and waiver issues lurking behind every corner. It is unworthy of the Court's time and attention. Certiorari should be denied.

STATEMENT

These petitions arise from a now-settled FCA case that, itself, arose from two overlapping complaints. Roughly a decade ago, two sets of *qui tam* relators filed separate lawsuits alleging the same core liability theory: that respondents Bryan White, Suresh Kumar, and several entities they owned had violated the FCA and the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b (AKS), in operating home healthcare businesses in North Texas. C.A.ROA.63, 7649. In these circumstances, the FCA's first-to-file rule requires the dismissal of the second-filed complaint. The lower courts did just that and rejected petitioners' separate demands for statutory attorney's fees.

Although that explanation is simple enough, this case suffers from a convoluted procedural history. Respondents offer the following narrative summary to contextualize the relevant rulings, correct errors in the petitions, and fill in the gaps.

The underlying lawsuits

In November 2012, the first relator—Christopher Capshaw, who is not a party to the appeal—filed an FCA

suit alleging that White, Kumar, and related entities had submitted false claims for reimbursement to Medicare and Medicaid for home health and hospice services. CA.ROA.63-65. Capshaw alleged these claims were "false" because the White/Kumar entities had obtained the business through referrals that violated the AKS and other laws. CA.ROA.66-71, 75-77. The AKS generally prohibits paying remuneration to induce or reward the referral of federally funded medical services. *United States ex rel. Nunnally v. W. Calcasieu Cameron Hosp.*, 519 F. App'x 890, 893 (5th Cir. 2013) (per curiam). The AKS does not create a private right of action but can trigger FCA claims where the kickbacks result in claims for federal payment. *Id.*

Capshaw alleged that White and Kumar secured referrals of home health and hospice business by providing kickbacks in the form of free rent, sham loans, and equity interests to owners of businesses that employed physicians with direct access to patients. CA.ROA.63-64, 75-77. Capshaw named White and Kumar as defendants, along with several of their entities, including respondent Hospice Plus, L.P. CA.ROA.57-60.

Roughly nine months later, in August 2013, Kevin Bryan and Franklin Brock Wendt filed suit based on similar allegations: that White, Kumar, and related entities violated the FCA by submitting false claims derived from AKS violations. CA.ROA.7649-7652. Bryan/Wendt alleged that White, Kumar, and their employees secured referrals by providing kickbacks in the form of cash, gift cards, free meals, and other gifts to employees of nursing homes and assisted living facilities. CA.ROA.7649-7650. Like Capshaw, Bryan/Wendt alleged as damages the claims submitted to Medicare and Medicaid tied to these allegedly illegal referrals. CA.ROA.7698-7699.

Bryan/Wendt sued three defendants named in the Capshaw complaint: White, Kumar, and Hospice Plus. CA.ROA.7647. They also sued two corporate relatives of Hospice Plus: (1) respondent International Tutoring Services, LLC, which they said was Hospice Plus's alter ego; and (2) respondent Curo Health Services, LLC, which acquired Hospice Plus and other affiliated entities from White/Kumar. CA.ROA.7657-7658.

Both complaints were filed under seal, so at first only the United States knew how similar they were. Soon after Bryan/Wendt filed their complaint, however, the government sought leave to share Capshaw's complaint with them, explaining "[t]he complaints in both cases *include the same or similar allegations*," so disclosing Capshaw's complaint to Bryan/Wendt might allow the relators to "reach an accord regarding which case should be pursued" in light of the FCA's limitations on related claims. *See* CA.ROA.308-309 (emphasis added).

The motion had no such effect. Bryan/Wendt chose instead to pursue their second-filed claims and moved to consolidate their case with Capshaw's based on several "commonalities in the cases." CA.ROA.326. Bryan/Wendt told the court both "suits allege similar schemes of illegal referrals of Medicare/Medicaid patients to hospices and home health agencies" by an alleged "core of bad actors" in violation of the FCA and Texas law. CA.ROA.328. The court agreed and consolidated the cases. CA.ROA.667.

Bryan/Wendt's claims are dismissed under the FCA's first-to-file rule

In the summer of 2015, the United States and the State of Texas declined to intervene, and the consolidated case was unsealed. CA.ROA.1075, 1079, 1083. The defendants (respondents here) then moved to dismiss on various

grounds, including the FCA's first-to-file rule, which forbids relators like Bryan/Wendt from bringing a "related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5); *e.g.*, CA.ROA.2711, 2892.

In January 2017, the District Court granted the motions in part and dismissed Bryan/Wendt's claims under the first-to-file rule. Pet.App.24-26. The court explained that the first-to-file rule is a "broad" bar that applies when a second-filed complaint alleges the same essential elements of fraud described in a pending complaint. *Id.* at 21. It held that Bryan/Wendt's claims were barred under that standard because, like Capshaw, they alleged a scheme of referrals and kickbacks between White, Kumar, and others that violated the FCA and AKS. *Id.* at 24. While Bryan/Wendt "alleged remuneration in a different form," the first-to-file rule applied because Capshaw had already put the government on notice of the same essential elements of fraud. *Id.* at 24-26.

The District Court's order permitted Capshaw and the United States to continue pursuing their claims but required Capshaw to replead. *See id.* at 43-44. Capshaw later filed a "Second Amended Joint Complaint" that purported to list Bryan/Wendt as relators despite their dismissal. CA.ROA.4213.

