No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. BENJAMIN CARTER,

Petitioner,

v.

KELLOGG BROWN & ROOT SERVICES, INC.,
KBR INC., HALLIBURTON COMPANY, AND
SERVICE EMPLOYEES INTERNATIONAL,

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

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QUESTIONS PRESENTED

The first-to-file bar of the False Claims Act provides that "[w]hen a person brings an action under this subsection, 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) (hereinafter referred to as the "first-to-file bar"). In *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015), this Court held that that once an earlier "pending" action is dismissed, it "ceases to bar" later suits. Now, this action returns to the Court to resolve *how* the later suits may proceed. The questions presented are:

1. Under the first-to-file bar of the False Claims Act, 31 U.S.C. § 3730(b)(5), may later actions proceed without refiling once all earlier actions have been dismissed, or must later actions be dismissed and refiled?

2. Is the first-to-file bar of the False Claims Act, 31 U.S.C. § 3730(b)(5), jurisdictional or not, and if jurisdictional, is the first-to-file bar applied only at time of filing, or may it be lifted by amendment, supplement, or later events?

PARTIES TO THE PROCEEDINGS

Petitioner Benjamin Carter ("Carter" or "Relator") was the plaintiff-relator in the United States District Court for the Eastern District of Virginia ("District Court") and the plaintiff-appellant in the United States Court of Appeals for the Fourth Circuit (the "Panel"). Respondents Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc. (collectively, "Defendants"), were the defendants in the District Court and the defendants-appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the District Court is reported at 144 F. Supp. 3d 869. The opinion of the District Court modifying and reconsidering its opinion (App. 27-46) is reported at 315 F.R.D. 56. The opinion of the Court of Appeals (App. 1-26) is reported at 866 F.3d 199. The order of the Court of Appeals denying the petition for rehearing *en banc* is unreported and reproduced at App. 47-48.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on July 31, 2017 (App. 1-26). The Court of Appeals denied Carter's petition for rehearing *en banc* on August 28, 2017 (App. 47-48). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730(b)(5), is reproduced in the appendix to this petition (App. 49).

INTRODUCTION

The decision below presents two important and recurring questions of law concerning the application of the FCA. Left unchecked, the Panel's opinion will fuel acknowledged and widening circuit splits over proper interpretation and implementation of the FCA's first-to-file bar. Resolving these issues will directly improve the United States of America's (the "Government") ability to identify, resolve, and deter fraud. This Court should grant certiorari to resolve the circuit conflicts on these issues.

The first-to-file bar of the FCA states that "[w]hen a person brings an action under this subsection, 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 purpose of the first-to-file bar reflects Congress' intent to promote prompt filing and recovery of fraudulently-obtained funds, while protecting meritorious relators from parasitic actions. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 313 n.11 (2010). There is no dispute that the first-to-file bar requires dismissal of later actions if an earlier action succeeds on its merits or remains pending. Nearly

three years ago, this Court clarified the meaning of the first-to-file bar, holding that once a prior action has been dismissed, it "ceases to bar" later actions. *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) ("*Carter*"). The Court's use of the term *cease* indicates that the bar imposed by the first-to-file provision dissolves following subsequent events. Following the reasoning laid down in *Carter*, the First Circuit heeded this Court's direction, while the Fourth Circuit and D.C. Circuit have chosen an inapposite interpretation. Now, Carter asks the Court to resolve these questions which are dividing the circuit courts, jeopardizing meritorious actions, and preventing the Government from recovering its funds procured by fraud.

The questions presented are in need of immediate resolution, as evidenced by the direct conflict between the circuit courts of appeals and the frequent reoccurrence of these issues in district courts throughout the country, specifically, (1) whether later actions may proceed without refiling once all earlier actions have been dismissed; and (2) whether the first-to-file bar is jurisdictional and whether it may be cured by motion or other post-filing events.

For the first question, three circuit courts – the D.C., First, and Fourth – have taken two directly conflicting positions, with a fourth – the Second Circuit – scheduled to hear this issue shortly. For the second question, six circuits – the First, Fourth, Fifth, Sixth, Ninth, and Tenth – have held that the first-to-file provision is jurisdictional, while the two most recent

circuits to address the issue – the D.C. and Second – have held that it is non-jurisdictional. How this Court answers these questions will significantly impact present and future FCA actions. As this Court previously found, if later actions must be dismissed and refiled – a dangerous option as actions frequently run to or over the statute of limitations due to the FCA's mandatory sealing provisions and lengthy federal and state investigations – "a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits." *Carter*, 135 S. Ct. at 1979.

Despite this Court's concerns over the unnecessary termination of meritorious actions, the Panel held that Carter must dismiss and refile his action, despite the fact that all earlier actions were entirely unsuccessful and had been dismissed years prior, without ever reaching their merits. Under the Panel's view, earlier, unmeritorious actions will forever bar later meritorious actions, forcing relators to refile their actions for no appreciable purpose or benefit, and potentially implicating the statute of limitations, as occurred in this case. Not only does this result contravene this Court's prior holding, it directly conflicts with the First Circuit's interpretation, which emphasizes that later-filed actions may proceed following the termination of all earlier actions, as dismissal would be a "pointless formalit[y] . . . needlessly expos[ing] the relator to the vagaries of filing a new action." *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2517 (2016) ("*Gadbois*").

Finally, by applying this formalistic approach, the Panel has effectively granted Defendants immunity for an extended campaign of fraud that directly endangered the lives of United States military personnel.

