No. 24-1179

IN THE

Supreme Court of the United States

UNITED STATES, *ex rel.* GANESA ROSALES, *et al.*,

Petitioners,

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

BRIEF IN OPPOSITION

BRIAN T. KELLY
Counsel of Record
BRIAN K. FRENCH
BRIANNA N. PORTU
JACOB E. MORSE
NIXON PEABODY LLP
53 State Street
Boston, MA 02109
(617) 345-1000
bkelly@nixonpeabody.com

Counsel for Respondents

131257

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

QUESTIONS PRESENTED

1. Whether the False Claim Act's first-to-file rule bars a subsequent suit brought while the initial action remains pending and where the later suit is based on the same material elements of fraud as the earlier-filed suit.

2. Whether the False Claim Act's first-to-file rule is jurisdictional and therefore properly analyzed under Fed. R. Civ. P. 12(b)(1), rather than under Fed. R. Civ. P. 12(b)(6).

RULE 29.6 STATEMENT

Amedisys North Carolina, LLC is a wholly owned subsidiary of Amedisys, Inc., a publicly traded company.

Batish Medical Service, PLLC is a North Carolina professional limited liability company. It has no parent company and no publicly traded corporation owns stock in it.

Sanjay Batish, M.D., is a medical doctor licensed to practice in North Carolina.

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INTRODUCTION

A. The Parties

Respondent Amedisys North Carolina, LLC is a hospice provider in North Carolina and a subsidiary of Amedisys, Inc., a publicly held company that provides hospice care in over thirty states. Respondent Sanjay Batish, M.D. is a physician who served as a medical director for the Amedisys hospice care center in Bolivia, North Carolina. Dr. Batish owns Respondent Batish Medical Service, PLLC, a North Carolina professional limited liability company in Leland, North Carolina. Petitioner Ganesa Rosales worked as a hospice case manager for Amedisys' care center in Bolivia, North Carolina from November 2017 to March 2019.

B. The Medicare Hospice Benefit

The Medicare hospice benefit covers holistic, end-of-life care for terminally ill patients that is palliative in nature, rather than curative. See 42 C.F.R. § 418.3; 48 Fed. Reg. 56,008 (Dec. 16, 1983). To qualify for hospice, a patient must be certified by a physician as "terminally ill," meaning that the patient "has a medical prognosis that his or her life expectancy is 6 months or less if the illness runs its normal course." 42 C.F.R. § 418.3; *see also id.* §§ 418.20, 418.22. Once admitted to hospice, a patient is eligible for two initial 90-day periods of service, followed by an unlimited number of 60-day service periods. *Id.* § 418.21. The Centers for Medicare and Medicaid Services, the agency that administers Medicare, recognizes that "[p]redicting life expectancy is not an exact science." 75 Fed. Reg. 70,372, 70,448 (Nov. 17, 2010). Thus, there is no

limit to the number of recertification periods as long as a patient remains terminally ill. *See* 42 U.S.C. § 1395d(d)(1).

C. The False Claims Act and Anti-Kickback Statute

The False Claims Act ("FCA") makes it unlawful to knowingly present, or cause to be presented, a false or fraudulent claim for payment, or to knowingly make use, or cause to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. §§ 3729(a)(1)(A)-(B). Under the FCA's *qui tam* provisions, private persons (known as "relators") may sue on behalf of the United States. *Id.* § 3730(b)(1). *Qui tam* actions are filed under seal to give the government time to investigate the relator's complaint and decide whether to intervene and assume responsibility for the case. *Id.* §§ 3730(b)(2), (b)(4), (c)(1). If the government declines to intervene, the relator may pursue the action on his or her own. *Id.* § 3730(b)(4). The relator may recover a share of the proceeds from the action, regardless of whether the government intervenes. *Id.* § 3730(d).

