No. 17-1060

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL. BENJAMIN CARTER, PETITIONER

v.

HALLIBURTON CO., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
MICHAEL S. RAAB
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

A provision of the False Claims Act commonly known as the first-to-file bar directs that, "[w]hen a person brings an action under this subsection, no person other than the Government may * * * bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). The questions presented are as follows:

1. Whether a *qui tam* action brought in violation of the first-to-file bar must be dismissed without prejudice even if the first-filed suit is no longer pending.

2. Whether the first-to-file bar is jurisdictional.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes liability on a person who knowingly presents, or causes to be presented, a false or fraudulent claim to the federal government for payment or approval. 31 U.S.C. 3729(a)(1)(A). The Attorney General may bring a civil action for such a violation. 31 U.S.C. 3730(a). The FCA also permits private persons, known as relators, to file *qui tam* actions on behalf of the United States. 31 U.S.C. 3730(b)(1).

When a relator brings a *qui tam* action, the government may intervene and proceed with the action, 31 U.S.C.

3730(b)(2) and (c)(1), or it may decline to intervene and allow the relator to conduct the suit alone, 31 U.S.C. 3730(c)(3). In either event, if the suit is ultimately successful, the defendant is liable for damages and statutory penalties, 31 U.S.C. 3729(a)(1), and the relator receives a portion of the recovery, 31 U.S.C. 3730(d). Suit must be brought within six years after the violation, or within three years after the material facts were known or should have been known to the responsible government official, so long as the suit is brought within ten years after the violation. 31 U.S.C. 3731(b)(1)-(2).

Reflecting Congress's effort to achieve a "golden mean between an inadequate and an excessive scope for private enforcement," *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 302 (2010), the FCA imposes several restrictions on a relator's ability to bring a *qui tam* suit. One of those restrictions, commonly known as the "first-to-file bar," specifies 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).

In its prior decision in this suit, this Court considered whether the first-to-file bar "keeps new claims out of court only while related claims are still alive," or instead "bar[s] those claims in perpetuity." *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (*Carter*). Noting that the first-to-file bar is triggered by the filing of a suit related to a "*pending*" action, *id.* at 1978 (quoting 31 U.S.C. 3730(b)(5)), the Court held that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed," *ibid.* The Court accordingly deter-

mined that a violation of the first-to-file bar should not result in "dismissal with prejudice." *Ibid.* In affirming the court of appeals' decision remanding "with instructions to dismiss without prejudice," *id.* at 1975; see *id.* at 1978-1979, the Court did not explicitly address whether a remedy other than dismissal would have been permissible. But the Court has since described the "'first-to-file bar'" as one of the FCA provisions that "require, in express terms, the dismissal of a relator's action" as the remedy for a violation. *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 440, 442-443 (2016) (citing 31 U.S.C. 3730(b)(5)).

2. Respondents are defense contractors and related entities that provided logistical services to the United States military during the armed conflict in Iraq. Pet. App. 5. Petitioner Benjamin Carter, the relator in this suit, worked in Iraq for one of the respondents for several months in 2005. *Ibid.*[1]

a. In February 2006, petitioner brought an FCA suit against respondents, alleging that they had fraudulently billed the government for water-purification services that were not performed or were performed improperly. See *Carter*, 135 S. Ct. at 1974. A "remarkable sequence of dismissals and filings" then ensued. *Ibid.*

Shortly before trial in the February 2006 suit, the government alerted the parties to the pendency of an earlier-filed action, brought by another *qui tam* relator, that "arguably contained similar claims." *Carter*, 135 S. Ct. at 1974. The district court determined that petitioner's suit was "related" to the earlier-filed action, and it dismissed

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[1] As discussed below, see pp. 20-21, *infra*, petitioner's counsel recently informed this Court that petitioner has died. For ease of reference, and because no substitution has been effected, this brief refers to the arguments in the petition as those of petitioner.

petitioner's suit under the first-to-file bar. *Ibid.* Petitioner appealed the dismissal of his complaint, and the earlier-filed action was dismissed during the pendency of that appeal. *Ibid.*

