No. 24-

IN THE

Supreme Court of the United States

UNITED STATES *ex rel.* GANESA ROSALES,
NORTH CAROLINA *ex rel.* GANESA ROSALES,

Petitioner,

v.

AMEDISYS NORTH CAROLINA, L.L.C., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN J. BEINS
Counsel of Record
BEINS GOLDBERG, LLP
Two Wisconsin Circle,
Suite 700
Chevy Chase, MD 20815
(240) 235-5040
jbeins@beinsgoldberg.com

Counsel for Petitioner

381472

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I

Whether, an action asserting claims under the False Claims Act, 31 U.S.C. § 3729(a)(1)(A), is a "related action" to a previously filed "pending action" and is thus properly dismissed under the First to File rule where the government has declined to intervene in either action and where Relator in the subsequently filed FCA action was not only the first to file, but the only to file an FCA action against the three named Defendants.

II

Whether a Motion to Dismiss under the FCA's "First to File Rule" is properly addressed under Fed. R. Cir. P. 12 (b)(1)(subject matter jurisdiction) or under Fed. R. Civ. P. 12 (b)(6) (failure to state a claim).

PARTIES TO THE PROCEEDINGS

Petitioner, Ganesa Rosales

Respondent, Amedisys North Carolina, L.L.C.

Respondent, Sanjay Batish

Respondent, Batish Medical Service, PLLC

CORPORATE DISCLOSURE STATEMENT

Petitioner has no corporate disclosures

RELATED PROCEEDINGS

United States ex rel. Rosales and North Carolina ex rel Rosales v. Amedisys, Inc., et al., No. 7:20-CV-90 (E.D.N.C. Apr. 10, 2024). Judgment entered April 10, 2024.

United States ex rel. Rosales and North Carolina ex rel Rosales v. Amedisys, Inc., No. 24-1418 (4th Cir.); *128 F.4th 548* (4th Cir. 2025). Opinion issued February 14, 2025.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Page

Page

Page

Statutes

Page

Rules and Regulations

Page

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ganesa Rosales, by and through counsel, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Fourth Circuit can be found at *128 F.4th 548* (4th Cir. 2025) and is attached at Pet. App. 1a – 23a. The unpublished decision of the United States District Court for the Eastern District of North Carolina is attached at Pet. App. 24a – 39a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on February 14, 2025. Ms. Rosales invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1), having timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the Fourth Circuit's decision.

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3730(b)(5):

> "[w]hen a person brings [an FCA action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."

STATEMENT OF THE CASE

As the federal government's primary tool for combatting fraud, the False Claims Act (FCA) imposes civil penalties on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. § 3729(a)(1)(A); *see* S. Rep. No. 99-345, at 2 (1986). In furtherance of this policy, the FCA empowers private citizens to bring qui tam actions as "relators" on behalf of the government. 31 U.S.C. § 3730(b). Such actions are filed under seal to provide the government with an opportunity to intervene and litigate the action, or, to decline intervention and allow the relator to continue the suit in the government's name. *See id.* at § 3730(b)(2). The government declined intervention in both of the actions at issue here: *Rosales* and the previously filed *Byers.*

Under 31 U.S.C. § 3730(b)(5), "[w]hen a 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".[1] This provision is known as the "first to file" rule. The first to file rule serves dual purposes: to encourage whistleblowers with knowledge of fraud to bring meritorious claims on behalf of the government while preventing opportunistic plaintiffs from filing duplicative claims. *See, e.g.*, *United States ex rel. LaCorte v. SmithKline Beecham 10 Clinical Lab'ys, Inc.,* 149 F.3d 227, 233 (3d Cir. 1998). However,

1. Prior to June 22, 2018, the North Carolina FCA also contained a "first to file" rule. N.C. Gen. Stat. § 1-608(b)(5). However, that provision was repealed by "Session Laws 2018-41, s. 3, effective June 22, 2018, and applicable to actions brought on or after that date." *Id.*

as this Court held in *Kellogg Brown & Root Services v. United States ex rel. Carter*, the first-to-file rule bars new claims only while related claims are still "pending." 575 U.S. 650, 664 (2015). Thus, once a claim is dismissed, a new claim, even one pleading related facts, is no longer barred by the rule. *Id.*

This action presents this Court with an opportunity to clarify the *Kellog* first to file principals. If an action is no longer "pending" where it was settled or dismissed, as in *Kellog*, it follows that such an action is not "pending" against a Defendant who was never named in the "pending action", as in the *Rosales* action. If the Fourth Circuit's underlying decision remains undisturbed, it would allow Respondents and any other unnamed Defendants whose claims may be somewhat "related" in a broad sense to those asserted in the "pending action" to forever escape any liability for violating the FCA. Nothing in the plain language of FCA's 1986 amendments indicates that Congress intended to allow Respondents and any other alleged wrongdoers to forever escape liability under the FCA simply by virtue of the fact that they were not named in the first filed action. Nor is such a result consistent with the plain meaning of the word "pending" since an action that is not brought cannot be deemed "pending" for purposes of the first to file rule. Nor is such a result consistent with the overall purpose of the FCA which is to impose liability under the FCA against all alleged wrongdoers who submit false claims to the government.

The Fourth Circuit also reaffirmed its prior holdings that the first to file rule is jurisdictional. *Rosales* at Pet. App. 22a-23a. Thus, there exists a clear circuit split: with the First, Second, Third, Sixth, Ninth, and DC Circuits

all holding that first to file rule is not jurisdictional, while the Fourth, Fifth, and Tenth holding that the rule is jurisdictional. This Court recently attempted to "bring some discipline" to the term, "jurisdictional" and has instructed lower courts that a statutory bar is jurisdictional only if congress clearly states that it is. *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). Thus, granting certiorari on Issue No 2 would provide an opportunity to resolve this important and longstanding split in the Circuits.

1. Factual Background

Rosales filed the Amended Complaint seeking to recover losses sustained to the North Carolina Medicaid Programs and the United States Medicare program in North Carolina - for unlawful government subsidized hospice services provided in North Carolina to North Carolina beneficiaries – and charged to the United States Medicare program and the North Carolina Medicaid program.[2] The Amended Complaint alleges that Amedisys North Carolina, L.L.C, defrauded the United States (within North Carolina) and the state of North Carolina by submitting false claims for payment to Medicare and North Carolina Medicaid for North Carolina patients who were not "terminally ill" - for the purpose of obtaining unlawfully subsidized hospice care. The Amended Complaint further alleges that Amedisys North Carolina, L.L.C. was assisted in defrauding the United States and the state of North Carolina by Defendant, Dr Batish and his wholly owned medical practice. The Amended

2. After filing her Amended Complaint and after this action was unsealed, Relator filed a Notice of Dismissal as to the non-North Carolina Defendants, none of whom were served in this case.

Complaint further alleges that Dr Batish signed off on numerous hospice admissions without ever examining the patients – even though those patients were not suffering from a "terminal" condition (i.e., a condition for which the life expectancy is six months or less). Moreover, Amedisys North Carolina, L.L.C. paid Dr Batish and his practice as an inducement to participate in this unlawful scheme.

The Amended Complaint alleges that these losses occurred in both home hospice and general inpatient hospice ("GIP") settings. The Amended Complaint sets forth, in detail, the factual allegations of how Appellees developed a scheme to encourage various North Carolina hospice locations to admit individuals who were not terminally ill and then recertify them for continued hospice care even though they were not terminally ill.

These factual allegations, when accepted as true and viewed in the light most favorable to Relator, are sufficient to support a plausible inference that Respondents knowingly submitted or caused the submission of false claims to Medicare and knowingly and unlawfully retained overpayments from Medicare and North Carolina Medicaid because of their scheme. They are also sufficient to support a plausible inference that Amedisys North Carolina unlawfully induced Dr. Batish and his practice to participate in this unlawful scheme in violation of the Anti-kickback statute.

a. The Medicare Hospice Benefit

Under the Medicare program, hospice provides palliative, rather than curative care to patients. Palliative care is aimed at relieving pain, symptoms, or stress

of terminal illness. *See* 42 C.F.R. § 418.3. Hospice care includes a comprehensive set of medical, social, psychological, emotional, and spiritual services provided to a terminally ill individual. *Id.* Medicare beneficiaries who elect hospice care agree to forego curative treatment for the terminal condition for which hospice care is provided. 42 C.F.R. § 418.24(d). In other words, a patient who receives the Medicare Hospice Benefit no longer receives care that could lead to a cure for the patient's illnesses.

Medicare only pays for hospice care provided to "terminally ill" individuals that is "reasonable and necessary for the palliation or management of terminal illness." 42 U.S.C. § 1395y(a)(1)(C). Terminally ill individuals are defined as those with a medical prognosis of a life expectancy of six months or less if the illness runs its normal course. *Id.* § 1395x(dd)(3)(A); 42 C.F.R § 418.3; For a patient to be eligible to elect Medicare hospice benefits, and for a hospice provider to be entitled to bill for such benefits, a patient must be certified as "terminally ill." *See* 42 C.F.R. § 418.20. There are two principal components of that certification: it must (1) be signed by at least one physician, and (2) be accompanied by "[c]linical information and other documentation that support the medical prognosis" of terminal illness in the medical record. *Id.* § 418.22.

The first component, the physician signature, must be obtained by the hospice provider at the time a patient is admitted to hospice and again at ninety days, six months, and every sixty days thereafter and state that the beneficiary is terminally ill "based on the physician's clinical judgment regarding the normal course of the

individual's illness." 42 U.S.C. §1395f(a)(7); 42 C.F.R. §§ 418.21, 418.22.

The second component requires hospice providers to have medical documentation supporting a prognosis of terminal illness. 42 C.F.R. §§ 418.22, 418.104. Permitting a hospice provider to claim reimbursement for patients who are not terminally ill undermines the goal of palliative care and threatens to deprive non-terminally ill patients of curative care. *See* 79 Fed. Reg. 50,452, 50,455-56 (Aug. 22, 2014). For this reason, clinical information in the patient's medical record supporting a life expectancy of six months or less is a condition of payment for hospice care. 42 C.F.R. § 418.22; 70 Fed. Reg. 70,532, 70,534-35 (Nov. 22, 2005). The United States reimburses hospice providers for services to qualified beneficiaries on a per diem rate for each day a qualified beneficiary is enrolled. 42 C.F.R. § 418.302. Medicare or Medicaid makes a daily payment, regardless of the number of services provided on a given day, and even on days when no services are provided. Payments are made according to a fee schedule with four base payment amounts for the four different categories of care: routine home care ("RHC"), continuous home care ("CHC"), inpatient respite care ("IRC"), and general inpatient care ("GIP"). In return for the hospice per diem payment, hospice providers are obligated to provide patients with all covered palliative services. *See* 42 C.F.R. § 418.202. The hospice must design a plan of care ("POC") inclusive of all covered services necessary to meet the patient's needs. *See* 42 C.F.R. § 418.56.

b. The North Carolina Medicaid Hospice Program

The North Carolina Medicaid program mirrors the federal Medicare program with regard to limiting hospice care to "terminally ill" individuals. *See* N.C. Gen. Stat. 10 GS § 131E-201(4)(Terminally ill patients are defined under North Carolina law as an individual who has been "diagnosed as terminally ill by a physician licensed to practice medicine in North Carolina, who the physician anticipates to have a life expectancy of weeks or months, generally not to exceed six months)." Under § 131E-201(3), "hospice" is defined as:

> any coordinated program of home care with provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

"Hospice services" means the provision of palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement. § 131E-201(5b). Thus, hospice patients in North Carolina must be properly certified as

"terminally ill" by a licensed physician in order to meet the initial threshold to qualify for Medicare and Medicaid funded hospice care.