Currently, the Fourth and D.C. Circuits are in direct conflict with the First Circuit over whether later actions must be refiled, and the Second Circuit is on the cusp of issuing its own decision. *See United States ex rel. Wood v. Allergan, Inc.*, No. 17-cv-2191 (2d Cir. July 17, 2017). Meanwhile, this precise issue continues to arise in district courts across the country, resulting in a patchwork of inconsistent rulings. The problem is magnified because related *qui tam* actions can be filed nationwide and are often filed in different circuits and will therefore be subject to competing law on identical issues. The Court's immediate review is required to resolve the widening circuit split and to answer two critical, recurring questions, the answers to which will determine whether meritorious actions will potentially be lost forever because they were filed when an unmeritorious action, often still under seal at the time of filing, was pending, or if Congress intended for those who commit fraud against the United States to be held accountable for their actions.

STATEMENT OF THE CASE

Carter was hired by Defendants to test and purify water for American troops stationed in Iraq. Upon arrival, Carter discovered that not only were Defendants

providing the military bases with polluted water, but that it was impossible to produce clean water given that the majority of necessary equipment was either not present or nonoperational. Despite the fact that Carter did not perform *one single hour* of water purification work, Defendants instructed him and other employees to report working a minimum of twelve hours of purification work per day, totaling eighty-four hours of billed purification work per week, per employee. Defendants then knowingly submitted these fraudulent timecards to the Government for payment, in express violation of the FCA and in complete disregard for the health risks imposed on American troops.

Carter first attempted to raise these concerns internally, but Defendants ignored his written complaints. Defendants later received additional warnings from their own Theater Water Quality Manager, Wil Granger, who reviewed the situation and issued a separate internal report concluding that Defendants' failure to test or purify water

> **should be considered a 'NEAR MISS' as the consequences of these actions could have been VERY SEVERE resulting in mass sickness or death [of American troops].**

Wil Granger, *KBR Report of Findings & Root Cause, Water Mission B4 Ar Ramadi*, May 13, 2005, https://www.dpc.senate.gov/hearings/hearing30/kbr.pdf (emphasis in original). In short, Defendants fraudulently billed the Government and received payment for purifying water that was never purified. Then, in the

ultimate act of hubris, Defendants applied for a $56 million bonus in connection with their purification contract, claiming they performed excellent work. Unaware the water had never been purified, this bonus was awarded by a military panel.

In January 2006, Carter returned to the United States and filed a *qui tam* action against Defendants. Due to what this Court later described as "a remarkable sequence of dismissals and filings," Carter was forced to refile his same complaint multiple times. *Carter*, 135 S. Ct. at 1974. The operative complaint before this Court was filed in June 2011, as *United States ex rel. Carter v. Halliburton Co., et al.*, No. 11-cv-0602 (E.D. Va. June 6, 2011) ("*Carter III*"). The District Court dismissed Carter's claims, holding that two complaints filed more than two years after Carter's original complaint, *United States ex rel. Duprey*, No. 8:07-cv-1487 (D. Md. June 5, 2007) (the "Maryland Action"), and a sealed action filed in Texas in 2007 (the "Texas Action") (collectively, the "Prior Actions"), were related to Carter's claims and barred him from proceeding under the first-to-file rule because they had not yet been dismissed by the date *Carter III* was filed.

Carter III proceeded through the Fourth Circuit to this Court, which held that the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, did not apply, as it was limited to criminal fraud, and rejected Defendants' claim that the first-to-file bar permanently bars all subsequent actions, regardless of the outcome of the earlier actions. On remand, Defendants immediately filed a new motion to dismiss, claiming that Carter was

still barred under the first-to-file bar despite the fact that the Prior Actions were no longer pending, having been dismissed without ever reaching their merits. In response, and as the rules allowed, Carter filed a motion for reconsideration and moved to amend his complaint, permitting the District Court to revisit its decision concerning the first-to-file bar in light of this Court's direction. Instead, the District Court held that Carter must refile his action because, even though the Prior Actions were dismissed, they were pending at the time *Carter III* was filed.

Carter appealed to the Fourth Circuit, asking the Panel to join the First Circuit and correct the District Court's misinterpretation of the first-to-file bar. The Panel disagreed, splitting from the First Circuit's holding in *Gadbois* that the first-to-file bar allows still-pending cases to proceed without refiling if all earlier actions have been dismissed. Not only are the First and Fourth Circuits split, but six days before the Panel issued its opinion, the D.C. Circuit entered a separate decision opposing the First Circuit's interpretation of the first-to-file bar. Carter then requested a timely hearing *en banc* from the Fourth Circuit, which was subsequently denied. Carter respectfully requests that the Court grant his petition for certiorari in order to resolve this widening circuit split and to better aid the government in recovering monies obtained from fraudulent activity.

REASONS FOR GRANTING THE WRIT

I. THE PANEL'S DECISION BELOW AND THE D.C. CIRCUIT'S DECISION CONFLICT WITH THE FIRST CIRCUIT ON A FUNDAMENTAL ISSUE OF THE FALSE CLAIMS ACT

This Court should grant certiorari to resolve the significant conflict among the courts of appeals as to the legal standard for determining whether and at what point in a case the first-to-file bar should apply, and whether a meritorious action filed during the pendency of since-dismissed cases may proceed without refiling. The Panel's decision in this case directly conflicts with the First Circuit in holding that the first-to-file bar mandates the dismissal and refiling of a relator's complaint, regardless of when the earlier action was dismissed or whether the earlier action ever reached its merits. Likewise, the D.C. Circuit's interpretation of the first-to-file bar stands in direct opposition to the First Circuit's holding. By splitting with the First Circuit on this issue, both the Panel and the D.C. Circuit have created confusion among relators, defendants, and the lower courts, necessitating immediate resolution.