Bryan/Wendt move for attorney's fees in two separate motions on behalf of two law firms

Around the same time, a group of defendants (the Curo Respondents[2]) negotiated a settlement of the claims against them with the United States and the relators. *See* CA.ROA.5000. This settlement, executed in March 2017,

[2] The Curo Respondents are Goodwin Hospice, LLC; Phoenix Hospice, L.P.; International Tutoring Services, LLC, f/k/a International Tutoring Services, Inc., d/b/a Hospice Plus; Curo Health Services, LLC, f/k/a Curo Health Services, Inc.; and Hospice Plus, LP.

included an agreement by the Curo Respondents to pay the United States a lump sum in exchange for a dismissal and release of all claims against them. *See* CA.ROA.5003, 5006. Some of the proceeds were ultimately shared with Capshaw and with Bryan/Wendt, who signed the settlement agreement and released their claims against the Curo Respondents. CA.ROA.5006, 5015.[3]

As part of the settlement, the Curo Respondents agreed to pay Capshaw an additional amount for the attorney's fees he might otherwise have been able to recover under the FCA. CA.ROA.5004. Although Bryan/Wendt had no similar right to any statutory fee award—because their claims had been dismissed on the merits—the Curo Respondents initially tried to resolve their fee claims too. They could not reach an agreement.

Rather than allowing this ancillary dispute to block the settlement, the Curo Respondents and Bryan/Wendt carved out the attorney's-fee claim for resolution by the court. CA.ROA.5006. Bryan/Wendt voluntarily released all underlying claims against the Curo Respondents while "reserv[ing] their right to claim their reasonable expenses, attorneys' fees, and costs under 31 U.S.C. § 3730(d)." CA.ROA.5006. The Curo Respondents reserved their right to contest those claims. CA.ROA.5006.

In light of this settlement, and pursuant to a joint stipulation, the court dismissed all claims against the Curo Respondents while retaining jurisdiction over Bryan/Wendt's fee claims and Capshaw's claims against the remaining defendants. CA.ROA.4612-4613.

Soon after, Bryan/Wendt moved to recover attorney's fees through separate motions filed by the law firms that

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[3] Around the same time, the Curo Respondents entered a separate settlement agreement with the State of Texas that resolved the state-law claims. CA.ROA.4494, 5003.

jointly represented them: Marchand & Rossi, LLP ("Marchand") and Boyd & Associates ("Boyd"). CA.ROA.4633, 4837. Both motions sought fees on the same theories: the lawyers claimed they were entitled to attorney's fees under Section 3730(d) of the FCA, which provides for an award of reasonable attorney's fees to a prevailing relator. *See* CA.ROA.4638, 4842. Both sought to recover fees from the Curo Respondents alone, in a combined amount that was five times larger than the attorney's fees paid to Capshaw, the first-filing relator. CA.ROA.4640, 4866.

The District Court denied Bryan/Wendt's fee requests in full. Pet.App.48. It held that because Bryan/Wendt's claims were dismissed under the first-to-file bar, they were never proper parties and were not entitled to attorney's fees. *Id.* at 50-53. Bryan/Wendt moved for reconsideration in a motion filed only by Marchand, not Boyd. CA.ROA.6694. The court rejected that request too. Pet.App.59-60. Bryan/Wendt tried to appeal that order (again through Marchand alone). The Fifth Circuit dismissed that appeal as premature because of the still-pending claims between Capshaw, the United States, and the remaining defendants (including White, Kumar, and associated entities). CA.ROA.7023.

After the remaining claims settle, Bryan/Wendt move for attorney's fees again—but only for one law firm

The United States and Capshaw later settled the underlying claims against all remaining defendants in a second and final round of settlement and moved to dismiss the case. CA.ROA.7050, 7053. Through this motion, the United States and the State of Texas—the real parties in interest—consented, agreed, and confirmed the dismissal with prejudice of all claims asserted on their behalf in the Second Amended Joint Complaint. CA.ROA.7052; *see*

also CA.ROA.4213. This settlement was entered and intended to fully and finally end the litigation on the merits. The court promptly granted that motion on October 2, 2019, resulting in a final order of dismissal. Pet.App.61-62.

Although Bryan/Wendt had nothing to do with this final settlement—because their claims were long dismissed—they used it as an opportunity to file *another* motion for attorney's fees, through Boyd alone this time. CA.ROA.7058. This motion again sought fees against the Curo Respondents and not any of the other defendants. CA.ROA.7063, 7068.[4] And it again sought fees under the FCA's attorney's-fee provision, although the court had already rejected this argument twice. CA.ROA.7063-7065. For the first time, however, Bryan/Wendt also sought to recover Boyd's fees under the Texas-law analog to the False Claims Act, the Texas Medicaid Fraud Prevention Act (TMFPA). CA.ROA.7067. The court denied these requests for the same reasons as its earlier orders: because the FCA's first-to-file rule required the dismissal of *all* of Bryan/Wendt's claims, including their claims under the TMFPA. Pet.App.6, 13-14. It therefore held they were not entitled to statutory fees under the FCA or TMFPA. *Id.*

Bryan/Wendt part ways with one law firm, but both firms appeal the denial of attorney's fees

At some point in the transition to appeal, Bryan/Wendt parted ways with Boyd and allegedly assigned to him his piece of the fee claim. While Boyd continued to press his final fee request in the District Court, Bryan/Wendt/Marchand filed a notice of appeal. CA.ROA.7169. After the District Court denied Boyd's fee

[4] Because Bryan/Wendt never moved for fees against the other defendants-respondents, they cannot seek that relief now, and they have not. Moreover, Bryan/Wendt conceded that this appeal relates *only* to attorney's fees. Bryan/Wendt C.A. Br. 38-39 n.11.

request—and long after the final dismissal order—Boyd filed his own notice of appeal. CA.ROA.8162, 8166. The Fifth Circuit consolidated the cases.