2. Procedural History

a. The *Rosales* action

Relator Rosales filed her initial Complaint on June 1, 2020. The Complaint included four counts: Three under the federal FCA (Counts I - III) and one under the North Carolina FCA (Count IV). Rosales' initial Complaint named the Amedisys parent corporation and a number of Amedisys state subsidiaries, including Appellee, Amedisys North Carolina, LLC as Defendants.

On October 15, 2021, Rosales filed an Amended Complaint adding Dr. Batish and his PLLC practice, asserting the identical North Carolina state and federal FCA claims against them (Counts I – IV) and adding an AKS count (Count V) against all Defendants on behalf of the United States and North Carolina. On May 28, 2023, the District Court lifted the seal in the *Rosales* action following the government's decision not to intervene in this action. On November 16, and 27, 2023, Rosales dismissed all of the non-North Carolina Defendants from this action leaving only North Carolina resident, Dr Batish and his North Carolina PLLC and Amedisys North Carolina, LLC as Defendants.

On April 10, 2024, the District Court granted Appellees' Motion to Dismiss. The District Court entered a final judgment on April 10, 2024. Ms. Rosales filed a Notice of Appeal on May 8, 2024. The United States Court

of Appeals affirmed the District Court's order of dismissal on February 14, 2025.

b. The *Byers* action

On August 14, 2015, the *Byers* relator filed its Complaint against the Amedisys parent corporation and its South Carolina subsidiary. In that Complaint, *Byers* asserted two federal FCA counts (Counts I and II), one Health Care Fraud Count under 18 U.S.C. § 1347 (Count III), and one common law count for fraud (Count IV). The District Court for South Carolina entered an order unsealing the Byers action on October 6, 2021.

On October 26, 2021, *Byers* filed an Amended Complaint. That Amended Complaint added 2 more federal FCA claims (new Counts III and IV), dropped the Health Care Fraud Count under 18 U.S.C. § 1347 and common law Fraud Count (the old Counts III and IV) and added a new Count for violating the federal Anti-kickback statute (new Count V). A review of the *Byers* docket on Pacer (Case No. 7:21-cv-3109-JDA, D. SC) indicates that *Byers* is now in discovery with trial presently scheduled to begin May 11, 2026.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a circuit split and to resolve nationwide uncertainty regarding the proper application of the FCA's First to file rule.

A. The Circuits Are Split Over How to Interpret The False Claim Act's First to File Rule

1. The Requirement to Plead With Particularity under Rule 9(b)

Federal Rule of Civil Procedure 9(b) requires that, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Given that all claims brought under the FCA necessarily allege fraud, relators must meet the heightened pleading requirements of Rule 9(b). *See* 31 U.S.C. § 3729(a)(1)(A) (establishing liability for anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"). This Court confirmed this reasoning in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 n.6 (2016), noting that, "False Claims Act plaintiffs must . . . plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality."

Where disagreement arises among the circuit courts is not whether FCA plaintiffs must meet the standard of Rule 9(b) but what is required to meet that standard. *Compare United States ex rel. Grubbs v. Kanneganti,* 565 F.3d 180, 190 (5th Cir. 2009) (holding broadly that only a strong inference was required) with *United States ex rel. Nathan v. Takeda Pharms.*, 707 F.3d 451, 457 (4th Cir. 2013) (holding that allegations must be pleaded with particularity and specificity). *See* Karin Lee, Note, *Linking Rule 9(b) Pleading and the First-to-File Rule to Advance the Goals of the False Claims Act,* 108 Nw. U. L. Rev. 1423, 1428-32 (2014) (describing the Fifth Circuit's

view as "most permissive" and the Fourth Circuit's as "most restrictive").

Stemming from the disagreement over the standards of Rule 9(b), circuit courts are also divided over whether the first-to-file rule requires a complaint to satisfy 9(b) to bar related, later-filed complaints. *Compare Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005)(holding that if a complaint is dismissed, it does not bar future complaints under the first-to file rule) with *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (holding that if a complaint is dismissed, it provides "sufficient notice" to the government and subsequent claims are barred under the first-to-file rule).

The purpose of Rule 9(b) is to provide defendants with fair notice of a plaintiff's claims as well as their factual grounds. *See United States ex rel. Lemmon v. Envirocare of Utah, Inc.,* 614 F.3d 1163, 1172 (10th Cir. 2010). Meanwhile, the purpose of the FCA is to encourage whistleblowers to come forward and alert the government of potential fraud. *Walburn,* 431 F.3d at 973. Neither purpose is well-served by allowing an insufficiently particular action to bar related later-filed action, especially where, as in this case, the "pending action" does not name the Defendants named in the subsequent action. *Id.*

2. Related Action

The first-to-file rule specifies that once a party files a qui tam action under the FCA, no party but the government may bring "a related action based on the facts underlying

the pending action." § 3730(b)(5). The Seventh Circuit has held that the plain language of this statute does not bar all related actions, only related actions that are also based on the same essential facts as the pending action. *See United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 363 (7th Cir. 2010). Thus, "similarity" to a pending action alone is not enough to trigger the first-to-file ban, at least in the Seventh Circuit. *Id. See also* Joel Deuth, *The False Claims Act's First-to-File Bar: How the Particularity Requirement of Civil Procedure Militates Against Combating Fraud,* 62 Cath. U. L. Rev. 795, 802-03 (2013)(Examining different approaches to applying the first to file rule including reading in conjunction with 9(b)'s particularity requirements, requiring identical claims and parties, and the majority rule examining whether the two Complaints share the same "material facts").

The majority of circuit courts, including the Fourth Circuit, have interpreted "facts" under § 3730(b)(5) to mean "material" or "essential" facts. *See Chovanec*, 606 F.3d at 363. However, even though most Circuits agree that the proper standard is the "material facts" test, the Circuits differ in the proper application of that test. For instance, in some Circuits, a complaint alleging a lesser fraud does not, in itself, encompass a greater fraud within the meaning of the First to File Rule. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 122 (D.C. Cir. 2015). This point is illustrated in *Duxbury v. Ortho Biotech Products*, 579 F.3d 13, 15–16 (1st Cir. 2009) where two relators brought FCA claims against the maker of an anemia medication. Both complaints alleged (1) an unapproved, "off-label" dosing scheme, (2) promoted for the purpose of increasing Medicare reimbursements, and (3) resulting in the company submitting false reimbursement claims. *Id.*

at 33. The only crucial difference between the complaints was that the second alleged off label use and the company's promotion efforts "in significant detail," while the original complaint alleged only one method of off-label promotion *Id.* Despite their similarities, the First Circuit held that because the original complaint failed to encompass all the allegations made in the second, the complaints did not plead the same essential facts. *Id.* The later-filed complaint, therefore, was not barred by the first-to-file rule. *Id.*

A different approach is found in *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 232-33 (3d Cir.1998) (" a later complaint may be barred by the first-to-file rule despite "incorporat[ing] somewhat different details"). *See also United States ex rel. Poteet v. Medtronic,* 552 F.3d 503, 517 (6th Cir. 2009), abrogated on other grounds by *United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813 (6th Cir. 2021) (subsequent FCA claim dismissed under the first to file rule where successive relators claimed that the same medical technology company had used illegal kickbacks to induce physicians to use its products and submit ineligible claims for Medicare and Medicaid reimbursement, even though the later complaint implicated different physicians than the earlier one.); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, (10th Cir. 2004)(subsidiaries are sufficiently related to parent corporations as a matter of law that applying the first to file rule against one, necessarily bars all claims against both.).[3]

3. *Grynberg* does not accurately reflect the law of North Carolina or the general law of corporations which treats parent corporations and subsidiaries as entirely different legal entities,

The Fourth Circuit has an expansive view of the First to File Rule. In *Rosales,* it held that the *Rosales* Amended Complaint arose out of the same "material facts" as the earlier filed *Byers* complaint even though the *Byers* Complaint differed materially from the *Rosales* action because the *Byers* Complaint had not named any of the three Respondents in the Rosales action, had not asserted a claim under the AKS, and had not asserted claims on behalf of the state of North Carolina or under the North Carolina FCA. The determinative factor to the Rosales Court was whether the underlying fraudulent scheme in both actions was factually similar enough to put the government on notice of both schemes – even though asserted against different Defendants. *Rosales*, Pet. App. at 15a. Thus, the Rosales Court held that Rosales Amended Complaint was barred by the previously filed Byers Complaint because Byers was sufficient to put the government on notice of the Amedisys' parent corporations' potential fraud nationwide, *Rosales*, Pet. App. at 15a-17a, presumably against any and all possible wrongdoers in all fifty states and US territories.

---

neither of which are liable for the wrongs of the other, in the absence of exceptional circumstances allowing a creditor of one to hold the other liable. *See United States v. Bestfoods,* 524 U.S. 51, 61 (1998)(while every subsidiary is "related" in a general sense to its parent corporation,"[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries."); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 2301–04, (2011) (holding that, where corporate formalities are observed, a corporate entity is not liable under SEC Rule 10b–5 for statements made by a related but legally separate entity); *Vitol, S.A. v. Primerose Shipping Co.*, 708 F. 3d 527, 543 (4th Cir.2013) ("A corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances, commonly referred to as piercing the corporate veil.").

However, this Court should look at whether merely placing the government on notice of a fraud against one Defendant anywhere in the country is the proper determinative test as to whether a subsequent action asserting similar and different claims against different defendants would also be barred, as the Fourth Circuit held is case.[4]

4. The *Rosales* Court declined to revisit the Fourth Circuit's prior rulings holding that the First to File rule was jurisdictional. *Rosales* at Pet App. 22a - 23a, It also held that Petitioner failed to preserve the issue of whether the First to File was jurisdictional. *Id. at 23a, n. 12.* However, in the cited passage in note 12 from Petitioner's Opposition to the Respondents' Motion to Dismiss, Petitioner was citing the Fourth Circuit precedent holding that the First to File was jurisdictional. *Id.* at n12 citing Petitioner's Opposition to Motion to Dismiss at 7–9, *United States ex rel. Rosales v. Amedisys N.C., LLC*, No. 7:20-cv-90 (E.D.N.C. Nov. 16, 2023), ECF No. 50.