Directly following this Court's ruling in *Carter*, the First Circuit addressed the questions presented and properly accounted for the plain language of the FCA and Congressional intent, as described by this Court, holding that the first-to-file bar does not require dismissal and refiling of a relator's complaint if all earlier actions are dismissed before reaching their merits. The

First Circuit's analysis incorporated this Court's understanding that the first-to-file bar is temporal – not permanent, as Defendants wrongly argued – and that post-filing events may allow later actions to proceed. *Gadbois*, 809 F.3d at 6.

In rejecting the First Circuit's careful analysis, the Panel and D.C. Circuit have created an untenable division of authority in the courts of appeals on the proper interpretation and application of the first-to-file bar.[1] Significantly, there is now a conflict between the First Circuit and Fourth and D.C. Circuits, leaving lower courts divided and without guidance, and resulting in the improper dismissal of meritorious cases. A national, uniform rule is necessary to avoid disparate outcomes, prevent forum shopping, and to ensure consistent enforcement of the first-to-file bar, a critical gatekeeping provision of the FCA.

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[1] While the Panel declined to overtly split with the First Circuit, it is in direct conflict with *Gadbois* by holding that dismissal and refiling is the only cure for a first-to-file issue, regardless of intervening events. *See United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199, 210 (4th Cir. 2017) ("The subsequent dismissals of the Maryland and Texas Actions do not alter the fact that Carter brought the Carter Action while factually related litigation remained pending, and those dismissals therefore do not cure the Carter Action's first-to-file defect. Because the Carter Action violated the first-to-file rule, and because the only remedy for such a violation is dismissal, the district court was correct to dismiss the Carter Action.").

A. The First Circuit Properly Allows Relators to Cure First-to-File Issues Without Refiling

The First Circuit provides the best analysis of this Court's decision in *Carter* and the first-to-file bar. In *Gadbois*, the First Circuit properly incorporates this Court's ruling that once an earlier action has been dismissed without reaching its merits, it ceases to bar later actions. Moreover, the First Circuit follows the plain language of the statute, promotes Congressional intent, properly incorporates this Court's rulings, and advances a method for resolving these frequent disputes while following the spirit and letter of the FCA, without prejudicing any parties.

The First Circuit's primary concern was that *Gadbois* was the only legitimate remaining action; while similar actions had been filed earlier, none had ever reached their merits. *Gadbois*, 809 F.3d at 4. Following two critical developments, namely this Court's guidance in *Carter* and the dismissal of prior actions while *Gadbois* was pending, the First Circuit ruled that the first-to-file bar "dissolved," because

> [a]lthough the order of dismissal may have been proper at the time it was entered, the relator timely appealed and the critical developments occurred during the pendency of that appeal. Consequently, this case is analogous to the cases in which a jurisdictional prerequisite (such as an exhaustion requirement) is satisfied only after suit is commenced. *Under the circumstances, it would be a pointless*

> *formality to let the dismissal of the second amended complaint stand – and doing so would needlessly expose the relator to the vagaries of filing a new action*.

Id. at 6 (emphasis added). Most importantly, the First Circuit instructed courts to give greater weight to substantive factors instead of "pointless formalities."

For all intents and purposes, Carter's factual and procedural posture mirrors those in *Gadbois*. Both operative complaints were filed while other, unsubstantiated actions were pending. *Carter*, 866 F.3d at 203; *Gadbois*, 809 F.3d at 3. In both cases, the earlier actions ended unsuccessfully while *Carter III* and *Gadbois* were still pending. *Carter*, 866 F.3d at 203; *Gadbois*, 809 F.3d at 3. Both *Carter III* and *Gadbois* were challenged under the first-to-file bar. *Carter*, 866 F.3d at 203; *Gadbois*, 809 F.3d at 3. Both relators moved to amend their complaints following this Court's decision in *Carter*, Carter under 15(a) and *Gadbois* under 15(d). *Carter*, 866 F.3d at 205; *Gadbois*, 809 F.3d at 4. In every substantive way, *Gadbois* and Carter are identical.

However, there is one significant distinction between *Gadbois* and Carter. *Gadbois* held that refiling was unnecessary because it was potentially prejudicial to the relator and provided no benefits whatsoever to the court, the government, or any party. *Gadbois*, 809 F.3d at 5. In contrast, Carter does not present this Court with theoretical prejudice or a "pointless formality[:]" dismissing Carter's claims and forcing him to

refile potentially ends his otherwise-valid claims by implicating the FCA's statute of limitations, a grossly inequitable result given that Carter completed discovery and is ready for trial. Therefore, Carter respectfully requests that this Court adopt the sound reasoning of the First Circuit.[2] The First Circuit has provided the most thorough analysis of the first-to-file bar after this Court's decision in *Carter*, and *Gadbois*' facts and legal analysis are directly on point, and thus highly informative.

B. The Fourth Circuit Requires Relators to Refile to Cure First-to-File Issues

The Panel's decision creates a circuit split, misinterprets the first-to-file bar, and disregards Congressional intent. The Panel disagreed with the First Circuit, concluding that *Carter III* must be dismissed under the first-to-file bar, despite all earlier actions having been dismissed without reaching their merits. The First Circuit held that "the time-of-filing rule is inapposite to the federal question context," holding that the relator could proceed because the first-to-file

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[2] It is worth reminding the Court that it already declined to review or overturn the First Circuit's interpretation of the first-to-file bar. The *Gadbois* defendants filed a petition for certiorari which specifically requested that this Court "should grant review to . . . prevent the effective neutering of the first-to-file bar that results from the First Circuit's misapplication of this Court's recent decision in [*Carter*]." Petition for Certiorari, *PharMerica Corp. v. United States ex rel. Gadbois*, 136 S. Ct. 2517 (2016) (No. 15-1309). This petition was denied. *Id.*

bar is not determined by the facts existing at the time of filing an original complaint. *Gadbois*, 809 F.3d at 5. This directly conflicts with the Panel's decision, which held that

> the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time that the FCA action under review is commenced. Facts that may arise after the commencement of a relator's action, such as the dismissals of earlier-filed, related actions pending at the time the relator brought his or her action, do not factor into this analysis.