In the consolidated appeal, Boyd and Marchand filed separate briefs seeking to recover their respective attorney's fees. Just days before oral argument, the Fifth Circuit raised questions about whether the law firms had standing to appeal. In a letter requesting supplemental briefs, the Fifth Circuit noted that "[n]onparties generally have no right to appeal" and asked the law firms to explain why they might satisfy an exception to that rule. Nov. 18, 2020 Letter to Parties, No. 19-11309 (5th Cir.).

The Fifth Circuit affirms

The Fifth Circuit affirmed the District Court's decisions in a two-and-a-half-page unpublished opinion with minimal elaboration. After reciting the basic procedural history, the court "affirm[ed] 'for essentially the reasons stated by the district court,'" finding that "[t]he district court thoroughly examined the issues in five separate decisions and faithfully applied the statutory text and our precedent in" denying attorney's fees. Pet.App.4-5. The Fifth Circuit therefore saw "no reason to disturb or expound upon" the District Court's rulings. *Id.* at 5. Perhaps unsurprisingly, then, the Fifth Circuit summarily denied Boyd's petition for rehearing *en banc*. Pet.App.65. Bryan/Wendt/Marchand did not move for rehearing.

Boyd and Marchand have now filed separate petitions challenging the same judgment and arguing that they are entitled to attorney's fees for their work on the dismissed claims. Bryan/Wendt—the former parties to the case, whose claims are required to trigger any fee award—did not join either petition.

REASONS FOR DENYING THE PETITIONS

These overlapping petitions raise an uncoordinated series of splitless, case-specific, and otherwise insignificant questions that do not warrant this Court's review. At their core, the petitions disagree with the lower courts' dismissal of Bryan/Wendt's claims on first-to-file grounds. But there is no circuit conflict to be found on the first-to-file test the courts applied, and petitioners don't even argue otherwise. This Court need not waste its time reviewing the fact-bound application of that unchallenged and settled test to the claims at issue here.

That is particularly true because the merits of this case are settled and cannot be re-opened. Bryan/Wendt conceded as much in the Fifth Circuit.[5] The *only* question left is whether Bryan/Wendt—and now that they have bowed out of the litigation, their former lawyers—have a right to recover statutory attorney's fees despite the dismissal of their second-filed claims. Petitioners seek, in essence, an academic reversal on the merits so they can reopen the door to attorney's fees.

The petitions do everything they can to obscure the issues actually presented in this case. Nowhere is that more true than in their requests for this Court to weigh in on

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[5] Bryan/Wendt C.A. Br. 38-39 n.11 ("Although in principle the erroneous first-to-file ruling could warrant re-visiting whether the Bryan/Wendt Relators also are entitled to further 'proceeds' pursuant to 31 U.S.C. § 3730(d); they do not herein seek to re-open that issue, because so doing would necessitate disturbance of payments that previously have been made by operation of the March 2017 Settlement Agreement with certain Appellees, as well as a September 2019 settlement regarding the balance of Appellees. *Cf.* (ROA.7050). ***This appeal consequently relates only to the Appellees' obligation to pay litigation 'expenses,' inclusive of attorneys' fees, pursuant to § 3730(d) and Texas law.***") (emphasis added).

the jurisdictional character of the first-to-file rule. The petitions spend a lot of time talking about *what* courts have said on this question in recent years—but make virtually no effort to explain *why* this characterization question matters to the outcome of this case. That's because it does not matter: whether the rule is jurisdictional or not, Bryan/Wendt's claims were properly dismissed and petitioners' fee claims were properly denied.

That is likely why the Fifth Circuit didn't write substantively on this issue—or any other issue. In fact, the Fifth Circuit found the questions presented in this appeal to be so insignificant that it "s[aw] no reason to disturb or expound upon" the District Court's rulings dismissing the claims and denying attorney's fees. Pet.App.4-5. That says it all. Certiorari can be denied for this reason alone.

Yet even in a vacuum, the questions presented here about the lower courts' application of the first-to-file rule are insignificant and unworthy of review.

A. The case-specific, fact-bound application of the first-to-file rule and the denial of attorney's fees are unworthy of review.

1. As an initial matter, the petitions have not attempted to allege a conflict over the proper meaning or application of the first-to-file rule.

Under that rule, when a relator brings an FCA case, "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). Petitioners don't argue that the elements of this provision are applied differently from circuit-to-circuit. Although Marchand vaguely references "divergent standards of review" in his questions presented, the corresponding argument addresses only the jurisdictional issue addressed below. Nei-

ther petition identifies a single case that applies a different substantive standard than the one the District Court applied and the Fifth Circuit affirmed.

This is for good reason: circuit courts have consistently interpreted the "related action" phrase in Section 3730(b)(5) just as the Fifth Circuit does, to mean a second-filed complaint that "alleges the same material or essential elements of fraud described in a pending *qui tam* action." *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377-78 (5th Cir. 2009); *see also, e.g.*, *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 235 n.6 (3d Cir. 1998); *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 964 (10th Cir. 2009); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009); *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 363 (7th Cir. 2010); *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011); *United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 938 (1st Cir. 2014); *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 302 (4th Cir. 2017). Under this widely accepted test, the second-filed claim is barred even if it alleges some additional details of the same essential fraud. *E.g.*, *Carson*, 851 F.3d at 302; *Chovanec*, 606 F.3d at 363; *Lacorte*, 149 F.3d at 232-33.