In other parts of Petitioners Opposition to Respondent's Motion to Dismiss before the District Court, Petitioner asserts that Respondents failed to meet their burden under Rule 12 (b)(6), *Id. at 3*; and argued that the Respondents were misapplying the First to File Rule, *Id.* at 3, 6, and that the First to File rule had no application to Petitioner's claims in the Amended Complaint, *Id.* at 9, including Rosales' Counts under the AKS and the North Carolina FCA - neither of which contains a first to file bar. *Id.* at 8, 21. Moreover, Petitioner asserted in his Brief and Reply brief before the Fourth Circuit – and again at oral argument – that the proper application of the first to file rule was under Rule 12 (b)(6), not Rule 12 (b)(1). *See* Petitioner Brief, *passim*, and Reply Brief at P. 2-3 in the Fourth Circuit appeal. Therefore, Petitioner properly preserved the issue of whether the First to File Rule should be addressed under Rule 12 (b)(1) or 12 (b)(6) in the District Court and again, before the Fourth Circuit.

3. The First to File Rule is not jurisdictional

a. The plain language of the FCA

The plain language of the first-to-file rule supports the conclusion that a violation thereof should be addressed under Rule 12 (b)(6), not Rule 12 (b)(1). "Jurisdiction" means the power of a court to adjudicate a case. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). A jurisdictional rule, then, "defines whether a court can exercise power to hear and resolve a case." *See* Howard M. Wasserman, Jurisdiction, Merits, and Procedure: Thoughts on A Trichotomy, 102 Nw. U. L. Rev. 1547, 1552 (2008). In contrast, a "merits rule" describes who may sue whom, when, and on what grounds; thus, limiting the ability of claimants to bring suit but not the power of courts to hear such claims. *Id.* at 1548.

Under this Court's canons of construction, unless Congress "clearly states" that a rule is jurisdictional, "courts should treat the restriction as non-jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006)); *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023) (same). The Court adopted this "readily administrable bright line" test in order to "ward off profligate use of the term 'jurisdiction.'" 568 U.S. at 153 (quoting *Arbaugh*, 546 U.S. at 515–16). Thus, under the "clear statement" rule, the first-to-file rule is non jurisdictional because nothing in § 3730(b)(5) clearly states that it should be treated as jurisdictional.

b. Congress intended the first-to-file to be non-jurisdictional.

In addition to its clear statement rule, this Court has held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder,* 558 U.S. 233, 249 (2010) (*quoting Nken v. Holder*, 556 U.S. 418, 430 (2009)). To illustrate, in *United States ex rel Heath v. AT&T*, relator Heath brought an FCA claim against AT&T which resembled his own earlier claim against Wisconsin Bell, a subsidiary of AT&T. 791 F.3d 112, 117-18. The district court found that the first to-file rule was jurisdictional and, therefore, barred Heath's second claim. *Id. at 118*. The D.C. Circuit, however, broke with the majority of courts of appeals at the time in holding that the rule was non jurisdictional. *Id. at 121*. The court reasoned that because Congress used clear jurisdictional language in some provisions of the FCA— e.g., "No court shall have jurisdiction over an action brought against a Member of Congress . . . if the action is based on evidence or information known to the Government when the action was brought"—Congress "knew how to reference 'jurisdiction expressly' in the False Claims Act." Id. at 120–21 (quoting § 3730(e)(2)). As a result, Congress' decision not to include jurisdictional language in § 3730(b)(5) must be interpreted as intentional. *See id.* Therefore, the D.C. Circuit concluded, the first-to file rule is not jurisdictional. *Id.;* accord *United States v. Millennium Lab'ys, Inc.*, 923 F.3d 240, 248 (1st Cir. 2019); *United States ex rel. Hanks v. United States,* 961 F.3d 131, 137 (2d Cir. 2020); *In re Plavix Mktg., Sales Pracs. & Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 234 (3d Cir. 2020). To hold otherwise would

not only contradict the text of the FCA but also Congress's intentions. *See Heath*, 791 F.3d at 120–21. 3. The plain text and proper interpretation of the first-to-file rule demonstrates that it is non jurisdictional and, therefore, the Fourth Circuit erred in holding that it barred Rosales' claim under Rule 12 (b)(1).

However, some circuits agree with the Fourth Circuit holding in *Rosales* and have also held that the first-to-file rule is jurisdictional. See, e.g., *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371 (5th Cir. 2009). In the *Branch Consultants* case, the Court emphasized the competing goals of a jurisdictional rule: incentivizing whistleblowing for the public good while preventing duplicative suits. *See Branch Consultants*, 560 F.3d at 376. Beyond referencing these policy goals, however, none of the courts offered "more analysis to explain why the first-to-file rule divested the district court of jurisdiction to hear follow-on relator filed FCA complaints." Scott Glass, *Note, Is the False Claims Act's First-to-File Rule Jurisdictional*?, 118 Colum. L. Rev. 2361, 2377 (2018). For example, in *United States ex rel. Carter v. Halliburton,* the Fourth Circuit assumed without argument that if a court finds a given action is barred by the first-to-file rule "the court lacks subject matter jurisdiction over the later-filed matter." 866 F.3d 199, 203, n.1 (quoting *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017)) (noting that the D.C. and Second Circuits have held otherwise without attempting to revisit the issue).

While construing the first-to-file rule as jurisdictional effectively prohibits duplicative suits, a non-jurisdictional, merits rule provides ample protection under the Federal

Rules of Civil Procedure. *See* Fed. R. Civ. P. 9(b), 12(b)(6), 56(a). For instance, FCA relators must satisfy Rule 9(b)'s heightened pleading standard for claims of fraud, and defendants may bring Rule 12(b)(6) motions to dismiss and Rule 56(a) summary judgment motions against meritless claims. *Id*. These are no small barriers to relators' claims and effectively serve the first-to-file rule's purpose of barring duplicative, and thereby unmeritorious, claims. *See Glass, supra,* at 2391.

c. The Split in the Circuits

The First, Second, Third, Sixth, Ninth and D.C. Circuits have held that the FCA's First-to-File Rule is not jurisdictional. *See United States v. Millenium Labs., Inc.*, 923 F.3d 240, 248–51 (1st Cir. 2019); *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85–86 (2d Cir. 2017) (*per curiam*); *In re Plavix Mktg., Sales Pracs. & Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 234 (3d Cir. 2020); *United States ex rel. Bryant v. Cmty. Health Sys., Inc.*, 24 F.4th 1024, 1036 (6th Cir. 2022); *Stein ex rel. United States v. Kaiser Foundation Health Plan, Inc.*, 115 F.4th 1244 (9th Cir. 2024)(*en banc*); *United States ex rel. Heath v. AT&T, Inc.,* 791 F.3d 112, 119–21 (D.C. Cir. 2015).

However, three other circuits have held that the First-to-File Rule is jurisdictional. *See United States ex rel. Carter v. Halliburton Co.,* 866 F.3d 199, 203 (4th Cir. 2017); *United States ex rel. Branch Consultants v. Allstate Ins. Co.,* 560 F.3d 371, 376 (5th Cir. 2009); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

The Courts that have found the First to File rule to be jurisdictional generally emphasize the competing goals of incentivizing whistleblowing for the public good while

preventing duplicative suits. *See Branch Consultants*, 560 F.3d at 376. Beyond referencing these policy goals, however, none of the courts offered "more analysis to explain why the first-to-file rule divested the district court of jurisdiction to hear follow-on relator filed FCA complaints." Scott Glass, *Note, Is the False Claims Act's First-to-File Rule Jurisdictional*?, 118 Colum. L. Rev. 2361, 2377 (2018). For example, in *United States ex rel. Carter v. Halliburton,* the Fourth Circuit assumed without argument that if a court finds a given action is barred by the first-to-file rule "the court lacks subject matter jurisdiction over the later-filed matter." 866 F.3d 199, 203, n.1 (quoting *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017)) (noting that the D.C. and Second Circuits have held otherwise without attempting to revisit the issue).

While holding that the first-to-file rule is jurisdictional effectively prohibits duplicative suits, a non-jurisdictional, merits rule also provides ample protection under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 9(b), 12(b)(6), 56(a). For instance, FCA relators must satisfy Rule 9(b)'s heightened pleading standard for claims of fraud, and defendants may bring Rule 12(b)(6) motions to dismiss and Rule 56(a) summary judgment motions against meritless claims. *Id.* These are no small barriers to relators' claims and effectively serve the first-to-file rule's purpose of barring duplicative, and thereby unmeritorious, claims. *See Glass, supra,* at 2391. Therefore, this Court should grant certiorari and hold that the FCA's first-to-file rule is non jurisdictional and, consequently, did not bar Rosales' claim.

B. This case presents an important and recurring issue of national scope.

Certiorari should be granted because the question presented is frequently recurring in FCA litigation. When an FCA Complaint is filed asserting certain claims against a certain set of Defendants, it is common that, while the "pending action" is still under seal, another FCA action is filed asserting somewhat similar claims arising out of the same general fraudulent scheme – but against different Defendants or asserting different claims or asserting different claims on behalf of different states. The question presented to the District Court in all of these cases is the one presented here: Whether the "pending action" is sufficiently related to the subsequent action to bar the subsequent action under the first to file rule, even where the claims and Defendants are different and what standard should be applied in making a First to File determination.

CONCLUSION

For the foregoing reasons, Ms. Rosales respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN J. BEINS
Counsel of Record
BEINS GOLDBERG, LLP
Two Wisconsin Circle,
Suite 700
Chevy Chase, MD 20815
(240) 235-5040
jbeins@beinsgoldberg.com

Counsel for Petitioner

May 15, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED FEBRUARY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1418

UNITED STATES EX REL. GANESA ROSALES; NORTH CAROLINA EX REL. GANESA ROSALES,

Plaintiffs-Appellants,

v.

AMEDISYS NORTH CAROLINA, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY; SANJAY BATISH, M.D.; BATISH MEDICAL SERVICE, PLLC,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. 7:20-cv-00090-D. James C. Dever III, District Judge.

Argued December 10, 2024 Decided February 14, 2025

Before KING, WYNN, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge King and Judge Thacker concurred.

Appendix A

WYNN, Circuit Judge:

The False Claims Act's first-to-file rule allows only one relator at a time to pursue a False Claims Act claim related to a given fraud. Here, the district court dismissed the case of Plaintiff-Relator, Ganesa Rosales, against Amedisys North Carolina, LLC, and two other defendants, because another relator beat her to the punch by five years.