Carter, 866 F.3d at 207. Moreover, this holding is inconsistent with this Court's earlier decision that earlier actions *cease* to bar later actions once they are no longer pending. Separately, this holding is also questionable because the Fourth Circuit continues to erroneously hold that the first-to-file bar is jurisdictional. *Id.* at 203. This circuit split – particularly where courts of appeals cannot even agree if the first-to-file bar is jurisdictional – serves only to create confusion and uncertainty among whistleblowers, defendants, and district courts in other circuits over the proper application of the first-to-file bar, an issue which is guaranteed to reoccur.

The Panel's attempt to sidestep its split from the First Circuit by focusing on irrelevant factual differences is unconvincing. *See id.* at 211. Not only are these claimed factual dissimilarities incorrect, they are distinctions without a difference. The First Circuit's legal reasoning is based upon the dismissal of the

previously-filed complaints, *not* the literal reference to these events in the relator's motion and briefing. *Gadbois*, 809 F.3d at 6 (holding that *Carter* and the dismissal of the prior action "dissolved the jurisdictional bar"). In this action, the Panel provides for the ultimate triumph of form over substance. The Panel held that Carter is barred from continuing with an otherwise-meritorious case because the Panel claimed that Carter's motion to amend and proposed amended complaint did not specifically focus on the dismissal of the Prior Actions. The Panel ignored the fact that the dismissal of the Prior Actions was frequently noted throughout Carter's briefs below and on appeal, and are, in any event, subject to judicial notice.[3]

Moreover, under this Court's prior decision and the First Circuit's analysis, it is immaterial whether Plaintiff's motion to amend and/or proposed amended complaint specifically reference the dismissed Prior Actions, since the bar "ceased" to exist. Instead, the First Circuit focused solely on whether the first-to-file bar prevents a later-filed action from proceeding without refiling when a first-filed action was pending at the time of filing. *Gadbois*, 809 F.3d at 3. The Panel's view is improper in light of this Court's precedent and Congress' intent.

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[3] Carter nevertheless cured any defect by filing a motion in the Fourth Circuit to amend the complaint which included such references. This motion was denied without opinion. *See* Court Order Denying Motion for Leave to File Amended and Supplemental Complaint, *United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199 (2017) (No. 16-1262).

C. The D.C. Circuit Commits the Same Errors as the Panel By Requiring Relators to Refile

Certiorari should also be granted because the D.C. Circuit's interpretation of the first-to-file bar directly conflicts with the First Circuit's interpretation and results in outcomes this Court warned that Congress never could have intended. In *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923 (D.C. Cir. 2017) ("*Shea*"), the D.C. Circuit held that later filed actions must be dismissed and refiled without exception, regardless of whether the prior actions were dismissed before reaching their merits. *Shea*, 863 F.3d at 930. However, unlike the Panel, the D.C. Circuit squarely split from the First Circuit. *Id.*

The D.C. Circuit justifies its decision in *Shea* by inventing a hypothetical situation wherein a third relator unjustly leapfrogs a second relator due to the vagaries of court scheduling. *Id*. However, when confronting the very real and constant danger that relators face, wherein court scheduling, long seal periods, and other procedural matters push claims past the FCA's statute of limitations, *Shea* offers no guidance. Declaring its fatal flaw to be a feature, not a bug, the D.C. Circuit holds that even when an action is pushed outside the statute of limitation "through no fault" of the relator, "Congress evidently considered the marginal value of additional suits to be outweighed by other considerations." *Id.* at 932. This interpretation of Congressional intent is made without citation, and directly contradicts this Court's conclusion that

Congress would *not* want a "potentially successful suit that might result in a large recovery for the Government" to be abandoned. *Carter*, 135 S. Ct. at 1979.

Moreover, the Panel and the D.C. Circuit fail to heed this Court's prior recognition of Congress' intent in enacting and amending the FCA, which was designed to "encourage more private enforcement suits." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 443 (2016) (citing S. Rep. No. 99-345, pp. 23-24 (1986)). As was the case in the 1980's, and is only truer today, "perhaps the most serious problem plaguing effective enforcement" of the FCA is "a lack of resources on the part of Federal enforcement agencies." *Id.* (citations omitted). The view espoused in *Shea* directly contradicts the purposes of the FCA, and work to only further frustrate Congress' intent, which was to promote more private FCA actions and to preserve the already limited resources of the Government.

D. Other District Courts Follow the First Circuit

The First Circuit's interpretation of *Carter* and the first-to-file bar have been adopted by multiple district courts outside of the First Circuit. District courts in the Second and Third Circuits have all performed their own separate analyses of the first-to-file bar post-*Carter* and post-*Gadbois*, and concluded that the First Circuit's approach presents the best way forward. Despite these individual agreements with the First Circuit's approach, without intervention by this Court, *qui*

tam actions will succeed or fail solely based on which circuit their suit was filed in, promoting unwanted forum shopping.

