No. 12-1497

In The
Supreme Court of the United States

KELLOGG BROWN & ROOT, INC., *et al.*,

Petitioners,

v.

UNITED STATES EX REL. BENJAMIN CARTER,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, organization dedicated to the protection of employees who report misconduct. The NWC is keenly aware of the issues facing employees who seek to report fraud and misconduct, *see e.g.* www.whistleblowers.org. The NWC's directors have authored seven books on whistleblower law.

As part of its core mission, the Center monitors major legal developments, and files amicus briefs in order to assist courts in understanding complex issues raised in many whistleblower cases, and the important public policies underlying the Congressional intent behind these important anti-fraud laws. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all *amicus* briefs. Pursuant to this Court's Rule 37.6, *Amicus* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

529 U.S. 765 (2000); *Beck v.* Prupis, 529 U.S. 494 (2000); EEOC *v. Waffle House, Inc.,* 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014).

Persons assisted by the Center have a direct interest in the outcome of this case. The False Claims Act is the government's "most important tool to uncover and punish fraud against the United States." U.S. Chamber, Institute for Legal Reform, "Fixing the False Claims Act," p. 1 (October 2013). The key enforcement mechanism in the False Claims Act is its reliance upon "insiders" or whistleblowers to provide credible information documenting fraud against the U.S. government. Numerous whistleblowers assisted by the Center have used the False Claims Act to effectively provide information to the government in order to protect the public fisc and hold fraudsters accountable.

SUMMARY OF THE ARGUMENT

Even the harshest critics of the False Claims Act (FCA or Act) are forced to admit that the Act is the government's "most important tool to uncover and punish fraud against the United States." U.S. Chamber, Institute for Legal Reform, "Fixing the False Claims Act," p. 1 (October 2013) ("Chamber Report"). At the very "heart" of the Act's effectiveness are the *qui tam* provisions which require would-be whistleblowers to make disclosures to the Attorney General

concerning fraud against the United States and to file civil lawsuits to hold the fraudsters accountable.[2] Based upon these facts, as the Senate Judiciary Committee unanimously noted in its comprehensive 2008 review of the history and impact of the law, "the need for a robust FCA cannot be understated."[3]

It is imperative that this Court give full effect to the law's explicit language, which is consistent with the clear intent of Congress. Fraud against the government is widespread, and has a devastating impact on the credibility of the government, the integrity of programs designed to serve the public interest and the long-term fiscal soundness of the public treasury. Although the amount of fraud for which the government (and taxpayers) suffers from each year is difficult to detect, the U.S. Chamber's Institute for Legal Reform (an affiliate of the U.S. Chamber of Commerce) estimates that "the United States Treasury loses approximately $72 billion to fraud, abuse and improper payments each year." Chamber Report, p. 1.

Whistleblowers are the single most important source of information concerning fraud against the government, and their contributions through the filing of FCA cases have constituted the basis for approximately 80% of all civil fraud

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[2] Committee on the Judiciary, "The False Claims Act Corrections Act of 2008, Senate Report 110-507, p. 1 (September 17, 2008).
[3] *Id.*, p. 6.

recoveries. The record demonstrates that FCA lawsuits, filed by whistleblowers, have been phenomenally successful, and that the unsubstantiated allegations of frivolity consistently raised by the Petitioners and some of the *amici* are without any basis in fact.

After nearly 30-years of litigation under the Act it is now uncontested that whistleblowers are the primary source of information regarding government fraud, and their active role in these cases is what makes the FCA the government's "most important tool to uncover and punish fraud against the United States." Chamber Report, p. 1.

There is no legal support, either in the text of the statute or in its legislative history, for the legal arguments raised by the Petitioners regarding the scope of the "first-to-file" claim bar. The Chamber of Commerce's concerns that upholding the Fourth Circuit's decision would promote frivolous complaints is not supported by objective empirical data, and is counter to common sense. A broad reading of the "first-to-file" bar would encourage plaintiffs to file overly broad, ill-conceived complaints simply to ensure their eligibility for a reward. It would place a premium on form over essence, clog the system with weaker claims, and reward plaintiffs who file overly broad claims, regardless of the substance of their information. Petitioners' argument would have a devastating impact on the primary purpose of the law: encouraging the

filing of high-quality fraud complaints that meet the strict pleading standards that are implicit and explicit in the statute.