This pleading-based analysis sensibly turns on the four corners of the respective complaints. *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 964 ("The first-to-file bar is designed to be quickly and easily determinable, simply requiring a side-by-side comparison of the complaints."); *United States ex rel. Smart v. Christus Health*, 563 F. App'x 314, 315-16 (5th Cir. 2014) (per curiam) (noting "the complaint is all that [one] needs" to conduct the first-to-file analysis); *United States ex rel. Heath*

v. AT&T, Inc., 791 F.3d 112, 121 (D.C. Cir. 2015) ("Similarity is assessed by comparing the complaints side-by-side, and asking whether the later complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the first complaint." (quotations omitted)); *LaCorte*, 149 F.3d at 235 n.6 ("[W]e may decide whether the later complaints allege the same material elements as claims in the original lawsuits simply by comparing the original and later complaints."). The analysis does not turn, as Marchand suggests, on whether there was evidence the government actually discovered the second scheme based on the first claim. Marchand Pet. i. In the Fifth Circuit and elsewhere, the first-to-file rule "presents a question of law" about the nature of the *allegations* in each complaint. *E.g., Ven-A-Care*, 772 F.3d at 938; *Batiste*, 659 F.3d at 1209; *cf. United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015) (en banc) ("Because this is a legal determination that did not rest on factual findings, we review de novo.").

The lower courts here properly applied these standards to dismiss Bryan/Wendt's second-filed complaint. Although petitioners clearly disagree with that decision, they make no real effort to suggest that the Court should review the lower courts' *application* of this unchallenged and settled legal test. And rightly so: whether the lower courts properly applied this test is a case-specific issue that turns on the allegations at issue here and has no significance outside this single case.

2. In any event, the first-to-file bar was properly applied. Both complaints alleged the same essential fraud scheme: that White, Kumar, and affiliated entities submitted claims for reimbursement that falsely certified AKS compliance. Pet.App.24-26. While Bryan/Wendt focused their claims on a different kind of alleged kickback, the

lower courts applied the settled principle that such additional details make no difference to the first-to-file analysis. *Id.* at 22, 25; *see also, e.g., Carson*, 851 F.3d at 302-03 (explaining that "[t]he material elements test bars a later suit 'if it is based upon the same material elements of fraud as the earlier suit, even though the subsequent suit may incorporate somewhat different details'" and citing cases for the proposition, including *Branch*, 560 F.3d at 378). Again, petitioners have not identified a single decision disagreeing with this rule. So, despite the addition of some details, Bryan/Wendt's action was still "related" under the essential-elements test—and was therefore properly dismissed under the first-to-file rule.

Marchand claims that applying the rule here affects the utility of the FCA's *qui tam* provisions, but he offers little to substantiate that concern. Marchand Pet. 28-31. In effect, Marchand argues that a broad first-to-file rule is a bad idea. But Congress did not think so. It weighed the competing policy considerations and settled on a broad bar of actions that are "related" to already-filed claims—it did not just bar *identical* actions. *Branch*, 560 F.3d at 377; *Lacorte*, 149 F.3d at 233-34. Courts have consistently found that this decision furthers the congressionally intended "golden mean" between incentivizing whistle-blowing insiders with genuinely valuable information and discouraging opportunistic plaintiffs who have little to add. *See id.* A broader bar also creates an incentive for relators with valuable information to file their claims quickly. *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 961 (citing cases for this principle); *see also Lacorte*, 149 F.3d at 234 (broader bar furthers FCA goals by ensuring "a race to the courthouse among eligible relators, which may spur the prompt reporting of fraud") (quotations omitted).

Again, Marchand offers nothing to challenge these reasoned views of the first-to-file rule. He just doesn't like the result. But that is no basis for this Court's review.

B. Petitioners' lead question—asking whether the first-to-file rule is jurisdictional—is irrelevant to the outcome of this case.

Without any real grounds to challenge the application of the first-to-file rule here, petitioners try to secure review based on an apparent conflict over the jurisdictional nature of the bar. But this alleged split is meaningless in this case. The result will be the same whether the first-to-file rule is jurisdictional or not: respondents timely asserted the defense; Bryan/Wendt's merits claims were properly dismissed; and petitioners' fee claims were properly denied. So, even if the Court is inclined to review the jurisdictional question at some point, this is not the right case for it, as explained in detail below.

1. *First*, Bryan/Wendt's claims were properly dismissed under the first-to-file rule whether the bar is characterized as jurisdictional or not. As noted above, federal courts treat this analysis as a pleading-based test that simply requires a side-by-side comparison of the complaints. *E.g.*, *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 964. Neither petition cites a single case disagreeing with that standard or applying a different test.

That's important because this analysis would be the same whether the first-to-file rule is characterized as jurisdictional or not. If the rule is jurisdictional and FED. R. CIV. P. 12(b)(1) applies, the analysis amounts to a "facial" attack on jurisdiction, which turns on the sufficiency of the allegations in the complaint rather than fact findings. *See, e.g.*, *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 816-17 (6th Cir. 2017); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). If the rule is not jurisdictional and

Rule 12(b)(6) applies, the analysis is effectively unchanged: the court looks only at the allegations in the complaints, presumes they are true, and asks whether those allegations, on their face, involve the same essential elements of fraud. *See Wayside Church,* 847 F.3d at 816 ("When reviewing a facial attack, a district court takes the allegations in the complaint as true, just as in a Rule 12(b)(6) motion." (quotations omitted)); *Heath*, 791 F.3d at 119 (even if prior opinion wrongly treated first-to-file rule as jurisdictional, "we could sustain that judgment for failure to state a claim under Rule 12(b)(6)").

