No. 21-796

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., ET AL.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The pejorative manner in which Respondents frame this effort by counsel for the Bryan/Wendt Relators to recover attorneys' fees for furthering a "private attorneys general" scheme, is irreconcilable with the import Congress placed on fee-shifting to effectuate the False Claims Act ("FCA"), as well as the equivalent import of the Texas Medicaid Fraud Prevention Act ("TMFPA"). Respondents fail to even acknowledge legislative intent, or the jeopardy rulings like those below create for *qui tam* enforcement regimes.

Petitioner Marchand L.L.P., by contrast, has made plain these considerations are central to the need for review, because "the fundamental utility of the FCA—to incentivize private citizen investigation and prosecution of fraud against the United States—is [in] jeopard[y] . . . ." *See* (Marchand L.L.P. *Petition for Writ of Certiorari* ["Pet."], p. i). Nothing about Marchand L.L.P.'s position in this regard is "obscure." *Cf.* (*Brief for the Respondents in Opposition* ["Opp."], p. 12).

Respondents nevertheless appear to think the concerns are trivial—or perhaps that FCA practitioners will work for free. Congress and the Texas Legislature did not. Marchand L.L.P. seeks to bring the law in realignment with legislative intent.

REPLY ARGUMENTS AND AUTHORITIES

A. The FCA Contemplates Remuneration for Legal Counsel, not Just Relators

Respondents posit "it is hard to tell from the[] overlapping petitions, this is an appeal about the denial of attorney's fees . . . in a case where the merits of the underlying claims are settled." (Opp. 1). The statement is curious, because Marchand L.L.P. did not mince words that is precisely what this dispute is about. *See, e.g.*, (Pet. 9) ("The plain language of the statutes . . . 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 . . . ."); (Pet. 28) ("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.").[1]

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[1] Respondents lament the amount of fees incurred by the Bryan/Wendt Relators to facilitate Respondents' $12,104,260 settlement payment to the United States and additional $105,740.00 payment to the state of Texas, *cf.* (ROA.5003), noting the "combined [fees are] five times larger than the attorney's fees

The outcome in this matter indeed is a case study in how Congress and the Texas Legislature did *not* want *qui tam* enforcement to operate, because a set of relators were represented by counsel who enabled the relators to provide valuable information that led to a *qui tam* settlement, the United States and Texas never questioned the value of information provided through counsel—yet counsel are not being compensated in accordance with statutory mandate. This matter therefore affords the opportunity to resolve a question about not only attorneys' fees owed Marchand L.L.P., but that all similarly-situated *qui tam* counsel must be ensured if the FCA and TMFPA are to operate with any effect.

Congress did not contemplate an army of untrained private citizens would themselves file and prosecute FCA claims. It instead recognized counsel must be incentivized to facilitate the enforcement scheme, to maximize the probability claims will be competently prosecuted.

This is evident from the plain language *and* legislative history of the FCA. The American Rule of attorneys' fees presumes parties will bear the burden of their attorneys' fees. *See generally Court's Peter v. NantKwest, Inc.*, 140 S. Ct. 365, 370 – 71 (2019). A statutory fee-shifting mandate creates an exception to the rule, and a common statutory exception is phrased in terms of fee-shifting to benefit a "prevailing party."

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paid to . . . the first-filing relator." (Opp. 9). But Congress, not Respondents, makes the value judgment whether fees are recoverable.

Id. at 371. Yet Congress did something altogether different in the FCA (as did the Texas Legislature in the TMFPA).

Congress not only guaranteed relators a percentage of proceeds carved out of what is paid the United States—it mandated attorneys' fees must be awarded in addition to the proceeds. *See* 31 U.S.C. § 3730(d). But in so doing, it did not authorize a *reciprocal* fee-shifting right if a *qui tam* defendant "prevails."

This framework conveys the import placed on compensating the counsel who *prosecute* FCA claims. Any doubt in this regard conclusively is foreclosed by reference to legislative history.