While petitioner's appeal of his first suit was pending, petitioner filed a second FCA suit against respondents. See *Carter*, 135 S. Ct. at 1974. The district court dismissed the second suit under the first-to-file bar, noting that petitioner's first suit had remained pending on appeal when the second suit was filed. *Ibid.* Petitioner voluntarily dismissed his appeal in the first suit, and he did not appeal the dismissal of his second suit. *Ibid.*

b. In 2011, petitioner filed this third suit, again asserting various claims concerning respondents' alleged fraudulent billing for services in Iraq. See *Carter*, 135 S. Ct. at 1974. Respondents moved to dismiss, arguing *inter alia* (1) that the action was barred by the first-to-file provision, this time because related *qui tam* suits had been pending in Maryland and Texas when petitioner brought this action; and (2) that most of petitioner's claims were untimely under the FCA's six-year statute of limitations. See *ibid.*

The district court dismissed this suit with prejudice. D. Ct. Doc. 57 (Dec. 12, 2011). The court held that the suit was barred by the FCA's first-to-file provision because it was related to the Maryland action, which had been pending when this suit commenced. *Id.* at 15-24; see Pet. App. 6-7. While acknowledging that the Maryland action had since been dismissed, the court held that application of the first-to-file bar depends on "the facts as they existed when the action was brought." D. Ct. Doc. 57, at 23. The court also held that all of petitioner's claims were either untimely or would be time-barred upon refiling, rejecting petitioner's argument that the Wartime

Suspension of Limitations Act (WSLA), 18 U.S.C. 3287, had tolled the statute of limitations. See D. Ct. Doc. 57, at 24-35.

c. The court of appeals reversed. 710 F.3d 171. The court held that none of petitioner's claims were time-barred because the WSLA had suspended the statute of limitations. *Id.* at 177-181. Although the court recognized that petitioner's third suit had violated the FCA's first-to-file provision because it was filed during the pendency of the Maryland and Texas actions, *id.* at 181-183, it concluded that the first-to-file bar would not prevent petitioner from re-filing his claims once the Maryland and Texas actions were dismissed, *id.* at 183. The court accordingly determined that "dismissal without prejudice" was warranted. *Ibid.*

d. This Court reversed in part, affirmed in part, and remanded. 135 S. Ct. 1970. The Court held that the WSLA did not toll the statute of limitations for petitioner's claims because the WSLA applies only to criminal charges. *Id.* at 1976. The Court therefore reversed the court of appeals' determination that all of petitioner's claims were timely filed. *Id.* at 1975, 1979.

Noting that at least one of petitioner's claims might have been timely even absent WSLA tolling, however, the Court then "consider[ed] whether [petitioner's] claims must be dismissed with prejudice under the first-to-file rule." 135 S. Ct. at 1978. The Court observed that the first-to-file provision bars the "bring[ing] [of] a related action based on the facts underlying the *pending* action," *ibid.* (quoting 31 U.S.C. 3730(b)(5)), and it explained that the "term 'pending' means '[r]emaining undecided; awaiting decision,'" *ibid.* (quoting *Black's Law Dictionary* 1314 (10th ed. 2014)) (brackets in original). The Court held that "an earlier suit bars a later suit while

the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Ibid.* The Court therefore concluded that "dismissal with prejudice was not called for," *ibid.*, and it affirmed the court of appeals' judgment remanding the case "with instructions to dismiss without prejudice," *id.* at 1975; see *id.* at 1978-1979.

3. On remand, petitioner—despite his prior concession that dismissal "without prejudice" was the appropriate remedy for the first-to-file violation, Pet. App. 8 (quoting Br. in Opp. at 17, *Carter*, *supra* (No. 12-1497) (12-1497 Br. in Opp.))—asserted that dismissal was unwarranted. Petitioner contended that the intervening dismissals of the Maryland and Texas actions (which had occurred in October 2011 and March 2012, respectively, see *id.* at 6) had "cured any first-to-file defect," and that the current suit could proceed without dismissal and refiling. *Id.* at 10.