In other words, the question presented here about the jurisdictional character of the first-to-file bar would change nothing about the analysis or result below. Whether analyzed under Rule 12(b)(1) or 12(b)(6), dismissal was required here because, on their face, the complaints alleged the same essential elements of fraud. The District Court did not make fact findings in reaching that result, as Marchand suggests. It faithfully applied the law to hold that the Bryan/Wendt complaint "*alleges* the same essential facts and claims of fraud as the Capshaw complaint," including because both "*allege* that the Defendants falsely certified compliance with AKS via Medicare payment forms." Pet.App.24-25 (emphasis added).

Remarkably, neither petition even attempts to explain how this analysis would come out differently if the rule were treated as non-jurisdictional. In the Fifth Circuit, Bryan/Wendt all but conceded that the characterization question made no difference in the analysis: "Whether or not Rule 12(b)(1) jurisdictional or Rule 12(b)(6) pleading standards apply does not have to be decided by this Court to resolve this appeal." Bryan/Wendt C.A. Br. 53. Marchand comes close to doing so again in his petition, suggesting that his real concern is "why Congress would have intended the FCA first-to-file rule to be construed as

a bar (jurisdictional or otherwise) to" the claims in this case. Marchand Pet. 35. These admissions effectively concede that this case is a poor vehicle for reviewing the jurisdictional question—because it makes no difference to the merits of the first-to-file dismissal.

2. *Second*, the jurisdictional character of the first-to-file bar is further irrelevant because petitioners' fee claims fail regardless of the answer to that question.

Under the FCA's *qui tam* provisions, a relator is entitled to recover some portion of the proceeds in a successful FCA case, with the precise amount depending on how involved the government was in the case. *See* 31 U.S.C. § 3730(d)(1)-(2). The statute also provides that "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." *Id.* Federal courts have held that this fee-shifting provision applies only to prevailing relators. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 8-9 (D.D.C. 2008), *amended in part, vacated in part sub nom. U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 786 F. Supp. 2d 110 (D.D.C. 2011); *see also Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995) ("Only those parties that are properly a part of the qui tam action are statutorily entitled to the award of attorneys' fees and expenses"). It makes sense, then, that the lower courts denied petitioners' requests for fees—because their clients did not prevail; their claims were dismissed under the first-to-file bar.

Re-characterizing that rule as non-jurisdictional does not provide any additional entitlement to attorney's fees here. Petitioners don't even argue as much. They make no attempt to connect their fee claims to the recited circuit split, and they don't cite a single case awarding attorney's fees to relators whose claims were dismissed on the merits. It may be that this issue is rarely analyzed because so

few relators are brazen enough to demand fees after their claims are dismissed. But where it has come up, courts have determined—as the lower courts did here—that a previously-dismissed relator is not entitled to a fee award. *Fed. Recovery Servs.,* 72 F.3d at 450 (denying fees where relators' claims were dismissed under public disclosure bar); *Miller*, 575 F. Supp. 2d at 8-9 (denying fees where relator's claim was dismissed on limitations grounds).

As those cases indicate, the jurisdictional character of the dismissal makes no difference to the fee claim: the operative fact is that the relator's claim was *dismissed*. A relator dismissed on non-jurisdictional grounds (*Miller*) is not entitled to prevailing-party attorney's fees any more than a relator dismissed on jurisdictional grounds (*Federal Recovery Services*).

Boyd's new authority is not to the contrary. Supp. Br. 2. In *United States ex rel. Bryant v. Community Health System*, 24 F.4th 1024 (6th Cir. 2022), the Sixth Circuit simply refused to apply the first-to-file or public-disclosure bars for the first time *after* the case had already been settled. There was no prior merits dismissal in *Bryant*, and the court specifically distinguished its facts from *Federal Recovery Services*, among others, on this ground. *Id.* at 1038 (noting that the court in *Federal Recovery Services* had "dismissed relators before the government settled with defendant"). That same distinction applies here (among others), so *Bryant* does not. The mere fact that Bryan/Wendt shared in some of the settlement does not change the fact that their claims were dismissed on the merits—they were never proper parties, and they are not entitled to attorney's fees.[6]

[6] That makes sense. As explained above, Congress tried to strike a balance in the FCA between incentivizing relators to prosecute fraud while discouraging parasitic litigation. In the first-to-file rule, it

The lack of case authority on this question confirms it is unworthy of the Court's review. These extremely unusual procedural circumstances rarely arise in FCA litigation. When they do come up, courts are not struggling to find an answer: previously dismissed relators are not entitled to attorney's fees. And again, the jurisdictional character of first-to-file bar has no impact on the analysis.

Even setting all of that aside, however, review should be denied because petitioners did not preserve any argument about how the jurisdictional character of the first-to-file rule affects their request for attorney's fees. Sure, they addressed the circuit conflict in their briefs below. But they never argued the jurisdictional character of the first-to-file rule would make a difference to their fee arguments, as Boyd did in the District Court.[7] Bryan/Wendt effectively did the opposite, suggesting that the characterization question "d[id] not have to be decided by [the] Court to resolve this appeal." Bryan/Wendt C.A. Br. 53, 55. Having abandoned any argument that the characterization question matters to the fee dispute, petitioners should not be permitted to obtain review on that ground.

