

## IS THE FALSE CLAIMS ACT'S FIRST-TO-FILE RULE JURISDICTIONAL?

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*The False Claims Act (FCA) is the primary statute used by the federal government to police fraud in government programs. In addition to providing the government with a means to recover civil penalties and treble damages, the FCA also contains a qui tam provision that allows private citizens—called “relators”—to sue on behalf of the United States and obtain a portion of the judgment. To prevent duplicative relator-filed litigation, Congress—as part of its 1986 amendments to the FCA—included a first-to-file rule, which effectively prohibits any party, except for the United States government, from filing a separate FCA case based on the same operative facts as a case that has previously been filed.*

*Recently, a new issue regarding the first-to-file rule has arisen: Does the rule limit the subject matter jurisdiction of the federal district courts, or does the rule simply affect whether a later-filed suit states a claim for relief on the merits? Prior to 2015, each of the circuits to confront this issue had held, or assumed, that the first-to-file rule was jurisdictional. But the D.C. and Second Circuits broke away from this pattern, holding that the rule was nonjurisdictional and instead bore only on whether the relator had stated a claim. This Note offers three primary contributions: (1) it identifies and analyzes several unresolved questions created by this disagreement among the circuits as well as the D.C. and Second Circuits' relatively narrow opinions; (2) it argues that a nonjurisdictional first-to-file rule is preferable for several reasons; and (3) it offers guidance to lower courts about how a nonjurisdictional first-to-file rule might best be applied in practice.*

### INTRODUCTION

The False Claims Act (FCA) is the federal government's “primary litigative tool for combatting fraud.”<sup>1</sup> In addition to providing the

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1. S. Rep. No. 99-345, at 2 (1986); see also H.R. Rep. No. 99-660, at 17–18 (1986); S. Rep. No. 96-615, at 2 (1980); Stuart Delery, Assistant Att’y Gen., U.S. Dep’t of Justice, Speech at the American Bar Association’s 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 5, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th> [<https://perma.cc/W52C-9NK3>] (“[The 1986] amendments have played a critical role in transforming the FCA into what it is today—the most powerful tool the American people

government with a means to recover civil penalties and treble damages,<sup>2</sup> the FCA also contains a qui tam provision that allows private citizens—called “relators”—to sue on behalf of the United States and obtain a portion of the judgment.<sup>3</sup> The FCA has allowed the government to recover billions of dollars in judgments and settlements, and these recoveries serve as a powerful deterrent to those who might consider defrauding the United States.<sup>4</sup>

A key provision of the FCA is its first-to-file rule, which effectively prohibits any party, except the United States government, from intervening or filing a separate FCA case based on the same operative facts as a case that has already been filed.<sup>5</sup> Given the powerful incentives for private citizens to file suits under the FCA,<sup>6</sup> the rule serves an important function by limiting duplicative relator-filed actions.<sup>7</sup>

Many provisions of the FCA have provided interpretive challenges for the federal courts,<sup>8</sup> and the first-to-file rule is no exception. Because

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have to protect the government from fraud.”). The federal government currently uses the FCA to police fraud in government programs touching a wide variety of economic sectors. See Christopher L. Martin, Jr., Comment, *Reining in Lincoln’s Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 *Calif. L. Rev.* 227, 229 (2013).

For helpful background information regarding the FCA, see generally Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* (3d ed. 2018) (discussing the history of the FCA, the case law interpreting it, and its various provisions and their operation); U.S. Dep’t of Justice, *The False Claims Act: A Primer*, [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf) [<https://perma.cc/RD55-3YME>] [hereinafter DOJ, FCA Primer] (last visited Aug. 11, 2018) (discussing the various provisions of the FCA and their operation).

2. See 31 U.S.C. § 3729(a)(1) (2012).

3. See *id.* § 3730(b); see also David Farber, Note, *Agency Costs and the False Claims Act*, 83 *Fordham L. Rev.* 219, 223 (2014) (“The enforcement of the FCA follows three principal avenues: (1) direct enforcement by the DOJ; (2) government intervention in qui tam actions; and (3) private enforcement by go-it-alone qui tam relators.”).

4. See *infra* notes 21–22 and accompanying text.

5. 31 U.S.C. § 3730(b)(5).

6. See *infra* notes 29–33 and accompanying text.

7. See, e.g., *United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999) (noting that, in enacting the first-to-file rule, Congress “struck a careful balance between encouraging citizens to report fraud and stifling parasitic lawsuits”); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 230 (3d Cir. 1998) (noting that the first-to-file rule was “intended to prevent duplicative lawsuits”); *United States ex rel. Palmieri v. Alparma, Inc.*, 928 F. Supp. 2d 840, 846 (D. Md. 2013) (“The first-to-file rule . . . sought to achieve ‘the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.’” (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994))).

8. The FCA’s public-disclosure bar, codified at 31 U.S.C. § 3730(e)(4)(A), is one such provision. See, e.g., *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 278 (7th Cir. 2016) (explaining that the public-disclosure bar can apply in situations in which the facts underlying the claim “are in the government’s possession or the public domain”); *United*

the rule is meant to act as a procedural bar, courts have often been called on to interpret how the first-to-file requirement relates to Rules 8 and 9 of the Federal Rules of Civil Procedure.<sup>9</sup> As a result, much of the scholarship regarding the first-to-file rule has also focused on its relationship to Rules 8 and 9.<sup>10</sup>

In recent years, however, a new issue regarding the first-to-file rule has arisen: Does the rule limit the subject matter jurisdiction of the federal district courts, or does the rule simply affect whether a later-filed suit states a claim for relief on the merits? Prior to 2015, all six U.S. courts of appeals to confront this issue held—or assumed—that the first-to-file rule was jurisdictional.<sup>11</sup> The D.C. Circuit broke away from this pattern in *United States ex rel. Heath v. AT&T, Inc. (Heath II)*, holding that the rule was nonjurisdictional and instead bore only on whether the relator had stated a claim.<sup>12</sup> The Second Circuit recently joined the D.C.

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States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist., 777 F.3d 691, 696 (4th Cir. 2015) (identifying that a public disclosure requires both “an affirmative act” and a “recipient” of such information).

9. See, e.g., *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 34 (1st Cir. 2013) (holding that a complaint need not comply “with Rule 9(b) particularity requirements in order to give sufficient notice to the government of an alleged fraudulent scheme”); *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1206 (D.C. Cir. 2011) (holding that “the earlier-filed complaint need not meet the heightened pleading standards of Rule 9(b) . . . to bar later-filed complaints under FCA Section 3730(b)(5)”); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (holding that “the [first] complaint’s failure to comply with Rule 9(b) rendered it legally infirm from its inception, and therefore it cannot preempt [the second] action under the first-to-file bar”). Rule 8 and Rule 9 define the general pleading obligations under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8, 9.

10. See, e.g., Joel Deuth, Comment, The False Claims Act’s First-to-File Bar: How the Particularity Requirement of Civil Procedure Militates Against Combating Fraud, 62 *Cath. U. L. Rev.* 795, 796–97 (2013); Brian D. Howe, Note, Conflicting Requirements of Notice: The Incorporation of Rule 9(b) into the False Claims Act’s First-to-File Bar, 113 *Mich. L. Rev.* 559, 569–72 (2015); Fisher K. Law, Note, Proper Pleading or Premature Proof? Rule 9(b)’s Particularity Requirement and the False Claims Act, 49 *Ga. L. Rev.* 855, 871–80 (2015); Karin Lee, Note, Linking Rule 9(b) Pleading and the First-to-File Rule to Advance the Goals of the False Claims Act, 108 *Nw. U. L. Rev.* 1423, 1427–37 (2014); Daniel Long, Comment, Last Call: According First-Filed Qui Tam Complaints Greater Preclusive Effect Under *Batiste*’s Narrow Interpretation of the First-to-File Rule, 54 *B.C. L. Rev. Electronic Supplement* 161, 167–71 (2013), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3303&context=bclr> (on file with the *Columbia Law Review*); Aaron Rubin, Comment, To Present Bills or Not to Present? An In-Depth Analysis of the Burden of Pleading in Qui Tam Suits, 8 *Seton Hall Cir. Rev.* 467, 478–89 (2012).

11. See *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014); *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *aff’d in part, rev’d in part on other grounds sub nom. Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376–77 (5th Cir. 2009); *Walburn*, 431 F.3d at 970; *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001).

12. 791 F.3d 112, 121 (D.C. Cir. 2015).

Circuit,<sup>13</sup> cementing a split between the eight circuits that have addressed this issue thus far. The first-to-file rule serves a critical procedural role in FCA litigation, and this disagreement among the circuits has created several unresolved questions that are important to both relators and defendants.<sup>14</sup>

This Note proceeds in three Parts. Part I discusses the FCA's qui tam provision and first-to-file rule, the dichotomy between jurisdictional and nonjurisdictional rules, and the procedural law underlying the first-to-file rule. Part II examines the debate among the courts of appeals regarding whether the first-to-file rule is jurisdictional and the implications of these competing constructions for FCA litigation. Part III argues that construing the first-to-file rule as nonjurisdictional is preferable for three primary reasons. First, building on the D.C. and Second Circuits' analyses, construing the rule as nonjurisdictional is consistent with several established theories of statutory interpretation. Second, the Supreme Court's past characterization of the role of relators in FCA suits, as articulated in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>15</sup> also supports a nonjurisdictional first-to-file rule. Finally, a nonjurisdictional rule would strike an appropriate balance between the competing policy goals undergirding the FCA's qui tam provision.<sup>16</sup> Part III also addresses several open questions related to a nonjurisdictional first-to-file rule and provides guidance as to how the lower federal courts could best apply such a rule in practice.

#### I. THE FCA AND JURISDICTIONAL VS. NONJURISDICTIONAL RULES

The FCA provides for several different theories of liability that the federal government may use to recover civil penalties and damages.<sup>17</sup> The most commonly litigated provisions of the Act impose liability upon “any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>18</sup> The FCA defines the term “claim” very

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13. See *United States ex rel. Hayes v. Allstate Ins. Co. (Hayes II)*, 853 F.3d 80, 86 (2d Cir. 2017), cert. denied, 138 S. Ct. 199 (2017).

14. See *infra* section II.C.

15. 529 U.S. 765 (2000).

16. See *infra* note 112 and accompanying text.

17. See 31 U.S.C. § 3729(a) (2012).

18. *Id.* § 3729(a)(1)(A)–(B). Claims are most often brought pursuant to these sections. See Lori L. Pines, Weil, Gotshal & Manges LLP, *Understanding the False Claims Act*, Westlaw Practical Law 7-561-1346 (database updated 2018). Claims are also sometimes brought under § 3729(a)(1)(G) (the “reverse false claim” provision) and § 3729(a)(1)(C) (conspiracy). See *id.* For further information regarding the elements that the government or a relator must prove to subject a defendant to FCA liability, see generally DOJ, *FCA Primer*, *supra* note 1; James Wiseman, Note, *Reasonable, but Wrong: Reckless Disregard*

expansively,<sup>19</sup> and “person” is similarly defined broadly.<sup>20</sup> This flexibility has allowed the government to recover significant monetary sums,<sup>21</sup> which provides the FCA with much of its deterrent power.<sup>22</sup>

This Part examines the components of the FCA relevant to the current debate regarding whether the first-to-file rule implicates subject matter jurisdiction. Section I.A discusses the FCA’s *qui tam* provision and its first-to-file rule, which applies to relator-filed suits. Section I.B considers the dichotomy between jurisdictional and nonjurisdictional rules.

A. *Incentivizing Private Actors: Qui Tam, Government Intervention, and the First-to-File Rule*

1. *Relators and the Government’s Right to Intervene.* — *Qui tam* suits by private parties have become a central mechanism for enforcement of the FCA. While the Attorney General can bring FCA actions of her own volition,<sup>23</sup> the FCA’s *qui tam* provision empowers private parties to “bring a civil action for a violation of section 3729 for the person and for the

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and Deliberate Ignorance in the False Claims Act After *Hixson*, 117 Colum. L. Rev. 435 (2017).

19. See 31 U.S.C. § 3729(b)(2) (defining “claim”). The FCA is meant “to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.” S. Rep. No. 99-345, at 9 (1986). For a detailed discussion of the types of claims that are actionable under the FCA, see generally S. Rep. No. 111-10 (2009); S. Rep. No. 99-345; H.R. Rep. No. 99-660 (1986); S. Rep. No. 96-615 (1980).

20. Senate Judiciary Committee reports indicate that the FCA was meant to reach “all parties who may submit false claims,” including individual people, corporations, partnerships, and associations. See S. Rep. No. 99-345, at 8; S. Rep. No. 96-615, at 3. The federal courts have added several important glosses on this. See *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (holding that local governments and municipalities are amenable to FCA suit); *Stevens*, 529 U.S. at 787–88 (holding that a state is not a “person” within the meaning of the key provision of the FCA and hence that the FCA does not create a cause of action against a state); *Pentagen Techs. Int’l Ltd. v. United States*, 103 F. Supp. 2d 232, 236 (S.D.N.Y. 2000) (holding that an FCA claim must be dismissed because the United States had not waived sovereign immunity).

21. This includes more than \$31.3 billion since January 2009, with more than \$8.2 billion recovered in fiscal years 2015 and 2016 alone. See Press Release, U.S. Dep’t of Justice, Justice Department Recovers over \$4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016> [<https://perma.cc/RZV3-UD44>]; Press Release, U.S. Dep’t of Justice, Justice Department Recovers over \$3.5 Billion from False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), <http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015> [<https://perma.cc/YP3T-C5LY>].

22. See Bill Baer, Acting Assoc. Att’y Gen., U.S. Dep’t of Justice, Speech at the American Bar Association’s 11th National Institute on the Civil False Claims Act and *Qui Tam* Enforcement (June 9, 2016), <http://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability/> [<https://perma.cc/PJ29-UMA5>] (“We also know that holding individuals accountable for corporate wrongdoing—even through civil enforcement actions—provides a powerful deterrent against future misconduct.”).

23. 31 U.S.C. § 3730(a).

United States Government.”<sup>24</sup> In response to significant fraud against the government<sup>25</sup>—as well as the perception that incentives for private parties were too weak—Congress strengthened the FCA’s *qui tam* provision in 1986.<sup>26</sup> The liability and *qui tam* provisions were further strengthened by the Fraud Enforcement and Recovery Act of 2009 (FERA) to help the government fight fraud in the financial sector.<sup>27</sup> These expansions have greatly increased the number of suits filed under the FCA, especially by private parties.<sup>28</sup>

FCA suits brought by members of the public have become more prevalent partly because successful relators are entitled to a portion of the judgment against the defendant, including both civil penalties and treble damages.<sup>29</sup> This share can vary between fifteen and twenty-five percent if the government intervenes or between twenty-five and thirty percent if the government elects not to intervene.<sup>30</sup> Within these ranges,

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24. *Id.* § 3730(b)(1); see also Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 *Minn. L. Rev.* 1357, 1359 (1998) (“Under the FCA *qui tam* provision, private citizens are given enforcement power; they have the ability to bring false claim suits on behalf of the United States.”).

25. Some estimates place the potential damages available in the range of billions of dollars each year. See, e.g., Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 *Vill. L. Rev.* 273, 282 & nn.32–33 (1992) (suggesting that instances of fraud against the government could amount to as much as \$100 billion per year).

26. See S. Rep. No. 99-345, at 2–3 (1986) (identifying significant fraud, both known and unknown, as a basis for the amendments). The amendments included revising procedures related to *qui tam* actions, increasing civil penalties and damages, and lengthening the statute of limitations. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–3733 (2012)); see also Jonathan T. Brollier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 *Ohio St. L.J.* 693, 701 (2006) (describing the substance of the FCA’s 1986 amendments).

27. See Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, *Health Law*, Aug. 2009, at 14, 14; see also Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 *Pub. Cont. L.J.* 813, 820 (2012) (detailing the potential for expanded liability under the FCA after FERA’s enactment). For a detailed discussion of FERA’s impact on the False Claims Act, see Ni Qian, Note, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 *Colum. Bus. L. Rev.* 594, 610.

28. See Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 *Colum. L. Rev.* 949, 955 (2007) (noting that the 1986 amendments to the FCA “led to the drastic increase in *qui tam* actions since that time”).

29. See 31 U.S.C. § 3730(d). Current civil penalties are assessed to be between \$11,181 and \$22,363 per claim, and these penalties increased each year between 2016 and 2018. See 28 C.F.R. § 85.5 (2018). Individual judgments can be quite significant, and several have recently exceeded \$200 million. See David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 *Colum. L. Rev.* 1913, 1915 & n.5 (2014) [hereinafter Engstrom, *Private Enforcement’s Pathways*].

30. See 31 U.S.C. § 3730(d)(1)–(2); Engstrom, *Private Enforcement’s Pathways*, *supra* note 29, at 1945 n.108. Professor Engstrom has further noted that, within Congress,

a district court has the discretion to determine the relator's share of the judgment.<sup>31</sup> Relators can also recover reasonable expenses and costs of litigation, including attorneys' fees.<sup>32</sup> With this combination of incentives, it is unsurprising that the majority of FCA cases are now brought pursuant to the Act's qui tam provision.<sup>33</sup>

In addition to providing incentives for private citizens to hold government contractors accountable, the qui tam provision serves an important information-sharing function. Even in cases filed by relators, the FCA provides substantial control and authority to the Attorney General and, by extension, the U.S. Department of Justice (DOJ).<sup>34</sup> Each FCA complaint must be filed under seal, and a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government."<sup>35</sup> The qui tam provision thus can provide the government with information of which it was previously unaware. By "creating a strong financial incentive for private citizens to guard against efforts to defraud the public fisc," qui tam actions serve the function of, by proxy, bolstering the government's constrained resources.<sup>36</sup>

When a private citizen brings a qui tam action, the federal government has sixty days after being served with the complaint and material

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"this tiered system of relator payoffs was seen as essential to incentivizing relators to go at it alone where a politicized bureaucracy refuses to enforce." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 *Colum. L. Rev.* 1244, 1273 (2012) [hereinafter Engstrom, *Harnessing Private AG*].

31. See, e.g., *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 81 (D.D.C. 2012) (discussing district courts' discretion to adjust relators' awards above the statutory minimums).

32. See 31 U.S.C. § 3730(d)(1)–(2). These costs, particularly attorneys' fees, can be a significant expense. See Qian, *supra* note 27, at 622 & n.121. Unsuccessful relators, at the district court's discretion, *may* be required to cover the defendant's "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 purposes of harassment." 31 U.S.C. § 3730(d)(4).

33. See U.S. Dep't of Justice, *Fraud Statistics—Overview* (2016), <https://www.justice.gov/opa/press-release/file/918361/download> [<https://perma.cc/WL3J-J3XP>] [hereinafter DOJ, *Fraud Statistics*] (indicating that the number of new qui tam suits have exceeded non-qui tam suits every year since 1995). Despite these seemingly clear benefits, there is some scholarly divide as to the extent to which the FCA's qui tam provision really serves the public interest. For a detailed discussion of the pros and cons of the FCA's qui tam provision, including discussion of competing scholarly views, see generally Broderick, *supra* note 28.

34. Cf. Engstrom, *Harnessing Private AG*, *supra* note 30, at 1273 ("[T]he FCA, while vesting the DOJ with substantial control, also plainly contemplates that relators will play an agency-forcing or anticapture role.").

35. 31 U.S.C. § 3730(b)(2).

36. *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 546 (D.C. Cir. 2002).

evidence to determine whether to intervene.<sup>37</sup> If it chooses to intervene, the government then has the sole discretion to conduct the action.<sup>38</sup> By contrast, if the government chooses not to intervene, the relator then has the right to conduct the action as she sees fit.<sup>39</sup> Whether the DOJ intervenes has important implications for the potential success of a qui tam action.<sup>40</sup> At the time FERA was enacted, the DOJ intervened in only twenty to twenty-five percent of relator-filed cases.<sup>41</sup> However, the overwhelming majority of settlements and favorable judgments have occurred in cases in which the DOJ either brought the case or intervened.<sup>42</sup> Conversely, in cases in which the DOJ declined to participate, a similarly large majority of cases fell flat, resulting in neither a settlement nor a favorable judgment for the relator.<sup>43</sup> Between 1987 and 2016, relators recovered more than nine times the share of judgments, by dollar value, when the U.S. government participated in the action versus when it declined to participate.<sup>44</sup>

The stark differences in outcomes may be due to the government's extensive experience reviewing, evaluating, and litigating these claims. However, the government is not required to justify its intervention decisions, and some commentators have noted that it is not always clear why the government chose a particular course of action.<sup>45</sup> Indeed, the

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37. 31 U.S.C. § 3730(b)(2). This period may be extended upon the government showing good cause for the extension. See *id.* § 3730(b)(3).

38. *Id.* § 3730(b)(4)(A).

39. *Id.* § 3730(b)(4)(B). Nevertheless, it is still permissible for the government, upon a showing of good cause and at the discretion of the district court, to intervene at a later date even though a relator has otherwise conducted the case. *Id.* § 3730(c)(3). Additionally, the government may “bring a [separate] related action based on the facts underlying the pending action” if it so chooses. *Id.* § 3730(b)(5).

40. See Engstrom, *Harnessing Private AG*, *supra* note 30, at 1274–75 (discussing the disparities in success for qui tam plaintiffs depending on the government's intervention).

41. See H.R. Rep. No. 111-97, at 28 (2009) (stating that the federal government has “consistently declined to intervene in about 80% of cases filed by private plaintiffs”); Forney, *supra* note 24, at 1359 (“[T]he government only enters about twenty-five percent of [the qui tam] suits filed . . . .”); Qian, *supra* note 27, at 609 (explaining that the FCA was amended in 2009 as part of FERA).

42. See DOJ, *Fraud Statistics*, *supra* note 33 (providing data regarding settlements and judgments from 1987 through 2016); see also Qian, *supra* note 27, at 611 (highlighting that ninety-five percent of the cases in which the government intervenes “go on to win judgments or settle”).

43. Qian, *supra* note 27, at 611 (highlighting that ninety-four percent of the cases in which the government does not intervene do not result in any favorable award to the relator).

44. See DOJ, *Fraud Statistics*, *supra* note 33. Over the same period, in terms of total judgments, more than twenty-two times the dollar value was obtained when the U.S. government participated in the action versus when it declined to do so. *Id.*

45. See, e.g., Elameto, *supra* note 27, at 835 (“Alas, the FCA does not require the Government to supply reasons for its decisions. Without requiring the Government to justify its FCA-related decisions, one might assume that the Government had no good reason at all for allowing a nonintervened case to proceed.”); Tara L. Ward, *Amending the*



government may decide not to pursue a case for a multitude of different reasons, including cost–benefit analysis or lack of merit.<sup>46</sup> Alternatively, this difference in outcomes may suggest that the federal courts are more sympathetic to FCA cases in which the government participates, perhaps under some perception that government intervention represents a stamp of merit.<sup>47</sup>

2. *The First-to-File Rule.* — The potential for a share of a large judgment can spur both relators with legitimate claims as well as those who might file unmeritorious lawsuits hoping to obtain a settlement. Recognizing this, Congress incorporated several procedural safeguards in the FCA. These safeguards, including the first-to-file rule, seek to strike an appropriate balance between encouraging private citizens to bring meritorious actions and discouraging litigation that would not uncover any new evidence of fraud.<sup>48</sup>

The first-to-file rule provides that “[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”<sup>49</sup> This rule effectively precludes follow-on actions, regardless of merit, that are based on the same facts underlying a previously filed claim so long as the previously filed claim is still pending.<sup>50</sup> Before the 1986 amendments to the FCA, a pending suit could bar a later-filed suit only if the latter was “based on evidence or information the Government had when the action was brought.”<sup>51</sup> For this procedural bar to apply, the information in the government’s possession must have been “sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute.”<sup>52</sup> Relators were often able to overcome this relatively

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Qui Tam Intervention Provisions: Setting Debar Higher?, 38 Pub. Cont. L.J. 297, 299 (2008) (“[T]he FCA only suggests that the Government ‘may’ elect to intervene and offers no comparable factors for consideration. Thus . . . [contractors] are unsure which characteristics of qui tam suits are likely to inspire government pursuit, dismissal, or, alternatively, disengagement.”).

46. See, e.g., *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005); *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997).

47. See Qian, *supra* note 27, at 611.

48. Engstrom, *Harnessing Private AG*, *supra* note 30, at 1273–74.

49. 31 U.S.C. § 3730(b)(5).

50. See *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015).

51. 31 U.S.C. 3730(b)(4) (1982) (amended 1986). This procedural bar was amended out of the FCA as part of the 1986 amendments, with the first-to-file rule and the public-disclosure rule taking its place. See S. Rep. No. 99-345, at 41, 43 (1986).

52. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978). Identical facts, however, were not required. *Id.*

imprecise standard so long as their claim was predicated on some facts that were different than those that the government already possessed.<sup>53</sup>

By contrast, defendants can avail themselves of the first-to-file rule's protection simply by identifying that a different relator filed suit first. However, certain judicial glosses on this rule are also relevant in determining whether the rule can be used to bar a later-filed suit. For example, courts have generally interpreted "facts underlying the pending action" loosely; identical facts are not required to bar a subsequent suit under the rule.<sup>54</sup> Further, while the Supreme Court has stated that relators must satisfy Rule 9(b) of the Federal Rules of Civil Procedure to survive a motion to dismiss,<sup>55</sup> several circuits are split on whether a first-filed complaint can preclude a later-filed one if the former has failed to satisfy Rule 9(b)'s requirements.<sup>56</sup>

Given the remedies at stake—as well as the potential downsides for waiting to bring one's claim—the first-to-file rule creates a powerful incentive to move quickly. While this rule has the potential to indirectly encourage shoddy legal work simply to beat competitors to the courthouse steps,<sup>57</sup> it does further "Congress' explicit policy choice to encourage prompt filing and, in turn, prompt recovery of defrauded funds by the United States."<sup>58</sup> And the conclusion that the first-to-file rule "incentivizes 'bare bones' or 'haphazard' claims" is far from universally accepted.<sup>59</sup> What is clear, however, is that judicial constructions affecting

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53. See, e.g., *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977) ("The statute clearly accords [the relator] standing to bring the action so long as he predicates his claim on information not in the possession of the United States at the time of his suit.").

54. See *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279–80 (10th Cir. 2004) ("[S]o long as a subsequent complaint raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first *qui tam* action, the § 3730(b)(5)'s first-to-file bar applies."). Several other circuits have followed suit. See, e.g., *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217–18 (D.C. Cir. 2003); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 232 (3d Cir. 1998).

This contrasts with the Senate Judiciary Committee's report, which states that the rule was meant to bar "separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25.

55. See *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2004 n.6 (2016).

56. See *Lee*, *supra* note 10, at 1427.

57. See *Engstrom, Harnessing Private AG*, *supra* note 30, at 1283 & n.142.

58. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 313 n.11 (2010) (Sotomayor, J., dissenting).

59. See *Engstrom, Harnessing Private AG*, *supra* note 30, at 1283 (citing Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 *Admin. L.J. Am. U.* 409, 452 & n.200 (1993)) (noting that supporters of the FCA claim that the statute promotes high-quality legal work).

how the rule operates are critical to defining the rights and expectations of relators and defendants alike.

B. *Subject Matter Jurisdiction and the Supreme Court's "Clear Statement" Rule*

Procedural bars, such as the first-to-file rule, can be divided into two distinct categories: jurisdictional rules, which implicate a court's subject matter jurisdiction, and nonjurisdictional rules, which instead bear only on whether a plaintiff's claim is meritorious or provide procedures for processing that claim. Section I.B.1 examines the substantive and procedural differences between jurisdictional and nonjurisdictional rules. Section I.B.2 discusses the Supreme Court's recent jurisprudence related to the dichotomy between jurisdictional and nonjurisdictional rules.