But Rosales argues that her claims were distinct from those in the earlier-filed complaint. She contends, in part, that the district court erred by refusing to consider new claims she asserted in an amended complaint. Although we conclude that the district court should have considered her amended complaint, we nevertheless affirm.

I.

Amedisys Holding, LLC, and its various subsidiaries provide hospice care, including for Medicare and Medicaid patients. Hospice care is, by definition, end-of-life, palliative care.

In October 2014, nurse Jackie Byers began working for Amedisys Holding's South Carolina subsidiary and noticed what she later alleged were "fraudulent practices"—namely, that Amedisys Holding was admitting and recertifying patients "for hospice care who [did] not meet hospice requirements." J.A. 12.[1] Months later, on August 14, 2015, Byers filed a qui tam complaint on behalf of the United States in the District of South

1. Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

Carolina against Amedisys Holding and its South Carolina subsidiaries ("Original Byers Complaint"). Complaint, *United States ex rel. Byers v. Amedisys Holding LLC*, No. 6:15-cv-03228 (D.S.C. Aug. 14, 2015), ECF No. 1 (sealed; available at J.A. 11-26). She brought federal and state claims, including two claims under the False Claims Act, 31 U.S.C. § 3729. As is normal in False Claims Act suits, she filed the complaint under seal to give the government time to determine whether to intervene. *See* 31 U.S.C. § 3730(b)(2).

The government moved for numerous extensions while it considered Byers's complaint alongside three similar complaints filed against Amedisys Holding entities in 2016 and 2017 by relators Cathy McGee and Angela Monroe in the Southern District of West Virginia; relator Ellyn Ward in the Eastern District of New York; and relators Diane Casho and Reba Brandon in the District of Maryland. *United States ex rel. Byers v. Amedisys SC LLC*, No. 7:21-cv-03109-DCC, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1 & n.3 (D.S.C. Sept. 14, 2022); *see* Complaint, *United States ex rel. McGee & Monroe v. Amedisys, Inc.*, No. 2:16-cv-0367 (S.D. W. Va. Jan. 15, 2016), ECF No. 1 (sealed); Complaint, *United States ex rel. Ward v. Amedisys, Inc.*, No. 1:16-cv-5741 (E.D.N.Y. Oct. 14, 2016), ECF No. 1 (sealed); Complaint, *United States ex rel. Casho & Brandon v. Amedisys Inc.*, No. 1:17-cv-01885 (D. Md. July 7, 2017), ECF No. 1 (sealed).[2]

2. While the original West Virginia and New York complaints remain under seal, their complaints are available publicly in the since-unsealed District of South Carolina litigation. *See* Motion to Unseal at 24, 71, 73, *Byers*, No. 7:21-cv-03109 (D.S.C. Oct. 4, 2021), ECF No. 85.

In April 2019, these six relators "consented to the Government's request to consolidate and transfer the[ir] cases to the . . . District of Massachusetts." *Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1. The case remained under seal at that time. *See United States ex rel. Casho & Brandon v. Amedisys Inc.*, No. 1:19-cv-11147 (D. Mass.) (sealed).

Meanwhile in this matter, on June 1, 2020, Rosales filed her own False Claims Act complaint under seal ("Original Rosales Complaint"). Acting on behalf of the United States and North Carolina, she sued Amedisys Holding and several of its subsidiaries, including Appellee Amedisys North Carolina, LLC ("Amedisys NC"). Rosales alleged that she "was a home hospice case manager" for Amedisys NC from November 2017 to March 2019 and that in that role she had seen Amedisys Holding and its subsidiaries (including Amedisys NC) engage in fraudulent behavior, including "unlawfully bill[ing] Medicare and Medicaid through the admission of unqualified and ineligible patients for hospice care, who are not terminal." J.A. 29, 35. She brought three claims under the federal False Claims Act and one under the North Carolina equivalent.

On February 16, 2021, the government filed a notice declining to intervene in the consolidated Massachusetts case. *Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1. "Subsequently," Maryland relators Casho and Brandon "voluntarily dismissed their case with prejudice." Response in Opposition to Amended Motion to Dismiss at 2, *Byers*, No. 7:21-cv-03109 (Mar. 28, 2022), ECF No. 121. With Byers, McGee, Monroe, and Ward still

acting as relators, the case returned to the District of South Carolina—where Byers had initially filed suit—and was unsealed on October 6, 2021.

On October 15, 2021, Rosales filed an amended complaint ("Amended Rosales Complaint"), adding as defendants Appellees Dr. Sanjay Batish and his practice, Batish Medical Service, PLLC. Rosales reiterated the four claims from the Original Rosales Complaint and added a fifth False Claims Act claim pursuant to the Anti-Kickback Statute.

On October 26, 2021, Byers, McGee, Monroe, and Ward filed a joint amended complaint in the District of South Carolina against Amedisys Holding, its South Carolina subsidiary, and Amedisys Hospice LLC. Amended Complaint, *Byers*, No. 7:21-cv-03109 (Oct. 26, 2021), ECF No. 90 (available at J.A. 113-75). They brought five False Claims Act claims, including one referencing the Anti-Kickback Statute.

On September 14, 2022, the *Byers* district court granted in part and denied in part the defendants' motion to dismiss. *Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1. The court noted that McGee's claims were barred by a release in a settlement agreement. 2022 U.S. Dist. LEXIS 166755, [WL] at *3. And it concluded that it was required to dismiss Monroe and Ward's claims without prejudice under the False Claim Act's first-to-file rule because Byers had filed a complaint "based on the

same material elements of fraud" before they did.[3] 2022 U.S. Dist. LEXIS 166755, [WL] at *4. The court also dismissed one of Byers's claims but otherwise denied the motion to dismiss Byers's complaint. 2022 U.S. Dist. LEXIS 166755, [WL] at *4-6. Byers's case remains pending in the District of South Carolina.

Regarding the matter before us, on May 24, 2023, the United States and North Carolina filed a notice in Rosales's case declining to intervene. The district court then partially unsealed this case. The three Appellees (Amedisys NC, Dr. Batish, and his practice) moved to dismiss, after which Rosales voluntarily dismissed all other defendants. In April 2024, the district court dismissed Rosales's federal claims against the three Appellees without prejudice for lack of jurisdiction pursuant to the first-to-file rule—because of Byers's earlier-filed action—and declined to exercise supplemental jurisdiction over her state-law claim. *United States ex rel. Rosales v. Amedisys, Inc.*, No. 7:20-CV-90, 2024 U.S. Dist. LEXIS 65855, 2024 WL 1559284, at *6-7 (E.D.N.C. Apr. 10, 2024). Rosales timely appealed.

II.

This Court "reviews a dismissal for lack of subject matter jurisdiction and questions of statutory interpretation de novo." *United States ex rel. Carson v.*

3. This Court has held that the False Claims Act "does not make an exception to the first-to-file rule for consolidated complaints." *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 305 (4th Cir. 2017).

Manor Care, Inc., 851 F.3d 293, 302 (4th Cir. 2017). On appeal from a motion to dismiss, "we may consider . . . 'matters of which a court may take judicial notice,'" *Just Puppies, Inc. v. Brown*, 123 F.4th 652 (4th Cir. 2024) (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)), including public records like complaints, *see Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

The False Claims Act provides that "[w]hen a person brings" a qui tam action under the statute, "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). This means that "an earlier suit bars a later suit while the earlier suit remains undecided." *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 575 U.S. 650, 662, 135 S. Ct. 1970, 191 L. Ed. 2d 899 (2015).

"The purpose of this restriction, known as the first-to-file rule, 'is to provide incentives to relators to promptly alert the government to the essential facts of a fraudulent scheme,' while also keeping in mind the [False Claims Act]'s goal of maintaining the 'balance between encouraging citizens to report fraud and stifling parasitic lawsuits.'" *Carson*, 851 F.3d at 302 (citations omitted) (first quoting *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014); and then quoting *United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999)). The rule applies, however, even where (as here) there is no indication that the subsequent lawsuit was *intentionally* parasitic because, at the time it

was filed, the earlier lawsuit(s) remained under seal. *Cf. United States ex rel. LaCorte v. SmithKline Beecham Clinical Lab'ys, Inc.*, 149 F.3d 227, 234 & n.5 (3d Cir. 1998) (explaining potential perverse incentives that would arise with a contrary rule). Indeed, "[t]he first-to-file rule is 'an absolute, unambiguous exception-free rule.'" *Carson*, 851 F.3d at 305 (quoting *United States ex rel. Carter v. Halliburton Co.* (*Carter I*), 710 F.3d 171, 181 (4th Cir. 2013), *rev'd in part on other grounds sub nom. Kellogg Brown & Root*, 575 U.S. 650).

This "Court applies the 'material elements test' in determining whether a later-filed complaint is based on the facts underlying a previously-filed complaint. The material elements tests 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.'" *Id.* at 302 (citation omitted) (quoting *Carter I*, 710 F.3d at 182). Accordingly, "[t]he later complaint 'need not rest on precisely the same facts as a previous claim to run afoul of this statutory bar.'" *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (quoting *LaCorte*, 149 F.3d at 232), *abrogated on other grounds by United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813 (6th Cir. 2021).

III.

In this appeal, Rosales seeks to overturn the district court's order dismissing her claims against Amedisys NC, Dr. Batish, and his practice. She argues that she was the first relator to bring claims against each of those

defendants, as well as the first to bring a claim based on the Anti-Kickback Statute.

To address Rosales's arguments, the first question we must consider is which of Rosales's complaints we review when applying the first-to-file rule. The district court concluded that it was restricted to reviewing the Original Rosales Complaint. *Rosales*, 2024 U.S. Dist. LEXIS 65855, 2024 WL 1559284, at *3-4. If that is correct, it resolves much of this appeal, as Rosales did not name Dr. Batish or his practice as defendants, or bring a claim related to the Anti-Kickback Statute, until she filed the Amended Rosales Complaint. But the district court erred on this point because the False Claims Act's first-to-file rule must be applied claim-by-claim and defendant-by-defendant, and this analysis should look to the most recent properly filed complaint.[4]

To begin, the False Claims Act's first-to-file rule states that, "[w]hen a person brings an action" under the statute's qui tam provisions, "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). Because the statute uses the word "action," rather than "claim," it could plausibly be read to mean that a complaint raising several False Claims Act claims is entirely barred if even *one* of its claims overlaps with a pending action.

