No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

Stephen M. Kohn
Counsel of Record
Michael D. Kohn
David K. Colapinto
Kohn, Kohn & Colapinto, LLP
3233 P St., NW
Washington, DC 20007
(202) 342-6980
sk@kkc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Founded in 1988, the National Whistleblower Center ("NWC") is a nonprofit, tax-exempt organization dedicated to the protection of employees who lawfully report illegal conduct.[1] *See* www.whistleblowers.org. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject.

The NWC has participated before this Court as *amicus curiae* in *English v. General Elec.*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House*, *Inc.*, 534 U.S. 279 (2002); *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); *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015); *Universal Health Svcs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016); and

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk.

Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).

The NWC has long-standing experience advocating on behalf of *qui tam* whistleblowers. The NWC's work has firmly established that the merits of a claim often bear no relation to the duration of a case. One of many examples which illustrates this point is the *qui tam* case of Dr. Aaron Westrick. *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., et al.,* No. 04-0280 (D.D.C. July 25, 2018). With the support of the NWC, Dr. Westrick shared vital information with the government regarding the sale of defective body armor to the police and military. His *qui tam* case was filed on February 20, 2004 and a final settlement was not reached until 14 year later, on July 25, 2018. However, the merits of the case and its contributions to public health and safety are unquestionable. Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests (Mar. 15, 2018), https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet. The importance of the False Claims Act ("FCA"), even in cases that take an extended period of time to resolve, was well summarized by then Senate Judiciary Chairman Sen. Grassley: "Because of whistleblowers like Dr. Westrick, the False Claims Act is the most effective tool we have to fight government fraud." Sen. Charles Grassley, Chairman, Sen. Jud.

Comm., Keynote Address at National Whistleblower Appreciation Day (July 30, 2018) (transcript and video available at https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude).

SUMMARY OF THE ARGUMENT

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible government official's knowledge of the alleged false claim. This Court should affirm the holding of the U.S. Court of Appeals for the Eleventh Circuit.

The statute of limitations in the FCA is clearly set forth in the law. It would be inappropriate for the Court to weigh in on the issue given the plain language of the statute and the clear expressions of Congressional intent regarding a broad interpretation of the law.

The Chamber Amici[2] strenuously argued that the delays caused by a 10-year statute of

[2] The "Chamber Amici" refers to the following organizations that joined in one amicus brief: U.S. Chamber of Congress, Pharmaceutical Research and Manufacturers

limitations in non-intervened cases cause hardship to defendants. They justified this argument with a statistical analysis of 2,086 non-intervened cases litigated between 2004 and 2013. Brief for the Chamber Amici, p. 16. However, the statistics relied upon by the Chamber Amici are flawed and inaccurate, resulting in a gross exaggeration of the alleged problems that would purportedly result from the Court upholding the 10-year limitations period. The degree to which their analysis is inaccurate renders their arguments into mere assertions, unsupported by the data that they cite. This Court should not rely upon the Chamber Amici's statistics for any purpose, and likewise reject the policy arguments the Chamber Amici allege the data supports.

Moreover, the False Claims Act is incredibly beneficial for both the public and private sectors. The Act's important role in government is highlighted by the bi-partisan support it receives from both members of Congress and Department of Justice officials, who have stressed that the FCA is essential to protecting the public fisc and rooting out corruption. For the private sector, the Act is

---

of America, the National Association of Manufacturers, and the National Defense Industrial Association. *See* Brief for the Chamber of Commerce et al., as Amici Curiae Supporting Petitioners, *Cochise Consultancy, Inc., et al., Petitioners v. U.S., ex rel. Billy Joe Hunt*, No. No. 18-315 (U.S. Jan. 9, 2019) (hereinafter, "Brief for the Chamber Amici").

indispensable because it keeps dishonest companies from obtaining unfair advantages over other businesses, which would prevent them from freely competing in the marketplace.

