ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-7135 & 15-7136

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED STATES OF AMERICA ex rel.
STEPHEN M. SHEA, *Plaintiff-Appellant/Cross-Appellee*,

v.

CELLCO PARTNERSHIP, doing business as
VERIZON WIRELESS, et al., *Defendants-Appellees/Cross-Appellants*.

On Appeal from a Judgment of the United States District Court
for the District of Columbia, No. 09-cv-1050 (Kessler, J.)

**BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS**

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May 18, 2016

STATEMENT REGARDING PERMISSION TO FILE AND SEPARATE BRIEFING

Amicus Curiae is authorized to represent that all parties to this appeal have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* certifies that it is aware of no other non-government *amicus curiae* planning to file a brief in this matter.[*]

[*] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Chamber of Commerce of the United States of America certifies that:

(A) Parties and *Amici*

The parties and *amici curiae* are listed in the Brief of Defendants-Appellees/Cross-Appellants. In addition, the Chamber of Commerce of the United States of America is hereby filing a brief as *amicus curiae* in support of Defendants-Appellees/Cross-Appellants.

(B) Rulings under Review

Reference to the rulings at issue appear in the Brief of Defendants-Appellees/Cross-Appellants.

(C) Related Cases

Related cases are discussed in the Brief of Defendants-Appellees/Cross-Appellants.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. It has no parent corporation, and no company owns 10 percent or more of its stock.

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GLOSSARY

Chamber	The Chamber of Commerce of the United States of America
FCA	The False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

STATUTES AND REGULATIONS

Pertinent materials are contained in the addendum to the brief for Defendants-Appellees/Cross-Appellants.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases involving the False Claims Act ("FCA" or "Act").

This appeal raises significant and recurring questions about the scope of FCA liability that are of particular interest to the Chamber and its members, including: (1) whether the FCA's first-to-file bar should be interpreted to allow self-interested relators to file successive and duplicative *qui tam* suits even where a "related" case remains "pending" when later-filed actions are brought, but is later dismissed; and (2) whether the FCA's "public-disclosure bar" applies only when the public record contains *proof* of fraud (as the District Court effectively held), or whether (as this Court and other circuits have long maintained) that bar applies whenever public information is sufficient to put government investigators "on the trail" of the fraud.

Many of the Chamber's members contract with the government, participate in federal programs, or receive federal funds. Those members—a significant fraction of which are subject to suit under the FCA in this Circuit—are threatened with growing potential liability from the increasing number of *qui tam* actions. Those members have experienced the *in terrorem* threat of treble damages and per-claim civil penalties that pressures defendants to settle even meritless allegations that add nothing to information already in the public domain, and which offer relators a windfall at the expense of the public fisc. The Chamber and its members have a substantial interest in the correct interpretation and application of the FCA's first-to-file and public disclosure bars, which serve as essential limitations on such suits.

SUMMARY OF ARGUMENT

Congress has repeatedly amended the False Claims Act, recognizing that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," imposing enormous costs—on the public, on potential defendants, on courts, and on the government itself, in the form of time wasted reviewing repetitive claims and recoveries diminished by the take of numerous relators—by allowing *qui tam* suits to proceed based on "information that was already in the government's possession." *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The first-to-file and public-disclosure bars, 31 U.S.C. § 3730(b)(5), (e)(4), represent two of Congress's most important mechanisms to "strike the appropriate balance between . . . encourag[ing] whistleblowers to come forward with allegations of fraud and [preventing] copycat actions." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

I. The first-to-file and public-disclosure bars limit duplicative *qui tam* suits that provide the government no new information about alleged fraud. They are particularly important in light of the recent surge in *qui tam* suits. The combination of the FCA's "punitive" liability regime and the severe financial, reputational, and practical consequences of allegedly defrauding the government exerts severe pressure on defendants to settle even non-meritorious claims. These two bars are necessary to guard against duplicative and non-intervened *qui tam* suits that do not provide the government new information about fraud, and historically have been overwhelmingly non-meritorious.

II. The District Court correctly held that "[o]nce an FCA action is pending," "[w]hat offends the first-to-file bar is the bringing of the action (*i.e.*, filing an initial complaint)." JA354. Therefore, "[n]o matter how many times [a] Plaintiff amends his Complaint, it will still be true that he 'br[ought] a related action based on the facts underlying the [*then*] *pending* action.'" JA356. By contrast, allowing relators to side-step the first-to-file bar through amendment once a first-filed case is dismissed would undermine the FCA's statutory purpose and lead to implausible practical results. Congress enacted the first-to-file bar to create a strong incentive for relators to bring forward non-public information about possible fraud. Relator's view, however, encourages plaintiffs to rush to file skeletal complaints, simply to hold their place in line—and to disclose any non-public information later, at a time chosen to maximize their personal recovery. Relator's reading also subjects defendants to endless copycat suits, and creates a roadmap to evade the FCA's statutes of limitations and repose. That interpretation is difficult to administer and will require creating new law on difficult subsidiary questions, including amendment and relation-back.