ARGUMENT

I. WHISTLEBLOWER DISCLOSURES UNDER THE FCA ARE THE BACKBONE OF THE UNITED STATES' ANTI-FRAUD PROGRAM AND WOULD BE UNDERMINED IF THE DECISION OF THE FOURTH CIRCUIT WERE REVERSED

The *qui tam* whistleblower provisions of the FCA have been remarkably successful. They constitute the backbone of the United States' anti-fraud program. Even the FCA's most aggressive critic, the U.S. Chamber of Commerce's Institute for Legal Reform, conceded, "*the False Claims Act is the government's most important tool to uncover and punish fraud against the United States.*" Chamber Report, p. 1. Similarly, the officials from the U.S. Department of Justice repeatedly echoed this same sentiment: *"[I]t is abundantly clear that, twenty-five years after this statute* [the whistleblower reward law] *was significantly amended, it remains the government's most potent civil weapon in addressing fraud against the taxpayers."* [4]

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[4] Acting Assistant Attorney, Civil Division DOJ (Statement before the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 7, 2012) (emphasis added).

Whistleblowers are the single largest source of all FCA recoveries.[5] The key to the success of the Act is the ability of the *qui tam* provisions to incentivize employee disclosures: "*The increased incentives for whistleblowers have led to an unprecedented number of investigations and greater recoveries . . . The whistleblowers who bring wrongdoing to the government's attention are instrumental in preserving the integrity of government programs and protecting taxpayers the costs of fraud.*"[6]

The "impact" of the *qui tam* whistleblower provisions added to the FCA by the 1986 amendments have been "nothing short of profound:"

[T]he False Claims Act has provided

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[5] "The False Claims Act is the government's primary civil remedy to redress false claims for government funds . . . . In 1986, Congress strengthened the Act by amending it to increase incentives for whistleblowers to file lawsuits on behalf of the government, which has led to more investigations and greater recoveries. Most false claims actions are filed under the Act's whistleblower, or qui tam, provisions . . ." U.S. Department of Justice, Office of Public Affairs, "Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013," December 20, 2013.

[6] Principal Deputy Assistant Attorney, quoted in Department of Justice, Office of Public Affairs, "Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (December 4, 2012).

> *ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of American taxpayers. Since the day that President Reagan signed these bipartisan amendments into law in 1986, their impact has been nothing short of profound . . . Some of these [False Claims Act cases] may have saved lives. All of them saved money. And – taken as a whole – this remarkable track record represents a wide-ranging effort to eradicate the scourge of fraud from some of government's most critical programs.*[7]

The "value" of the Act's *qui tam* provisions is not just in recovering money for the taxpayer, but also in deterring fraud and protecting honest federal contractors from unfair competition:

> *[The False Claims Act's whistleblower reward] amendments have played a critical role in transforming the FCA into what it is today – the most powerful tool the American people have to protect the government from fraud . . . relators* [have] *been central to our record-setting recoveries . . . But the value of the False Claims Act is not just in allowing the government to respond to fraud after it*

[7] Attorney General Eric Holder Speaks at the 25th Anniversary of the False Claims Act Amendment of 1986 (January 31, 2012)(emphasis added).

> *happens. It is also in preventing fraud from happening in the first place . . . The results have been a tremendous benefit not only to the government and the American public but also to companies that want to do business fairly and honestly, and want to know that they won't be put at a competitive disadvantage as a result because others are not playing by the rules.*[8]

The key role whistleblowers now play in the government's anti-fraud efforts is reflected in the objective statistics published by the Justice Department's Civil Division.[9] Since the 1986 amendments came into effect, whistleblower *qui tam* lawsuits triggered 69.85% of all FCA recoveries. This was $27,201,587,782 of $38,941,590,490 total recoveries. Non-whistleblowers made up 30.15% ($11,740,002,708 of $38,941,590,490) in recoveries for the taxpayers.

This percentage has grown exponentially over time, as more employees have learned of the effectiveness of the Act. From 2009-2013, whistleblowers made up 78.08% of FCA recoveries. This was $13,497,026,294 of

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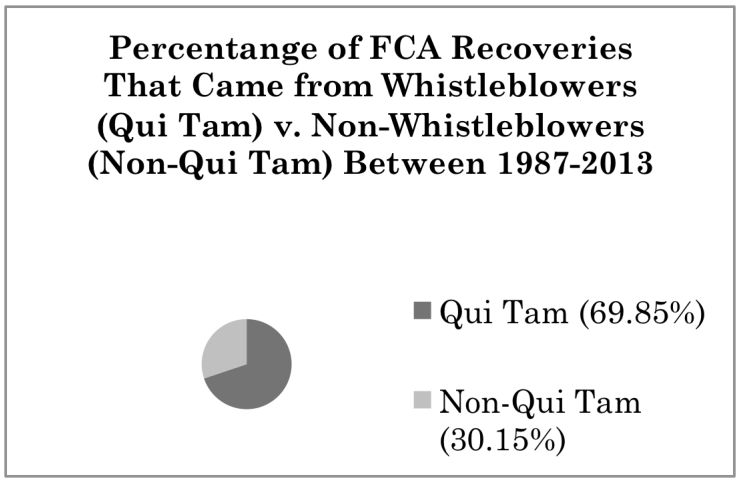
[8] Assistant Attorney General, U.S. Department of Justice (Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 5, 2014)(emphasis added).