The Anti-Kickback Statute ("AKS") is a criminal law that prohibits anyone from knowingly and willingly offering or providing anything of value to induce the referral of items or services reimbursed under a federal health care program. 42 U.S.C. § 1320a-7b(b). The AKS does not provide a private right of action, *see United States ex rel. King v. Solvay Pharms., Inc.*, 871 F.3d 318, 324 n.1 (5th Cir. 2017), but claims for items or services resulting from AKS violations may constitute false or fraudulent claims actionable under the FCA, *see* 42 U.S.C. § 1320a-7b(g).

D. Procedural History

In June 2020, Petitioner filed her original *qui tam* complaint in the United States District Court for the Eastern District of North Carolina, alleging that Amedisys, Inc. and twelve of its subsidiaries, including Amedisys Holding, LLC, Amedisys Hospice, LLC, and Amedisys North Carolina, LLC, violated the FCA by engaging in a nationwide scheme to bill Medicare and Medicaid for services provided to patients who were not terminally ill. *See* Joint Appendix ("JA"), *United States ex rel. Rosales v. Amedisys North Carolina, LLC*, 24-1418 (4th Cir. July 1, 2024), ECF No. 25 at 27-29. Petitioner's initial complaint included four counts: three under the FCA (Counts I-III) and one under the North Carolina False Claims Act (Count IV). JA55-60.

When Petitioner filed her initial complaint in June 2020, four other *qui tam* actions were pending against Amedisys, Inc. and certain Amedisys subsidiaries. On August 14, 2015, relator Jackie Byers filed a *qui tam* action against Amedisys, Inc., Amedisys Holding, LLC, Amedisys Hospice, LLC (each of which was also a defendant in Petitioner's later-filed initial complaint), along with Amedisys SC, LLC, in the United States District Court for the District of South Carolina. *See 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 JA11-26). After Byers brought her action, three other *qui tam* suits were filed against Amedisys, Inc. 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. *See*

United States ex rel. Byers v. Amedisys Holding, LLC, et al., No. 7:21-cv-03109-DCC, 2022 WL 4237076, at *1 (D. S.C. Sept. 14, 2022); *see also United States ex rel. Rosales v. Amedisys North Carolina, LLC*, 128 F.4th 548, 553 (4th Cir. 2025). In April 2019, the relators in these four *qui tam* actions consented to the government's request to consolidate and transfer their cases to the United States District Court for the District of Massachusetts. *See id.*

The government investigated the allegations in the consolidated complaints for over five years while the cases were under seal. *Byers*, 2022 WL 4237076, at *1. In February 2021, the government declined to intervene in any of the actions. *Id.* The cases were then transferred to the District of South Carolina (where the *Byers* action was the first-filed case) and the court ordered the complaints unsealed.[1] *See id.*; *see also Rosales*, 128 F.4th at 553-54. In October 2021, Byers, McGee, Monroe, and Ward filed a joint amended complaint against Amedisys, Inc., Amedisys Hospice, LLC, and Amedisys SC, LLC. *See Byers*, 2022 WL 4237076, at *1; JA113. The joint amended complaint asserted five FCA counts, including one based on violations of the Anti-Kickback Statute. *See Rosales*, 128 F.4th at 554; JA168-75.

The Amedisys defendants moved to dismiss the claims of relators McGee, Monroe, and Ward under the FCA's first-to-file rule because their actions were commenced

1. Relators Casho and Brandon voluntarily dismissed their *qui tam* action with prejudice. *See Byers*, 2022 WL 4237076, at *1 n.3; *see also Rosales*, 128 F.4th at 553.

after Byers brought her related action.[2] In a preview of the district court's dismissal of Petitioner's complaint, the *Byers* court dismissed Monroe and Ward's claims, finding that "Monroe and Ward's later-filed claims are based on the same material elements of fraud as Byers's suit—that is, the Defendants defrauded the United States by submitting, or causing to be submitted, false or fraudulent claims to Medicare for ineligible hospice patients."[3] *Byers*, 2022 WL 4237076, at *4.