III. The public-disclosure bar is an equally important check on parasitic *qui tam* suits. This Court and its sister circuits have long held that the bar is triggered for suits based on public information sufficient to put government investigators "on the trail" of fraud. Although the District Court correctly applied the first-to-file bar, unfortunately it erred in applying the public-disclosure bar, effectively concluding that the latter limitation applies only where public information provides *affirmative proof* of fraud. The public record rarely contains such affirmative proof, and the District Court's ruling invites relators to evade the bar by pleading that they possess additional non-public information elaborating on the public record. Indeed, the District Court's rule benefits those relators least deserving of an FCA bounty, and is unnecessary to protect "original source[s]" of information.

This Court adopting the District Court's reasoning would create tremendous uncertainty nationwide, opening the floodgates to parasitic claims that other courts have correctly rejected. It would also risk throwing the law nationwide into disarray, because many circuits and district courts follow this Court's reading of the public-disclosure bar.

ARGUMENT

I. The First-to-File and Public Disclosure Bars Reflect Congress's Deliberate Choice to Prevent Duplicative *Qui Tam* Suits

In the 1986 False Claims Act amendments, and subsequent enactments, Congress sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *Springfield Terminal*, 14 F.3d at 649). The Act's express limitations on *qui tam* suits, including the first-to-file and public disclosure bars, *see* 31 U.S.C. § 3730(b)(5), (e)(4), are critical to Congress's decision to "preven[t] 'parasitic' lawsuits." *See Cause of Action v. Chi. Transit Auth.*, 815

F.3d 267, 273 (7th Cir. 2016) (quoting *False Claims Act Implementation: Hearing before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 101st Cong. 5 (1990) (statement of co-sponsor Sen. Grassley)). Such suits "present the danger of parasitic exploitation of the public coffers." *Springfield Terminal*, 14 F.3d at 649. Suits based on public information, or that advance allegations related to those made in already-filed suits, do not further "legitimate citizen enforcement," *id.* at 651, or "present 'genuinely new and material information,'" *Cause of Action*, 815 F.3d at 281. The importance of these statutory limits has been heightened in recent years, as the dramatic growth of *qui tam* litigation—most of which is non-intervened and meritless—has increased the burden on False Claims Act defendants and the economy as a whole.

A. The Recent Surge in *Qui Tam* Litigation Has Imposed Significant Costs On American Business

The recent skyrocketing number of *qui tam* suits has underscored the importance of the FCA's statutory limitations. Since 1986, an "army of whistle-blowers, consultants, and, of course, lawyers" has been released onto the landscape of American business. 1 John T. Boese, *Civil False Claims and Qui Tam Actions*, at xxi (4th ed. 2011); *see also* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014 (discussing emergence of "serial whistleblower[s]"). In the last few years, the number of *qui tam* actions increased from roughly 400 annually to more than 700 in each of 2013 and 2014 and over

630 in 2015. Civil Division, U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987 - Sept. 30, 2015*, at 1-2 (2015) ("*Fraud Statistics*"), https://www.justice.gov/opa/file/796866/download.

The jump in *qui tam* cases stems from several factors that combine to pressure defendants into settlements that are potentially highly lucrative for relators. To begin with, the FCA imposes "essentially punitive" financial sanctions, *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000), including treble damages and per-claim civil penalties, 31 U.S.C. § 3729(a). Bounty-hunting relators often attempt to measure damages aggressively based on the entire value of a contract or amount billed, even if the alleged fraud affected only a small portion of performance or billing. *But cf. U.S. ex rel. Wall v. Circle C Constr., LLC*, 813 F.3d 616 (6th Cir. 2016) (rejecting "taint" theory of FCA damages).

The Act also authorizes civil penalties of $5,500-$11,000 per false claim, 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9), a sum that can approach constitutional boundaries where a contract or government program (e.g., Medicare) involves submission of many small-value claims. Under this Court's decisions, relators may seek penalties even where the government suffered no actual injury. *E.g.*, *U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012). Recently, one agency doubled the per-claim penalty to more than $21,000, indexed to inflation. *See* 28 U.S.C. § 2461 note; 81 Fed. Reg. 26,127, 26,128 (May 2, 2016). Other agencies will likely follow suit, given Congress's recent mandate to increase penalties to account for inflation. *See* 28 U.S.C. § 2461 note. The Act also authorizes relators to recover attorneys' fees and "reasonable expenses." 31 U.S.C. § 3730(d)(1)-(2).