For example, in *United States ex rel. Boise v. Cephalon, Inc.*, 159 F. Supp. 3d 550 (E.D. Pa. 2016) ("*Boise*"), the Eastern District of Pennsylvania addressed the same situation presented by *Carter* and *Gadbois*, where an otherwise-valid complaint was challenged under the first-to-file bar because a since-dismissed case was pending at the time of filing. Despite owing no deference to the First Circuit, the district court first interpreted *Carter* and then sided with *Gadbois*, holding that the later action could proceed without refiling. The district court found, "it would be unjust to require relators to refile their claims" following the dismissal of the first-filed complaint, as allowing the "claims to continue without dismissal and refiling is the proper, fair and efficient procedural route." *Id.* at 554. *Boise*'s conclusion follows this Court's clear "reasoning in *Carter* that Congress would not want an abandoned first suit to bar a potentially successful recovery for the government in a second suit." *Id.* This simple and effective approach underscores the persuasiveness of this Court's reasoning and *Gadbois*, allowing relators to amend instead of needlessly dismissing and refiling their complaints.

Another case within the Eastern District of Pennsylvania performed a separate analysis and answered the same question, holding that under *Carter*, "[r]elators may file an amended complaint to assert the claims that were barred by the first-to-file rule."

United States ex rel. Brown v. Pfizer, Inc., No. 05-6795, 2016 U.S. Dist. LEXIS 25723, at *28 (E.D. Pa. Feb. 29, 2016).

Similarly, the Southern District of New York analyzed "the text, purpose, and structure of the FCA" and concluded "that a violation of the rule is curable through the filing of an amended or supplemental complaint after the earlier-filed action was dismissed," as under

> these circumstances, it would be a pointless formality to dismiss the action. In fact, it would be worse than a pointless informality, as it would – in light of the passage of time – effectively immunize [the Defendant] from liability for what the Court must assume here was fraud. . . . [Therefore,] the Court concludes that the law does not require that perverse result.

United States ex rel. Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 799-800 (S.D.N.Y. 2017) (citations omitted).[4] Indeed, another "perverse result" is that – under the Panel and the D.C. Circuit's analyses – a single unmeritorious case could immunize a defendant from liability as a sequence of multiple, meritorious relators would be barred and bar each other in turn. The Fourth and D.C. Circuits' decisions frustrate Congressional intent and lead to the exact absurdities that neutral district courts reject in favor of the First Circuit's

[4] Additionally, the district court found the first-to-file bar non-jurisdictional. *Wood*, 246 F. Supp. 3d at 799.

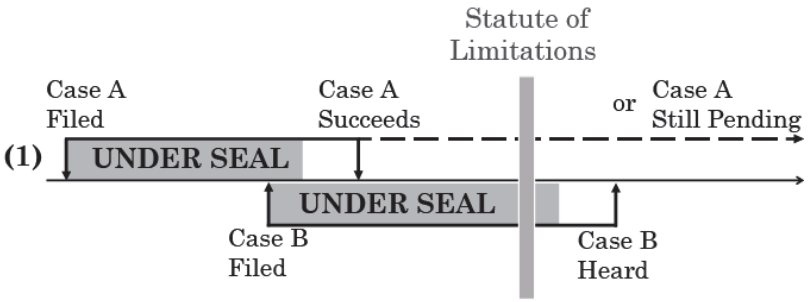
interpretation of the first-to-file bar. Yet, without corrective guidance, district courts and circuits across the country will continue to produce these "perverse result[s]."

II. THE COURT SHOULD REVERSE THE PANEL'S DECISION

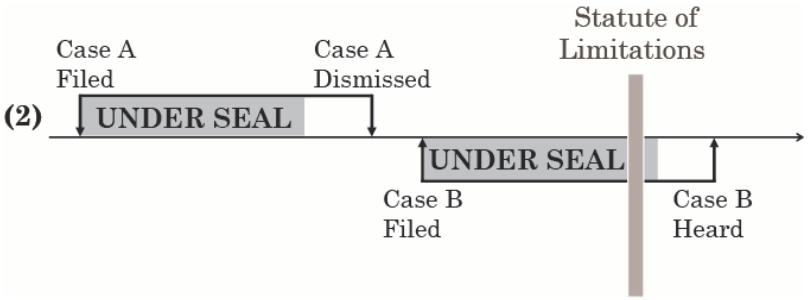
For the second time in this case, the Court is called upon to grant certiorari in order to resolve a dispute as to the first-to-file bar's proper application. The FCA states that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). As this Court correctly identified during Carter's first visit to this Court, the first-to-file bar is temporal: a meritorious complaint may be barred from proceeding at certain moments in time, yet that same case may "cease" to be barred at a later date. *Carter*, 135 S. Ct. at 1978 ("an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed"). This Court's review is essential to resolve the growing circuit split and correct misinterpretations of the first-to-file bar, permitting meritorious actions to proceed uninterrupted and allowing the reclamation of fraudulently-obtained Government funds.

To better aid this Court, Carter has created figures illustrating different examples of how the first-to-file bar works and demonstrating how the First Circuit's

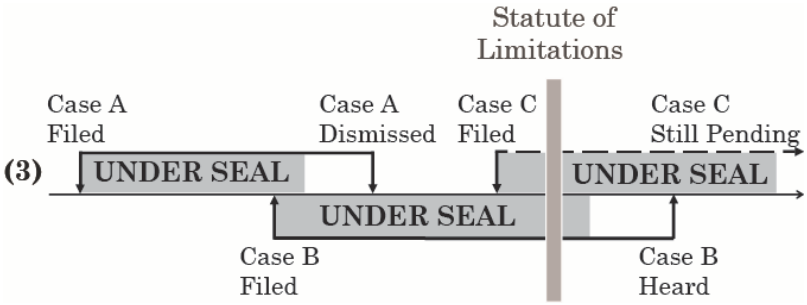
approach is superior to the Panel and the D.C. Circuit's:



Example (1) presents a standard application of the first-to-file bar. Case A was filed. Before Case A was resolved, Case B was filed. Case A succeeds, or has not yet been resolved by the time Case B is heard. Here, there is no dispute that Case B must be dismissed under the first-to-file bar.