In October 2021, Petitioner filed an amended complaint adding Dr. Batish and Batish Medical Service

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2. The FCA's first-to-file rule provides that "[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." 31 U.S.C. § 3730(b)(5). Petitioner claims that, unlike the federal FCA, the North Carolina FCA no longer contains a first-to-file bar. *See* Pet. at 2 n.1. While Petitioner has not appealed or meaningfully addressed this issue, she is nevertheless wrong: The North Carolina FCA's first-to-file provision ***was not*** repealed, as Petitioner claims. Instead, the June 2018 amendment to the state statute that Petitioner cites for support struck the original first-to-file language from the North Carolina FCA and rewrote the provision, now appearing at N.C. Gen. Stat. § 1-608(b)(5), to read: "When a person brings an action under this subsection, no other person other than the State may intervene or bring a related action based on the facts underlying the pending action." Far from repealing the provision, the amendment brought the North Carolina FCA's first-to-file bar into alignment with the nearly identical language of the federal FCA. *See* N.C. Gen. Stat. § 1-608(b)(5); 31 U.S.C. § 3730(b)(5).

3. Before the district court ruled on Amedisys' motion to dismiss, the relators filed a motion to remove relator McGee as a plaintiff in the case, which the district court granted. *See Byers*, 2022 WL 4237076, at *1 n.2.

as defendants, and claiming that Dr. Batish, in his role as an Amedisys medical director, had failed to exercise his clinical judgment in certifying patients for hospice. *See Rosales*, 128 F.4th at 554; JA65-68. Petitioner also added a fifth count to her complaint, alleging that the defendants violated the FCA by submitting false claims tainted by AKS violations. *See Rosales*, 128 F.4th at 554; JA110.

In October 2023, after the government declined to intervene in Petitioner's *qui tam* action and unsealed Petitioner's complaint, Respondents moved to dismiss her complaint for lack of subject matter jurisdiction and failure to state a claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), respectively. Respondents argued, among other things, that Petitioner's action had to be dismissed under the FCA's first-to-file rule because a materially similar *qui tam* action—the *Byers* case—was pending at that time. In a clear act of gamesmanship, on the same day that Petitioner opposed Respondents' motion to dismiss, Petitioner voluntarily dismissed Amedisys, Inc., Amedisys Holding, LLC, and Amedisys Hospice, LLC (each of which was a defendant in *Byers*), along with eight other Amedisys, Inc. subsidiaries from her case. JA8, JA178. One week later, Petitioner voluntarily dismissed another Amedisys, Inc. subsidiary from her action, JA179, leaving Amedisys North Carolina, LLC, Dr. Batish, and Batish Medical Service as the only defendants in the case in a transparent—and futile—attempt to avoid the first-to-file bar.

In April 2024, the district court dismissed all of Petitioner's claims without prejudice. Pet. App. 39a. The court dismissed Petitioner's federal FCA claims (Counts I-III, V) for lack of subject matter jurisdiction based on first-to-file grounds, and declined to exercise supplemental

jurisdiction over Petitioner's North Carolina FCA claim (Count IV). *Id.* The Fourth Circuit affirmed on appeal. *See Rosales*, 128 F.4th at 562.

REASONS FOR DENYING THE PETITION

The FCA's first-to-file rule provides that "[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." 31 U.S.C. § 3730(b)(5). 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) ("*Carter I*"), *aff'd in part, rev'd in part and remanded sub nom. Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015). "The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed." *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

Despite the plain language of the statute, Petitioner seeks to create ambiguity by claiming—without any support or clear explanation—that "nationwide uncertainty" exists over the proper application of the first-to-file bar. *See* Pet. at 10. But any confusion belongs to Petitioner alone. Petitioner not only seeks to have this Court set aside precedent and reinterpret the first-to-file provision, but also asks this Court to revive issues that the Fourth Circuit correctly found to be waived, and to become a court of first review on a Rule 9(b) argument that she makes for the first time in her Petition. In any event, this Court's review of these questions would not resolve the case in her favor. This Court should therefore deny the Petition.