4. We say "properly filed" because, of course, any amendments are subject to the normal rules for amending complaints.

But the circuit courts have not read the statute in that way. Instead, they have noted that its reference to an "action" "may reasonably be read to mean 'claim' because the statute envisions a single-claim complaint." *United States ex rel. Schumann v. Astrazeneca Pharms.*, 769 F.3d 837, 846 (3d Cir. 2014) (citing *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 101-02 (3d Cir. 2000) (Alito, J.)). For that reason, every Circuit to address the issue has held that the first-to-file analysis is conducted *claim-by-claim*, with "courts consider[ing] each claim individually" and "separating genuinely new claims from recycled ones." *United States ex rel. Conyers v. Conyers*, 108 F.4th 351, 358 n.8 (5th Cir. 2024), *petition for cert. filed*, No., 2025 U.S. Dist. LEXIS 18097; *accord United States ex rel. Lovell v. AthenaHealth, Inc.*, 56 F.4th 152, 159-160 (1st Cir. 2022); *United States v. Millenium Lab'ys, Inc.*, 923 F.3d 240, 253 (1st Cir. 2019); *Merena*, 205 F.3d at 102; *see also United States ex rel. Branch Consultants v. Allstate Ins.*, 560 F.3d 371, 378-80 (5th Cir. 2009) (analyzing claims against each defendant individually). The Supreme Court has held the same in the related context of the False Claims Act's public-disclosure bar. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007), *abrogated in part on other grounds by Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 220 L. Ed. 2d 289 (2025); *accord United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 45 (4th Cir. 2016).

We see no reason why this claim-by-claim analysis should be treated differently just because a complaint has been amended. Nothing in the statute expressly precludes

amendment. And if a relator files a complaint asserting Claim A, then files an amended complaint asserting Claims A and B, the fact that the court later concludes that Claim A is barred by the first-to-file rule does not necessarily tell us anything about whether Claim B ought also to be barred. It will need to be evaluated on its own merit, in the same way that it would have been had it been included in the original complaint.

Other circuits appear to agree. In *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, the Fifth Circuit concluded that its "focus [was] on the allegations in [the relator]'s first amended complaint because 'when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.'" *Branch Consultants*, 560 F.3d at 375 n.5 (quoting *Rockwell Int'l Corp.*, 549 U.S. at 473-74). The Sixth Circuit has similarly looked to the allegations of an amended complaint—specifically, new defendants added in a third amended complaint—in applying the first-to-file rule. *See Poteet*, 552 F.3d at 509, 517. When the First Circuit was faced with a situation where a second relator filed a complaint before the initial relator filed an amended complaint, it looked to the specifics of all three complaints to determine when the claim at issue was first asserted. *United States ex rel. Duxbury v. Ortho Biotech Prods.*, 579 F.3d 13, 32-34 (1st Cir. 2009).

Similarly, we and at least one other circuit have implied that an amendment might cure a first-to-file deficiency if it served to demonstrate that a relator was

bringing at least one truly new claim. *E.g.*, *Carson*, 851 F.3d at 306 n.6 (rejecting the relator's argument that the district court erred by not allowing him to amend his complaint because he "made no proffer . . . of how his complaint could be amended to overcome the first-to-file bar," so "any amendment would be futile"); *United States ex rel. Carter v. Halliburton Co.* (*Carter II*), 866 F.3d 199, 210 (4th Cir. 2017) (affirming the denial of a proposed amendment because, "[r]ather than address any matters potentially relevant to the first-to-file rule, . . . the proposed amendment simply add[ed] detail to [the relator]'s damages theories"); *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 927, 430 U.S. App. D.C. 353 (D.C. Cir. 2017) (noting that, "[r]ather than amend his complaint" after "deduc[ing] that [the defendant] had used the same fraudulent billing scheme [as noted in his first qui tam action] in twenty additional federal contracts," the relator "brought a second qui tam action against" the defendant).

The district court concluded otherwise, and Appellees defend that conclusion on appeal, based on an inapposite line of circuit cases. In those cases, a relator filed a False Claims Act lawsuit, which was precluded by a first-filed action; but before their case could be dismissed, the first-filed action resolved. With the first-filed action no longer pending, the relator sought to amend their complaint to note that the first-to-file bar was no longer present. But several circuits have concluded (albeit not unanimously) that, in that situation, an amendment cannot cure the complaint's original sin of having been filed while a bar existed; the relator's only recourse is to refile. *Compare*

Shea, 863 F.3d at 929, 936 (concluding that "a supplemental *complaint* cannot change when [the relator] brought his . . . *action* for purposes of the statutory bar," but that "the district court did not abuse its discretion by allowing [the relator] to refile his action"), *United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 172-75 (2d Cir. 2018) (similar), *and Cho v. Surgery Partners, Inc.*, 30 F.4th 1035, 1040-41 (11th Cir. 2022) (similar), *with United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015) (rejecting this approach). And, while we have not specifically addressed this question, *see Carter II*, 866 F.3d at 212 (Wynn, J, concurring), we have held that "courts must 'look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar,'" *id.* at 206 (majority opinion) (quoting *Carter I*, 710 F.3d at 183).

Here, however, Rosales is not seeking to rely on facts arising after the time she filed the Original Rosales Complaint.[5] Instead, she is merely arguing that she was in fact the first to file certain (allegedly) *new* claims clarified or raised in the Amended Rosales Complaint. That, we hold, she is permitted to do.

In sum, we conclude that a district court applying the False Claims Act's first-to-file rule should analyze all properly filed complaints claim-by-claim to determine

5. The Amended Complaint does allege one fact that occurred after she filed the Original Rosales Complaint, namely, that the Government intervened in a Tennessee case in June 2021. That allegation is irrelevant for purposes of the first-to-file analysis in this case.

which relator was the first to bring a specific claim, or to bring that claim against a particular defendant.

IV.

Aided by our consideration of her amended complaint, Rosales argues that her claims against Amedisys NC are not barred by Byers's earlier-filed claims against Amedisys Holding (the parent corporation) because she brought claims against three additional defendants—Amedisys NC, Dr. Batish, and his practice—and added a False Claims Act claim for a violation of the Anti-Kickback Statute. Nonetheless, even with the consideration of Rosales's amended complaint, we conclude that the district court was correct to dismiss this matter based on the application of the first-to-file rule.

A.

First, regarding the addition of Amedisys NC as a defendant, the False Claims Act's first-to-file rule does not create a bright-line distinction based on the identities of the defendants. That is, there is no firm rule that claims brought against different defendants, no matter how similar the underlying facts and no matter the corporate relationship between the defendants, are permissible. Nor is there an inverse bright-line rule that claims against one entity bar claims against that entity's parent, subsidiary, or sister entity.

Instead, the statute provides that "[w]hen a person brings" a qui tam action under the statute, "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) (emphasis added). The emphasis is on the facts at play and whether the earlier-filed lawsuit was sufficient "to promptly alert the government to the essential facts of a fraudulent scheme," not necessarily the identities of the defendants named in the complaints. *Carson*, 851 F.3d at 302 (quotation marks omitted); *accord Cho*, 30 F.4th at 1043 ("[W]e find instructive the view of our sister circuits that adding a new defendant to the mix does not *necessarily* allow a later-filed action to evade the first-to-file bar, particularly where the new defendant is a corporate relative or affiliate of the earlier-named defendants.").

Thus, courts facing this situation "must determine whether the introduction of a new defendant amounts to allegations of a 'different' or 'more far-reaching scheme' than was alleged in the earlier-filed action." *Cho*, 30 F.4th at 1043 (quoting *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 121, 416 U.S. App. D.C. 289 (D.C. Cir. 2015)); *accord Poteet*, 552 F.3d at 517 ("[T]he fact that the later action names different or additional defendants is not dispositive as long as the two complaints identify the same general fraudulent scheme."); *cf. In re Nat. Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 962 (10th Cir. 2009) (concluding that the identity of the defendant *is* a relevant fact if—unlike here—the defendants are not part of "the same corporate family").

Where, as here, the corporate entities are related, "to understand whether the suits materially overlap we must

know whether the initial suits alleged frauds by rogue personnel at scattered offices or instead alleged a scheme orchestrated by . . . national management." *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 364 (7th Cir. 2010). This is because "[a] belated 'relator who merely adds details to a previously exposed fraud does not help reduce fraud or return funds to the federal fisc, because once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.'" *Carson*, 851 F.3d at 302-03 (quoting *Branch Consultants*, 560 F.3d at 378).

So, if a parent company and its subsidiaries are engaging in the same fraud, a lawsuit pointing to fraud by the parent—or the parent and some subsidiaries—alerts the government to the possibility that other subsidiaries may be engaging in the same conduct. *E.g., United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218, 355 U.S. App. D.C. 23 (D.C. Cir. 2003) (first-to-file rule barred suit against subsidiary where prior suit had been brought against parent and alleged nationwide scheme); *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209, 398 U.S. App. D.C. 110 (D.C. Cir. 2011) (first-to-file rule applied when first-filed complaint alleged that "corporate policies" perpetuated a "nationwide scheme attributable" to both Nevada subsidiary and parent company, and second-filed complaint simply asserted same fraudulent practices nationwide and in New Jersey subsidiary); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1280 n.4 (10th Cir. 2004) (first-to-file rule barred suit even though relator "named as defendants some affiliated . . . entities that were not

listed as defendants in the [earlier] suit" because "[t]his variation does not change the fact that the . . . complaints alleged the same essential claim of fraud").

By contrast, a lawsuit brought against only one geographically limited subsidiary might not alert the government to fraud being committed by a separate subsidiary. *E.g., Heath*, 791 F.3d at 123 (first-to-file rule did not bar suit against parent company and nineteen subsidiaries where earlier suit related only to single subsidiary committing a specific, geographically limited fraud because, "[w]ithout more, one subsidiary's infractions do not presumptively symptomize a corporate-pervading problem"); *Cho*, 30 F.4th at 1044 ("[A] public disclosure that one of a company's subsidiaries engaged in fraud may not alert the government to a parallel, distinct scheme by another subsidiary." (citing *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566-67 (11th Cir. 1994) (per curiam))).

This case falls under the former category. Byers's lawsuit against Amedisys Holding and Amedisys South Carolina alerted the government to the same alleged fraud that Rosales later asserted against Amedisys NC.

Specifically, both the Original Byers Complaint and the Amended Rosales Complaint[6] alleged that Amedisys Holding admitted and recertified patients "for hospice care who [did] not meet hospice requirements," with

6. Rosales brought essentially the same claims in the Original Rosales Complaint, and only added further detail in her Amended Complaint. For simplicity, we cite only the Amended Complaint.

the medical director signing off "without having seen the patient or having reviewed the patient records," and with false "documentation of patients' conditions." J.A. 12, 20 (Original Byers Complaint); *accord* J.A. 67-68, 86, 88 (Amended Rosales Complaint). Both complaints also alleged that nurse case managers were pressured to admit patients, and that the company would "send a different nurse to admit the patient" if they refused. J.A. 21 (Original Byers Complaint); *accord* J.A. 86, 88, 92 (Amended Rosales Complaint). And, importantly, both complaints alleged that these practices were not limited to the particular locations where the relators worked, but instead were "systematic" and "wide-spread." J.A. 20 (Original Byers Complaint); *accord* J.A. 70, 86 (Amended Rosales Complaint alleging the fraud was "conducted on a regional and national scale," was "a company-wide (nationwide) phenomenon," and was "understood and encouraged from the highest corporate levels").