Example (2) presents the scenario addressed by *Carter*, where this Court clarified how multiple cases interact under the first-to-file bar. Case A was filed first, but was dismissed without reaching its merits. Thereafter, Case B was filed. Per *Carter*, Case B may proceed without refiling.



> Example (3) presents the scenario that this Court is now asked to resolve. Case A was filed. While Case A remained under seal, Case B was filed. Thereafter, Case A was dismissed without ever reaching its merits. While Case B remained under seal, Case C was filed.

In Example (3), the First Circuit would permit Case B to proceed unabated, as Case A was dismissed without ever reaching its merits. Each relator is permitted to pursue their action in the order in which they were filed, and it is not until the prior action is dismissed or no longer pending that the next-in-line action may proceed. This approach alleviates any concern over parasitic relators or the early termination of meritorious actions, while preserving the Government's ability to recover in viable cases.

In contrast, applying the rationale adopted by the Panel and the D.C. Circuit to Example (3) would result in the dismissal of Case B and Case C under the first-to-file bar, no matter the outcome of Case A. Dismissing Case B and Case C does not present a mere inconvenience, it would be fatal. If Case B were to attempt to refile, it would find itself twice-barred, first by the statute of limitations, and second by Case C, as Case C

would inequitably be credited as the earlier-filed action. Case C's triumph would be short-lived, however, as it would similarly be barred by Case B, given that it was filed while Case B was still pending. Both Case B and Case C, potentially meritorious actions, would be forever barred simply because Case A existed, allowing the defendant to permanently escape liability.

Example (3) is not just a theoretical exercise; it is an accurate representation of the circumstances which relators frequently find themselves in, as exemplified by Carter's situation.

A. The Panel Essentially Rewrote the First-to-File Bar Contrary to this Court's Direction

The question before the Court in *Carter* was whether prior cases permanently bar later actions, or whether they *cease to bar* those actions once the first-filed actions have been dismissed. This Court rejected Defendants' claim that the later actions were permanently barred, observing that such an interpretation, in addition to directly contradicting the plain language of the statute, would be contrary to Congressional intent. As the Court asked hypothetically

> [h]ere, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule, was dismissed for failure to prosecute. *Why 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 1974 (emphasis added).

Critically, this Court held that once a prior action has been dismissed, it "ceases to bar" later actions. If this Court intended to hold that dismissed actions only "cease to bar" actions *filed or refiled* after the dismissal, it would have said so. By using the term "ceases to bar," this Court indicated that cases filed before the prior case was dismissed may proceed uninterrupted. This interpretation has been adopted by *Gadbois* and multiple district courts, and it is the very result the Panel squarely rejected over Carter's objection.

This Court knew that *Carter III* had been filed while the Prior Actions were pending when deciding *Carter*. *Id.* at 1972. The Court explicitly acknowledged that proper application of the first-to-file bar was central to Carter's and Defendants' arguments:

> [Defendants] sought dismissal of this third complaint under the first-to-file rule, pointing to two allegedly related cases, one in Maryland and one in Texas, that had been filed in the interim between the filing of *Carter I* and *Carter III*. This time, the [District Court] dismissed respondent's complaint with prejudice. The [District Court] held that the latest complaint was barred under the first-to-file rule because the Maryland suit was already pending when that complaint was filed.

Id. at 1974. Therefore, *Carter* provides strong guidance to the circuit courts that dismissed actions do not bar later actions in perpetuity; the mere fact that a dismissed action was pending at the time of filing should not impede continued pursuit of meritorious actions or require them to be refiled.

B. The Panel's Decision Disregards Congressional Intent

The Panel's interpretation of the first-to-file bar violates the rules of statutory interpretation and frustrates Congress' intent. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (holding that statutory language must be interpreted "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

First and foremost, the FCA is an anti-fraud statute, and the "objective of Congress was broadly to protect the funds and property of the government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). The Court has consistently and properly returned to Congressional intent when interpreting the FCA, utilizing commonsense inferences above narrow or bizarre interpretations of out-of-context words or phrases. *Rigsby*, 137 S. Ct. at 442-43 (inferring Congressional intent to determine proper application of 31 U.S.C. § 3730(b)(2)). In fact, courts have taken special care to avoid interpretations which frustrate Congressional intent by allowing wrongdoers

to escape liability thanks to self-serving contortions of procedural requirements. *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005) ("[S]uch an interpretation of § 3730(b)(5) would contravene the intent of Congress . . . [which] sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention.").

Likewise, courts – including the Fourth Circuit – regularly recognize that in order to achieve Congress' underlying purpose, the FCA's procedural provisions should not be used to terminate meritorious actions. *See*, *e.g.*, *Smith v. Clark/Smoot/Russell, A JV*, 796 F.3d 424, 430 (4th Cir. 2015) ("The False Claims Act's seal provision serves several purposes. . . . Here, the seal violation did not incurably frustrate these purposes . . . [therefore] the False Claims Act does not support the district court's dismissal."). This Court has repeatedly avoided interpreting the FCA in literal or obtuse ways which would frustrate its true purpose. *See United States v. Bornstein*, 423 U.S. 303, 311 (1976) (holding that an overly-literal interpretation of an FCA provision would "defeat the statutory purpose"). By narrowly focusing on the isolated words "bring" and "action," the Panel misses the forest for the trees and ignores the rule that words in a statute must be read in context and be interpreted consistently with the language and purpose of the overall statute. *See Graham Cty.*, 559 U.S. at 301.