The district court rejected petitioner's contention. 144 F. Supp. 3d 869. The court explained that the determination "whether an action is barred by the first-to-file bar" in Section 3730(b)(5) depends on "the facts as they existed when the [action] was brought," and not on subsequent developments. *Id.* at 875 (quoting 710 F.3d at 183). The court also rejected petitioner's alternative contention that the violation could be cured by amending his existing complaint. See *id.* at 877-883. Noting that the first-to-file bar prevents the "bring[ing]" of a related "action," *id.* at 880 (quoting 31 U.S.C. 3730(b)(5)), the court explained that an amended complaint could not correct the violation, "regardless of the substance of the amendments," because an amended pleading would simply continue the existing (defective) action rather than commence a new one, *id.* at 883; see *id.* at 880-881. The court therefore dismissed petitioner's suit without prejudice,

id. at 883-884, and subsequently denied reconsideration, Pet. App. 27-46.

4. a. The court of appeals affirmed. Pet. App. 1-26. The court noted that circuit precedent treated the first-to-file bar as jurisdictional, and it disclaimed any intent "to revisit this Circuit's rule here." *Id.* at 4 n.1. The court "reaffirm[ed]" its prior holding 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." *Id.* at 13. The court explained that developments arising after this suit was filed—including the dismissal of the earlier-filed Maryland and Texas actions—"do not factor into" the determination whether the suit violates the first-to-file bar. *Ibid.* With respect to the appropriate remedy, the court stated that, "when a relator brings an FCA action to court in violation of the first-to-file rule, the court must dismiss the action." *Id.* at 18 (citation and internal quotation marks omitted). The court noted that this conclusion was "underscored" by this Court's decision in *Rigsby*, which described the first-to-file provision as one of "a number of [FCA] provisions that * * * require, in express terms, the dismissal of a relator's action." *Ibid.* (quoting *Rigsby*, 137 S. Ct. at 442-443) (brackets in original).

The court of appeals then addressed and rejected petitioner's theory that the filing of his proposed amended complaint would cure the first-to-file defect. Pet. App. 21-22. Although the district court had concluded that the filing of an amended complaint could never cure a first-to-file violation, see 144 F. Supp. 3d at 880-883, the court of appeals instead emphasized that "[petitioner's] proposed amendment simply add[ed] detail to [his] damages theories," without "address[ing] any matters potentially relevant to the first-to-file rule, such as the dismissals of

the Maryland and Texas Actions," Pet. App. 22. The court of appeals affirmed the district court's judgment of dismissal because "[petitioner's] [a]ction violated the FCA's first-to-file rule in a manner not cured by subsequent developments." *Id.* at 24. The court of appeals did not attempt to reconcile this aspect of its analysis with the statement earlier in its opinion that "when a relator brings an FCA action to court in violation of the first-to-file rule, the court must dismiss the action." *Id.* at 18 (citation and internal quotation marks omitted).

Judge Wynn filed a concurring opinion. Pet. App. 25-26. He "emphasize[d] the narrow scope" of the court of appeals' opinion, which he asserted did not "address, much less adopt, the district court's reasoning that an amendment or supplement to a complaint cannot, as a matter of law, cure a first-to-file defect." *Ibid.*

b. The court of appeals denied rehearing en banc. Pet. App. 47-48. It also denied petitioner's post-judgment motion in the court of appeals for leave to file an amended or supplemental complaint pursuant to Federal Rule of Civil Procedure 15. See C.A. Doc. 74 (Aug. 31, 2017).

DISCUSSION

Petitioner contends that his suit should not have been dismissed under the FCA's first-to-file bar, 31 U.S.C. 3730(b)(5), and that the bar is not jurisdictional. Neither issue warrants this Court's review.

I. THE COURT OF APPEALS' DETERMINATION THAT DISMISSAL WITHOUT PREJUDICE WAS PROPER IN THIS CASE DOES NOT WARRANT REVIEW

A. The court of appeals correctly held that (1) petitioner's suit violated the FCA's first-to-file bar and (2) the appropriate remedy for that violation was dismissal without prejudice.

1. The first-to-file provision 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). A *qui tam* relator therefore cannot "bring" a related "action" while a first-filed *qui tam* action remains "pending." *Ibid.* A person "'brings' an action" when he "commenc[es] [a] suit." Pet. App. 13 (quoting *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 362 (7th Cir. 2010)); see *Goldenberg* v. *Murphy*, 108 U.S. 162, 163 (1883) ("A suit is brought when in law it is commenced."); *Black's Law Dictionary* 231 (defining "bring an action" as "[t]o sue; institute legal proceedings").