1. *The Dichotomy Between Jurisdictional and Nonjurisdictional Rules.* — Jurisdiction relates to “the power or authority of a court to issue legitimate, binding, and enforceable orders.”<sup>60</sup> Due to the limited subject matter jurisdiction of the federal courts,<sup>61</sup> these courts have uniformly held that “the absence of jurisdiction [is] fatal to a particular adjudication, other legal considerations notwithstanding.”<sup>62</sup> To preserve this result, legal rules that implicate subject matter jurisdiction, which this Note characterizes as jurisdictional rules, generally “have clear and well-settled effects.”<sup>63</sup> Often, these rules focus on subjects that do not affect the merit of the plaintiff's underlying claim, such as the legal source of that action.<sup>64</sup>

For example, unlike personal jurisdiction, the consent of the parties is irrelevant when considering subject matter jurisdiction; courts have the power, and indeed the obligation, to address *sua sponte* whether subject

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60. Scott Dodson, In Search of Removal Jurisdiction, 102 Nw. U. L. Rev. 55, 59 (2008) [hereinafter Dodson, Removal Jurisdiction].

61. See, e.g., *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

62. Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 22 (1981).

63. Scott Dodson, Mandatory Rules, 61 Stan. L. Rev. 1, 4 (2008) [hereinafter Dodson, Mandatory Rules]; see also Howard M. Wasserman, Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy, 102 Nw. U. L. Rev. 1547, 1548 (2008) [hereinafter Wasserman, Jurisdiction, Merits, and Procedure] (observing that the “consequence of the jurisdictional label most frequently sounds in [several] practical effects”).

However, Professor Dodson qualifies these assertions in an important way and identifies several areas in which a jurisdictional rule's effects might be more complicated. See Dodson, Mandatory Rules, *supra*, at 4 n.15. These include, but are not limited to, jurisdictional rules that implicate personal jurisdiction, jurisdictional rules with nonjurisdictional conditions precedent, and jurisdictional rules that provide outside bases for dealing with waiver and other equitable concepts. See *id.*

64. Wasserman, Jurisdiction, Merits, and Procedure, *supra* note 63, at 1548.

matter jurisdiction is lacking.<sup>65</sup> Further, arguments citing a “jurisdictional rule can be raised by any party at any time,” even on appeal, and cannot be forfeited or waived.<sup>66</sup> Finally, jurisdictional rules are generally not subject to traditional equitable doctrines such as estoppel, which permit courts to exercise discretion when principles of equity indicate that strictly applying a rule would be unjust or unfair.<sup>67</sup>

To invoke a jurisdictional rule, a defendant may move to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.<sup>68</sup> If the court agrees that it lacks subject matter jurisdiction over the complaint, the court must dismiss the action; it generally cannot proceed to consider the merits of the plaintiff’s claim.<sup>69</sup> Dismissals under Rule 12(b)(1) do not ordinarily constitute judgments on the merits for the purposes of claim preclusion.<sup>70</sup>

Nonjurisdictional rules, however, do not automatically have the opposite effects of jurisdictional rules.<sup>71</sup> In part, this is because these rules do not result in uniform legal consequences.<sup>72</sup> Indeed, in many cases, nonjurisdictional rules can exhibit several characteristics that are generally associated with jurisdictional rules.<sup>73</sup> Nonjurisdictional rules typically focus on the validity of the plaintiff’s claim or the procedural

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65. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Ins. Corp.*, 456 U.S. at 702; *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); Dodson, *Mandatory Rules*, supra note 63, at 4–5.

66. Dodson, *Mandatory Rules*, supra note 63, at 4–5; see also Fed. R. Civ. P. 12(h)(1) (excluding subject matter jurisdiction from the list of waivable defenses); *United States v. Cotton*, 535 U.S. 625, 630 (2002) (holding that subject matter jurisdiction cannot be forfeited or waived).

67. See *Ins. Corp.*, 456 U.S. at 702 (citing *Swan*, 111 U.S. at 382); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951).

68. See Fed. R. Civ. P. 12(b)(1).

69. See Fed. R. Civ. P. 12(h)(3).

70. See Fed. R. Civ. P. 41(b) (providing a specific exception for dismissals for lack of jurisdiction when denoting situations in which a dismissal serves as an adjudication on the merits). But see *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (recognizing that not all adjudications on the merits are entitled to claim-preclusive effect). For further discussion of claim preclusion, see *infra* note 247 and accompanying text.