The first-to-file bar is designed to ensure that meritorious claims proceed while protecting whistleblowers from copycat claims, not to hamstring whistleblowers by forcing them into repetitive refilings. Both the Panel and the D.C. Circuit err by failing to properly analyze *Carter* and ignoring the Congressional intent behind the first-to-file bar. *Shea*'s original interpretation of the first-to-file bar was rejected by *Carter*, and its most recent interpretation has found little support outside the Eastern District of Virginia. *See United States ex rel. Carter v. Halliburton Co.*, 315 F.R.D. 56 (E.D. Va. 2016); *see also United States v. Unisys Corp.*, No. 1:14-CV-1217, 2016 WL 1367163, at *8 (E.D. Va. Apr. 5, 2016).

C. The Panel and D.C. Circuits' Decisions Are Fundamentally Flawed

Although the Panel and D.C. Circuit claim to have solved the first-to-file question by requiring refiling in all instances, their solution creates more problems than it solves and results in numerous internal contradictions. If the first-to-file bar was as rigid as the Panel proposes, the Prior Actions, which the Panel claims bars Carter, would themselves be barred by either Carter's first filing, *United States ex rel. Carter v. Halliburton Co.*, No. 06-cv-0616 (CD Cal., filed Feb. 1, 2006) ("*Carter I*"), or *Thorpe v. Halliburton Co.*, No. 05-cv-08924 (CD Cal., filed Dec. 23, 2005) ("*Thorpe*"), and therefore should have been dismissed and not permitted to bar *Carter III*. Congress clearly did not design the first-to-file bar to create a chain reaction where

subsequent actions cancel each other out in turn, ultimately leading to scenarios where fraudulent actors escape liability because no meritorious claims can proceed. This inequitable and absurd result does not occur if Carter's proposed interpretation of the first-to-file rule – the same interpretation applied in *Gadbois* – is adopted here.

To illustrate in greater detail, if the Panel is correct 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," this rule must be applied uniformly and fairly to all related *qui tam* actions, not solely to Carter's claims. *Carter*, 866 F.3d at 207. Yet, *Carter I* was filed in February 2006, and was not dismissed until February 14, 2011. The Maryland action was filed on June 5, 2007 and the still-sealed Texas Action was also filed in 2007. *Carter I* was originally blocked under the first-to-file bar by *Thorpe*, which was filed in December 2005, and not dismissed until July 2010. Therefore, according to the Panel, all *qui tam* actions filed during the time when *Thorpe* and *Carter I* were pending must also be dismissed under the first-to-file bar. This application of the Panel's own rule seems to have been lost in the shuffle, creating an unjust contradiction: *Carter III* must be dismissed, because it was filed while the Maryland and Texas Actions were pending; yet the Maryland and Texas

Actions are undisturbed, despite being filed while *Thorpe* and *Carter I* were pending.[5]

This illogical application is presumptively unreasonable. Either (a) the Panel is correct and the Prior Actions should have been dismissed because of *Thorpe* and *Carter I*, allowing *Carter III* to proceed normally; or (b) the Panel is incorrect and later events allow reassessment of the first-to-file bar, allowing *Carter III* to proceed normally. Either the Panel's reasoning or its conclusion is wrongly decided and must be corrected.

Furthermore, the Panel's proposed interpretation of the first-to-file bar is unworkable as a matter of public policy and contradictory to Congressional intent. Under the FCA, whistleblowers are required to file their claims under seal. 31 U.S.C. § 3730(b)(2). These claims must remain under seal for a minimum of 60 days, but, as a practical matter, regularly remain sealed for years. During this time, federal and state governments conduct their own investigations, creating further delays. After the seal is lifted, relators face the usual, slow-moving obstacles created by ordinary motion practice, which can extend the life of unmeritorious actions, further frustrating valid claims in later actions. Even a relatively uncomplicated *qui tam*

[5] This real-world example exemplifies how the theory espoused by the D.C. Circuit for restricting the first-to-file bar to time of filing fails in actual application. *Shea*, 863 F.3d at 930.

action can quickly exhaust the FCA's six-year statute of limitation.[6]

Add in other common occurrences, such as allegations which only partially overlap, actions filed in different jurisdictions, or cases on appeal, and whistleblowers are left in an impossible situation. Congress did not intend for the first-to-file bar to stymie meritorious claims, only to prevent parasitic relators. *Carter*, 135 S. Ct. at 1979 ("Why 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?"). This Court has indicated that the first-to-file bar is temporal and ceases to bar

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[6] As FCA actions routinely remain under seal for long periods and face constant procedural challenges when unsealed, the statute of limitations frequently expires while whistleblowers attempt to proceed with their cases. By way of illustration, over the past decade, this Court has issued major decisions in seven FCA actions which, on average, were decided over nine years after the complaint was originally filed. The oldest action was decided 18 years after its original filing date. In 2008, this Court ruled on an action originally filed in 1995 (*Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008)); in 2011, this Court ruled on an action originally filed in 2005 (*Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011)); in 2007, this Court ruled on an action originally filed in 1989 (*Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007)); in 2010, this Court ruled on an action originally filed in 2001 (*Graham Cty.*, 559 U.S. 280); in 2015, this Court ruled on an action filed in 2011 – although originally filed in 2006 (*Carter*); and in 2016, this Court ruled on two actions originally filed in 2006 and 2011 (*Rigsby*, 137 S. Ct. 436 and *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)). Only a few of these actions could have been refiled within the statute of limitations, assuming, of course, that they would not themselves be barred by later actions.

upon the dismissal of the previously-filed action. *Id.* at 1978. The Court must provide a reasonable method for allowing valid complaints to proceed, as the Panel's decision is ultimately unworkable.