Finally, Congress did not intend the statute of limitations to be the primary method of motivating the expeditious filing of FCA complaints. Instead, the first-to-file bar is a much stronger incentive that guarantees interested relators and their attorneys file their complaints as soon as possible. As a uniquely harsh provision, the first-to-file bar ensures expeditious filing much more efficiently than the statute of limitations.

The judgment below should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 31 U.S.C. § 3731(b) AFFIRMS THE ELEVENTH CIRCUIT'S HOLDING.

The relevant provision of the FCA in the instant case is 31 U.S.C. § 3731(b)(2), which provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or

> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

A plain reading of this provision grants relators the same deadlines under the statute of limitations as the United States and entitles relators to file a "civil action under section 3730" within the 10-year time period set forth in 31 U.S.C. § 3731(b)(2). This Court has stated that, "[i]n determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning.'" *Moskal v. U.S.*, 498 U.S. 103, 108 (1990).

The efforts of Petitioner and the Chamber Amici to distort the statute should be viewed with the same skepticism that the Court has applied in the past to previous efforts of statutory misinterpretation. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) ("This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive."). 31 U.S.C. § 3731(b)(2) read plainly has only one reasonable meaning. *Caminetti v. U.S.,* 242 U.S. 470, 485 (1917) (citation omitted) ("Where the language is

plain and admits of no more than one meaning the duty of interpretation does not arise."). The language clearly states that the ten-year statute of limitations applies equally to both relators and government officials and to any civil action brought under section 3730.

II. THE PLAIN MEANING OF THE 10-YEAR STATUTE OF LIMITATIONS IS CONSISTENT WITH THE POLICY DECISIONS OF CONGRESS WHEN AMENDING THE FCA AFTER 1986 TO EXPAND AND STRENGTHEN THE RIGHTS OF RELATORS TO BRING CIVIL ACTIONS UNDER THE FCA.

The length of the statute of limitations for any particular statute is a policy-based determination properly decided by the Legislature. Petitioner is asking this Court to inappropriately reduce the filing period for relators, when they ought to take their qualms to to Congress. The Petitioner, the Chamber Amici and other organizations supporting the Petitioner as amici curie have failed to do so because members of Congress and Department of Justice officials (who have extensive experience litigating FCA claims) strongly endorse a broad reading of the law. Moreover, although the law has been amended several times since 1986, providing numerous opportunities to Congressional members to limit the statute, the Legislature has repeatedly decided not to shorten the statute of limitations.

Instead of amending the law to reduce the ability of relators to file cases, Congress has consistently *expanded* the ability of relators to file claims. *See* Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (expanding the statute of limitations for filing retaliation cases in most states); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (expanding coverage to apply to the Affordable Care Act); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (expanding the scope of liability of those who receive government funds).

The support for the FCA by members of Congress and the DOJ is universal. For example, in 2009 Congress passed numerous amendments to the FCA as part of the Fraud Enforcement and Recovery Act ("FERA"). The Senate Report on FERA, which was unanimously approved by the Committee on the Judiciary, explained:

> FERA improves **one of the most potent civil tools for rooting out waste and fraud in Government—the False Claims Act** (18 U.S.C. § 3729 *et seq*.). The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law .... The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds

> expended in response to our current economic crisis."

Sen. Jud. Comm. Rep., "Fraud Enforcement and Recovery Act," March 23, 2009, S. Rep. 111-10, p. 4 (emphasis added).

The Senate Report further explained:

> One of the **most successful tools** for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an **extraordinary civil enforcement tool** used to recover funds lost to fraud and abuse.

Id. at 10 (emphasis added).

The Congressional Budget Office confirmed that the FERA amendments were designed to *encourage* the filing of *additiona*l FCA cases by *qui tam* relators: "CBO estimates that the provisions relating to the FCA would, on net, increase civil fines and recoveries collected by the federal government because it would likely lead to the initiation of additional claims under FCA. S. 386 also could increase collections of civil and criminal fines for violations of the bill's other provisions." *Id. at* 17.

Senator Charles Grassley, former chair of the Senate Judiciary Committee and an original sponsor of the FCA, is one of the most qualified individuals to speak about the benefits of the

FCA, given his familiarity with the law over the past 33 years. Senator Grassley has continuously voiced his support for the law, recently praising the use of the FCA in the case of Dr. Aaron Westrick, despite the fact that the case took over 14-years to litigate. As explained by Senator Grassley, Dr. Aaron Westrick helped the government recover more than $67 million in lost funds and protected law enforcement personnel from the risk caused by defective body armor:

> Because of whistleblowers like Dr. Westrick, the False Claims Act is the most effective tool we have to fight government fraud. Opponents of the False Claims Act are often skeptical about its reward provisions. They assume whistleblowers are motivated by self-interest or greed, and the rewards just encourage bad behavior. But the reward programs are not about what whistleblowers gain by blowing the whistle. They're about everything the whistleblowers stand to lose ... The truth is that whistleblowers are so ostracized and reviled, they suffer retaliation for speaking up. In a lot of cases it costs them their livelihood and their reputations. And if they get fired, they can't just go out and get another job, because they've been blacklisted. So they incur huge legal costs at the same time they lose their income, maybe for a long time.

Sen. Charles Grassley, Chairman, Sen. Jud. Comm., Keynote Address at National Whistleblower Appreciation Day (July 30, 2018) (transcript and video available at https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude).

When discussing the settlement reached in the same *Westrick* FCA case, former Attorney General of the Department of Justice Jeff Sessions, said:

> Bulletproof vests are sometimes what stands between a police officer and death ... Selling material for these vests that one knows to be defective is dishonest and risks the lives of the men and women who serve to protect us. The Department of Justice is committed to the protection of our law enforcement officers, and today's resolution sends another clear message that we will not tolerate those who put our first responders in harm's way.

Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests, https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet.

The FCA has received strong bi-partisan support. Not only did President Trump's former Attorney General praise the FCA in the Westrick case, the former Obama Administration Attorney General Eric Holder said of the act:

> [T]he False Claims Act has provided 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.

Former Att'y Gen. Eric Holder, Address at the 25th Anniversary of the False Claims Act Amendments of 1986 (Jan. 31, 2012) (transcript available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986).

In testimony before the Senate Judiciary Committee, Michael Hertz, the Deputy Assistant

Attorney General of the Civil Division of the Department of Justice, explained that the FCA has had a tremendously successful deterrent effect:

> In the wake of well-publicized recoveries attributable to the *qui tam* cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the `watchdog' effect of the qui tam statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.

Sen. Jud. Comm. Rep., "The False Claims Act Correction Act Of 2008," Sept. 25, 2008, S. Rep. 110-507, p. 8.

The testimony and public comments of these officials are objectively supported by the available data concerning FCA recoveries. For example, in the 2017 fiscal year, the U.S. government recovered over $3.7 billion through its civil fraud program. Press Release, Department of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017. Of this amount, whistleblowers were directly responsible for the detection and reporting of over $3.4 billion, or 91.8% of all civil fraud recovered under *qui tam*

provisions. *Id.* Deputy Associate Attorney General Stephen Cox explained:

> The False Claims Act is our most important civil enforcement tool to protect the taxpayer from fraud, and using this tool effectively is very important to this Administration and our Department of Justice.
>
> This past fiscal year, the Department recovered more than $3.4 billion for the Treasury using the False Claims Act. Since the 1986 amendments, the Department has recovered a total of $56 billion. These cases are not only about protecting the public fisc through financial recoveries. There are victims of fraud other than the taxpayer, and the False Claims Act protects these potential victims by deterring bad actors. When a company falsely certifies the quality of military equipment, it sends our brave men and women into harm's way with less protection. When medical providers submit false claims to Medicare, they often fail to provide adequate medical care to their patients. Kick-back schemes not only defraud the government, they also drive up consumer costs, undermine competition, and may distort independent medical decision-making.

Dep. Assoc. Att'y. Gen., Stephen Cox, Address at Federal Bar Association Qui Tam Conference (Feb. 28, 2018) (transcript available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association).

Stephen Cox also emphasized the important role of relators in False Claims Act,

> As we all know, the success of the False Claims Act is due in large part to the partnership between the federal government and whistleblowers. Since 1986, nearly 70% of all False Claims Act recoveries can be attributed to qui tam matters. And of the recoveries last year, more than $3 billion was recovered in qui tam cases.

Id.

Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division noted the importance of encouraging relators to file *qui tam* lawsuits:

> Whistleblowers have played a vital role in unmasking fraudulent schemes that might otherwise evade detection ... The taxpayers owe a debt of gratitude to those who often put much on the line to expose such schemes.

Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests (Dec. 21, 2018), https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet.

It is little wonder why Petitioner and their supporting amici have foregone attempts to convince Congress to roll-back provisions of the FCA and are instead urging this Court to enter a policy debate that they have already lost in Congress and the court of public opinion.

III. THE STATISTICAL ANALYSIS IN THE CHAMBER AMICI BRIEF IS FLAWED AND CANNOT BE RELIED UPON.

The Chamber Amici relies upon flawed and misleading statistics to justify their policy position that the Court should misconstrue the FCA and limit the scope of the ten-year statute of limitations. The Chamber Amici cites statistics based upon an excel spreadsheet of FCA cases, previously cited by the Chamber in their amici brief filed in *Gilead Scis., Inc. v. U.S. ex rel. Campie*. *See* Brief for the Chamber of Commerce et al. as Amici Curiae Supporting Petitioners at 13, *Gilead Scis., Inc. v. U.S. ex rel. Campie*, 138 S. Ct. 1585 (2018) (No. 17-936); Brief for the Chamber Amici at 16. The Chamber Amici argue the spreadsheet demonstrates that a large percentage of relators purse non-meritorious

cases three or more years after the United States already declined to intervene, inflicting hardship upon defendants in FCA cases through litigation costs.

The Chamber Amici stated the following in their brief:

> More broadly, False Claims Act litigation is time consuming and costly. False Claims Act actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. They also frequently last a long time. As the Chamber has noted in another recently filed amici brief before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Chamber of Commerce of the United States of America et al. Amici Br. 13, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Id.

The statistical analysis referenced above is flawed, misleading and inaccurate. The NWC reviewed the excel spreadsheet relied upon by the Chamber Amici by utilizing PACER[3] to download docket sheets and other court documents from the cited cases. In contrast to the spreadsheet cited by the Chamber Amici, the data derived from publicly available docket sheets demonstrate an accurate picture of the duration of the cited cases. The review firmly establishes that the spreadsheet relied upon by the Chamber Amici was materially flawed and should not have been presented to this Court.

The NWC reviewed the Electronic Case File of each case cited by the Chamber Amici to determine the actual number of cases that took place between 2004 and 2013, resulted in zero recovery, and lasted over 1,095 days (*i.e.* 3-years), from the date of the Justice Department's declination of intervention, to the date of the ultimate dismissal of the case.

According to the court records available on PACER, at least 112 of the cases between 2004 and 2013 which the spreadsheet indicated went

---

[3] "PACER" stands for Public Access to Court Electronic Records of the U.S. Courts and it is "an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator." *See* https://www.pacer.gov.

over the 3-year period, in fact were dismissed prior to the marker. The Chamber Amici's statistics were almost 50% inaccurate based on a review of this one indicator alone. A copy of the Electronic Case File Docket Sheets for these 112 cases were printed by the counsel for the NWC and are available at - https://www.kkc.com/assets/site_18/files/fca/date-discrepancy-court-files-toc.pdf.

Moreover, in reviewing the cases which the spreadsheet cited by the Chamber Amici indicated resulted in zero recovery, the docket sheets and other court documents located in PACER actually show that some of these cases did in fact result in recoveries for the United States and/or state governments. The NWC's review identified no less than 6 such cases. A copy of the Electronic Case File Docket Sheets for these 6 cases were printed by counsel for the NWC and are available at https://www.kkc.com/assets/site_18/files/fca/Recovery-Court-Files-TOC.pdf.

Furthermore, the data demonstrates that the duration-based argument raised by the Chamber Amici is analytically flawed. The reasons that some cited cases extended beyond the three-year threshold set by the Chamber Amici often had nothing to do with the merits of a case and would not have been cured by shortening the statute of limitations. For example, in *U.S. ex rel. Bane v. Breathe Easy Pulmonary Servs.*, the case ran long in part

because the *Defendant* requested or stipulated to multiple extensions of time, undercutting the argument that the length of time these cases may take prejudices the defense. *U.S. ex rel. Bane v. Breathe Easy Pulmonary Servs.,* 597 F. Supp. 2d 1280 (M.D. Fla Jan 23, 2009). A copy of the Electronic Case File Docket Sheets for this case was printed by counsel for the NWC and is available at https://www.kkc.com/assets/site_18/files/fca/example-court-files-toc.pdf. It is illogical to assert that a company would request or consent to at least thirteen extensions, stays, and a mediation postponement, if they were being prejudiced by those very delays. Regardless, the fact that there were multiple extensions of time stipulated to by the parties does not support a policy argument for shortening the statute of limitations to bar filing a suit.

Likewise, the docket sheets show that other intervening factors in cases caused delay, such as a stay of proceedings due to bankruptcy such as in *U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc. U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc.*, No. 1:09-cv-00137-SPM-GRJ, 2012 U.S. A copy of the Electronic Case File Docket Sheets for this case was printed by counsel for the NWC and is available at https://www.kkc.com/assets/site_18/files/fca/example-court-files-toc.pdf.

Finally, even if one accepts the Chamber Amici's analysis on its face, the resulting

numbers mean that 87% of FCA cases between 2004 and 2013 did not extend for more than 3 years when the government declined to intervene and resulted in zero recovery. It would also mean that 95% of FCA cases between 2004 and 2013 did not extend for more than 5 years after the government declined to intervene and resulted in zero recovery.

IV. THE FIRST TO FILE PROVISION RENDERS THE CHAMBER AMICI'S ARGUMENTS IRRELEVANT.

Congress did not intend for the statute of limitations provision of the FCA to be the primary tool driving the expeditious filing of *qui tam* lawsuits. The FCA has a "first-to-file" bar,[4] thus unlike other laws where a party can wait until the statute of limitations is almost over in order to file a case, the first-to-file bar negates this approach.

If a relator delays in filing a claim, his or her case may be dismissed *not* under a statute of limitations analysis, but under the "first-to-file" bar. To illustrate, if a relator waits until the statute of limitations is about to expire before filing a claim, another whistleblower may have

---

[4] In *KBR v. U.S. ex rel Carter,* 135 S.Ct. 1970, 1978 (2015), this Court explained the "first-to-file" rule that governs all *qui tam* cases: "The first-to-file bar provides that '[w]hen a person brings an action ... 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)."

already filed a similar claim, and consequently the tardy whistleblower's claim would be dismissed, even if it was filed within the limitations period. The FCA was built with a major incentive encouraging relators to file claims well before the statute of limitations expires.

The first-to-file rule is harsh and unique. It promotes the expeditious filing of claims because any delay risks the dismissal of a claim, not under a statute of limitations analysis, but under the first-to-file bar.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

Respectfully Submitted,

Stephen M. Kohn
Counsel of Record
Michael D. Kohn
David K. Colapinto
Kohn, Kohn and Colapinto, LLP
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980
sk@kkc.com