While Rosales's complaint was more detailed than Byers's, it put forward the same essential elements of fraud. She did not allege a North Carolina-specific scheme; to the contrary, she alleged that the fraud was *not* "limited to only North Carolina," but was "a company-wide (nationwide) phenomenon." J.A. 86. Thus, "[n]either [Rosales]'s factual additions"—including the addition of Amedisys NC as a defendant—"nor the fact that [her] experience took place in [North Carolina], as opposed to [Byers]'s experience in [South Carolina], saves [her] from the first-to-file bar." *Carson*, 851 F.3d at 304.

B.

Likewise, we find no significance to the Amended Rosales Complaint's addition of claims against Dr. Batish and his medical practice. As the district court noted,[7] Dr. Batish "is a medical director, and the [Original Byers Complaint] includes allegations against Amedisys [Holding]'s medical directors," meaning the Original Byers Complaint gave "the government . . . enough information to discover the fraud in North Carolina that Rosales alleges." *Rosales*, 2024 U.S. Dist. LEXIS 65855, 2024 WL 1559284, at *5. We agree.

Again, a comparison between the two complaints demonstrates that they alleged the same material elements of fraud. Both complaints alleged that Amedisys Holding's "medical director[s] often sign[ed] certifications for patient(s) without having seen the patient or having reviewed the patient records at the time of certification." J.A. 20 (Original Byers Complaint); *accord* J.A. 87-88 (Amended Rosales Complaint). Both complaints alleged that "nurse case managers were instructed not to bother the medical director with eligibility and admissions determinations." J.A. 95 (Amended Rosales Complaint); *accord* J.A. 21 (Original Byers Complaint). And both complaints alleged that these were "systematic" and

7. Although the district court concluded that Rosales could not rely on her Amended Complaint, it also determined that, even if it considered the Amended Complaint, the first-to-file rule barred Rosales's claims against Dr. Batish and his practice. *Rosales*, 2024 U.S. Dist. LEXIS 65855, 2024 WL 1559284, at *5-6.

"wide-spread" practices. J.A. 20 (Original Byers Complaint); *accord* J.A. 88 (Amended Rosales Complaint alleging that "Dr. Batish's practice of admitting patients to hospice without actually seeing much less examining any such patients was not unique to Dr. Batish," but "reflected a widespread practice followed by Amedisys [Holding] not only in North Carolina but nationwide"). The district court was correct to apply the first-to-file bar to Rosales's claims against Dr. Batish and his practice.

C.

Finally, the Amended Rosales Complaint added a False Claims Act claim for a violation of the Anti-Kickback Statute.[8] In rejecting Rosales's claim premised on the

---

8. Rosales gestures toward the idea that she brought a standalone claim under the Anti-Kickback Statute, rather than a False Claims Act claim predicated on a violation of the Anti-Kickback Statute. *E.g.*, Opening Br. at 2-3 (arguing that Rosales brought "a count arising under the anti-kickback statute," which "does not contain a first to file bar"). But "[w]hile the Fourth Circuit has not yet addressed the issue, other courts agree that there is no private cause of action under the Anti-Kickback Statute." *United States ex rel. Nicholson v. MedCom Carolinas, Inc.*, 42 F.4th 185, 193 n.4 (4th Cir. 2022). As Rosales makes no argument in her Opening Brief that this Court should recognize such a private cause of action, she forfeits any such argument. *See G.M. ex rel. E.P. v. Barnes*, 114 F.4th 323, 338 n.7 (4th Cir. 2024).

However, "[a] violation of [the Anti-Kickback S]tatute 'automatically constitutes a false claim under the False Claims Act.'" *Nicholson*, 42 F.4th at 194 (quoting *United States ex rel. Lutz v. Mallory*, 988 F.3d 730, 741 (4th Cir. 2021)). The actual text of Rosales's Amended Complaint appears to allege just such a claim.

Anti-Kickback Statute, the district court relied solely on its conclusion that "Rosales cannot amend her complaint to defeat the first-to-file rule." *Rosales*, 2024 U.S. Dist. LEXIS 65855, 2024 WL 1559284, at *6.

We disagree for the reasons explained above. But we affirm on another "ground apparent from the record before us." *Carter II*, 866 F.3d at 206. Specifically, Rosales's Opening Brief fails to argue how her Anti-Kickback Statute claim is distinct from the allegations in the Original Byers Complaint or the other complaints filed before hers, at least two of which alleged a kickback scheme and cited the Anti-Kickback Statute.[9] *See* Motion to Unseal at 28, 30, 50, 94, 96, *Byers*, No. 7:21-cv-03109 (D.S.C. Oct. 4, 2021), ECF No. 85. Instead, she merely points to the claim in a conclusory fashion. That is

---

And at times, her Opening Brief speaks of the claim in that way. So, we address that claim.

9. The McGee/Monroe and Ward complaints present a potential first-to-file bar for Rosales even though they were dismissed in 2022, after she filed her Original and Amended Complaints. *See Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *3-4. While "an earlier suit . . . ceases to bar [a later] suit once it is dismissed," *Kellogg Brown & Root*, 575 U.S. at 662, such a dismissal does not "*automatically* cure the . . . first-to-file defect," *Carter II*, 866 F.3d at 210 (emphasis added). Instead, a relator faced with a first-filed complaint that is later dismissed must either refile her lawsuit or—if she can persuade the court to follow the minority view in the circuit split discussed above, *see supra* at 11—at least amend her complaint to note the dismissal. *See Carter II*, 866 F.3d at 211-12 (Wynn, J., concurring) (noting that which option such a relator must pursue is an open question in this Circuit).

insufficient to avoid forfeiture.[10] *See G.M. ex rel. E.P. v. Barnes*, 114 F.4th 323, 338 n.7 (4th Cir. 2024) ("[A] party forfeits an argument by failing to develop it in the opening brief, even if its brief takes a passing shot at the issue." (quoting *United States v. Smith*, 75 F.4th 459, 468 (4th Cir. 2023))).

V.

Rosales also contends that the district court erred in dismissing her claims without prejudice based on a lack of jurisdiction. But this Court has held that the first-to-file rule is jurisdictional. *Carson*, 851 F.3d at 303 ("If a court finds that the particular action before it is barred by the first-to-file rule, the court lacks subject matter jurisdiction over the later-filed matter.").

To be sure, our Court falls within a rapidly shrinking minority of circuits taking that view.[11] Indeed, the Supreme

---

10. Rosales raises other arguments, but they lack merit. She notes that she was the only relator to bring suit on behalf of North Carolina, but she does not even attempt to develop an argument as to why that matters, thus forfeiting that issue. *See G.M.*, 114 F.4th at 338 n.7. She also points to her state-law claim, but argues only that the district court had supplemental jurisdiction over that claim because it "erred in dismissing the federal claims"—an argument that we reject for the reasons discussed. Opening Br. at 19.

11. *Compare Millenium Lab'ys.*, 923 F.3d at 251 (1st Cir.) (first-to-file rule is not jurisdictional; overruling *Wilson*, 750 F.3d at 117), *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85-86 (2d Cir. 2017) (per curiam) (same), *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 232 (3d Cir. 2020) (same), *United States ex rel. Bryant v. Cmty. Health Sys., Inc.*, 24 F.4th 1024,

Court seemingly hinted in 2015 that the first-to-file rule is *not* jurisdictional by indicating that a dismissal under the rule can be done *with prejudice*. *Kellogg Brown & Root*, 575 U.S. at 662. Yet, after remand from the Supreme Court in that very same case, this Court declined to reconsider our precedent that the issue is jurisdictional. *Carter II*, 866 F.3d at 203 n.1. Accordingly, because we remain bound by our pronouncements on this issue in *Carson* and *Carter II*, and because Rosales failed to raise this argument below,[12] we decline to revisit the issue of jurisdiction in this matter.

VI.

For the foregoing reasons, we affirm the decision of the district court dismissing Rosales's complaint without prejudice for lack of jurisdiction.

AFFIRMED

1036 (6th Cir. 2022) (same, overruling *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005)), *Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1246 (9th Cir. 2024) (en banc) (same, overruling *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186-87 (9th Cir. 2001)), *and Heath*, 791 F.3d at 119-21 (D.C. Cir.) (same), *with Branch Consultants*, 560 F.3d at 376-77 (5th Cir.) (jurisdictional), *and Grynberg*, 390 F.3d at 1278 (10th Cir.) (same). *But see United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1246 n.3 (10th Cir. 2017) (suggesting the question is actually open in the Tenth Circuit in light of intervening Supreme Court precedent).

12. In fact, before the district court, she affirmatively argued that the first-to-file bar *was* jurisdictional. *See* Opposition to Motion to Dismiss at 7-9, *United States ex rel. Rosales v. Amedisys N.C., LLC*, No. 7:20-cv-90 (E.D.N.C. Nov. 16, 2023), ECF No. 50.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION, FILED APRIL 10, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
SOUTHERN DIVISION

No. 7:20-CV-90-D

UNITED STATES OF AMERICA EX REL.
GANESA ROSALES,

Plaintiff,

v.

AMEDISYS, INC., *et al.*,

Defendants.

ORDER

On June 1, 2020, Ganesa Rosales ("Rosales" or "relator") filed a *qui tam* complaint on behalf of the United States and North Carolina against Amedisys North Carolina, L.L.C. ("Amedisys") alleging violations of the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and the North Carolina False Claims Act ("North Carolina FCA"), N.C. Gen. Stat. §§ 1-605 *et seq.* [D.E. 1].[1]

1. Rosales also named Amedisys's parent company, Amedisys, Inc., and several Amedisys, Inc. subsidiaries as defendants in this action. *See* [D.E. 1, 22]. On November 16 and 27, 2023, Rosales

On October 15, 2021, Rosales amended her complaint, adding Sanjay Batish, M.D. ("Batish") and Batish Medical Service, PLLC ("BMS") (collectively with Amedisys, "defendants") as defendants and adding a claim for alleged violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b [D.E. 22]. On May 24, 2023, the United States and North Carolina declined to intervene [D.E. 35].

On October 16, 2023, defendants moved to dismiss Rosales's amended complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief may be granted [D.E. 45] and filed a memorandum in support [D.E. 46]. *See* Fed. R. Civ. P. 12(b)(1), (6). On October 16, 2023, defendants asked the court to take judicial notice of another FCA complaint [D.E. 47]. On November 16, 2023, Rosales responded in opposition to defendants' motion to dismiss [D.E. 50]. On December 11, 2023, defendants replied [D.E. 57]. As explained below, the court grants defendants' motion to dismiss for lack of subject-matter jurisdiction.