Congress was explicit the FCA enforcement regime could not operate without relator's counsel: "*Unavailability* of attorneys fees *inhibits* and *precludes* many private individuals, as well as their attorneys, from bringing civil fraud suits." S. Rep. No. 99-345, 99th Cong., 2d Sess. 29 (July 28, 1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5294 (emphasis added).

Broadly speaking, this Court also has made clear the FCA incentive structure "encourag[es] more private enforcement suits" and 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). But what this case calls for is inquiry into how precisely that lofty aspiration can be given effect if the FCA—through provisions such as the "first-to-file" rule—deters the essential role legal counsel play in enforcement.

That unquestionably is what the fact pattern of this case places at risk. A settlement was extracted by the United States, yet one set of counsel who provided information regarding the categories of wrongdoing the United States deemed "Covered Conduct," (ROA.5000, 5002), did not receive a fee award because a trial court presumed, *without endorsement by the government*, all "Covered Conduct" could have been discovered absent the role of counsel and their clients. This is no incentive structure at all and certainly is not "fact-bound" to this case, *cf.* (Opp. VI, 1, 3, 12, 13, 22, 23, 29),[2] because by definition, no relators or counsel ever could anticipate or avoid what occurred here.

The Bryan/Wendt Relators' claims were not dismissed based on what is commonly known as the "public disclosure" bar, found at 31 U.S.C. § 3730(e)(4)(A), which precludes a successive suit when information already is in the public domain. This case instead is indicative of the risk every FCA relator and counsel are subject to, but cannot preempt, because they will have no idea a prior action has been filed *under seal*, and no matter how valuable their contributions of novel information regarding discrete wrongdoing, or how much the federal or a state government recovers because of the contributions—no fees will be forthcoming.

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[2] None of this Court's jurisprudence suggests it has been dissuaded from resolving a jurisdictional question, simply because doing so resolves the "fact bound" dispute that created the live case and controversy. *Cf. Hamer v. Neighborhood Housing Sers. of Chicago*, 138 S.Ct. 13 (2017); *Gonzalez v. Thaler,* 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011).

The public policy benefits of robust FCA enforcement are not subject to debate, because Congress has spoken conclusively. But what this case reveals is desperately in need of consideration is the impossibility of realizing those policy benefits given what has been illuminated by this first-to-file disposition.

Respondents have not, for instance, responded to Marchand L.L.P.'s briefing that since January 1, 2020, there have been twenty-five identifiable FCA complaints filed in district courts within the Fifth Circuit—all of which were initiated by private citizens. (Pet. 29). The added significance of this fact is *none* of the cases were *pro se* prosecutions. At least one of the relators in all was represented by counsel.

Marchand L.L.P. therefore makes no apologies it puts squarely before this Court whether it is realistic to think counsel will continue to serve as the essential instrumentalities for FCA enforcement, if there is "no reasonably sound means to anticipate whether a court may strip them of their statutorily mandated right to recover attorneys' fees and costs, irrespective of the valuable contributions they make to identify and prosecute fraud . . . ." (Pet. 31). Of course Respondents retort Marchand L.L.P. did not make valuable contributions on behalf of its clients to enable settlement of the "Covered Conduct." *Cf.* (Opp. 3, 14, 16, 24) (contending "[t]he result here will be the same whether the first-to-file rule is jurisdictional or not[,]" and that Marchand L.L.P. and its clients added only "details" to a fraud the United States and Texas purportedly had sufficient information to discover).