The court of appeals correctly stated 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." Pet. App. 13. Because the statute prohibits the act of "bring[ing]" a related "action," 31 U.S.C. 3730(b)(5), a violation of the first-to-file bar occurs when a related suit is commenced. See Pet. App. 13. That conclusion accords with the decisions of all other circuits that have directly addressed the question. See *United States ex rel. Shea* v. *Cellco P'ship*, 863 F.3d 923, 929-930 (D.C. Cir. 2017); *Chovanec*, 606 F.3d at 362; *Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 972 n.5 (6th Cir. 2005); *United States ex rel. Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir.), cert. denied, 534 U.S. 1040 (2001).[2]

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[2] Petitioner describes the First Circuit as holding in *United States ex rel. Gadbois* v. *PharMerica Corp.*, 809 F.3d 1 (2015), cert.

2. The court of appeals also correctly held that petitioner's suit must be dismissed without prejudice. Pet. App. 14.

a. As noted, the first-to-file bar directs that no relator may "bring a related action" while an existing *qui tam* action is pending. 31 U.S.C. 3730(b)(5). "When a statute specifies that an 'action shall not be instituted' and the plaintiff fails 'to heed that clear statutory command,' a district court properly dismisses the suit." *Shea*, 863 F.3d at 929 (quoting *McNeil* v. *United States*, 508 U.S. 106, 107, 113 (1993)). Such a dismissal should not be "with prejudice," however, because the first-to-file provision bars future suits only so long as the first-filed action remains "pending." *Carter*, 135 S. Ct. at 1978 (citation omitted); see *id.* at 1975, 1979 ("affirm[ing]" the court of appeals' judgment remanding "with instructions to dismiss without prejudice").

The Court in *Carter* did not address whether dismissal without prejudice is the *only* permissible remedy for a violation of the first-to-file bar. In another recent decision, however, the Court recognized that the required remedy for a first-to-file violation is dismissal.

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denied, 136 S. Ct. 2517 (2016), that "the first-to-file bar is not determined by the facts existing at the time of filing an original complaint." Pet. 13-14. In fact, the First Circuit's decision rests on the premise that the relator violated the first-to-file bar by bringing suit while a related action was pending. See 809 F.3d at 3, 4, 6 n.2 (referring to the suit's jurisdictional "defect"). The court did remark in passing that "the familiar rule that jurisdiction is determined by the facts existing at the time of filing an original complaint" generally "is inapposite to the federal question context." *Id.* at 5. But the court made that statement in addressing whether the first-to-file violation could be "cured by a supplemental pleading," *ibid.*, not whether a violation of the bar had occurred.

In *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436 (2016), the Court held that a relator's violation of an FCA provision requiring the complaint to remain sealed, 31 U.S.C. 3730(b)(2), does not "necessarily require[] [the] relator's complaint to be dismissed." 137 S. Ct. at 442. The Court explained that, although the seal provision "create[d] a mandatory rule the relator must follow," the provision "says nothing * * * about the remedy for a violation of that rule." *Ibid.* The Court contrasted the seal provision with several of the FCA's other requirements, including the first-to-file bar, that the Court identified as "provisions that do require, in express terms, the dismissal of a relator's action." *Id.* at 443; see *Shea*, 863 F.3d at 929 (discussing this aspect of *Rigsby*).

Interpreting the first-to-file provision to require dismissal is consistent with this Court's treatment of similarly worded provisions under other statutes. In *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), the Court considered a provision of the Resource Conservation and Recovery Act of 1976 specifying that "[n]o action may be commenced * * * prior to sixty days after the plaintiff has given notice of the violation" to various people and entities. *Id.* at 25 (quoting 42 U.S.C. 6972(b)(1) (1982)). The Court rejected the argument that noncompliant suits could simply be "stayed until 60 days after notice had been given." *Id.* at 26. The Court concluded that, where a plaintiff had not given notice at the time of filing suit, "the district court must dismiss the action as barred by the terms of the statute." *Id.* at 33. Similarly in *McNeil*, the Court concluded that dismissal was necessary for a failure to comply with the Federal Tort Claims Act's requirement that an "action shall not be instituted" unless the claimant first exhausted his administrative

remedies. 508 U.S. at 111 (quoting 28 U.S.C. 2675(a)). See *Shea*, 863 F.3d at 929 (relying on *Hallstrom* and *McNeil* in holding that dismissal is required for first-to-file violations); *Chovanec*, 606 F.3d at 362 (same).