I.

Amedisys and its corporate affiliates operate hospice care centers. *See* Am. Compl. [D.E. 22] ¶ 37. Medicare pays for a patient's hospice care, provided the "patient's attending physician and the medical director of the hospice program . . . each certify in writing that the [patient] is terminally ill prior to the admission of that patient

---

voluntarily dismissed Amedisys, Inc. and its subsidiaries (except for Amedisys North Carolina, L.L.C.) from this action [D.E. 49, 52].

into the Medicare hospice program." *Id.* at ¶ 45. Proper certificates "include the presence of clinical information and other documentation in the medical record that support the patient's status as 'terminally ill.'" *Id.* at ¶ 47. Medicare conditions payment for hospice care on proper certification. *See id.* at ¶¶ 50, 58. North Carolina Medicaid closely tracks Medicare's hospice laws "and requires compliance therewith." *Id.* at ¶ 59.

From November 13, 2017, to March 24, 2019, Rosales was a home hospice case manager for Amedisys. *See id.* at ¶ 35. Rosales examined and cared for patients in their homes and assessed their suitability for admission to hospice care. *See id.* Batish was Rosales's medical director and oversaw and approved hospice admissions. *See id.*

According to Rosales, "Amedisys and [Batish] repeatedly pressured [Rosales] and other Amedisys nurses and Amedisys employees to admit patients to hospice care and/or provide false information for the purposes of recertifying a hospice patient by fabricating, falsifying, or enhancing symptoms, capabilities, diagnoses[,] and/or patient status when the patients did not actually meet the Medicare and Medicaid guidelines as 'terminal' to qualify for hospice care." *Id.* at ¶ 73. Rosales alleges "the fraudulent admissions were . . . a company-wide (nationwide) phenomenon" and were "encouraged from the highest corporate levels." *Id.* at ¶¶ 74-75. Moreover, Rosales and "her fellow nurse case managers" often "attempt[ed] to present their findings to [Batish] for a medical eligibility determination," but "Batish was unavailable and did not make hospice eligibility and admission decisions

for Amedisys." *Id.* at ¶¶ 80-81. Instead, Rosales and other nurses "would be directed to the hospice regional director . . . , who is not a medical doctor," for hospice admissions. *Id.* at ¶ 82. Thus, Amedisys often admitted patients to hospice care without proper approval from its medical director. *See id.* at ¶¶ 83-87. Rosales alleges that, despite defendants' improper admissions and false certifications, Amedisys routinely submitted fraudulent claims to and received reimbursement from Medicare and North Carolina Medicaid. *See id.* at ¶¶ 24, 94-95,104-05, 155. Rosales alleges that Medicare and North Carolina Medicaid would not have paid Amedisys for these claims if they had known of Amedisys's fraud. *See id.*

II.

A motion to dismiss under Rule 12(b)(1) tests subject-matter jurisdiction, which is the court's "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (emphasis omitted). A federal court "must determine that it has subject-matter jurisdiction over [a claim] before it can pass on the merits of that [claim]." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 479-80 (4th Cir. 2005). When considering a Rule 12(b)(1) motion, the "court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (quotation omitted); *see Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). A plaintiff must establish that this court has subject-matter jurisdiction.

See, e.g., Steel Co., 523 U.S. at 103-04; *Evans*, 166 F.3d at 647; *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). When a defendant asserts "that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged" in the complaint and any additional materials. *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009).

Defendants contend that *United States ex rel. Byers v. Amedisys SC LLC*, No. 7:21-CV-3109, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076 (D.S.C. Sept. 14, 2022) (unpublished), bars Rosales's action under the FCA's first-to-file rule. *See* [D.E. 46] 11-16; 31 U.S.C. § 3730(b)(5).[2] Rosales responds that the first-to-file rule does not apply because she named different defendants than in *Byers*. *See* [D.E. 50] 9-11. Rosales also argues that the first-to-file rule does not apply to her North Carolina FCA claim or her anti-kickback claim. *See id.* at 11. Defendants reply that Rosales's operative complaint for purposes of the first-to-file rule is her original complaint, and Rosales

2. Defendants ask this court to take judicial notice of the *Byers* complaint. *See* [D.E. 47, 47-1]. Courts "properly take judicial notice of matters of public record." *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Thus, "Federal Rule of Evidence 201 allows a court to take judicial notice of a document filed in another court to establish the fact of such litigation." *In re Hunter*, 610 B.R. 479, 491 (M.D.N.C. Bankr. 2019) (quotation omitted); *see In re Alexander*, 524 B.R. 82, 88 (E.D. Va. 2014). Accordingly, the court grants defendants' motion to take judicial notice of the *Byers* complaint. *See, e.g., Cho ex rel. States v. Surgery Partners, Inc.*, 30 F.4th 1035, 1043 n.5 (11th Cir. 2022).

cannot add different defendants or different claims to evade the first-to-file rule. *See* [D.E. 57] 3-6. Defendants also contend that the first-to-file rule applies to Rosales's North Carolina FCA claim and her anti-kickback claim. *See id.* at 6-8.

"When a person brings an action under [the *qui tam* subsection of the FCA], 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). This restriction, called the "first-to-file" rule, incentivizes "relators to promptly alert the government to the essential facts of a fraudulent scheme, while also keeping in mind the FCA's goal of maintaining the balance between encouraging citizens to report fraud and stifling parasitic lawsuits." *United States ex rel. Carson v. Manor Care. Inc.*, 851 F.3d 293, 302 (4th Cir. 2017) (cleaned up). "In other words, only one *qui tam* action relating to the alleged fraud is permitted to be pending at any time." *United States ex rel. Rush v. Agape Senior, LLC*, No. 3:13-CV-666, 2014 U.S. Dist. LEXIS 174206, 2014 WL 6910480, at *3 (D.S.C. Aug. 18, 2014) (unpublished). The "first-to-file bar [is] an absolute, unambiguous[,] exception-free rule." *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *rev'd on other grounds sub nom. Kellogg Brown & Root Servs., Inc. v. United States. ex rd. Carter*, 575 U.S. 650, 135 S. Ct. 1970, 191 L. Ed. 2d 899 (2015); *see United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191-92 (4th Cir. 1999). The first-to-file rule is jurisdictional. *See Carter*, 710 F.3d at 181. Thus, "[i]f a court finds that the particular action before it is barred by the first-to-file rule, the court lacks subject matter

jurisdiction over the later-filed matter," and the court "must dismiss the action." *Carson*, 851 F.3d at 303; *see Carter*, 710 F.3d at 181.

To determine whether a later-filed complaint is based on the facts underlying an earlier complaint, the court uses the "same material elements" test. *See Carter*, 710 F.3d at 181-82. "Under this test, a later suit is barred 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." *Id.* at 182 (quotation omitted); *see Carson*, 851 F.3d at 302-03; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2011). "Differences in specifics—such as geographic location or added facts—will not save a subsequent case." *Carson*, 851 F.3d at 302 (cleaned up); *see Carter*, 710 F.3d at 181.

The first-to-file analysis proceeds in two steps: first, the court must determine if the earlier-filed case "remains undecided." *Kellogg Brown & Root Servs., Inc.*, 575 U.S. at 662. Second, the court "must decide if the claims in the later-filed case are based on facts underlying the case filed first." *Rush*, 2014 U.S. Dist. LEXIS 174206, 2014 WL 6910480, at *4; *see Carson*, 851 F.3d at 302-03; *Carter*, 710 F.3d at 181-82.

On August 14, 2015, the relator in *Byers* filed her initial complaint. *See Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1. The case remains pending in the United States District Court for the District of South Carolina. *See 2022 U.S. Dist. LEXIS 166755*, [WL] at *6; *see also* Docket, *Byers*, No. 7:21-CV-3109 (D.S.C.),

2022 U.S. Dist. LEXIS 166755. Accordingly, Rosales's complaint meets the first prong of the first-to-file rule.

As for whether Rosales's complaint is based on facts underlying the complaint in *Byers*, the court must first determine which of Rosales's complaints is the operative complaint. Rosales contends her amended complaint is the operative complaint. *See* [D.E. 50] 6-11. Defendants respond that Rosales's operative complaint is her initial complaint. *See* [D.E. 57] 3-5.

The United States Court of Appeals for the Fourth Circuit has not decided whether a relator can amend her initial complaint to defeat the FCA's first-to-file rule. *Cf. United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199, 212 (4th Cir. 2017) (Wynn, J., concurring). Courts are divided on the question. *Compare United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015), *with United States ex rel. Wood v. Allergan. Inc.*, 899 F.3d 163,171-74 (2d Cir. 2018), *and United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923,929-30, 430 U.S. App. D.C. 353 (D.C. Cir. 2017).

In *Wood*, the Second Circuit held that permitting a relator to amend his complaint in order to defeat "the first-to-file bar" conflicts "with the language of the statute." *Wood*, 899 F.3d at 171. The Second Circuit explained that "the statute bars a person from *bringing*—*not* continuing to prosecute—a related action during the pendency of an FCA case." *Id.* at 172 (emphasis in original). "[A]mending or supplementing a complaint does not *bring* a new action, it only *brings* a new complaint into an action that is already

pending." *Id.* "[A]n amended or supplemental pleading cannot change the fact that [relator] *brought* an action while another related action was pending, as is prohibited by the first-to-file bar." *Id.* at 172-73.

In *Shea*, the D.C. Circuit held that a relator's "action was incurably flawed from the moment he filed it." *Shea*, 863 F.3d at 930. The court explained that "a plaintiff can often cure a pleading defect by amending the complaint." *Id.* at 929. Under the FCA, however, "a supplemental *complaint* cannot change when [relator] brought [the later-filed] *action* for purposes of the statutory [first-to-file] bar." *Id.*

Courts generally agree with the Second and D.C. Circuits and hold that a relator cannot avoid the first-to-file bar by amending her complaint. *See, e.g., Cho*, 30 F.4th at 1040-41 & n.3; *United States ex rel. Mohajer v. Omnicare, Inc.*, 525 F. Supp. 3d 447, 459 (S.D.N.Y. 2021); *United States v. Albertson, LLC*, No. SA-15-CV-957, 2018 U.S. Dist. LEXIS 211538, 2018 WL 6609571, at *5 (W.D. Tex. Dec. 17, 2018) (unpublished); *United States ex rel. Carter v. Halliburton Co.*, 144 F. Supp. 3d 869, 883 (E.D. Va. 2015); *United States ex rel. Moore v. Pennrose Props., LLC*, No. 3:11-CV-121, 2015 U.S. Dist. LEXIS 37373, 2015 WL 1358034, at *15 (S.D. Ohio Mar. 24, 2015) (unpublished); *United States ex rel. Branch Consultants. L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259-264 (E.D. La. 2011). This court finds these cases persuasive. Thus, the court reviews Rosales's initial complaint to determine whether the first-to-file rule bars her action.