What else could Respondents say? There consequently is nothing remarkable about their attempt to dissuade full merits review, by, of course, prematurely arguing merits issues—and discounting the interrelation between the circuit split regarding the jurisdictional character of the first-to-file rule, compared to the "test" for applying the rule.[3]

But what is noteworthy is neither the United States nor the State of Texas ever has agreed with Respondents, ever has remotely implied the contributions made by Marchand L.L.P. and its clients were immaterial, ever has remotely implied they had sufficient information based on the first-filed lawsuit to extract a settlement for the second category of "Covered Conduct", or ever has disputed it is essential to award attorneys' fees to both the first-filed and second-filed counsel under such circumstances. The irrational operation of the first-to-file rule in general, and specific to the facts in this matter, consequently cannot be

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[3] Respondents' contentions regarding the standard of review invite numerous questions, but provide no clarity. Proper analysis of a first-to-file defense *depends* upon whether the defense is or is not jurisdictional. *Cf.* (Opp. 4, 13 – 20). And it is no answer for Respondents to posit a Rule 12(b)(1) "facial" challenge operates in the same way as a Rule 12(b)(6) "plausibility" analysis, because as Marchand L.L.P. briefed *ad nauseam* in the court below, the Fifth Circuit does *not* permit a facial challenge to be utilized to dismiss a statutory remedy—like the FCA—that "provides both the basis of federal court subject matter jurisdiction *and* the cause of action." *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) (emphasis added). There consequently is nothing "academic," *cf.* (Opp. 3), about the standard of review that must be applied to a first-to-file defense.

cleaved from compensation of attorneys in effective FCA enforcement.

Respondents' barely veiled attempt to cast Marchand L.L.P. as a craven plaintiff's counsel, seeking a large payday, is an unworthy distraction. This case instead implicates jeopardy to the policy judgment Congress and states imbedded in *qui tam* statutes to ensure cases are competently prosecuted by capable legal counsel. Full merits review is warranted.

B. Respondents Obscure the Issues of Consequence

Respondents repeatedly offer inaccurate characterizations of the course of proceedings in the courts below, and Marchand L.L.P.'s contentions, that creates good cause to view with suspicion their assurances this case purportedly is unworthy of full merits review. Were that so, Respondents would have fairly and accurately presented the record of proceedings in the lower court, acknowledged the nature of contentions presented by Marchand L.L.P., and very likely forgone overuse of inflammatory rhetoric.

Instead, they obscure the important considerations that should be weighed by this Court to assess whether merits review is warranted. For example, Respondents use variations of the phrases "dismissed" claims or relators, and "settled" claims more than thirty times in their Opposition. But they never make clear to what ends—other than to inflame by characterizing Marchand L.L.P.'s attempt to recover fees as "brazen." *See* (Opp. 20).

Yet it is inaccurate for Respondents to suggest Marchand L.L.P.'s request for relief is moot or was foreclosed by the dismissal of the Bryan/Wendt Relators' claims or the subsequent settlement, *cf.* (Opp. 2) ("The merits of this case are closed and cannot be re-opened."), because Respondents expressly assented to *preservation* of the attorneys' fee dispute *in* the settlement agreement: "Nothing in this Paragraph or Agreement shall be construed in any way to release, waive, or otherwise affect the rights of Dismissed Relators Kevin Bryan and Brock Wendt to assert their claims for reasonable expenses, attorneys' fees, and costs pursuant to 31 U.S.C. § 3730(d) . . . . ." (ROA.5000, 5004).

Indeed, Respondents memorialized that the 31 U.S.C. § 3730(b)(5) first-to-file defense would be *grounds* for Respondents to oppose an attorneys' fee award: "Nothing in this Paragraph or Agreement shall be construed in any way to release, waive, or otherwise affect the right or ability of Settling Defendants to challenge or object under 31 U.S.C. § 3730(b)(5) . . . ." (ROA.5004). That is precisely what Respondents did in the lower courts, yet they now imply the attorneys' fee dispute is moot or waived, although they contractually preserved the nexus between recoverability of fees, relative to the first-to-file rule. That a *portion* of the FCA dispute is "now-settled" consequently does nothing to aid Respondents, because the preserved portion is what warrants review.