A. The Fourth Circuit Correctly Concluded that the First-to-File Rule Bars Petitioner's Federal *Qui Tam* Claims

The first-to-file bar provides that "[w]hen a person brings an action ... 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). Put another way, "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 (2015) ("*Carter II*").

1. The first-to-file bar applies in full force

The first step of the first-to-file analysis requires that the first-filed action be pending at the time of the later-filed action. *See Carter II*, 575 U.S. at 622. There is no dispute that *Byers* (filed August 14, 2015) was "pending" when Rosales filed her initial complaint on June 1, 2020—*Byers* remains pending today. Thus, the first requirement of the first-to-file bar is met.

The second step requires determination of whether the actions are sufficiently related such that the first-to-file rule bars the later-filed suit. The Fourth Circuit applies the "same material elements of fraud" test to determine whether a later-filed action relates to the first-filed complaint. *See Carter I*, 710 F.3d at 181-82 (joining the Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits in adopting the "same material elements" test). 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." *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 302 (4th Cir. 2017). Thus, "[t]he later complaint 'need not rest on precisely the same facts as a previous claim to run afoul of this statutory bar.'" *Rosales*, 128 F.4th at 555 (citation omitted).

As the Fourth Circuit correctly held, Petitioner's amended complaint violated the first-to-file bar because it is based on the same material elements of fraud as the original *Byers* complaint. Start with the core allegations of fraud: Byers' complaint and Petitioner's amended complaint fundamentally assert that Amedisys submitted fraudulent bills to Medicare and Medicaid by admitting and treating patients ineligible for hospice services under relevant federal guidelines.

The Fourth Circuit's analysis of the similarities between Byers' original complaint and Petitioner's amended complaint was correct. Both alleged that Amedisys admitted and recertified patients who were ineligible for hospice. *See Rosales*, 128 F.4th at 559. Both alleged that medical directors signed off on certifications without ever having seen the patient or having reviewed the medical records. *Id.* Both alleged that patients were admitted and recertified with false documentation of their medical conditions. *Id.* Both alleged that nurse case managers—like Petitioner—were pressured to admit patients; if they failed to do so, according to both Byers and Petitioner, Amedisys would "send a different nurse to admit the patient." *Id.* (internal quotations omitted).

Petitioner's Complaint may have been more detailed that Byers' original complaint, but Petitioner "put forward the same essential elements of fraud." *Rosales*, 128 F.4th

at 559-60. Indeed, the Fourth Circuit focused on a key point: both Petitioner and Byers alleged that the improper practices were not limited to the particular locations where the relators worked, but instead were "systemic" and "wide-spread." *See id.* at 559; *accord Byers* Compl. ¶ 45 (JA20) ("Plaintiff-Relator is aware of the Defendant's following practices that are occurring on an ongoing, regular, systematic, and wide-spread basis"); *accord Rosales* Am. Compl. ¶¶ 19, 74-75 (JA70, 86) (Defendants' fraudulent course of conduct was "conducted on a regional and national scale," was "a company-wide (nationwide) phenomenon," and was "understood and encouraged from the highest corporate levels"). "Thus, neither 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." *Rosales*, 128 F.4th at 560 (citation modified) (citing *Carson*, 851 F.3d at 304).