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struck that balance by barring all claims "related" to an existing FCA case—thus creating a race to the courthouse that encourages relators to report fraud promptly. *Lacorte*, 149 F.3d at 234. If a relator loses the race and its claim is dismissed under that provision, Congress has already decided that claim was unworthy of an FCA reward. It would make little sense to award statutory attorney's fees anyway. *See Miller*, 575 F. Supp. 2d at 8-9.

[7] Respondents pointed out this fact in their response brief at the Fifth Circuit, noting that the appellants-petitioners had "wisely abandoned" their argument that they could recover attorney's fees as dismissed relators if only the first-to-file rule were treated as non-jurisdictional. Respondents' C.A. Br. 38 n.17. Neither petitioner challenged this statement in their Fifth Circuit reply briefs.

In sum, the primary questions presented here—about the dismissal of the underlying claims and the denial of attorney's fees—are insignificant, splitless, fact-bound questions that were resolved below in unpublished decisions. The alleged conflict over the first-to-file bar's supposedly "jurisdictional" character is irrelevant to the outcome, as petitioners effectively acknowledged below. If the Court were ever to address that question, it would be better to do so in a case where the distinction has some conceivable effect on the outcome.[8] And the Court may not have to address the issue at all: the split could resolve itself as more courts in the "jurisdictional" camp reconsider their positions in light of the more recent authorities; further percolation is plainly warranted. *See* Marchand Pet. 33-34; Boyd Pet. 20-23. Certiorari should be denied.

C. The denial of attorney's fees under the companion Texas statute is a splitless, fact-bound question unworthy of review.

In addition to their misguided arguments under the federal FCA, petitioners ask the Court to review their fee claims under Texas's parallel false claims act, the Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE § 36.101, *et seq.* (TMFPA). The District Court dismissed Bryan/Wendt's TMFPA claims because, like their FCA claims, they alleged the same material elements of fraud as the Capshaw complaint. Pet.App.25-26. The District Court later denied Boyd's last-minute request for attorney's fees under the TMFPA. *Id.* at 13-14. Petitioners now

[8] As one example, this question might be material in a case where the first-to-file argument is raised late, so the rule's jurisdictional character could be relevant to claims of forfeiture or waiver. *See, e.g., Ven-A-Care*, 772 F.3d at 936 (first-to-file arguments raised for the first time in response to motion for reconsideration under Rule 60(b)).

say those rulings were improper. They are wrong, and this narrow question is certainly not worthy of review.

As an initial matter, petitioners have not identified any circuit conflict about whether the FCA's first-to-file rule bars a relator's state-law tag-along claims in federal court, as the District Court held here. This is yet another fact-bound question that turns on the allegations at issue here.

Boyd tries to anchor his argument to 31 U.S.C. § 3732(b), which says "district courts shall have 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." Boyd Pet. 24-31. Section 3732(b) merely provides for supplemental jurisdiction in federal court over properly filed state-law claims. *See, e.g., United States ex rel. King v. Solvay S.A.*, No. CIV. A. H-06-2662, 2015 WL 5692859, at *2 (S.D. Tex. Sept. 28, 2015). It does not purport to override the effect of the first-to-file rule by allowing relators to file copycat claims in federal court under state law.

Several of Boyd's case authorities actually *support* this reading. *See Illinois v. Abbott Labs., Inc. (In re Pharm. Indus. Average Wholesale Price Litig.),* 509 F. Supp. 2d 82, 93 (D. Mass. 2007) (mem. op.); *United States ex rel. McCoy v. Madison Ctr.*, No. 3:10-cv-259 RM, 2011 WL 1791710 at *4 (N.D. Ind. May 9, 2011). Others suggest only that Section 3732(b) creates an exception to the first-to-file rule for *state governments*; but that doesn't help private relators like Bryan/Wendt.[9] Indeed, one of Boyd's cases relies on a Seventh Circuit opinion that harmonizes

[9] *Abbott Labs.*, 509 F. Supp. 2d at 93; *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 880 (D.C. Cir. 1999); *United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 205 (2d Cir. 1998), *rev'd*, 529 U.S. 765 (2000); *McCoy*, 2011 WL 1791710, at *4.

Section 3732(b) with the first-to-file rule by concluding the FCA prohibits other relators from filing a related action, but not states. *McCoy*, 2011 WL 1791710 at *4 (citing *Wisconsin v. Amgen, Inc.*, 516 F.3d 530 (7th Cir. 2008)).[10] Neither petitioner identifies any authority that resolves this issue differently on these facts.

In any event, the lower courts properly applied the FCA in dismissing Bryan/Wendt's copycat claims under Texas law. As discussed above, the first-to-file rule bars any "related action" based on the same "facts" as the original claim. 31 U.S.C. § 3730(b)(5). If the second-filed action alleges the same essential elements of fraud, it is barred even if it adds new details or legal theories. *See Planned Parenthood of Houston & Southeast Texas, Inc.*, 570 F. App'x 386, 389 (5th Cir. 2014) (per curiam). The District Court thus properly held that Bryan/Wendt could not avoid dismissal simply by tacking on a copycat state-law claim alleging the same essential fraud. Pet.App.25-26.[11]

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[10] For this reason, Texas's concern that its "claims would be subject to dismissal before ever being presented in a complaint" are misguided. CA.ROA.7142. A *State*'s second-filed claims may be protected by Section 3732(b), just not a private relator's.