The burdens on the business community are not limited to direct financial consequences. Defending an FCA case requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). "Pharmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with FCA investigations. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (Oct. 2011). The mere existence of allegations (no matter how tenuous) that a company "defraud[ed] [the] country sends a [harmful] message" and "[r]eputation[,] . . . once tarnished, is extremely difficult to restore." Canni, *supra*, at 11; *accord* Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012). For companies that do significant government work, "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices." Canni, *supra*, at 11; *U.S. ex rel. Grenadyor v. Ukrainian Vill.*

Pharmacy, Inc., 772 F.3d 1102, 1105-08 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm[.]"). A finding of FCA liability can result in suspension and debarment from government contracting, *see* 2 C.F.R. § 180.800—"equivalent to the death penalty" for many government contractors. Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24, at 4 (Mar. 1989). FCA allegations can precipitate satellite litigation, such as shareholder derivative suits. *E.g.*, Stipulation of Settlement at 1, *In re Oracle Corp. Derivative Litig.*, 10-cv-03392 (N.D. Cal. May 28, 2013), ECF No. 95.

Given this "perfect storm" of financial and practical pressures, relators are keenly aware that the mere existence of allegations, regardless of their foundation, can "be used to extract settlements." Elameto, *supra*, at 824; *accord* Canni, *supra*, at 11-12. The combination of "punitive" liability and the reality that even meritless lawsuits often drag on for years creates intense pressure on defendants to "settl[e] [even] questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

B. Statutory Limits on FCA Liability Are Necessary to Ensure the Statute's Costs Do Not Dwarf Its Benefits

Allowing relators to repeatedly plead and pursue "copycat actions that provide [the government] no additional material information" about fraud beyond what is already in the public domain, *Batiste*, 659 F.3d at 1210, upsets Congress's careful statutory balance, *Graham Cty.*, 559 U.S. at 294. Relator's interpretation of those provisions would subject FCA defendants to costly investigations and litigation of dubious claims.

By their plain terms, the first-to-file and public-disclosure bars apply only to non-intervened *qui tam* suits brought by private plaintiffs. *See* 31 U.S.C. § 3730(b)(5), (e)(4). The government remains free to pursue such cases, in any event. That approach makes sense. Historically, non-intervened *qui tam* actions—though they impose tremendous litigation costs on defendants—have accounted for a tiny fraction (less than five percent) of total FCA recoveries. *Fraud Statistics*, *supra*, at 1-2.[1] According to one comprehensive study, less than ten percent of private *qui tam* actions result in any recovery. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007); *see also* Canni, *supra*, at 9. Historical data suggests that non-intervened *qui tam* suits serve primarily to inflict large litigation costs on defendants, not to protect the public fisc.

[1] In 2015, the percentage of recoveries attributable to non-intervened cases increased materially. *Fraud Statistics*, *supra*. That increase appears to be significantly due to a small number of large settlements, including a single outlier exceeding the total *qui tam* recoveries for the preceding *four years*. *E.g.*, Press Release, U.S. Dep't of Justice, Office of Public Affairs, DaVita to Pay $450 Million to Resolve Allegations That it Sought Reimbursement for Unnecessary Drug Wastage (June 24, 2015), http://goo.gl/vxQytz.

Although under 31 U.S.C. § 3730(c)(2)(A) the United States can dismiss any *qui tam* action, it rarely does so, instead routinely letting relators "proceed with[] thousands of non-meritorious qui tam suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008). The government has repeatedly stated that its decision to decline intervention should not be interpreted to express its views on the merits, and that it does not routinely devote resources to determining whether suits are meritless and should be dismissed on that ground. As a result, the government only extraordinarily rarely intervenes to dismiss. Most often, the government is only too happy to "wait it out," reaping the bounty if a defendant elects to settle or the relator is ultimately successful. *Id.* at 1265-66; *accord* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013) (noting that 460-case subsample of *qui tam* actions "revealed exactly *none* in which DOJ exercised its termination authority"). Thus, the principal restraints on misuse of *qui tam* actions are the FCA's statutory bars—in particular, the first-to-file and public disclosure bars.

II. Allowing Relators to Sidestep the First-to-File Bar Through Amendment Would Disserve the Statutory Purpose

Verizon has persuasively shown why the first-to-file bar's plain text, which prohibits a relator from "*bring[ing]* a related action based on the facts underlying the pending action," prohibits relators from keeping later-filed cases on ice or proceeding through amendment after a first-filed case is dismissed. Verizon Br. 40-53. Relator's theory also conflicts with the first-to-file bar's statutory purpose, and would lead to implausible results that Congress plainly never intended. *Cf. FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

A. Relator's Rule Encourages Multiple Skeletal Filings That Do Not Provide the Government Notice of Fraud

In relator's view, the first-to-file bar is a nullity once an earlier-filed case is dismissed or reduced to judgment, such that copycat complaints can move forward either automatically or by amendment. *See* Shea Br. 10-14. That rule encourages relators to file threadbare complaints quickly, to hold their place in line. Late-arriving relators can keep their cases in abeyance (or allow dismissal of their complaint without prejudice), and then move forward with the placeholder complaint, or seek leave to amend, once the earlier-filed case (or cases) are no longer pending.