Respondents also suggest the Bryan/Wendt Relators are "now-former" clients of Marchand L.L.P., which Respondents suggest is indicative the Bryan/Wendt

Relators abandoned the attorneys' fees claim. *Cf.* (Opp. II, 2, 3, 11, 12, 27). Respondents have not directed this Court (and cannot) to a single place in the record—or otherwise—to support the suggestion Marchand L.L.P. no longer represents the Bryan/Wendt Relators, lacks authority to purse the attorneys' fee claims Respondents assented to preserve in the settlement agreement, or that the Bryan/Wendt Relators "bowed out" of the fee dispute to the detriment of the Marchand L.L.P. The proposition is baseless.

Respondents otherwise state Marchand L.L.P. in the lower court "abandoned any argument that the [jurisdictional] question matters to the fee dispute . . . ." (Opp. 21). Respondents even decontextualize a statement from Marchand L.L.P.'s Petition to contend "Marchand comes close to [waiving the error] in his petition . . . ." (Opp. 19).

These statements are especially misleading. The trial court denied Marchand L.L.P.'s fee request based on the circuit split regarding whether the first-to-file rule is jurisdictional, because it was constrained by Fifth Circuit precedent. (Appx. 48, 52) ("There is a clear circuit split as to whether the first-to-file rule is jurisdictional. . . . However absent controlling law that the first-to-file rule is not jurisdictional, this Court is bound by Fifth Circuit precedent."). In the Fifth Circuit, Marchand L.L.P. therefore addressed why the first-to-file rule is *not* jurisdictional, *see* (Opening Brief on Appeal, pp. 44 – 45, 53 – 54); (Reply Brief on Appeal, pp. 8 – 9), *and* why the trial court's first-to-file dismissal was erroneous irrespective of whether a Rule 12(b)(1) jurisdictional analysis was undertaken or a

Rule 12(b)(6) analysis appropriate for claims processing rules. *see* (Opening Brief on Appeal, pp. 41 – 54); (Reply Brief on Appeal, pp. 7 – 13).

This was not remotely a concession by Marchand L.L.P. "dismissal would have been required whether the rule is jurisdictional or not . . . ." (Opp. 1). Nor did Marchand L.L.P. "come close" to conceding that point in the Petition, because the decontextualized quote referenced by Respondents, in full was a reference to a concern raised in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015), regarding the need to ensure the FCA operates in a rational manner to fulfill congressional intent. The pertinent passage in Marchand L.L.P.'s Petition in that context read:

> 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.

(Pet. 35).

Marchand L.L.P. did not waive argument regarding whether the jurisdictional or non-jurisdictional

character of the first-to-file rule is material, and there is no responsible basis for Respondents to suggest otherwise. Indeed, Marchand L.L.P. views very differently the Fifth Circuit's decision to dispose of this appeal by "unpublished, per curiam decision." (Opp. 2).

The disposition is not commentary on whether the issues raised in the Petition are "worthy"; it instead confirms the Fifth Circuit is not in the "camp" of circuits, *cf.* (Opp. 22), that have deemed it appropriate to reevaluate attribution of jurisdictional import to the first-to-file rule. This issue consequently has "percolated" in the lower courts long enough to define the problem and air competing views. *Cf. Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities*, 59 N. Y. U. L. Rev. 677, n. 8, at 716, 719 (1984).

Finally—though there are more examples—Respondents offer a self-contradictory assessment that Marchand L.L.P. waived its right to a TMFPA recovery by not joining a request made by co-counsel. *Cf.* (Op. 29 – 30). Yet Respondents concede the trial "court denied [the TMFPA] 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." (Opp. 10). Respondents consequently cannot deny the FCA fee request properly is before this Court, nor can they offer a coherent explanation why the TMFPA fee claim was not adjudicated in a manner that preserved it for Marchand L.L.P.

CONCLUSION

Respondents' opposition has not adequately addressed continued uncertainty regarding the character of the first-to-file rule to protect Congress's and states' intent to bar only "a related action based on the *facts* underlying the pending action[,]" 31 U.S.C. § 3730(b)(5) (emphasis added), without undermining the incentive structure for relators' counsel. Full merits review is warranted.

Respectfully submitted,

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