[11] Moreover, Bryan/Wendt were not even technically the first to assert claims under Texas law. In Count 1 of Capshaw's complaint, he plainly alleged false claims under both Medicare *and Medicaid*. CA.ROA.81-82. Medicaid is administered by state governments, so Count 1 alleged a claim under Texas law in substance, even though it did not specifically cite the TMFPA. *See, e.g., Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (failing to cite statute in complaint, "or to cite the correct one," does not render claim defective because "[f]actual allegations alone are what matters").

Bryan/Wendt also judicially admitted that Capshaw filed a claim under Texas law in the motion to consolidate. CA.ROA.325. They told the District Court that "both" underlying complaints were "brought pursuant to" the FCA, the AKS, the Stark Law, "and Texas statutes." CA.ROA.328. They doubled down on this admission by explaining

Other federal courts have reached the same result. *E.g., United States ex rel. De Souza v. AstraZeneca PLC*, 72 F. Supp. 3d 561, 568 (D. Del. 2014) (mem. op.) (state-law claims in second case barred by FCA first-to-file rule where first complaint "encompass[ed] the same fraudulent scheme" as the second); *United States ex rel. Szymoniak v. ACE Sec. Corp.*, No. 0:13-cv-00464-JFA, 2014 WL 1910876, at *6 (D.S.C. May 12, 2014), appeal dism'd No. 14-1579 (4th Cir. Aug. 11, 2014) (holding the "FCA bars the later-filed action" alleging state-law claims and also declining supplemental jurisdiction over such claims).

Nothing about Section 3732 alters the broad scope of the first-to-file bar, as Boyd claims. Reading these provisions together, Section 3732(b) is limited to providing supplemental jurisdiction over state-law claims not otherwise barred by some other limitation in the FCA. Or, to frame this as Boyd does in his petition: "the FCA's express grant of jurisdiction over state-law claims *is* limited by the FCA's First-to-File Bar." Boyd Pet. 24 (emphasis added).

Holding that the FCA's first-to-file rule requires dismissal of second-filed state-law claims is not inconsistent with any federal policy to encourage state-law FCA analogs. Boyd Pet. 24, 27-28. And it is not necessarily a matter of preemption either. *Id.*; Marchand Pet. 36-37. While the District Court later mentioned preemption in discussing its rulings, the bottom-line conclusion simply applied the FCA's broad first-to-file rule to properly limit federal-court litigation over duplicative state-law claims. Pet.App.25-26.

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that the two "suits allege similar schemes of illegal referrals of Medicare/*Medicaid* patients to hospices and home health agencies and acts to defraud the United States *and the State of Texas*." CA.ROA.328 (emphasis added). This further establishes this case as a poor vehicle for deciding the question presented.

Whether Bryan/Wendt could have brought standalone TMFPA claims in Texas state court is a question for another day. Marchand is wrong to suggest that the District Court actually prohibited any state lawsuit. *See* Marchand Pet. i. The court simply dismissed the entirety of Bryan/Wendt's lawsuit in *federal* court and later referenced preemption principles in discussing its decision. Pet.App.12-13, 25-26. None of the courts here addressed whether the FCA would bar a state-court lawsuit in similar circumstances. This Court should not be the first. The answer for now is clear: this case is over, Bryan/Wendt's TMFPA claims were properly dismissed, and petitioners were properly denied fees under that statute. Nothing about those decisions merits this Court's review.

D. Additional procedural hurdles make these cases especially poor vehicles for deciding the questions presented.

Finally, even if the questions presented were remotely certworthy, denying review would still be appropriate because this case is a poor vehicle impaired by jurisdictional deficiencies and waiver issues.

1. First, there is a substantial question whether the petitioner law firms have any basis to continue litigating their attorney's-fee claims when they apparently no longer represent the dismissed relators—much less whether *two* law firms can press *two separate* claims.

The Fifth Circuit raised this issue *sua sponte* in a letter request to the parties just before oral argument. As it properly noted, nonparties generally have no right to appeal. *See, e.g.*, *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Further, claims to statutory attorney's fees belong to the parties, not their counsel. *See Lipscomb v. Wise*, 643 F.2d 319, 320 (5th Cir. Unit A 1981) (per curiam); *Long v. Morton Plant Hosp. Assoc.*, 265 F. App'x

798, 800 (11th Cir. 2008). Since Bryan/Wendt have declined to seek certiorari on the denial of their fee claims, it is unclear whether their former lawyers have standing to do so. And this Court would have to resolve that question before deciding any other aspect of the case.[12]

Moreover, Bryan/Wendt arguably forfeited Boyd's fee claim by not pressing it in the Fifth Circuit. Fee claims belong to the party (not the lawyer) and can be waived by the party. *See Evans v. Jeff D.*, 475 U.S. 717, 730-31 (1986). Courts have applied this principle to deny an attorney's request for a statutory fee award where the client withdrew the request. *McAlear v. Merit Sys. Prot. Bd.,* 806 F.2d 1016, 1017 (Fed. Cir. 1986); *cf. Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 614 (6th Cir. 2007) ("[O]nly the plaintiff has the power to demand that the defendant pay the fees of the plaintiff's attorney under the FCA; without such a demand, the defendant is under no obligation to pay." (quotations omitted)); *Willis v. Gov't Accountability Office*, 448 F.3d 1341, 1346 (Fed. Cir. 2006) ("If the client can compromise the fee award, the client can equally decline to claim it in the first instance or to pursue it on appeal. The client's lack of interest does not transfer the client's right to the attorney.").

That is effectively what happened here: at the Fifth Circuit, Bryan/Wendt sought to reverse the District

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[12] There is some precedent in the Fifth Circuit allowing a lawyer to appeal where it is the only person adversely affected by a judgment. *Lipscomb*, 643 F.2d at 320-21. This Court has not apparently adopted that exception and it would essentially have to do so for this appeal to go forward. In any event, it is unclear whether petitioners could even satisfy that standard. They had the burden to establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). But neither submitted evidence of their fee arrangements or other facts to show how they are the parties "aggrieved in fact" under *Lipscomb,* other than generic references that Bryan/Wendt assigned them their fee claims.

Court's denial of fees only as to Marchand—and not as to Boyd. That decision was arguably fatal to Boyd's fee claim. But at a minimum, it presents another an impediment to this Court's review.

2. Even if Boyd has standing to appeal (and a fee claim to pursue), there remains a significant question whether Boyd timely filed his notice of appeal—potentially eliminating appellate jurisdiction over his case.

The underlying appeal clock started ticking on October 2, 2019, when the District Court entered its final order dismissing all remaining substantive claims pursuant to the final settlement. Pet.App.61-62. While the order was not explicitly phrased as such, this was the final judgment. *See* FED. R. APP. P. 4(a)(1)(B) (notice of appeal due within 60 days of judgment); *United States v. Perez*, 736 F.2d 236, 238 (5th Cir. 1984) (per curiam) (order was final judgment under Rule 58 because it was "intended to be the final dispositive and adjudicatory action of the district court, rather than an opinion or findings"); *McGregor v. Bd. of Comm'rs of Palm Beach Cty.*, 956 F.2d 1017, 1020 (11th Cir. 1992) (per curiam) ("An order granting a plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2) 'qualifies as a final judgment for purposes of appeal.'") (*quoting Yoffe v. Keller Indus., Inc.*, 580 F.2d 126, 129 (5th Cir.1978)).[13] Indeed, Bryan/Wendt/Marchand

[13] That the District Court later entered a redundant, apparently administrative "Final Judgment" did not change the effect of its prior order. Case No. 3:12-CV-4457, Dkt. No. 475 (N.D. Tex. June 2, 2020); *see Offshore Prod. Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990) ("The mere fact that a court reenters a judgment or revises a judgment in an immaterial way does not affect the time within which litigants must pursue an appeal."). Regardless, Boyd waived any argument that a separate final judgment was required (beyond the October 2 order) by filing his notice of appeal without demanding a separate judgment. *See, e.g., Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 696–97 (5th Cir. 2015).

recognized the finality of the October 2 order and noticed their appeal within 60 days. CA.ROA.7170.

Boyd did not. Though the only remaining issue after the October 2, 2019 order was a question of attorney's fees, Boyd did not file his notice of appeal until March 9, 2020, after the District Court denied his third fee request. CA.ROA.8162. Because "motions addressing costs and attorney's fees . . . do not toll the time period for filing an appeal" on the merits, Boyd's notice of appeal appears untimely to challenge the merits of the District Court's order dismissing Bryan/Wendt's claims on first-to-file grounds. *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.*, 383 F.3d 249, 250 (5th Cir. 2004).[14] That would be fatal to Boyd's petition because both of his arguments—about the jurisdictional character of the first-to-file bar and the dismissal of the Texas-law claims—challenge the merits of the dismissal order. Boyd's failure to timely appeal that order could therefore bar jurisdiction over his petition. *Kleinman v. City of Austin*, 749 F. App'x 294, 295 (5th Cir. 2019) (per curiam).[15]

3. Finally, Marchand failed to preserve his claim to attorney's fees under the TMFPA and thus forfeited the claim underlying his third question presented.

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[14] Boyd's motion to "correct or modify" the October 2 dismissal order (CA.ROA.7100) did not extend his appellate timetable because it did not truly seek to alter or amend the court's judgment—it simply asked the court to reiterate its continuing jurisdiction over his fee request. *See* FED. R. APP. P. 4(a)(4); *Moody Nat'l Bank*, 383 F.3d at 251 ("[A] motion's substance, and not its form, controls."). In any event, Boyd himself rendered this motion a nullity by withdrawing it, as the District Court noted in its final attorney's-fee order. Pet.App.10.

[15] Although respondents raised these arguments in their Fifth Circuit briefing, the court of appeals neither accepted nor rejected them. This Court would therefore have to decide this fact-bound jurisdictional issue without the benefit of any lower-court discussion.

Neither Marchand nor Bryan/Wendt ever asked the District Court for Marchand's fees under the TMFPA. Only Boyd moved for his fees under the TMFPA. Marchand's earlier fee requests invoked only the FCA's fee provisions, and Marchand has never argued otherwise. CA.ROA.4842, 7063. It is a "bedrock principle of appellate review" that a party cannot seek on appeal relief never requested from the district court. *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc.*, 200 F.3d 307, 316 (5th Cir. 2000); *see also, e.g., Ferrari v. Aetna Life Ins. Co.*, 754 F. App'x 266, 268 (5th Cir. 2018) (per curiam) (noting the "well-settled understanding that the scope of appellate review is limited to matters actually presented to the district court"); *see also Lipscomb*, 643 F.2d at 321 n.2 (noting that an attorney's individual claim for fees "must, of course, be first presented to the district court in an appropriate manner"). Although Marchand's claim for fees under the FCA was presented to the District Court, his claim under the TMFPA was not—and was therefore forfeited. This further eliminates his case as an appropriate vehicle for deciding this issue.

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted.

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