No. 15-1309

In the Supreme Court of the United States

PHARMERICA CORPORATION,

Petitioner,

v.

UNITED STATES EX REL. ROBERT GADBOIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

At bottom, respondent's brief in opposition confirms the need for this Court's immediate review of an important, frequently-recurring question on which the federal courts of appeals are divided. Respondent pays scant attention to the statutory language, brushes aside an undeniably entrenched circuit conflict, offers a mélange of supposed policy objectives that Congress did not enact in the FCA, and contends that additional district courts are allowing such statutorily-barred suits to proceed. These factors strongly support this Court's review and reversal of the First Circuit decision in this case.

The issue presented is whether a follow-on relator can circumvent the first-to-file bar by bringing an otherwise prohibited *qui tam* action and waiting until the first-filed case is inevitably resolved. In his opposition brief ("Opp."), respondent Gadbois recasts this question as a simple matter of curing a "defect in his original pleading" by "supplementing" his complaint. Opp. 1. Having ignored the issue, he argues that the court of appeals addressed a matter of first impression on which, in his view, the circuits are not split. *Id*. The language of his complaint is not Gadbois's actual problem, however, nor is it at issue here. Gadbois's problem is that the plain text of the first-to-file bar prohibited him from "bringing a related action" when a prior case was pending, which is precisely what he did — and precisely what the district court found. 31 U.S.C. § 3730(b)(5); *see also* Pet. App. 18-39. Under the unambiguous words of the statute, the only correct step for the court of appeals would have been to affirm the dismissal of Gadbois's related, second-filed action. That result would have

obtained in the Fourth, Seventh, and Tenth Circuits. In the mistaken view of the First Circuit, however, the case is remanded for the district court to consider an amended complaint alleging that the first-filed case has ended. But no amendment can change the fact that the complaint Gadbois filed in 2010 — the operative pleading in this case — was related to the case pending in Wisconsin; and Gadbois's brief in opposition says nothing about how his complaint would change if he were allowed to amend. By disregarding the dispositive fact that his suit was plainly barred when it was brought, as the First Circuit did, allows follow-on relators to file placeholder suits that secures their spot in line and avoids the application of the statute of limitations. For just that reason, the decision below is wrong as a matter of statutory construction and wrong as a matter of sound judicial administration. This Court should grant review and reverse.

I. CONGRESS HAD GOOD REASONS TO BAR FOLLOW-ON *QUI TAM* ACTIONS.

Gadbois asks why Congress would have wanted to bar any potential claim that might accrue to the benefit of the government. Opp. 1, 9. The answer is simple: to prevent follow-on relators from squandering the resources of the judicial system, the Government, and defendants. For the sake of the proper administration of justice, Congress limited *qui tam* claims in several ways. These included a limitations period in the False Claims Act ("FCA") which bars claims that might otherwise accrue to the benefit of the Government (31 U.S.C § 3731); a bar against claims identified by a prior public disclosure

(31 U.S.C. § 3730(e)(4)); and a bar against claims, such as Gadbois's, that were not first-filed (31 U.S.C. § 3730(b)(5)). By allowing relators to bring suits barred by the first-to-file rule and wait—in this case, for five years—until the first-filed action is resolved, the First Circuit's decision rewards relators who violated the first-filed bar by allowing them also to evade the FCA's statute of limitations. Both of these important provisions are necessary to the fair and efficient resolution of *qui tam* cases. The First Circuit decision is wholly incompatible with the determinations Congress made and enacted into law.

II. COURTS OF APPEALS ARE DIVIDED ON HOW TO APPLY THE FIRST-TO-FILE RULE.

As the petition explained, there is a stark and incontrovertible split among the circuits that warrants this Court's review. The Fourth, Seventh, and Tenth Circuits have all ruled that courts applying the first-to-file bar must look to the time that the second action was filed in deciding whether it was brought when a related action was pending. Pet. 12-15. This clear-cut rule follows the statutory mandate; the subsequent resolution of a first-filed action does not breathe life into a follow-on case that was barred when it was brought. *Id*. The First Circuit, in contrast, deviated from this rule by allowing Gadbois's lawsuit to continue simply because the first-filed case happened to be resolved during the pendency of his appeal. *Id*. 9-10. Under the First Circuit's rule, district courts would stay second-filed cases awaiting the inevitable resolution of first-filed cases. *See United States ex rel. Chovanec v. Apria Healthcare Grp. Inc*., 606 F.3d 361, 362-65 (7th Cir. 2010) (Easterbrook, J.);

Br. of Amicus Curiae New England Foundation in Supp. of Petitioner at 12-13 (May 26, 2016).

III. GADBOIS'S POSITION IS NOT GROUNDED IN THE TERMS OF THE STATUTE. THE CASES ON WHICH HE RELIES SHOW THE EXTENT OF DISAGREEMENT AMONG COURTS.