Because the first-to-file provision prohibits the "bring[ing]" of a related "action," 31 U.S.C. 3730(b)(5), a violation cannot be cured simply by amending or supplementing the complaint after the first-filed action has been dismissed. "[T]he filing of an amended complaint, while serving to modify the complaint, does not operate to end the action and bring a new one." *Shea*, 863 F.3d at 930. Although "Congress could certainly have enacted a revival mechanism in the first-to-file rule statute," it "has not done so." Pet. App. 21. A related action brought "while [the] first-filed case remained pending" therefore is "incurably flawed from the moment [the relator] filed it." *Shea*, 863 F.3d at 929-930. Requiring dismissal in these circumstances also serves to "level the playing field among relators" and to avoid the "anomalous outcomes" that would occur if a relator's ability to proceed with a successive suit "depend[ed] on the pure happenstance of whether the district court reached her case while the first-filed suit remained pending." *Ibid.*

b. The court of appeals correctly identified the foregoing principles. The court acknowledged and endorsed this Court's analysis in *Rigsby*, correctly stating that "[t]his reasoning by the Supreme Court confirms that the only appropriate response for a first-to-file rule violation is dismissal." Pet. App. 18. The court explained that, "[b]ecause th[is] * * * [a]ction 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 [action]." *Id.* at 21.

The court of appeals then proceeded, however, to consider petitioner's argument that his proposed amended complaint had "cured the first-to-file defect." Pet. App. 22. Rather than reject that argument outright, as inconsistent with the court's prior statement that dismissal is the only permissible remedy for a first-to-file violation, the court observed that petitioner's "proposed amendment simply adds detail to [his] damages theories" rather than "address[ing] any matters potentially relevant to the first-to-file rule." *Ibid.* The court specifically "decline[d] to comment" on the district court's more categorical holding that a relator cannot "circumvent dismissal through amendment." *Id.* at 22 n.7; see *id.* at 26 (Wynn, J., concurring) ("[T]he majority opinion simply holds that a proposed amendment or supplement to a complaint cannot cure a first-to-file defect when the amendment or supplement does not reference the dismissal of publicly disclosed, earlier-filed related actions.").

In the view of the United States, the court of appeals need not have qualified its statement that "the only appropriate response for a first-to-file rule violation is dismissal." Pet. App. 18. Even if petitioner's proposed amended complaint had specifically addressed "the dismissals of the Maryland and Texas Actions," *id.* at 22, that amendment would not have cured the statutory violation or justified a remedy other than dismissal without prejudice. Nonetheless, the court of appeals reached the correct outcome, since it affirmed the district court's dismissal order. See *id.* at 24. And even with respect to the question whether petitioner might have avoided dismissal through a different type of amendment, the court did not hold that petitioner could have done so, but simply left open that possibility. See *id.* at 22 & n.7.

3. Petitioner asserts (Pet. 3, 23-25) that the decision below conflicts with this Court's prior decision in this case (*Carter*). Petitioner characterizes that decision as holding that a violation of the first-to-file bar "dissolves" as soon as the first-filed action is dismissed (Pet. 3), so that an action commenced in violation of Section 3730(b)(5) may proceed.

As the court of appeals correctly recognized, that argument reflects a misreading of *Carter*. Pet. App. 15. The Court's prior opinion in this case addressed the question whether the first-to-file bar "keeps new claims out of court only while related claims are still alive," or instead "bar[s] those claims in perpetuity." 135 S. Ct. at 1973. The Court resolved that question in petitioner's favor, rejecting respondents' argument that a "first-filed action remains 'pending' even after it has been dismissed" and thus "forever bars any subsequent related action." *Id.* at 1979.