[9] *Fraud Statistics,* U.S. Department of Justice (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf [hereinafter DOJ Statistics].

$17,285,075,094 total recoveries. Non-whistleblowers made up 21.92% ($3,788,048,800 of $17,285,075,094) of recoveries.



The reason why whistleblowers are so effective at reporting fraud was explained in a bi-partisan report issued by the U.S. Senate Judiciary Committee. Quoting University of Alabama Bainbridge Professor of Law, Pamela Bucy, the report stated:

> *Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring . . . Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization . . . Given these facts, insiders who are wiling to blow the whistle are the <u>only</u> way to effectively*

> *and efficiently piece together what happened and who is responsible.* [10]

Significantly, Professor Bucy, the Justice Department, and the Senate Judiciary Committee's strong support for incentivizing insiders to report fraud were empirically supported by key objective studies. For example, the University of Chicago Booth School of Economics conducted the most comprehensive and objective study of whether whistleblower reward laws work. The study focused on the FCA, and was designed to "identify the most effective mechanisms for detecting corporate fraud." It was based upon an "in-depth" study of "all reported fraud cases in large U.S. companies between 1996 and 2004."[11]

The Booth School's conclusions are clear and speak for themselves:

- *"A strong monetary incentive to blow the whistle does motivate people with information to come forward."*[12]
- *"[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."*[13]

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[10] Committee on the Judiciary, "The False Claims Act Corrections Act of 2008, Senate Report 110-507, pp. 6-7 (quoting from Professor Bucy) (emphasis added).

[11] Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?* University of Chicago, 2006, p. 1.

[12] *Id.,* p. 4.

[13] *Id.,* p. 25.

- *"Monetary incentives seem to work well, without the negative side effects often attributed to them."*[14]

In addition to validating the importance of whistleblower laws such as the FCA, the Booth School study also explained the downside of whistleblowing, and how without laws such as the FCA, fraud will be undetected, and the few whistleblowers who do step forward will not be rewarded:

"[E]mployees clearly have the best access to information," [but whistleblowers were] "fired, quit under duress, or had significantly altered responsibilities. In addition, many employee whistleblowers report having to move to another industry and often to another town to escape personal harassment."

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"Not only is the honest behavior not rewarded by the market, but it is penalized . . . Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all."[15]

Given the key role the *qui tam* provisions play in the United States' anti-fraud program, this Court must reject the invitation of the Petitioners' to create judicially constructed barriers to fraud reporting. Not only would this

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[14] *Id.,* p. 26.
[15] *Id.,* p. 23.

undermine the public interest, it would be radically at odds with the Congressional intent behind the 1986 amendments to the FCA.

The FCA's "first-to-file" bar is extremely narrow. The bar only covers claims that are closely related or identical to each other, and also only applies to "pending" actions. 31 U.S.C. § 3730(b)(5). This narrow statutory language well serves the Congressional purposes and policies behind this critical anti-fraud law.

II. THE HARSH ATTACK ON RELATORS' CONDUCT IS WITHOUT MERIT

Petitioners and their supporting *amici* have raised unsupported, undocumented and highly speculative arguments deriding whistleblowers. These speculations are not supported by empirical evidence.

The brief filed by the Chamber of Commerce, *et al.* raises a host of meritless and misleading arguments attempting to paint whistleblowers in a negative light. First, they argue "FCA claims are at [an] all time high, with claims being filed in "increasing numbers." Chamber Brief, pp. 4, 13. These claims feed into their unsubstantiated fear that the Fourth Circuit's ruling will invite numerous meritless "serial, duplicative claims." *Id.* p. 23.

Although the number of False Claims Act cases has increased over time, their total number

is miniscule. Only 753 cases were filed in 2013, which represents, on average, a mere eight cases in each of the 94 judicial districts in the United States. *See* DOJ Fraud Statistics.

But the real problem is not the large number of False Claims Act cases, it is the *small number* of such cases. As the Chamber's own Institute for Legal Reform pointed out, although the False Claims Act is the "most important tool to uncover and punish fraud," its reach still fails to capture a majority of fraud committed against the United States, which the Chamber estimated at $72 billion per year. Chamber Report, p. 1.

The reason that the majority of fraud is going undetected has nothing to do with whistleblowers filing "serial" claims. The inability of the government to detect and punish fraud is fuelled by the continuing reluctance of the overwhelming majority of employees to report fraud to the government.