Gadbois admits, as he must, that the FCA forbids a follow-on relator from bringing a related action based on facts underlying the already pending action. Opp. 2. Nonetheless, he strains to argue that having violated this clear-cut prohibition, a follow-on relator should nonetheless retain the advantage of having done so. There is no merit to Gadbois's contention — made without any statutory support whatsoever — that the word "action" in the first-to-file bar should be read to mean "claim" or "complaint." Opp. 2, 14. The first-to-file bar does not speak of claims or complaints, and the law draws a clear distinction between an action itself and the complaint asserting claims within that action. *See, e.g.*, Fed. R. Civ. P. 3 ("A civil *action* is commenced by the filing of a *complaint* with the court." (emphasis added)). As the Seventh Circuit explained, "[o]ne 'brings' an action [under the FCA] by commencing suit. . . . Statutes of this form are understood to forbid the commencement of a suit." *Chovanec*, 606 F.3d at 362.

Gadbois's only stated support for his peculiar reading of the word "action" is a hypothetical scenario in which a relator files suit and, shortly thereafter, amends the complaint to add allegations prohibited by the first-to-file bar. Opp. 14. In *Chovanec,* Judge Easterbrook anticipated this very hypothetical,

explaining that the first-to-file bar prevents a relator not only from commencing a follow-on action, but also from commencing a new follow-on claim "within a larger action." 606 F.3d at 362. Contrary to Gadbois's suggestion, nothing in *Chovanec* supports his arguments or the First Circuit's ruling. Opp. 14. To the contrary, *Chovanec* flatly states that the "current *proceeding* should have been dismissed with prejudice" despite the fact that the first-filed action was no longer pending at the time. 606 F.3d at 365 (emphasis added). The Seventh Circuit's ruling is completely compatible with this Court's later decision in *Carter*, which affirmed the dismissal with prejudice of a follow-on action despite the fact that the first-filed case was no longer pending. *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 575 U.S. ---, 135 S.Ct. 1970, 1973 (2015).

Nor is there any merit to Gadbois's reliance on the dubious subsequent history of the *Chovanec* litigation, namely, the district court's inexplicable failure to heed the Seventh Circuit's clear command to dismiss the "current proceeding" without prejudice. Instead, the Northern District of Illinois granted Chovanec's two-page motion to file an amended complaint after having received no opposition brief. *See* Relator/Plaintiff's Motion for Leave to File Amended Complaint, No. 04-cv-04543*, United States ex rel. Chovanec v. Apria Healthcare Grp., Inc.* (N.D. Ill. Aug. 18, 2010). The district court in *Chovanec* provided no analysis to explain or justify a ruling that is plainly incompatible with the Seventh Circuit decision. *See* Docket Entry Granting Motion to Amend, No. 04-cv-04543*, United States ex rel. Chovanec v. Apria Healthcare Grp., Inc.* (N.D. Ill. Aug. 25, 2010). And, in fact, the case settled before an

amended complaint was ever filed. *See* Docket, No. 04-cv-04543*, United States ex rel. Chovanec v. Apria Healthcare Grp., Inc*. (N.D. Ill.). For present purposes, the significance of the latest district court order in *Chovanec* is that it highlights even more emphatically the need for this Court's immediate review. Because lower courts are acting in a way that is contrary to the clearly-stated statutory bar, this Court's guidance is necessary.

Indeed, Gadbois identifies three other recent district court decisions that, like the First Circuit, allowed actions once barred by the first-to-file rule to continue after the first-filed action was no longer pending. Opp. 10-11 (citing *United States ex rel. Boise v. Cephalon, Inc.,* No. 08-287, 2016 WL 398014, at *5 (E.D. Pa. Feb. 2, 2016); *United States ex rel. Kurnik v. PharMerica Corp*., No. 3:11-cv-01464, 2015 WL 1524402, at *6 (D.S.C. Apr. 2, 2015); *United States ex rel. Palmieri v. Alpharma, Inc*., 928 F. Supp. 2d 840, 852 (D. Md. 2013)). These cases are diametrically opposed to the recent decisions of other district courts that have dismissed follow-on *qui tam* cases without prejudice despite the resolution of the first-filed action. *United States ex rel. Carter v. Halliburton Co*., No. 11-CV-0602, 2015 WL 7012542, at *13 (E.D. Va. Nov. 12, 2015); *United States ex rel. Shea v. Verizon Commc'ns, Inc*., No. 09-1050, 2015 WL 7769624, at *11 (D.D.C. Oct. 6, 2015). Together, these decisions show that this is a frequently recurring issue on which courts are sharply divided.