III. THE CIRCUITS ARE SPLIT ON WHETHER THE FIRST-TO-FILE BAR IS JURISDICTIONAL

This case provides the Court with an opportunity to correct mistaken assumptions among circuit courts that the first-to-file bar is jurisdictional. Although the Court need not reach this issue in order to find that the first-to-file bar allows later actions to proceed without refiling, it provides an attractive vehicle for correcting the record on issues often addressed in tandem. Following this Court's decision in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) ("*Kwai Fun Wong*"), several circuit courts have correctly determined that the first-to-file bar is non-jurisdictional. However, many circuit courts still labor under an erroneous understanding of the first-to-file bar, such as the Fourth Circuit, which has contributed to improper interpretations of the FCA.

With the benefit of *Kwai Fun Wong*, the D.C. Circuit and Second Circuit have correctly concluded that the first-to-file provision is *not* jurisdictional. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 119 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016); *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 199 (2017).

Despite ample guidance from this Court and its sister circuits, the Fourth Circuit maintains its view that the first-to-file bar is a jurisdictional limitation on *qui tam* actions, maintaining that "Section 3730(b)(5) is jurisdictional . . . [and] if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction." *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *rev'd in part on other grounds sub nom.*, *Carter*, 135 S. Ct. 1970 (2015). However, the Panel is not alone in misinterpreting the first-to-file bar as jurisdictional; the First,[7] Fifth, Sixth, Ninth, and Tenth Circuits also share this mistaken view. *See United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *United States ex rel. Lujan v. Hughes Aircraft Co*., 243 F.3d 1181, 1183 (9th Cir. 2001); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

This Court may find that because the first-to-file bar is non-jurisdictional, the Panel's conclusion that any later filed action *must* be dismissed is incorrect. Such a decision would resolve a nation-wide circuit split, with the D.C. Circuit and Second Circuit, in the two most recent decisions, concluding that the first-to-file bar is non-jurisdictional, and the First, Fourth,

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[7] The First Circuit has since walked-back its conclusion, appearing to reopen the question within its jurisdiction. *Gadbois*, 809 F.3d at 6 n.2.

Fifth, Sixth, Ninth, and Tenth Circuits concluding that the first-to-file bar is jurisdictional.

IV. THE QUESTIONS PRESENTED ARE RIPE FOR THE COURT'S REVIEW AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THEM

This case provides the Court with an attractive opportunity to guide lower courts on one of the most frequently misunderstood and misapplied provisions of the FCA. Carter presented both issues to the District Court and the Panel, and both issues were fully briefed and squarely decided. Both issues involve pure questions of law for which there are no unresolved factual issues that might prevent a definitive resolution. The Court has the benefit of three separate opinions concerning the judgment below outlining different bases for decision, in addition to extended discussions of the FCA in recent case law, and a previous decision of this Court to rely on.

This case is a particularly appropriate vehicle because its facts illustrate the interaction of the first-to-file bar and the FCA's statute of limitations, and provides a clear record because Carter was on the eve of trial and the district court has held that, but for the first-to-file bar, Carter would be allowed to proceed. *Carter*, 315 F.R.D. at 65 ("[The Court clarifies] that neither prejudice, the statute of limitations, nor the statute of repose defeat Relator's motion to amend.

Therefore, if the first-to-file bar did not to [sic] apply, Relator could amend.").

The procedural history of this litigation, which is now over a decade old thanks to defendants intent on raising every procedural obstacle to avoid being held to account for its fraudulent activity, demonstrates how defendants will use and abuse the first-to-file bar to shield themselves until the statute of limitations has run. Defendants are on the verge of demonstrating a perfect end-run around the FCA – one of the few remaining statutory means for reining in corruption, a concern which has only grown in recent years – providing this Court a concrete set of facts against which to determine the appropriate application of the FCA's first-to-file bar.

The Court will not benefit from further percolation of this issue in the lower courts. The concerns over proper interpretation of the first-to-file bar were present before *Carter*, and are cropping up across the federal judicial system on a regular basis. Three circuits have fully considered the issue, split between the First Circuit and the Fourth and D.C. Circuits, with the Second Circuit prepared to issue it's own ruling shortly.

The First Circuit's incisive application of this Court's ruling in *Carter* has been frustrated by overly reductive and mechanistic interpretations within the Fourth and D.C. Circuits, requiring relators to refile their complaints in a pointless procedure that fails to benefit plaintiffs, relators, the federal government, or anyone except guilty defendants who will simply

possess another weapon in their arsenal for dodging responsibility. The conflict is thus fully developed.

Furthermore, there is no realistic prospect of the conflict being resolved without this Court's intervention. The Fourth Circuit denied rehearing on the question, while several recent district court decisions have adhered to *Gadbois*. There are no preliminary or threshold issues that the Court would have to decide before reaching the question presented. Accordingly, the question presented is ripe for adjudication by this Court. Declining to intervene will only lead to further confusion and inconsistent results in the lower courts.

CONCLUSION

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

Respectfully submitted,

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