The Court thus held that, after an initial *qui tam* suit has been dismissed, a second relator becomes free to *commence* a related action without running afoul of the first-to-file bar. No violation of the first-to-file bar occurs in that situation because the second relator "bring[s]" his action at a time when the first suit is no longer "pending." 31 U.S.C. 3730(b)(5). Here, by contrast, it is undisputed that petitioner violated the first-to-file bar by commencing his related action during the pendency of the Maryland and Texas suits. The contested question is whether dismissal of petitioner's suit is the required remedy for that violation. The understanding that the *Carter* Court did not resolve that question in petitioner's favor is confirmed by the Court's subsequent decision in *Rigsby*, which both cited *Carter* and clearly

stated that dismissal is the required remedy for a first-to-file violation. See *Rigsby*, 137 S. Ct. at 440, 442-443.

Petitioner expresses concern that requiring dismissal in these circumstances would lead to the "unnecessary termination of meritorious actions," Pet. 4, and could allow "wrongdoers to escape liability" if a relator's suit is dismissed after the statute of limitations has expired, Pet. 25-26. But if the government determines that a *qui tam* action likely has merit, it may intervene to pursue that action notwithstanding any violation of the first-to-file bar. See 31 U.S.C. 3730(b)(5) (specifying that "no person *other than the Government* may intervene or bring a related action" while the first-filed suit is pending) (emphasis added). Even when a *qui tam* suit is barred by Section 3730(b)(5), the relator will often be able to refile the suit within the six-year statute of limitations.[3] And a relator whose refiled suit is time-barred despite his diligent conduct could potentially seek equitable tolling of the limitations period applicable to his refiled suit. Cf. *Menominee Indian Tribe of Wis.* v. *United States*, 136 S. Ct. 750, 755-756 (2016); *Shea*, 863 F.3d at 932 (noting that relator intended to seek equitable tolling, but "express[ing] no view" on its applicability).

B. Petitioner contends (Pet. 9-17) that the decision below conflicts with *United States ex rel. Gadbois* v. *PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015), cert.

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[3] Though the FCA does not require it, the United States often attempts to notify relators when their suits appear to overlap. This practice enables a later-filing relator to make an informed decision, in light of the risk that a court may ultimately find the suit barred by Section 3730(b)(5), about whether to proceed with his suit or instead to dismiss and re-file later if appropriate.

denied, 136 S. Ct. 2517 (2016).[4] The tension between those decisions provides no sound basis for this Court's review.

In *Gadbois*, the relator appealed the dismissal of his *qui tam* suit under the first-to-file bar. While the appeal was pending, the first-filed action was settled and dismissed. 809 F.3d at 4. The First Circuit acknowledged that the relator's suit would contain a "jurisdictional defect" if it was indeed related to the first-filed action. *Id.* at 6 n.2; see p. 9 n.2, *supra*. The court concluded, however, that any such defect could be cured by filing a "supplementation" to the complaint setting forth facts about the intervening dismissal of the first-filed action. 809 F.3d at 6.

Gadbois does not squarely conflict with the decision below. Although the court of appeals stated that the "only remedy for [a first-to-file] violation is dismissal," Pet. App. 21, it ultimately reserved the question whether petitioner could have avoided that sanction by amending

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[4] Petitioner acknowledges (Pet. 9-10, 16) that the decision below accords with the D.C. Circuit's decision in *Shea*, *supra*. The Seventh, Ninth, and Tenth Circuits have also affirmed or directed dismissal under Section 3730(b)(5) of a relator's suit brought while a first-filed action was pending, even though the first-filed action had since been dismissed or settled. See *Chovanec*, 606 F.3d at 362 ("[A] follow-on suit must be dismissed if its predecessor is still pending when the new one is filed."); *Grynberg*, 390 F.3d at 1279 & n.2 (second suit was "barred from its inception by § 3730(b)(5)," even though first suit had "ultimately settled"); *Lujan*, 243 F.3d at 1188 ("[The relator's] action is barred if she brought the claim while [the first suit] was pending," even though the first suit was "later dismissed."). The Sixth Circuit endorsed the same principle in *Walburn*, but found the first-to-file bar inapplicable for other reasons. See 431 F.3d at 972 n.5.

his complaint to "address any matters potentially relevant to the first-to-file rule, such as the dismissals of the Maryland and Texas Actions," *id.* at 22. Indeed, the court distinguished *Gadbois* on that basis, observing that the relator in that case had "sought to revise an FCA complaint with information pertaining to the related action that gave rise to the first-to-file defect," while petitioner's "proposed revision ma[de] no mention of the related Maryland and Texas Actions." *Id.* at 23.