Appendix B

In *Byers*, the relator alleged that Amedisys, Inc. and some of its subsidiaries violated the FCA by submitting false claims to Medicare, Medicaid, and Tricare for hospice care for ineligible patients. *See* [D.E. 46-1] ¶¶ 48-59. In particular, the *Byers* relator alleged that Amedisys, Inc. and its affiliates submitted improper and false certifications of hospice patients, developed false or fraudulent plans of care, falsely documented patient conditions, improperly admitted hospice patients without conducting assessments, and improperly marketed its services to prospective patients. *See id.* at ¶ 45. Rosales alleges that Amedisys violated the FCA by fabricating patients' conditions and symptoms, conducting improper patient assessments and admissions, and submitting false patient certifications to receive reimbursement from Medicare and Medicaid. *See* Compl. [D.E. 1] ¶¶ 22-24, 75-127. Accordingly, Rosales and the *Byers* relator both allege Amedisys (or its relevant affiliates) sought and received government reimbursements by submitting claims for patients Amedisys fraudulently certified as hospice patients. Rosales does not meaningfully argue to the contrary. *See* [D.E. 50] 9-11. Thus, the first-to-file rule bars Rosales's action. *See, e.g., Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *4.

This conclusion comports with *Byers*, in which relators filed four complaints in four different courts against Amedisys, Inc. and some of its subsidiaries. *See Byers*, No. 7:21-CV-3109, [D.E. 121] 9 (D.S.C. Mar. 28, 2022); *see also Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *1. Relators consented to these cases' consolidation

and transfer to the United States District Court for the District of Massachusetts. *See Byers*, No. 7:21-CV-3109, [D.E. 121] 9. After the United States declined to intervene, relators dismissed one of the underlying actions and moved to transfer the consolidated action to the United States District Court for the District of South Carolina, where the action still proceeds. *See id.* On September 14, 2022, the United States District Court for the District of South Carolina dismissed two of the underlying actions under the FCA's first-to-file rule because the "later-filed claims are based on the same material elements of fraud as Byers's suit—that is, that Defendants defrauded the United States by submitting, or causing to be submitted, false or fraudulent claims to Medicare for ineligible hospital patients." *Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *4. Accordingly, the court dismisses Rosales's action for lack of subject-matter jurisdiction under the FCA's first-to-file rule.

In opposition to this conclusion, Rosales contends that the first-to-file rule does not apply because she named different defendants in her amended complaint than the *Byers* complaint. *See* [D.E. 50] 8-11. Defendants respond that adding new defendants does not save Rosales's amended complaint from the first-to-file rule. *See* [D.E. 57] 4-6.

As discussed, Rosales cannot amend her complaint to defeat the first-to-file rule. Even if she could, however, Rosales's new defendants do not save her action. Rosales amended her complaint to add Batish and BMS as defendants and voluntarily dismissed all other defendants except Amedisys. *See* Am. Compl. 2-3; [D.E. 49, 52].

Thus, Rosales's amended complaint names Amedisys, Batish, and BMS as defendants. In *Byers*, the relator named Amedisys's parent company and Amedisys's South Carolina sister companies as defendants. *See* [D.E. 46-1] 2.

Under the "material elements test," a relator cannot defeat the first-to-file rule "by simply adding factual details or geographic location to the essential or material elements of a fraud claim." *Carter*, 710 F.3d at 182 (quotation omitted); *see Carson*, 851 F.3d at 302-03. "A belated relator who merely adds details to a previously exposed fraud does not help reduce fraud or return funds to the federal fisc, because once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *Carson*, 851 F.3d at 303 (quotation omitted). "[A]dding a new defendant to the mix does not *necessarily* allow a later-filed action to evade the first-to-file bar, particularly where the new defendant' is a corporate relative or affiliate of the earlier-named defendants." *Cho*, 30 F.4th at 1043; *see, e.g., In re Nat. Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 962 (10th Cir. 2009); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1280 n.4 (10th Cir. 2004); *Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218, 355 U.S. App. D.C. 23 (D.C. Cir. 2003) (holding that a later-filed action was barred where it alleged the same fraudulent scheme as the earlier-filed action, but named a different subsidiary and several employees as defendants and alleged the defendants perpetrated the scheme in six other states while the earlier-filed action named only the parent corporation as a defendant); *Rush*, 2014 U.S. Dist. LEXIS 174206, 2014 WL 6910480, at *6. Thus, the court "must determine whether [adding] a new

defendant amounts to allegations of a 'different' or 'more far-reaching scheme' than was alleged in the earlier-filed action." *Cho*, 30 F.4th at 1043.

In *Byers*, the complaint principally focuses on Amedisys, Inc.'s alleged FCA violations in South Carolina, but relator alleges that "Defendant's . . . practices . . . are occurring on an ongoing, regular, systematic, and widespread basis." [D.E. 46-1] ¶ 45. As discussed, the *Byers* relator and Rosales both allege Amedisys (or its relevant affiliates) violated the FCA by submitting false claims to Medicare and Medicaid for ineligible hospice patients. In her amended complaint, Rosales directs these allegations at North Carolina defendants. *See* [D.E. 50] 10 ("[U]nless the *Byers* Plaintiffs assert and prove a federal FCA claim against Amedisys' North Carolina subsidiary, it will not recover against Defendant, Amedisys North Carolina LLC . . . [and] Dr. Batish and his practice."). Batish, however, is a medical director, and the *Byers* relator includes allegations against Amedisys, Inc.'s medical directors. *See* [D.E. 46-1] ¶ 45. Rosales's amended complaint does not overcome the first-to-file bar by alleging a narrower scheme or different geographical area from the *Byers* complaint and naming one employee implicitly named in the *Byers* complaint. *See, e.g., Hampton*, 318 F.3d at 218. In other words, based on the *Byers* action, the government knows the essential facts of Amedisys, Inc.'s alleged company-wide fraudulent scheme. Thus, the government has enough information to discover the fraud in North Carolina that Rosales alleges. *See Carson*, 851 F.3d at 303.

This conclusion comports with *Byers*. In *Byers*, the United States District Court for the District of South

Carolina dismissed a subset of the consolidated claims (the "Monroe action" and the "Ward action") under the FCA's first-to-file rule. *See Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *4. In the Ward action, the relator's allegations principally concerned Amedisys, Inc.'s New Jersey operations, but the relator alleged that "based on conversations between Relator and Amedisys executives . . . , the same type of misconduct is occurring at other Amedisys locations around the country." *Byers*, 7:21-CV-3109, [D.E. 85-4] ¶ 37 (D.S.C. Oct. 4, 2021). In the Monroe action, the relator's allegations were "company-wide." *Byers*, 7:21-CV-3109, [D.E. 85-3] ¶ 29 (D.S.C. Oct. 4, 2021). Neither action survived the FCA's first-to-file bar. *See Byers*, 2022 U.S. Dist. LEXIS 166755, 2022 WL 4237076, at *4. Accordingly, Rosales's action meets the same fate.

Rosales contends "the first to file rule has no application to . . . her Anti-Kickback claim." [D.E. 50] 11.[3] Rosales's amended complaint includes a claim under the Anti-Kickback Statute. As discussed, however, Rosales cannot amend her complaint to defeat the first-to-file rule. Thus, the court rejects Rosales's argument.

Rosales also alleges a claim under the North Carolina FCA. *See* Compl. ¶¶ 149-53. The parties dispute whether the FCA's first-to-file rule also bars this claim. *Compare* [D.E. 50] 11, *with* [D.E. 57] 7. The court, however, need not reach this question. The court dismisses Rosales's

3. The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), does not provide a private right of action. *See* 42 U.S.C. § 1320a-7b(b). A violation, however, of the Anti-Kickback Statute constitutes a "false or fraudulent claim" under the FCA. *See* 42 U.S.C. § 1320a-7b(g).

federal claims for lack of subject-matter jurisdiction. Rosales and at least two of the three remaining defendants are North Carolina citizens. *See* Am. Compl. ¶¶ 34, 40. Thus, this court lacks original subject-matter jurisdiction over Rosales's North Carolina FCA claim. *See* 28 U.S.C. §§ 1331, 1332.

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988), *superseded on other grounds by* 28 U.S.C. § 1447(c); *see Shanaghan v Cahill*, 58 F.3d 106, 110 (4th Cir. 1995) ("Recent case law has emphasized that trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished."); *see also Walsh v. Mitchell*, 427 F. App'x 282, 283 (4th Cir. 2011) (per curiam) (unpublished); *Root v. Cnty. of Fairfax*, 371 F. App'x 432, 435 (4th Cir. 2010) (per curiam) (unpublished). Accordingly, the court declines to exercise supplemental jurisdiction over Rosales's North Carolina FCA claim. *See, e.g., Fogg v. U.S.A. Transp. Sec. Admin.*, No. 5:22-CV-124, 2023 U.S. Dist. LEXIS 91057, 2023 WL 3635622, at *7 (E.D.N.C. May 24, 2023) (unpublished); *A.R. ex rel. D.R. v. Wake Cnty. Bd. of Educ.*, No. 5:22-CV-45, 2022 U.S. Dist. LEXIS 206651, 2022 WI, 16953620, at *5 (E.D.N.C. Nov. 15, 2022) (unpublished); *United States ex rel. Crocano v. Trividia Health Inc.*, 615 F. Supp. 3d 1296, 1314 (S.D. Fla. 2022); *United States ex rel. Brown v. BankUnited Tr. 2005-1*, 235 F. Supp. 3d 1343, 1362 (S.D. Fla. 2017).

In their notice of notice of declination, the United States and North Carolina "request that, should . . . the Defendant propose that this action be dismissed, . . . this Court solicit the written consent of the Governments before ruling." [D.E. 35] 1-2; *see* 31 U.S.C. § 3730(b)(1). The governments' "consent is required only where the relator seeks a voluntary dismissal," not where a district court grants a defense motion to dismiss. *United States ex rel. Shaver v. Lucas W. Corp.*, 237 F.3d 932, 934 (8th Cir. 2001); *see Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 n.5 (7th Cir. 2009); *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 158 (5th Cir. 1997); *Minotti v. Lensink*, 895 F.2d 100, 103-04 (2d Cir. 1990) (per curiam). Accordingly, the court dismisses the action.

III.

In sum, the court GRANTS defendants' motion to dismiss [D.E. 45], GRANTS defendants' motion for judicial notice [D.E. 47], DISMISSES WITHOUT PREJUDICE plaintiff's federal FCA claims, and DECLINES to exercise supplemental jurisdiction over plaintiff's North Carolina FCA claim. The clerk shall close the case.

SO ORDERED. This 10 day of April, 2024.

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge