

No. A-_____

In the Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. BENJAMIN CARTER,

Petitioners,

v.

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE
EMPLOYEES INTERNATIONAL INC.; KBR, INC.,

Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

APPLICATION OF PLAINTIFF FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Directed To The Honorable John G. Roberts, Jr.
Chief Justice Of The United States And Circuit Justice For The United
States Court Of Appeals For The Fourth Circuit

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit
Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Petitioner Benjamin Carter (“Petitioner”) respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for sixty days to and including January 25, 2018. The United States Court of Appeals for the Fourth Circuit issued its opinion on July 31, 2017. Exhibit A. On August 28, 2017, the Fourth Circuit issued an order in which it denied Petitioner’s timely-filed petition for rehearing *en banc*. Exhibit B. Absent an extension of time, the Petition would therefore be due on

November 26, 2017. Petitioner is filing this Application at least ten days before that date. S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING AN EXTENSION OF TIME

This case was previously before the Court in order to resolve matters concerning the application of 18 U.S.C. § 3287, the Wartime Suspension of Limitations Act, and 31 U.S.C. § 3730(b)(5), the first-to-file bar. *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). The Court ruled in favor of Petitioner concerning the first-to-file bar, opining “[w]hy would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?” *Id.* at 1979. However, the Court did not directly reach the issue of whether a later-filed action may proceed without refiling if it remains pending and all earlier-filed and previously-pending actions have been dismissed without ever reaching their merits. Since then, several courts have come to different results in their attempts to answer this question: can a pending case continue once a first-filed case is dismissed, either pursuant to the rules or by operation of law? This matter may also allow the Court to finally address whether the first-to-file bar is jurisdictional, or, pursuant to this Court’s recent decision that clear Congressional intent is required, it is not jurisdictional. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015).

As this Court itself described, Petitioner has gone through “a remarkable sequence of dismissals and filings.” *Carter*, 135 S. Ct. at 1974. Petitioner worked for Halliburton Company, Kellogg Brown & Root Services, Inc.; KBR, Inc., and Service Employees, International, Inc. (collectively, “Defendants”) in Iraq at a water purification unit which was supposed to provide clean water to American troops. Petitioner filed his *qui tam* action on February 1, 2006, alleging

that Defendants had failed to perform any water purification, despite being paid handsomely for their services.

In 2010, shortly before Petitioner's claims were scheduled to begin trial, the Government suddenly revealed that another allegedly-related complaint had been filed under seal in December, 2005 (*USA ex rel. Thorpe v. Halliburton Company, et al.*, C.D. Ca., Civ. No. 05-cv-8924), mere weeks before Petitioner's. As a result, Petitioner's complaint was dismissed under the first-to-file rule of the False Claims Act ("FCA"). The District Court dismissed Petitioner's complaint, and, in an attempt to reach the merits, Petitioner refiled in June, 2011. As described above and in greater detail in Petitioner's previous briefings before this Court, this action wound its way through the district court and the Fourth Circuit, eventually appearing before this Court, and was "remanded for further proceedings." *Carter*, 135 S. Ct. at 1979. On remand, Defendants filed a motion to dismiss, while Petitioner moved to amend and argued that the first-to-file bar had been dissolved by the dismissal of the earlier-filed complaints and refiling was not mandated. The district court held that, except for the first-to-file bar, Petitioner would be allowed to proceed, but dismissed on that ground. The Fourth Circuit concurred, holding that Petitioner's action must be refiled, exposing Petitioner to the vagaries and dangers of refiling and the statute of limitations. Now, Petitioner is preparing to file his Petition for a Writ of Certiorari, but requires additional time.

In support of this motion, we respectfully submit that the time to file a Petition for a Writ of Certiorari should be extended for sixty days for these reasons:

1. Petitioner had been engaged in talks for a significant period of time with another similarly-situated party and potential petitioner concerning the possibility for joining the action and filing simultaneous petitions for a writ of certiorari. The other potential

petitioner unexpectedly dropped out of the discussions to proceed together, necessitating additional time for Petitioner to prepare a petition solely focused on this action.

2. The issues which Petitioner intends to raise are currently on appeal before the United States Court of Appeals for the Second Circuit. *United States ex rel. Wood v. Allergan, Inc.*, No. 10-CV-5645 (JMF), 2017 U.S. Dist. LEXIS 68908 (S.D.N.Y. May 4, 2017). In this matter, the appellant's reply brief is not due until November 21, 2017, and the most recent amicus brief was filed on November 9, 2017. Petitioner requires additional time to incorporate the arguments and positions taken in the briefing and amicus briefs, which will otherwise require additional briefing to incorporate if further time is not granted.
3. There is the increased likelihood that this Court will grant certiorari and potentially reverse. In addition to involving extraordinarily important issues, the Fourth Circuit has joined the circuit split between the First Circuit and the D.C. Circuit. *See United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015) ("Under the circumstances, it would be a pointless formality to let the dismissal of the...complaint stand — and doing so would needlessly expose the relator to the vagaries of filing a new action."); *see also United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 930 (D.C. Cir. 2017) ("The First Circuit agrees, reasoning that dismissal in the circumstances of this case would be a 'pointless formality.' Respectfully, we see things differently."). Thus, it is in the best interests of all parties to be provided with additional time to fully brief these complex issues.
4. No prejudice would arise from the extension, as this Court would hear oral argument and issue its opinion in the October 2018 Term regardless of whether an extension is granted.
5. Petitioner has conferred with opposing counsel, who intend to oppose this request.

CONCLUSION

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended sixty days to and including January 25, 2018.

Respectfully submitted,



Dated: November 16, 2017

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