The most thorough empirical studies of this problem were conducted by the corporate-sponsored Ethics Resource Center ("ERC").[16]

[16] The ERC used Survey Sampling International to collect its data, with a sampling error of +/- 1.4 percent at the 95 percent confidence level. ERC, "2011 National Business Ethics Survey: Workplace in Transition," *www.ethics.org/files/u5/FinalNBES-web.pdf* (Arlington, Va., 2012). The "principal sponsors" of the survey were Walmart Stores, Inc. and Northrop Grumman. Other sponsors included BP, Raytheon, Lockheed Martin, BAE Systems and SAIC, not whistleblower advocacy groups.

Their 2011 survey of workplace culture concluded that "retaliation against employee whistleblowers" had "r[isen] sharply," while at the same time there was an "increase in pressure to compromise their companies standards or polices, or even break the law."[17]

Another ERC report, "Blowing the Whistle on Workplace Misconduct," concluded that close to 40% of all American workers did not disclose fraud or misconduct observed in the workplace to *anyone*. "Blowing the Whistle," p. 2 ("four in ten employees who witnessed workplace misconduct did not typically report it.").[18] Even worse was the failure of employees to report misconduct to law enforcement authorities. Of the 60% of employees willing to report misconduct, the "vast majority" simply made a report to their supervisor or manager. Only 4% of those willing to report relayed their concerns to "someone outside" of the "company." *Id.*, p. 5. Based upon these numbers, the ERC concluded that "boosting" the percentage of employees willing to disclose "wrongdoing" should be an "important goal" for *both* private sector companies and "government enforcement agencies." *Id.*, p. 13.

Thus, in the current corporate culture, 96% of those who initially reported misconduct were

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[17] *Id.*, pp. 12, 18.

[18] Ethics Resource Center, "Blowing the Whistle on Workplace Misconduct," *www.ethics.org/resource/blowing-whistle-workplace-misconduct* (Arlington, Va., December 2010).

unwilling (or simply did not) report the misconduct outside of their company, let alone to federal law enforcement agencies.

The Chamber of Commerce asserted that "there is strong evidence" that "the vast majority of *qui tam* relator suits are meritless." Chamber Brief, p. 15. This is a misleading distortion of the facts. First, they cite to absolutely no "strong evidence" to support this point. They only cite to overall statistics that contain no data whatsoever as to why the Department of Justice declined various lawsuits. See Id.

Second, the record demonstrates that *qui tam* lawsuits filed by whistleblowers are now the cornerstone of the government's anti-fraud enforcement program. It is the *qui tam* whistleblower lawsuits that now constitute nearly 80% of all FCA lawsuits pursued by the Department of Justice. Although the Chamber ridiculed the *qui tam* lawsuits for which the Justice Department declined intervention as resulting in only a "miniscule percentage of total recoveries," it is only common sense that the Justice Department would use its very limited resources in pursing larger cases. Why would the Justice Department prosecute a fraud case for which the underlying recovery would only be $1 million, when they could select a case for which the recovery would be $100 million? In fact, it would be highly irresponsible for the Justice Department to prosecute small cases, at the expense of equally meritorious large cases.

Third, fraud recoveries in non-intervened cases are not "miniscule." As of the end of FY 2013 the total amount of fraud recovered by the United States in declined cases was $991,079,038.00.[19] For the average taxpayer, who is the primary victim of fraud against the government, this amount is not "miniscule."

The Chamber was not able to point to any data that objectively analyzed the merits of the declined False Claims Act cases. However, as explained below, there is a specific provision in the Act that permits companies victimized by vexatious or meritless filings to seek attorney fees from the *qui tam* relators. A review of all of the available cases decided under this provision demonstrates that the numbers of truly meritless and frivolous cases are "miniscule." It appears as if over the entire 30-year history of the amended FCA there have been less then a dozen reported cases decided under the sanctions provision.

Finally, the Chamber alleged that "serial relators have become commonplace." Chamber Brief, p. 24. But this argument confused the concept of a "serial relator" with someone filing serial complaints on a similar issue. The "two dozen" such serial relators (which is a "miniscule" number given the nearly 10,000 False Claims Act complaints filed since the law was amended in 1986) would not have been prohibited from filing

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[19] *Fraud Statistics,* U.S. Department of Justice (2013), p. 2.

their claims under the "first-to-file" rule at issue in this case, as they were not accused of re-filing similar complaints. Moreover, the entire concern that without a broad "first-to-file" rule whistleblowers "would be able to file, dismiss, and re-file identical *qui tam* actions," is nonsensical. There is no evidence that this is a real problem, and it would make no sense whatsoever for a relator to file, dismiss and re-file an identical lawsuit. It would be a waste of time and money for the relator and his or her counsel, and would open up the relator to sanctions pursuant to the reverse attorney fee provision of the False Claims Act discussed below.