Such a rule turns the Act's incentive scheme upside down. The FCA's *qui tam* procedure is not an end in itself, but rather a means of "put[ting] the government on notice of potential fraud." *Batiste*, 659 F.3d at 1210. "[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). Beyond meeting procedural requirements to initiate suit and properly communicating claims to the defendant, "the primary function of a *qui tam* complaint is to notify the *investigating* agency, *i.e.*, the Department of Justice" of the allegations and to disclose evidence of the alleged fraud. *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 37, 41-42 (D.D.C. 2010); *cf.* S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290 ("private [FCA] enforcement . . . is not meant to produce . . . multiple separate suits based on identical facts"). That purpose is served only where relators have an incentive expeditiously to bring forward information not already known to the government.

Relator's reading would defeat that statutory purpose. If a relator can evade the first-to-file bar by amendment, he "could neglect to inform the government of the information upon which the allegations are based before filing his or her action. Instead, the relator could provide that information to the government at a later time"—a time chosen to maximize the relator's benefit, not to facilitate the government's investigation. *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 259-64 (E.D. La. 2011); *accord U.S. ex rel. Carter v. Halliburton Co.*, No. 1:11-cv-602, 2015 WL 7012542, at *8-14 (E.D. Va. Nov. 12, 2015), *modified on denial of reconsideration*, 2016 WL 634656 (E.D. Va. Feb. 17, 2016), *appeal filed*, No. 16-1262 (4th Cir. Mar. 14, 2016). Duplicative skeletal complaints also "wast[e] government resources," as the government must "review the claims in each action"—even duplicative claims that have already been reviewed. Such filings increase the likelihood that new, valid claims will be lost in a crush of redundant suits. *U.S. ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012).

The District Court's rule better respects the statutory balance. With knowledge that later-filed complaints cannot be easily resurrected through amendment, relators with legitimate non-public information will have an incentive to bring it forward immediately. While the first-filed case remains pending, subsequent relators have no incentive to burden the court with copycat complaints, because the first-to-file bar will require such actions to be dismissed.

B. <u>Relator's Rule Undermines the Statutes of Limitation and Repose, Subjecting Defendants Endless Copycat Suits</u>

Sidestepping the first-to-file bar through amendment also conflicts with the FCA's detailed statutes of limitations and repose. Congress provided a six-year statute of limitations, subject to a three-year discovery rule for suits by the government and an "absolute" ten-year statute of repose. *See* 31 U.S.C. § 3731(b); *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013).

The District Court's reading is faithful to Congress's expressed intention that the threat of FCA liability not persist indefinitely. *Cf. Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1975-78 (2015) (rejecting interpretation of Wartime Suspension of Limitations Act that would have indefinitely tolled FCA claims). Relator's interpretation, by contrast, would risk rendering the Act's limitations (and, potentially, repose) periods a dead letter.

Under relator's theory, an action "br[ought]" when an earlier-filed related case is pending can escape the first-to-file bar through amendment, once the first-filed case is dismissed or reduced to judgment. That theory is a roadmap for evading the FCA's statute of limitations, as relators can simply file their complaints—however skeletal or duplicative—while a first-filed case remains "pending," and have their case held in abeyance until the earlier case is dismissed. Relators will doubtless assert that their initial complaints satisfied the statutes of limitations and repose, and that amendments should relate back under Federal Rule of Civil Procedure 15(c) to the original complaint's date of filing. Relators could (and will) let cases sit for a decade. If, as some courts have held, relation-back can evade the statute of repose, *see Carter*, 2016 WL 634656, at *7, there is literally *no* end-point until a defendant (1) settles with all potential plaintiffs or (2) obtains both a judgment on the merits and a ruling from later courts that the judgment has preclusive effect. Shea's proposed rule benefits *no one* except bounty-hunting relators (and their counsel) who file duplicative claims.