The district court cases on which Gadbois relies, like the First Circuit below, fail to address the statute of limitations consequences of allowing relators to avoid the dismissal required by the first-to-

file bar and the practical problems that follow from such placeholder suits. These decisions incorrectly treat the question of whether to dismiss without prejudice or simply to allow a relator to proceed with a once-barred suit as a distinction without a difference. *See Palmieri,* 928 F. Supp. 2d at 851 ("If the Court were to dismiss the Amended Complaint, it would do so without prejudice, and the first-to-file rule would not preclude Mr. Palmieri from filing an identical pleading under a new case number tomorrow . . . . It would elevate form over substance to dismiss the Amended Complaint on first-to-file grounds at this juncture."); *Kurnik*, 2015 WL 1524402, at *6 ("If this Court were to dismiss Kurnik's kickback claims, it would do so without prejudice, and the FCA first-to-file rule would not preclude Kurnik from filing an identical pleading under a new case number tomorrow . . . ."") (case settled; no appeal); *Boise,* 2016 WL 398014, at *5 (expressly deferring consideration of the statute of limitations implications while refusing to dismiss without prejudice).

But "filing a new operative complaint" is hardly the same as bringing a new action. The critical difference, of course, is that an amended complaint relates back to the date on which the initial complaint was filed. To allow amendment rather than dismissing without prejudice converts the FCA's express "one-at-a-time" rule into a "first-in-line" rule in which multiple relators are allowed to maintain simultaneous, related *qui tam* actions while they await the resolution of the earlier-filed action or actions. In enacting a provision barring follow-on suits, Congress cannot have intended to encourage them.

Gadbois's reliance on this Court's decision in *Rockwell International* is altogether misplaced. Opp. 12. That case addressed the public disclosure bar, not the first-to-file bar. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007). Unlike the first-to-file bar, the public disclosure bar does not contain a prohibition on a relator "bring[ing]" a suit. Further, *Rockwell International* dealt primarily with the relator's effort to claim original source status by filing a narrow complaint, later amended to allege more substantial claims drawn from the public record. *Id.* at 466, 473-76. That circumstance is far removed from the concerns here.

IV. THE PUBLIC DISCLOSURE BAR DOES NOT PREVENT MANY FOLLOW-ON SUITS.

There is no merit to respondent's contention that the "public disclosure bar" would adequately protect against follow-on suits. Opp. 3. In reality, the public disclosure bar is not triggered by cases under seal (which the FCA requires for all *qui tam* cases), and it is common for *qui tam* cases to remain under seal for years. 31 U.S.C. § 3730(b)(2)-(3); *see, e.g.*, *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 929-30 (10th Cir. 2005) (observing that the relators' complaint remained under seal for more than two years while the Government conducted its investigation). For this reason, the public disclosure bar is insufficient to prevent follow-on relators from filing placeholder suits and simply waiting until the first-filed action ends.

V. THE GOVERNMENT HAS ALREADY ASSESSED AND PASSED OVER THE TIME-BARRED CLAIMS THAT GADBOIS SEEKS TO PURSUE.

Gadbois is plainly incorrect in stating that the relator in *Denk* did not make allegations regarding the improper dispensing of both controlled and non-controlled medications. *Compare* Opp. 6 ("There were no claims in that [*Denk*] proceeding based on PharMerica's dispensing of non-controlled medication for which no prescription has been supplied at the pharmacy."), *with* Denk's Complaint (JA 154-55, ¶¶ 79-82) (specifically alleging that non-controlled medications Seroquel, Coumadin, Ciprofloxacin, Metformin, Calcitriol were dispensed without prescriptions). Indeed, the Denk Complaint alleged numerous instances of the wrongful dispensing of non-controlled medications, claiming, for example, that "PharMerica billed the United States for Seroquel 50mg on behalf of a Sheridan facility patient K.D., who had no such prescription." JA 154, ¶ 80(a). This allegation is repeated almost verbatim in Gadbois's Complaint, which alleges that "an order for Seroquel 100 mg. tablets . . . [was] billed to Medicaid for patient 'BD.'" JA 53, ¶ 119. As the District of Rhode Island correctly concluded, "[o]nce Denk alerted the government . . . to the essential facts of the fraudulent scheme allegedly perpetrated by PharMerica, the government had enough information to discover related frauds." Pet. App. 38 (internal quotations and parentheticals omitted).

The Government, having received notice that PharMerica was allegedly dispensing *both controlled and non-controlled medications* without legally valid

prescriptions, conducted an investigation lasting over three years, intervened in *Denk*, and ultimately decided to pursue certain claims related to controlled medications only. JA 214-49. That the Government decided not to pursue claims regarding non-controlled medications suggests something about the weakness of such claims, but it does not change the fact that they were undeniably part of *Denk*. "The identification of a 'related' action must depend on the claim made in the initial suit and not the terms of the settlement, for it is the suit rather than the settlement that activates § 3730(b)(5)." *Chovanec,* 606 F.3d at 363. The reason for this is plain: the administration of justice under the paradigm Congress chose so requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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