The Chamber's entire concern is premised on a distorted view of whistleblowers, harping on derogatory stereotypes with no supporting empirical data. Objective studies of whistleblower behavior demonstrate that this concern is misplaced. A major study published in the *New England Journal of Medicine* found that whistleblowers were motivated by "integrity," "strong ethical standards," concerns over "public health," and, to a far lesser extent, "fears that the fraudulent behavior" made it necessary for the employees to "protect themselves."[20] There is nothing in the *Journal's* study that indicates that any real whistleblower would pose a risk for filing and re-filing meritless lawsuits.

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[20] Kesselheim, et al., "Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies," *New England Journal of Medicine* (May 13, 2010).

III. PETITIONERS' INTERPRETATION OF THE "FIRST-TO-FILE" RULE FLOUTS THE PLAIN LANGUAGE AND INTENT OF THE FCA

Once a person has brought a sufficient FCA action, "no person other than the Government may intervene or bring a related action based on the same facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The Petitioners' far-reaching interpretation of the FCA flouts the plain language and intention of this statute.

The "meaning of a statute must, in the first instance, be sought in the language in which . . . [it] is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1916). Moreover, Congressional "intent may appear implicitly in the language or structure of the statute." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). It follows that "[a]ll laws are to be given a sensible construction; and a literal application of a statute, *which would lead to absurd consequences*, should be avoided whenever a reasonable application can be given to it, consistent with legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926) (emphasis added).

If Mr. Carter is precluded from bringing a subsequent suit, a precedent will be established wherein a wholly uninformed whistleblower could file a vexatious, frivolous, overbroad and all-

encompassing lawsuit. The government would be left as uninformed of the fraud as it was prior to the filing of the suit, and other well-informed whistleblowers would have no incentive or ability to come forward.

A. Once Dismissed Without Prejudice the Duprey And Texas Actions Were No Longer "Pending"

The voluntary dismissals of the Texas and Duprey claims, regardless of what induced those dismissals, mean, for purposes of the FCA, that they were, effectively, never filed. It is beyond dispute that voluntary dismissals, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), "completely terminate[d] the litigation, without further order by the district court." *Perkins v. Johnson*, 118 Fed.Appx. 824, 825 (5th Cir. 2004); *Long v. Bd. of Pardons and Paroles of Tex.*, 725 F.2d 306, 306 (5th Cir. 1984).

Moreover, "a voluntary dismissal without prejudice leaves the situation as if the action had never been filed. After a dismissal the action is no longer pending in the court and no further proceedings in the action are proper." *Id.*; *Long*, 725 F.2d at 306. Thus, "[a] suit that is voluntarily dismissed under Rule 41(a) generally is treated as if it had never been filed," *Nelson v. Napolitano,* 657 F.3d 586, 587-88 (7th Cir. 2011), and does not count as a pending action against the first-to-file rule. The Texas and Duprey actions, which were voluntarily dismissed by the

plaintiffs, have no effect on the status of Mr. Carter's action, as they are "treated as if [they] had never been filed." *Id.*[21]

B. Allowing Mr. Carter To Re-File Would Not Promote Frivolous Lawsuits

In order to *prevent* the filing of frivolous lawsuits, Mr. Carter must be allowed to re-file his lawsuit. While Petitioners and the Chamber of Commerce paradoxically argue that allowing such a suit would diminish the purpose of the first-to-file bar, just the opposite is true. The Chamber clumsily argues that the first-to-file bar was designed to create a "race to the courthouse," and encourage suits be brought forward quickly. In fact, the natural consequence of this would be to encourage frivolous, overbroad, all-encompassing lawsuits brought by plaintiffs without all of the facts, creating a circumstance where subsequent, more-substantiated claims would be precluded. The Chamber's interpretation would preclude the effectiveness of insiders to come forward with well-informed claims.

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[21] In light of the case law addressing the Federal Rules of Civil Procedure and dismissals without prejudice, it would be unreasonable to hold that Congress, during any of its legislation involving the FCA in the last thirty years, assumed that a dismissal without prejudice could meet its definition of "pending action. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)(.""Congress is understood to legislate against a background of common-law adjudicatory principles.").

C. § 3730 Is Not A "Notice" Pleading Statute

The FCA does not operate as simply a "notice" regime, but instead requires substantial evidence and information because Congress understood that claims brought under this statute would be the only means by which many acts of fraud would be perceived. Congress purposefully and carefully required that an action brought by a private person under FCA include a "complaint and written disclosure." 31 U.S.C. § 3730(b)(2).