The need to interpret the first-to-file bar to give meaning to the FCA's statutes of limitations and repose provides an important ground to distinguish the handful of out-of-circuit district court cases Shea cites (in passing) as supposedly supporting his interpretation. *See* Shea Br. 12 n.26. The statute of limitations was not at issue in *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840 (D. Md. 2013). There, the relator filed his original complaint in 2010, alleging conduct dating to 2008. *Id.* at 843, 846. The relator amended his complaint in 2011, and the district court decided the first-to-file question on March 5, 2013—some nine months before the six-year statute of limitations would have run on even the oldest 2008 claim, and four years before the statute would expire on 2011 claims in the amended complaint. The defendant in *Palmieri* did not (indeed, could not) raise a statute of limitations defense.[2]

[2] *Palmieri* pointedly noted that the first-to-file bar "does not prevent a subsequent relator from *filing a related suit*" after an earlier-filed case's dismissal, using language that underscores the textual basis for the District Court's ruling here. *See* 928 F. Supp. 2d at 850 (emphasis added) (citing *U.S. ex rel. Chovanec v. Apria Healthcare Grp., Inc.*, 606 F.3d 361, 362, 365 (7th Cir. 2010)). Because "Palmieri [could] fil[e] an identical pleading under a new case number tomorrow," *id*. at 851, it would have "elevate[d] form over substance" to require the litigant to go through

So too in *U.S. ex rel. Kurnik v. PharMerica Corp.*, No. 3:11-cv-01464-JFA, 2015 WL 1524402 (D.S.C. Apr. 2, 2015), where the defendants conceded that under the Fourth Circuit's 2013 *Carter* decision (then binding on that court), dismissal would be without prejudice, and "at some point in time when the first filed case is no longer pending, anyone, not just these Relators, could file another action." Tr. of Mot. Hrg. at 3-4, *Kurnik*, No. 3:11-cv-1464 (Mar. 18, 2015), ECF No. 198; *see also id.* (counsel for defendants agreed that once earlier-filed case was dismissed, "Plaintiffs could . . . file a new action, assuming the statute of limitations hasn't run"). If the Court dismissed Kurnick's claims without prejudice, "the FCA first-to-file rule would not preclude Kurnick from filing an identical pleading under a new case number tomorrow." *Kurnik*, 2015 WL 1524402, at *6 & n.6.[3]

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the motions. *Id.* at 851-52. That rationale does not apply where the statute of limitations is violated.

[3] Nor was the question squarely presented in *U.S. ex rel. Boise v. Cephalon, Inc.*, No. 08-cv-287, 2016 U.S. Dist. LEXIS 12331, at *7-8 (E.D. Pa. Feb. 2, 2016), which addressed the statutory interpretation question only under the heightened standard for reconsideration. There, the plaintiffs pleaded conduct within the statute of limitations measured even from the second amended complaint, filed after the first-filed case had been dismissed. *Id.* at *21. The court gave no indication that the relator had invoked the relation-back doctrine to save earlier claims from dismissal. *Id.* at *20-21.

In short, none of the cited district court cases confronted the critical question whether sidestepping the first-to-file bar through amendment would effectively repeal the FCA's statute of limitations and repose.

C. The District Court's Rule Is Clear And Easily Administrable, But Relator's Test Will Spawn Additional Litigation

In contrast to the District Court's straightforward test, the relator's reading will spawn extensive satellite litigation, necessitating a new body of law about the interaction between the first-to-file rule, amendment, and relation back.

The first-to-file bar's text compels a straightforward inquiry that can be undertaken on the face of two complaints. If an earlier-filed "action" is "pending" at the time any "related" "action" is "br[ought]," that later-filed action must be dismissed without prejudice. Verizon.Br. 12-14. This rule does not require comparing multiple generations of later-filed complaints; all that matters is the date the first complaint was filed. "[K]eeping the emphasis on the time the initial complaint was filed 'has the advantage of simplicity.'" *Carter*, 2015 WL 7012542, at *13 (quoting *Branch Consultants*, 782 F. Supp. 2d at 264).

By contrast, relator's rule generates needless complexity. Under that approach, follow-on *complaints* are dismissed without prejudice while a first-filed case is pending, but the underlying action remains alive. If the first-filed case is dismissed, relators may attempt to move forward with their original complaints, or amend—with amendments not necessarily occurring in the order the cases were filed. If the third-in-line relator amends his complaint before the second-in-line relator, which case can proceed under the first-to-file bar?

Relator's rule also raises novel issues under Federal Rule of Civil Procedure 15(c), under which an amended complaint relates back to the date of the original complaint if it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." If the third-filing relator amends a complaint to include allegations distinct from those in the original complaint, and the second-filing relator later amends to add allegations closely related to those in her original complaint, a court will need to address how Rule 15 interacts with the first-to-file bar. Other questions abound. For instance, if a third-filing relator seeks leave to amend and a second-filing relator then amends as-of-right before the first motion is granted, which complaint should have priority? If two copycat relators seek leave to amend, does the date of their motions (or the date the court grants leave) control?

The difficulty of resolving these questions is compounded by the relator's invitation to ignore the first-to-file bar's statutory text. Once a court discards the ordinary meaning of the statutory words "bring a[n] . . . action"—i.e., to file a lawsuit—courts will be left to decide subsidiary questions without their primary interpretative tool of statutory text. These complexities are easily avoided by giving the bar its ordinary and natural construction: prohibiting subsequent relators from "bring[ing]" any related action while the first-filed case is "pending."