Petitioner makes no serious effort to distinguish the material allegations of fraud included in each complaint, but instead notes that the defendants in her lawsuit are ***now*** limited to Amedisys North Carolina, LLC, Dr. Batish, and Batish Medical Service, after she voluntarily dismissed Amedisys, Inc. (the parent company) and eleven of its subsidiaries from her action in a transparent effort to avoid the first-to-file bar. As the Fourth Circuit observed, however, "the False Claims Act's first-to-file rule does not create a bright-line distinction based on the identities of the defendants." *Rosales*, 128 F.4th at 558. To the contrary, courts must assess "whether the initial suits alleged frauds by rogue personnel at scattered offices or instead alleged a scheme orchestrated by … national

management." *Id.* at 558 (quoting *United States ex rel. Chovanec v. Apira Healthcare Grp. Inc.*, 606 F.3d 361, 364 (7th Cir. 2010)). As Petitioner acknowledged in her original and amended complaints, Amedisys North Carolina, LLC is a subsidiary of Amedisys, Inc. JA27, JA36, JA65, JA75. Amedisys, Inc. is a defendant in *Byers* and was also a defendant in Petitioner's original and amended complaints before Petitioner voluntarily dismissed that parent company from her action in hopes of avoiding the first-to-file rule. *See* JA11, JA27, JA65, JA178. The first-to-file bar applies to actions with different defendants where, as here, the defendant in the later-filed action is an affiliate or subsidiary of a defendant in the first-filed case. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1280 n.4 (10th Cir. 2004); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003).

By including Amedisys, Inc., the parent corporation, as a defendant in the case, the *Byers* complaint put the government on notice of a broad "ongoing, regular, systemic, and wide-spread" corporate scheme to submit false claims for ineligible hospice patients. JA20, JA22-24. *See Grynberg*, 390 F.3d at 1279 ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied"). Petitioner did not expand on the material elements of the alleged fraud simply by adding Amedisys North Carolina, LLC—an Amedisys, Inc. subsidiary—to her case. *See Cho on behalf of States v. Surgery Partners, Inc.*, 30 F.4th 1035, 1043 (11th Cir. 2022) ("[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") (emphasis in original).

Likewise, adding Dr. Batish and his practice, Batish Medical Service, did not introduce new material fraud allegations that were not already addressed in *Byers*. As the district court in *Rosales* noted, Dr. Batish "is a medical director, and the [original *Byers* complaint] includes allegations against Amedisys, Inc.'s medical directors." Pet. App. 36a. Indeed, while the *Byers* complaint did not name Dr. Batish specifically, it included allegations describing how Amedisys medical directors had purportedly helped the company submit false claims for ineligible patients. *Byers* alleged that "[t]he medical director often signs certifications for patient(s) without having seen the patient or having reviewed the patient records at the time of certification." JA20. These and other allegations alerted the government to investigate the involvement of Amedisys medical directors in the alleged scheme, including the strikingly similar conduct that Petitioner attributed to Dr. Batish. *See* JA88 (alleging that Dr. Batish "authorized the initial admission of all of the hospice patients after the fact of their admission and reauthorized those same patients for continuing participation in the hospice program even though he never examined those patients").

As for Petitioner adding an FCA count (Count V) based on alleged AKS violations, that count also does not help Petitioner avoid the first-to-file bar. First, as the Fourth Circuit found, Petitioner failed to argue in her opening brief "how her Anti-Kickback Statute claim is distinct from the allegations in the [*Byers* complaint] or the other complaints filed before hers, at least two of which alleged a kickback scheme and cited the Anti-

Kickback Statute." *See Rosales*, 128 F.4th at 561. Thus, the Fourth Circuit held that Petitioner had forfeited the argument. *Id.* Moreover, even if Petitioner had not waived the argument, it still would not save her claim from the first-to-file bar. Petitioner alleged that Amedisys provided remuneration to Dr. Batish and various facilities to induce them to refer patients to Amedisys.[4] JA110. The *Byers* complaint included similar allegations that Amedisys, Inc. and certain subsidiaries offered "Prohibited Inducements," such as extra care and more staff at no cost to the patient, and medical equipment for patients before they were admitted to hospice. JA20. Byers also alleged that Amedisys wrongfully obtained money from the United States in violation of the FCA from "knowing and recurring … inducements …." JA14. In short, the Fourth Circuit correctly held that Petitioner's amended complaint was based on the same material elements of fraud alleged in *Byers* and Petitioner has failed to show otherwise.

2. Petitioner waived her Rule 9(b) argument

The Court can reject Petitioner's Rule 9(b) arguments in short order. Petitioner argues—for the first time in seeking certiorari—that Fed. R. Civ. P. 9(b) somehow applies to her case. She imagines a circuit split in which the circuit courts apply different standards for purposes of Rule 9(b) in the context of the first-to-file rule. *See* Pet. at 11.

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4. Although Petitioner refers to Count V as a "claim under the AKS," Pet. 15, that count simply alleges a FCA violation based on false claims resulting from AKS violations. JA110. The AKS does not provide a private right of action. *King*, 871 F.3d at 324 n.1.

First, Petitioner did not make this argument below and it is therefore forfeited. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015). Absent "unusual circumstances," none of which Petitioner has alleged, the Court ordinarily will not entertain arguments raised for the first time on appeal. *Id.* (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (2015)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). There is nothing unusual about the circumstances under which this argument made its way to the Court—Petitioner had every opportunity to make this argument below, but she did not. The argument is therefore waived.

But even if Petitioner had adequately preserved the argument (she did not), Petitioner fails to explain how her theory of differing Rule 9(b) standards would impact the outcome of this case. Even if circuit courts apply Rule 9(b) in materially different ways for purposes of evaluating the first-to-file rule, Petitioner makes no effort to explain how her amended complaint survives dismissal under a different Rule 9(b) standard. The Court can therefore disregard this argument, both because the issue was forfeited and because the argument is underdeveloped and unpersuasive.

B. The First-to-File Rule is Jurisdictional

As a threshold matter, and as the Fourth Circuit correctly noted, Petitioner failed to raise her jurisdictional argument before the district court. *See Rosales*, 128 F.4th at 562. Indeed, Petitioner affirmatively argued in her opposition to Respondent's motion to dismiss that the first-to-file rule ***is*** jurisdictional. *Id.* at 562 n.12. Petitioner's jurisdictional argument is therefore waived and should be

disregarded by this Court.[5] *See Auer v. Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was inadequately preserved in prior proceedings).

Moreover, the Fourth Circuit has long held that the first-to-file rule is jurisdictional, and thus a motion to dismiss on such grounds is analyzed under Fed. R. Civ. P. 12(b)(1). *Rosales*, 128 F.4th at 561 (citing *Carson*, 851 F.3d at 303). While it is true that the Fourth Circuit's view has become a minority position among other circuits, *see Rosales*, 128 F.4th at 561 n.11, the distinction has no bearing here. Indeed, as the Fourth Circuit observed in its opinion below, it has declined to reconsider its precedent on this jurisdictional question and remains bound by its earlier pronouncements on this issue. *See Rosales*, 128 F.4th at 561-62.

Finally, and perhaps most important, even if the first-to-file rule is deemed non-jurisdictional, that conclusion would not alter the outcome of this case. Petitioner contends that this Court should grant certiorari so that the "jurisdictional" debate can be settled. But Petitioner

5. Petitioner unpersuasively attempts to save this argument by suggesting in her Petition that her reference to the first-to-file rule as jurisdictional in her opposition to Respondents' motion to dismiss before the district court was "citing to Fourth Circuit precedent holding that the First to File was jurisdictional." Pet. at 16 n.4. But this is not the case. In that brief, Petitioner argued, without quoting or referring to any precedent, that "the FCA places jurisdictional limits on its *qui tam* provisions, such as the first-to-file rule[.]" *See* Opposition to Motion to Dismiss at 7, *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. That she later raised her jurisdictional argument in her Fourth Circuit opening brief and reply is irrelevant: Petitioner failed to make the argument before the district court.

identifies no reason why an analysis under Fed. R. Civ. P. 12(b)(6) would lead to a different outcome than an analysis under Fed. R. Civ. P. 12(b)(1). As demonstrated below, the analysis of the first-to-file rule in this case is the same under either rule.