Congress has, in the past, established notice-regime whistleblower laws. The Internal Revenue Service had a reward law in effect in 1986 which simply required the whistleblower to fill out a one page form, known as Form 211. 26 C.F.R. 301.7623-1(a). The theory behind this doctrine is that the information presented in Form 211 is sufficient to put the IRS on notice, at which point they can, after analyzing the information received from the whistleblower, either investigate the matter itself or assign it to the appropriate IRS office. Congress did not utilize a "notice" rule in crafting the FCA. Instead, Congress required whistleblowers to provide *detailed* notice through a mandatory "disclosure" statement *and* required whistleblowers to also file a valid and formal complaint in the appropriate U.S. District Court. Furthermore, Congress amended the IRS whistleblower statute in 2006 by providing for

mandatory whistleblower rewards. 26 U.S.C. § 7623 (1954), *amended by* 26 U.S.C. § 7623(b) (2006). However, Congress deliberately kept the statute as a notice regime, clearly differentiating the FCA's requirement of a complaint and written disclosure.

"Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991). In § 3730, Congress specifically required a "complaint and written disclosure." 31 U.S.C. § 3730(b)(2). While Congress merely called for the filling out of a form in § 7623, it required substantially greater pleading requirements in § 3730. To ignore these "specific provisions" of the statute is to "ignore[ ] the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Instead, "invocation of the . . . terms of the statute itself takes" into account the processes of compromise in Congress and, in the end, supports the "effectuation of congressional intent." *See Id.*

D. Section 3730(b)(5) Only Bars Subsequent Qui Tam Actions Arising From Interchangeable Facts

The plain meaning of the statute, along with the statutory intent, requires a finding that subsequent actions are only barred as against

previous claims based upon interchangeable facts. The FCA is intended to provide the government with a population full of "private attorney generals." *McKesson Corp.*, 649 F.3d at 330. As such, it is clear that Congress, in enacting the FCA in 1863, was concerned with securing information and alleviating all forms of fraud. Allowing for a broad definition of "related" would counteract this purpose by precluding claims that might inform the government of ongoing fraudulent activity.

Another stated goal is to prevent opportunistic and parasitic suits while encouraging citizens to act as whistleblowers. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 63 S. Ct. 379, 386, 87 L. Ed. 443 (1943) (Jackson, J., dissenting); *see also* False Claims Act Implementation: Hearing Before the Subcommittee on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (1986 amendment "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits") (statement of Sen. Grassley).

Consistent with the language and intent of the 1986 amendments, Justice Jackson emphasized in his dissenting opinion in *Hess* that parasitic cases are those brought when an informer literally brings a civil case using identical facts alleged in a criminal charge brought by the government. *Hess*, 317 U.S. at 547

(dissenting opinion by Justice Jackson). That fear does not apply when parties bring claims based upon unrelated facts, facts for which no other case is pending or claims that were not subject to a dismissal with prejudice.

Defining "facts underlying the pending action" as "interchangeable" facts *would preserve* the balance of the amendment's two competing goals. It would set a high bar for subsequent lawsuits, while preventing the parasitic suits. *See United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1154 (3d Cir. 1991).

IV. THE SANCTIONS PROVISION IN § 3730(d)(4) DISALLOWS THE USE OF THE "FIRST-TO-FILE" BAR AS A TOOL FOR POLICING FRIVOLOUS LAWSUITS

Proponents of the broad "first-to-file" bar argue that it is necessary to protect both businesses and the judicial system from burdensome frivolous claims. Such a fear only unsubstantiated and without merit. The FCA has a special provision designed by Congress to police frivolous or harassing lawsuits. 31 U.S.C. § 3730(d)(4). The language of this sanctions provision, paired with the demonstrated legislative intent and the way the provision has been successfully used in deterring and dismissing frivolous claims in the past, shows that it is the sole provision meant to police potentially frivolous claims.

The argument that affirming the Fourth Circuit's holding on the "first-to-file" issue would lead to recurring frivolous lawsuits is unpersuasive in light of § 3730(d)(4). This section was added into the FCA by Congress and authorizes sanctions against a plaintiff if a court finds that the plaintiff's claim is frivolous, vexatious, or was brought for the purposes of harassment. *Herbert v. National Academy of Sciences*, No. 90-2568, 1992 U.S. Dist. LEXIS 14063, at *1, *3 (D.D.C. Sept. 15, 1992). The section provides, in relevant part, that "if the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment." 31 U.S.C. § 3730(d)(4).

The sanctions provision's importance is twofold. First, it allows a private citizen to bring a qui tam action against an entity involved in fraudulent practices. Second, and more relevant to the purposes of this brief, it allows a prevailing defendant to be awarded reasonable attorneys' fees where it can be demonstrated that the relator has acted inappropriately, in the manner for which Congress decided was improper. This sanctioning authority is in addition to other tools

courts can use to sanction harassing lawsuits, such as Federal Rule of Civil Procedure 11.

The provision adequately and efficiently serves the legislative intent of the Act. It does not discourage whistleblowers from providing the government with a detailed disclosure statement regarding substantially all of the whistleblower's information related to the fraud, nor does it dissuade them from filing a confidential complaint. It does, however, discourage meritless and baseless claims. Thus, the government's interest in obtaining information about fraud is served, without risking overburdening the system with frivolous claims.

The act was clearly constructed in a particular way to fulfill its purpose of encouraging citizens with relevant information to aid the United States Government in rooting out fraud.

It is a cardinal principle of statutory construction that a document is read as a whole and each provision is given meaning, so that no provisions render others superfluous, void, or insignificant. *See Corley v. United States*, 556 U.S. 303 (2009). It is clear from the language of the statute, and from the legislative intent, that the purpose of § 3730(d)(4) is to prevent non-meritorious cases from being brought. As such, reading § 3730(b)(5) to do the same would effectively render § 3730(d)(4) superfluous and unnecessary.

Furthermore, the proposed redundant reading of § 3730(b)(5) to contain a restrictive first-to-file bar would result in absurd and dangerous results. A broad first-to-file bar would promote poorly or hastily filed claims under the FCA that lack the specificity for which Congress intended when it required *qui tam* plaintiffs to file a formal complaint in U.S. District Court that would have to conform to the Federal Rules of Civil Procedure, including Rule 11, as opposed to crafting a simple notice-filing law, such as existed within the IRS. *See United States ex rel. Gudur v. Deloitte & Touche*, 2008 WL 3244000 (5th Cir. Aug. 7, 2008) (case dismissed under Fed. R. Civ. P. 9(b) for not meeting fraud action pleading requirements). A first-to-file-bar would, in such a circumstance, create a situation where a wrongdoer is forever protected from the legal consequences of their actions, simply because a claim was improperly or hastily filed. Under Petitioners' theory, such a dismissal would impede and disincentivize valid whistleblowers, who possessed the detailed information for which Congress was attempting to encourage the filing thereof, from filing information with the government.

Not only could reading such a first-to-file-bar into § 3730(b)(5) lead to an absurd result, it would also materially alter the careful sanctions-framework constructed by Congress which balanced the need for the Justice Department to obtain reasonable notice of high quality

information with the need of defendants to obtain sanctions against plaintiffs who abused the law in the manner prohibited by Congress in § 3730(b)(5).

Under the current law, although there have been very few frivolous lawsuits filed, Courts have found filing claims based upon previously litigated events frivolous without relying on a first-to-file-bar. *See United States ex. rel. Pugach v. M&T Mortgage Corp*., 2008 U.S. Dist. Lexis 117231 (E.D.N.Y. July 3, 2008), dismissing claim under FCA on grounds of res judicata. While there are very few cases of such a "frivolous" nature, (presumably due to the fact that most people do not have the time or desire to file frivolous claims and, therefore, do not), the cases that do address the issue do it broadly enough so that the concern of frivolity is effectively covered by § 3730(d)(4). *See Herbert v. Nat'l Acad. of Scis.*, U.S. Dist. LEXIS 14063 (1992); 1992 WL 247587. *Cooper and Assoc. v. Bernard Hodes Group,* 422 F. Supp. 2d, 225 (D.D.C. 2006). *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 (9th Cir. 2002).

V. THE "FIRST-TO-FILE" BAR CANNOT OPERATE TO DISMISS A CLAIM UNLESS CONSENT IS OBTAINED PURSUANT TO § 3730(b)(1)

Notwithstanding all of the independently sufficient arguments detailed above, the case before this Court is also barred from being

dismissed under the § 3730(b)(1) dismissal bar. This section states that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. § 3730(b)(1). The language of the section could not be clearer, and unambiguously states that the Attorney General must consent for a *qui tam* action to be dismissed. *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1397 (9th Cir. 1992).

The Attorney General has effectively enforced the consent requirement in § 3730(b)(1) to combat actions taken by district courts and parties supporting a "defendants' desire to maximize preclusive effects." *Searcy v. Philips Electronics N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997). *Searcy*, involved the district court's dismissal of a *qui tam* claim as the result of a settlement agreement reached between the qui tam plaintiff and defendant. *Id.* at 155. The Attorney General objected to the dismissal based upon the Government's required consent in § 3730(b)(1), however, the district court overruled the objection. *Id.* On the Government's appeal to the Fifth Circuit, the court ruled that the Attorney General's consent was required to dismiss a *qui tam* case, thereby acknowledging the creation of the Attorney General's veto power in § 3730(b)(1). *Id.* at 160. In the case before this Court, a similar situation exists. Here, the defendants are seeking a dismissal of a *qui tam* claim without any consent by the Attorney

General, as required by statute. The case simply *cannot* be dismissed under § 3730(b)(5) when § 3730(b)(1) has not been satisfied.

Moreover, this is not a case where the application of the dismissal bar could infringe on the authority of the courts. Some disagreement exists as to whether the dismissal bar covers dismissals that are normally within the court's sole authority, such as some dismissals under Fed. R. Civ. P. 41(b). *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990). In the case at hand, however, dismissal is sought under the authority of § 3730(b)(5), the first-to-file protection. Therefore, applying the § 3730(b)(1) dismissal bar here does not interfere with the court's authority, but rather it is an acknowledgement that where a dismissal is sought under the authority of specific provisions within the FCA, the dismissal must comply with sections of the FCA that specifically govern dismissals.

This case does not raise any separation of power issues since dismissal is sought under the authority of § 3730(b)(5). The dismissal bar ensures recognition that the Government is a "real party in interest" in all *qui tam* suits. *United States ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930, 129 S. Ct. 2230, 2232, 173 L. Ed. 2d 1255 (2009). It is clear that the Attorney General has an important role in determining whether a *qui tam* suit should be dismissed or if it violates first-to-file protections.

Congress did not intend for defendants to use § 3730(b)(5) as a sword.

VI. THE LEGISLATIVE HISTORY SUPPORTS THE HOLDING OF THE FOURTH CIRCUIT

Petitioners urge this Court to adopt an interpretation of § 3730(b)(5) that bars all claims related to the underlying facts once an initial suit is filed. The Petitioners' view is focused on the position that the Government is put on notice by the initial filing, and ignores the fact that the intent of the *qui tam* provisions in the FCA is remedial in nature. However, § 3730(e)(2) requires that relators serve the Government with a "copy of the complaint and a written disclosure of substantially all material facts and information the person possesses." This provision demands far more than simple notice to the government.

The 1986 amendments were designed not just to provide notice to the government of a fraud, but to induce whistleblowers to provide detailed information of substantially all their original information that would permit the plaintiffs to pursue the fraud "if the government fails to adequately pursue the individual's allegations of false claims." This provision in the law was drafted recognizing the reality that "the often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in

a timely matter." S. Rep. no. 345, 99th Cong., 2d Sess., 26 (1986).

The "Committee's overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess., 23-24 (1986). The legislative history makes clear that the interest of Congress in enacting § 3730(b)(5) was to enable the U.S. Government to intervene in *qui tam* suits and to prohibit multiple parties from separately filing the same cause of action concurrently. The Senate Report asserts that, although "there are few known instances of multiple parties intervening in past *qui tam* cases," "the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on *identical facts and circumstances*." S. Rep. no. 345, 99th Cong., 2d Sess., 25 (1986) (emphasis added).

Under the FCA, the primary goal sought by Congress was to encourage plaintiffs to bring forth actions. The Act arose "from a realization that the Government needs help--lots of help--to adequately protect the taxpayer funds from growing and increasingly sophisticated fraud." Remarks by Senator Grassley, 132 Cong. Rec. 28580, Oct. 3, 1986. At the same time, Congress sought to enable the Government (and only the Government) to intervene and to prohibit additional parties from concurrently bringing

forth the same causes of action. Thus, as Senator Grassley remarked when discussing agreed upon changes by the House and Senate to the False Claims Amendments Act of 1986, "[t]he expanded qui tam provisions serve to establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud[.]" Remarks by Senator Grassley, 132 Cong. Rec. 28580, Oct. 3, 1986. While the "role of the qui tam plaintiff was expanded to allow participation as a party to the action," "the court is granted greater discretion to impose limitations in certain circumstances on the participation of the qui tam plaintiff[.]" Id.

Even if for some reason Congress did include a perpetual first-to-file protection, the case before the court would not fall within the scope of the first-to-file protection because it is not a "related action based on the facts underlying" any other relator action alleging false claims under the FCA. The Congressional report states that first-to-file rule protects the plaintiff against "separate suits based on identical facts and circumstances." This protects quality informers who bring quality actions against specific false claims where "[e]ach separate bill, voucher or other 'false payment demand' constitutes a separate claim." Sen. Rep. at 7 (citing *United States v. Bornstein*, 423 U.S. 303 (1976) and *United States v. Collyer Insulated Wire Co.*, 84 F. Supp. 493 (D.R.I. 1950)).

CONCLUSION

The judgment of the Fourth Circuit below should be affirmed.

Respectfully submitted,

/s/

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