III. Adopting the District Court's Approach to the Public Disclosure Bar Would Eviscerate a Key Protection Against Abusive *Qui Tam* Suits

The FCA's public disclosure bar represents a separate and equally important tool for preventing meritless and parasitic *qui tam* suits. Congress enacted (and fine-tuned) the public disclosure bar to guard against opportunistic exploitation of public information, while still encouraging legitimate whistleblowers to inform the government about potential fraud not already in the public domain. *See Graham Cty.*, 559 U.S. at 295. Although the District Court correctly applied the first-to-file bar, its application of the public-disclosure bar disrupts the careful balance Congress established, frustrates the FCA's purposes, and will pose profound consequences for FCA defendants and the business community.

A. The District Court's Conclusion That Effectively Only *Proof* of Fraud Triggers the Public Disclosure Bar Frustrates the Statutory Purpose

The public disclosure bar furthers the FCA's "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Springfield Terminal*, 14 F.3d at 651. As Verizon explains (Br. 24-25), this Court has applied the bar where public information is sufficient to "set government investigators on the trail of fraud." *U.S. ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 87 (D.C. Cir. 2014). The information need not, however, *prove* a case of fraud. *U.S. ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 919 (D.C. Cir. 1999).

While correctly reciting this rule, the District Court eviscerated it, effectively limiting the public disclosure bar to situations in which a fully developed, proven fraud case exists in the public domain. Not only is this contrary to well-settled Circuit law, *see* Verizon Br. 24-26; it conflicts with the purpose of the FCA's *qui tam* provisions. The "primary function" of a *qui tam* action is to notify the government of the *possibility* of fraud so that the government can *investigate* and determine whether fraud occurred. *See U.S. ex rel. Findley v. FPC-Boron Emps.' Club*, 105 F.3d 675, 685 (D.C. Cir. 1997). Where everything the government needs to investigate is already in the public domain, a *qui tam* suit adds little value. *See id.* ("Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds."); *Doe*, 773 F.3d at 86 (public disclosure bar prevents *qui tam* suits "when the government already has enough information to investigate the case").

The FCA requires the government to "diligently . . . investigate" potential violations—an obligation that encompasses potential violations discoverable from public information. *See* 31 U.S.C. § 3730(a). Where sufficient details about an allegedly fraudulent transaction have been publicly disclosed and the government does not pursue an FCA action, courts assume the government "ha[d] good reasons not to." *See Findley*, 105 F.3d at 685; *Springfield Terminal*, 14 F.3d at 654 ("[W]hen X [the true state of facts] *and* Y [the misrepresented state of facts] surface publicly, . . . there is little need for *qui tam* actions, which would tend to be suits that the government presumably has chosen not to pursue. . . ."). The public disclosure bar gives effect to the government's choice, and bars a *qui tam* suit based on the publicly disclosed facts.

The District Court's approach, by contrast, substitutes the judgment of an opportunistic relator for that of the government. It would make available a *qui tam* bounty on transactions the government decided not to pursue. That approach does not reduce fraud or preserve the public fisc. Statistically, non-intervened *qui tam* actions overwhelmingly lack merit. *See supra* p. 10. If affirmed, the District Court's decision will only exacerbate the problem, allowing relators to bring *qui tam* actions based on facts of which the government had every reason to be aware. Such actions do not help the government root out fraud.

B. The District Court's Decision Will Eviscerate the Public Disclosure Bar's Ability to Prevent Parasitic and Burdensome *Qui Tam* Actions

Qui tam suits based on public information are not only extremely unlikely to expose actual fraud; they are "downright harmful" to the business community. *See Graham Cty.*, 559 U.S. at 298. Diluting the public disclosure bar's role as a check on parasitic suits would have broad negative effects on, and significant costs for, American business.

The public disclosure bar is a critical bulwark against the financial, pragmatic, and reputational harms to FCA defendants. *See supra* Part I. That is particularly true for actions—like this one—governed by the pre-2010 jurisdictional bar, which disposed of parasitic *qui tam* actions before they reached costly merits litigation. *See* 31 U.S.C. § 3730(e)(4)(A) (2009); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 469-70 (2007). Although non-jurisdictional, the post-2010 version of the bar remains a defendant's "first line of defense" against parasitic actions and facilitates prompt resolution. *See* Benjamin R. Kwan, Comment, *Rescuing the False Claims Act's "Golden Mean": Keeping Parasitic Profits Out of the Whistleblower's Pot of Gold*, 10 U. St. Thomas L.J. 859, 875 (2013); *see also* Verizon Br. 19-21.