Gadbois's remedial analysis is inconsistent with the D.C. Circuit's statement that "[a] supplemental or amended complaint * * * could not remedy [a relator's] violation of the first-to-file bar." *Shea*, 863 F.3d at 929. The practical significance of that disagreement, however, is unclear. The First Circuit in *Gadbois* did not hold that a relator *must* be permitted to supplement his complaint in order to avoid dismissal under Section 3730(b)(5). See 809 F.3d at 7 (rejecting "supplementation as a matter of right"). Instead, it contemplated that any supplementation would be "subject to the [district] court's discretion," *id.* at 6, and it remanded for the district court to consider whether to permit such supplementation or instead to "reenter [its] judgment of dismissal," *id.* at 8. On remand, the district court again dismissed the relator's suit, see *United States ex rel. Gadbois* v. *PharMerica Corp.*, 292 F. Supp. 3d 570, 581 (D.R.I. 2017), and the relator did not appeal.

In addition, the First Circuit's decision in *Gadbois* predated this Court's decision in *Rigsby*, which identified dismissal as the required remedy for a first-to-file violation, and the D.C. Circuit's decision in *Shea*, which relied in part on *Rigsby* and specifically rejected amendment of a *qui tam* complaint as a possible means of avoiding dismissal in these circumstances. In light of

the limited scope of *Gadbois*'s holding; the possibility that the First Circuit might reconsider that decision in light of intervening authority; and the fact that petitioner could not prevail under either the *Gadbois* or the *Shea* approach to this remedial question, the Court's review would be premature at this time.[5]

II. THE COURT OF APPEALS' STATEMENT THAT THE FIRST-TO-FILE PROVISION IS JURISDICTIONAL DOES NOT WARRANT REVIEW

As petitioner notes (Pet. 31-32), and as the court below acknowledged (Pet. App. 4 n.1), two courts of appeals have recently concluded that a violation of the first-to-file bar does not divest a district court of subject matter jurisdiction, but simply defeats the relator's cause of action. See *United States ex rel. Hayes* v. *Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir.) (per curiam), cert. denied, 138 S. Ct. 199 (2017); *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). Other courts of appeals, including the court below, have characterized the provision as jurisdictional. See Pet. App. 4 & n.1; *United States ex rel. Ven-A-Care of the Fla. Keys, Inc.* v. *Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014); *United States ex rel. Carson* v. *Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017); *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d

[5] A case raising similar issues under the first-to-file bar is currently pending in the Second Circuit. See *Wood* v. *Allergan, Inc.*, No. 17-2191 (argued Feb. 7, 2018). If the Second Circuit decides *Wood* in a way that sharpens the circuit conflict, and a petition for a writ of certiorari is filed in that case, the Court can consider at that time whether its review is warranted.

371, 376-377 (5th Cir. 2009); *Walburn*, 431 F.3d at 970; *Lujan*, 243 F.3d at 1183; *Grynberg*, 390 F.3d at 1278.[6]

Petitioner suggests (Pet. 32) that, if the first-to-file bar is "non-jurisdictional," a mandatory dismissal rule would be inappropriate. But "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed" whether or not that bar is "jurisdictional in the strict sense of the term." *Hallstrom*, 493 U.S. at 31. The D.C. Circuit has held that dismissal is the mandatory remedy for a violation of the first-to-file bar, see *Shea*, 863 F.3d at 930, even though that court shares petitioner's view that the first-to-file bar is "nonjurisdictional," *Heath*, 791 F.3d at 120.[7]

The question whether the first-to-file bar is jurisdictional could potentially be outcome-determinative if dismissal of a later-filed suit was not sought in a timely manner. Cf. *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam) ("[C]laim-processing rules * * * assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."). But petitioner does not contend that any such forfeiture occurred here. The district court in this case stated that, "[e]ven if the first-to-file bar were to sound in nonjurisdictional terms, * * * the result in this case would not change." 144 F. Supp. 3d at 874 n.1. And while the

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[6] In some past filings, the United States has described the first-to-file provision as jurisdictional. See, *e.g.*, U.S. Br. at 19, *United States ex rel. Summers* v. *LHC Grp., Inc.*, No. 10-827 (May 26, 2011) (citing *Grynberg*, 390 F.3d at 1278).