The D.C. Circuit has held that the first-to-file rule is not jurisdictional and "bears only on whether a *qui tam* plaintiff has properly stated a claim." *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 121 (D.C. Cir. 2015). Other circuits have reached similar conclusions. *See In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 232 (3d Cir. 2020) ("Because the first-to-file bar is not jurisdictional, [the defendants'] motion to dismiss falls under Rule 12(b)(6) for failure to state a claim"); *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir. 2017) ("[T]he first-to-file rule is not jurisdictional and instead bears on the merits of whether a plaintiff has stated a claim"). Even so, circuits holding that the first-to-file bar is not jurisdictional still analyze whether to dismiss a case under Rule 12(b)(6) by comparing the complaints for relatedness under the "same material elements of fraud" test that the district court and Fourth Circuit applied in this case. *See Stein v. Kaiser Found. Health Plan, Inc.*, No. 22-15862, 2024 WL 4784915, at *1 (9th Cir. Nov. 14, 2024) (holding that while the first-to-file bar is not jurisdictional, the district court properly dismissed the complaint on first-to-file grounds under the "same material elements of fraud" test); *United States ex rel. Wood v. Allergan*, 899 F.3d 163, 168-70 & n.3 (2d Cir. 2018) (acknowledging that the first-to-file bar is not jurisdictional in the Second Circuit but holding that a later-filed action was barred by the first-to-file rule under the "same material elements of fraud" test and had to be dismissed under Rule 12(b)(6)); *Heath*, 791 F.3d at 121

(holding that the first-to-file rule bears only on whether a relator has properly stated a claim and employing the "same material elements of fraud" test to determine whether a later-filed action related to an earlier case).

As discussed, the Fourth Circuit held that Petitioner's federal FCA claims were properly dismissed because they alleged the same material elements of fraud as *Byers*. And while that dismissal was based on Rule 12(b)(1) for lack of subject matter jurisdiction, the Fourth Circuit could have also affirmed the dismissal for failure to state a claim under Rule 12(b)(6). *See Carson*, 851 F.3d at 302 ("We may affirm on any grounds supported by the record, notwithstanding the reasoning of the district court") (citation omitted); *Heath*, 791 F.3d at 119 ("Even if the district court wrongly characterized its dismissal [on first-to-file grounds] as jurisdictional, we could sustain that judgment for failure to state a claim under Rule 12(b)(6)"). Respondents moved to dismiss Petitioner's claims under both Rules 12(b)(1) and 12(b)(6). JA180-81. Thus, since the jurisdictional issue would not have changed the outcome of Petitioner's appeal, a point Petitioner all but conceded at oral argument,[6] this Court should deny Petitioner's petition for certiorari.

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6. Oral Argument at 27:04, *United States ex rel. Rosales v. Amedisys North Carolina, LLC, et al.*, 128 F.4th 548 (2025) (No. 24-1418), https://www.ca4.uscourts.gov/OAarchive/mp3/24-1418-20241210.mp3 ("I do agree with my opposing counsel that I'm not sure it affects the outcome of this case that much either way, except that when the court does not have jurisdiction they have to dismiss immediately as opposed to a 12(b)(6) where you can grant leave to amend if there is some pleading defect. That will be the important distinction …." As for leave to amend, the district court dismissed Petitioner's amended complaint ***without prejudice***. *See* Pet. App. At 39a.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Brian T. Kelly
Counsel of Record
Brian K. French
Brianna N. Portu
Jacob E. Morse
Nixon Peabody LLP
53 State Street
Boston, MA 02109
(617) 345-1000
bkelly@nixonpeabody.com

Counsel for Respondents

June 18, 2025