The District Court's approach, if upheld, will substantially diminish the public disclosure bar's value as a check on parasitic *qui tam* actions. *First*, the only suits to which the bar would apply—those already fully developed in the public domain—are rare. *See U.S. ex rel. Osheroff v. Humana, Inc.*, No. 10-cv-24486, 2013 WL 394877, at *3 (S.D. Fla. Jan. 31, 2013) (to require "the disclosed information [to] definitively establish that Defendants in fact 'committed fraud' . . . would establish an impossibly high threshold for application of the public disclosure bar"), *aff'd*, 776 F.3d 805 (11th Cir. 2015). If they even exist, such cases will likely be pursued by the government itself, leaving little need for *qui tam* actions (and no role for the public disclosure bar, which does not apply to the government). Therefore, the bar would apply only in an incredibly small number of cases—contrary to congressional intent to create a "wide-reaching public disclosure bar." *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011); *Osheroff*, 2013 WL 394877, at *3 (proof-of-fraud rule would "undermine Congress's expressed concern of preventing 'parasitic' lawsuits").

Second, the District Court's decision invites relators to evade the bar by pleading that they possess additional nonpublic information that elaborates on information in public documents. But this Court has repeatedly rejected that rule (*see* Verizon Br. 26-29)—for good reason. If a relator who bases his complaint almost entirely on public information need only add a reference to nonpublic information to survive dismissal, the public disclosure bar would be a dead letter.

C. The District Court's Approach Benefits Those Relators Least Deserving of an FCA Bounty

Unlike in private-party litigation, a FCA relator is not vindicating any personal right and so has no freestanding entitlement to money owed to the United States. *See* Jonathan H. Gold, Current Developments 2006-2007, *Legal Duties That Qui Tam Relators and Their Counsel Owe to the Government*, 20 Geo. J. Legal Ethics 629 (2007) ("Fraud injures the proprietary interest of the government, not the relator's interest."); *see also* Boese, *supra*, § 4.02[D], at 4-12 (relator cannot bring personal claims for common law fraud, unjust enrichment, or violation of other statutes).

"The interest pursued is a public interest, regardless of who actually litigates the claim." *See* Valerie R. Park, Note, *The False Claims Act*, Qui Tam *Relators, and the Government: Which Is the Real Party to the Action?*, 43 Stan. L. Rev. 1061, 1072 (1991). The FCA's *qui tam* provisions are designed to serve that interest, not pad the relator's pocketbook. *See U.S. ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 18 (D.D.C. 2003) (relator's attempt to "independently pursue . . . his or her personal part of a FCA lawsuit" without regard to government's interest "is wholly inconsistent with the purpose behind the FCA"), *aff'd*, No. 03-7120, 2004 WL 180264 (D.C. Cir. Jan. 21, 2014) (per curiam); Gold, *supra*, at 650-51 (Congress "grant[ed] relators limited independent rights, but only to the extent that the exercise of those rights ultimately benefits the government"). Where the relator contributes nothing to the government's ability to protect the public fisc, he is owed nothing in return.

Nor is the District Court's approach necessary to protect deserving relators who add useful information. Congress built that protection into the FCA's "original source" exception. *See* 31 U.S.C. § 3730(e)(4); *U.S. ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104, 113 (1st Cir. 2010) ("[T]he 'original source' exception already ensures that the most valuable relators—typically insiders with direct and independent knowledge of fraud—will not be barred by prior public disclosures. . . ."); Boese, *supra*, § 4.02[D], at 4-127 ("The exception was designed to implement Congress's intent to encourage non-parasitic *qui tam* relators to come forward and report fraud, even in cases where public disclosure has occurred."). In short, the only relators who will benefit from the District Court's approach are precisely those Congress meant to bar from a *qui tam* windfall.

D. If Affirmed, the Decision Will Create Tremendous Uncertainty

Businesses depend on consistent application of the law in complying with the myriad regulations that affect every aspect of their daily operations. That is particularly true with respect to courts' treatment of FCA *qui tam* actions, which routinely seek to transform trivial regulatory violations into multi-million-dollar "fraud" claims. The District Court's outlier decision calls into question this Court's consistent view—widely shared by its sister circuits—that the public disclosure bar is triggered whenever publicly disclosed transactions raise the "inference of fraud," even if public information does not definitively prove fraud. The District Court's approach, if upheld, would upend this Circuit's FCA law, place it at odds with other circuits, and cause tremendous uncertainty for the business community.

Other circuits agree that the bar does not require a publicly proven fraud case. *See, e.g., U.S. ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 n.7

(3d Cir. 2013) (rejecting argument that "an 'inference of fraud' is 'not sufficient' to invoke the public disclosure bar"); *Poteet*, 619 F.3d at 111 ("If the materials necessary to ground an inference of fraud are generally available to the public, . . . there is nothing to prevent the government from detecting it."); *see also* Verizon Br. 25 n.3 (citing cases from Sixth, Ninth, and Tenth Circuits).