[7] Conversely, the First Circuit, which rejected a mandatory dismissal rule, has repeatedly held or assumed that the first-to-file bar is jurisdictional. See, *e.g.*, *Gadbois*, 809 F.3d at 6 n.2; *Ven-A-Care*, 772 F.3d at 936; *United States ex rel. Wilson* v. *Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014).

Fourth Circuit treated the bar as jurisdictional, see Pet. App. 4 & n.1, it did not suggest that this characterization affected its disposition of the case. Because there is no reason to believe that the outcome of this case would have been different if the court below had viewed the first-to-file bar as non-jurisdictional, this would be an unsuitable vehicle for deciding the second question presented.

III. ADDITIONAL CIRCUMSTANCES OF THIS CASE REINFORCE THE CONCLUSION THAT REVIEW SHOULD BE DENIED

As respondents emphasize (Br. in Opp. 16-21), petitioner previously took positions in this litigation that are directly contrary to the positions he urges now. Petitioner repeatedly argued—including in this Court—that the current suit should be "dismiss[ed] * * * without prejudice." 12-1497 Br. in Opp. at 17; see, *e.g.*, D. Ct. Doc. 96, at 2 (Aug. 11, 2015) (asserting on remand that the district court was "obligated" to "dismiss this matter without prejudice"). Petitioner also repeatedly argued—again, including in this Court—that "the first-to-file provision in 31 U.S.C. § 3730(b)(5) is jurisdictional." 12-1497 Br. in Opp. at 17. Although petitioner's advocacy of shifting and contradictory positions does not create a "jurisdictional bar" to the Court's consideration of the questions presented, it constitutes a "considerable prudential objection" to review. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

In addition, petitioner's counsel recently notified this Court that petitioner had "passed away during the course of appellate proceedings." Letter from David S. Stone to the Clerk of the Supreme Court (Apr. 5, 2018). Counsel's letter does not indicate the date of petitioner's death or whether it occurred before or after the

petition was filed. This Court's Rules provide that, "[i]f a party dies after the filing of a petition for a writ of certiorari," the deceased party's authorized representative may be substituted so long as the substitution is "made within six months after the death of the party." Sup. Ct. R. 35.1; see Stephen M. Shapiro et al., *Supreme Court Practice* 975-978 (10th ed. 2013). But if petitioner's death preceded the filing of the petition (as counsel's letter can be read to imply), this case would require the Court to decide both whether petitioner's petition was effective in invoking this Court's jurisdiction and, if so, whether substitution under Rule 35.1 is appropriate in these circumstances.[8]

This Court also would likely need to confront the substantive question whether this action survives petitioner's death. Although most lower courts have held that a *qui tam* action survives the death of a relator, see, *e.g.*, *United States ex rel. Neher* v. *NEC Corp.*, 11 F.3d 136, 137-139 (11th Cir. 1994); *United States ex rel. Colucci* v. *Beth Israel Med. Ctr.*, 603 F. Supp. 2d 677, 680-683 (S.D.N.Y. 2009), the decisions have not been unanimous, see *United States ex rel. Harrington* v. *Sisters of Providence*, 209 F. Supp. 2d 1085, 1086-1089 (D. Or. 2002). That uncertainty creates a further prudential obstacle to this Court's review.

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[8] In *Riegel* v. *Medtronic, Inc.*, 552 U.S. 804, 804-805 (2007), a case in which there were two petitioners, the Court permitted a substitution for one deceased petitioner who had died before the petition was filed, even though more than six months had elapsed since his death.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
MICHAEL S. RAAB
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

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