The District Court's reading, by contrast, would open the floodgates to parasitic and duplicative *qui tam* suits, imposing tremendous cost and uncertainty on government contractors, program participants, and grantees by disturbing settled law. For example, in *Doe*, 773 F.3d at 84, the relator alleged that the defendants violated the FCA by importing Chinese-made pencils while telling Customs officials they were made elsewhere. The relator conceded that "Chinese pencils c[ould] be readily identified by their overall appearance and quality that is a result of the unique manufacturing processes used in China." *Id.* at 85. Defendants moved to dismiss on the ground that public reports described the physical characteristics of Chinese pencils—the very information the relator conceded would inform the general public (including the government) that defendants' pencils were made in China. This Court correctly held that these reports and the publicly available Customs declarations would "set government investigators on the trail of fraud." *Id.* at 87. That the reports did not definitively *prove* the pencils were made in China was irrelevant.

In *U.S. ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 569-70 (10th Cir. 1995), the relator alleged that a laboratory contractor falsely certified compliance with federal nuclear waste disposal laws in fiscal years 1991 and 1992. The defendant invoked the public disclosure bar based on a 1990 government report and 1991 congressional hearing that disclosed other laboratories' waste disposal practices, as well as the Department of Energy's acquiescence in those practices. *Id.* The Tenth Circuit held that the public disclosure bar applied because the disclosures raised an inference that the defendant behaved in a manner similar to its peers in the years that followed. *Id.* at 571.

In *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 437 F. App'x 13, 15-16 (2d Cir. 2011), the relator alleged that the defendant failed to file reports required in a government contract. Responses to the relator's Freedom of Information Act ("FOIA") requests indicated that reports for certain years were not found. The Second Circuit held that the FOIA responses were sufficient to trigger the public disclosure bar because even though they "d[id] not definitively state that the reports were not in fact filed," they gave rise to an inference that they were not filed. *Id.* at 17.

The District Court's rationale would reverse the outcome in each case. The public disclosure bar would have applied in *Doe* only in the unlikely event that actual manufacturing information for the specific pencils at issue existed in the public domain, presumably from the foreign supplier. The bar would have applied in *Fine* only if the public disclosures specifically named the defendant as following the generally accepted practice. In *Kirk*, the District Court's rule would have required definitive public proof of a negative (that no reports were filed). Congress never intended such results.

Upholding the District Court's decision would affect businesses nationwide. Given the numerous government agencies and contractors located in or around Washington, D.C., the D.C. District Court is among the country's most active venues for *qui tam* litigation. *See* U.S. Gov't Accountability Off., GAO-06-320R, Information on False Claims Act Litigation: Briefing for Congressional Requesters Dec. 15, 2005 at 27 (2006), http://www.gao.gov/new.items/d06320r.pdf (*qui tam* cases filed in U.S. district courts). This Court's FCA decisions therefore have a significant impact on the development of FCA jurisprudence generally.

At least four circuits have followed this Court's approach to the public disclosure bar. *See, e.g.*, *U.S. ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565 (9th Cir. 2016); *Zizic*, 728 F.3d at 236; *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 513 n.6 (6th Cir. 2009); *U.S. ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994). District courts in the remaining circuits overwhelmingly do so also.[4] Upholding the District Court's reading would risk throwing FCA law nationwide into disarray.

CONCLUSION

This Court should remand for the district court to dismiss with prejudice or, at a minimum, affirm the judgment of dismissal without prejudice.

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Respectfully submitted,

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[4] *See, e.g.*, *U.S. ex rel. Saunders v. Unisys Corp.*, No. 1:12-cv-00379, 2014 WL 1165869, at *6 (E.D. Va. Mar. 21, 2014); *U.S. ex rel. Lockey v. City of Dallas*, No. 11-cv-354, 2013 WL 268371, at *7-8 (N.D. Tex. Jan. 23, 2013); *U.S. ex rel. Brickman v. Bus. Loan Express, LLC*, No. 05-cv-3147, 2007 WL 4553474, at *6-7 (N.D. Ga. Dec. 18, 2007), *aff'd*, 310 F. App'x 322 (11th Cir. 2009); *U.S. ex rel. Lissack v. Sakura Glob. Capital Mkts.*, No. 95 Civ. 1363, 2003 WL 21998968, at *10-11 (S.D.N.Y. Aug. 21, 2003), *aff'd*, 377 F.3d 145 (2d Cir. 2004); *Feingold v. Associated Ins. Cos.*, No. 98-cv-4392, 2001 WL 1155250, at *6-7 (N.D. Ill. Sept. 28, 2001), *aff'd*, 324 F.3d 492 (7th Cir. 2003).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2016, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Defendants-Appellees/Cross-Appellants was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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