71. See Scott Dodson, *Hybridizing Jurisdiction*, 99 *Calif. L. Rev.* 1439, 1448 (2011) [hereinafter *Dodson, Hybridizing Jurisdiction*] (discussing this false dichotomy). Professor Dodson argues that this false dichotomy has been perpetuated by several different sources, including the Supreme Court. See Dodson, *Mandatory Rules*, supra note 63, at 5–6 & nn.17–18.

72. Not all nonjurisdictional rules “are subject to waiver, consent, forfeiture, and equitable exceptions.” Dodson, *Mandatory Rules*, supra note 63, at 5. Furthermore, the assumption that these rules “need not be raised (or cannot be raised) sua sponte by the court . . . is erroneous.” *Id.*

73. See *id.* at 6 & nn.20–25 (identifying several examples). One such example is what Professor Dodson characterizes as a mandatory rule: a rule that is nonjurisdictional (that is, subject to forfeiture, waiver, etc.) but is not subject to “equitable excuses for noncompliance.” *Id.* at 9.

means for processing that claim as opposed to the claim's adjudicative basis.<sup>74</sup> Additionally, whether right or wrong, courts tend not to apply nonjurisdictional rules as “rigidly, literally, [or] mercilessly” as they do jurisdictional rules.<sup>75</sup> Consequently, simply characterizing a rule as nonjurisdictional does not resolve all ambiguities surrounding that rule's application or the conduct required for a party to avail itself of the rule's protections.

In contrast to jurisdictional rules, when defendants invoke a nonjurisdictional rule, they may be required to raise such an issue in their responsive pleading or rely on a motion to dismiss for “failure to state a claim upon which relief can be granted.”<sup>76</sup> After a plaintiff files her initial complaint, or, in the case of FCA litigation, when the court unseals it, a defendant is generally obligated to file a responsive pleading within a specified time window or assert a defense by motion.<sup>77</sup> Depending on whether a nonjurisdictional rule is characterized as an affirmative or a negative defense, a defendant may have to move quickly to invoke that rule's protection.<sup>78</sup> Further, and very importantly, dismissals for failure to state a claim pursuant to Rule 12(b)(6) are generally considered judgments on the merits for the purposes of claim preclusion.<sup>79</sup>

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74. See Howard M. Wasserman, *The Demise of “Drive-By Jurisdictional Rulings,”* 105 *Nw. U. L. Rev.* 947, 948–49 (2011) [hereinafter Wasserman, *Demise*].

75. Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 63, at 1548 (quoting Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 *Hofstra L. Rev.* 1, 5 (1994)).

76. Fed. R. Civ. P. 12(b)(6).

77. See Fed. R. Civ. P. 12(a)–(b). Rule 8 governs what must be included in a responsive pleading. See Fed. R. Civ. P. 8(a)–(b).

78. This distinction can materially change the obligations imposed on a defendant. Unlike negative defenses, affirmative defenses must be asserted in a responsive pleading. See Fed. R. Civ. P. 8(c). While the FCA's first-to-file rule is not specifically enumerated in Rule 8(c), courts have recognized that the enumeration in Rule 8(c) is not exhaustive. See, e.g., *Winforge, Inc. v. Coachmen Indus., Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) (articulating criteria to determine “whether a defense not specifically enumerated in Rule 8(c) is an affirmative defense”).

Failure to assert an affirmative defense at the pleadings stage typically results in a waiver of that defense. See, e.g., *Wood v. Milyard*, 566 U.S. 463, 470 (2012); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Arizona v. California*, 530 U.S. 392, 410 (2000). However, the Federal Rules provide discretion to the district court judge to grant a defendant leave to amend her answer to add such a defense. See Fed. R. Civ. P. 15(a). After the D.C. Circuit and Second Circuit decisions construing the FCA's first-to-file rule as nonjurisdictional, discussed in detail *infra* section II.B, lower federal court case law is scant on defendants' pleading obligations to invoke the rule.

79. See Fed. R. Civ. P. 41(b) (“[A]ny dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (“The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a ‘judgment on the merits.’”); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 *Tex. L. Rev.* 1209, 1218 n.44 (1986) (discussing motions to dismiss for failure to state a claim and the availability of a claim preclusion defense under

2. *The Supreme Court's "Clear Statement" Rule.* — In the first half of the nineteenth century, the federal courts regularly identified procedural rules as jurisdictional, though these courts likely did not have today's rigid conception of jurisdiction in mind.<sup>80</sup> Broad definitions of what constituted a jurisdictional rule continued through the Taney Court and even as late as the mid-twentieth century.<sup>81</sup> During this period, however, the Supreme Court routinely allowed for exceptions to jurisdictional rules, perhaps out of recognition of the harsh consequences of applying these rules rigidly.<sup>82</sup> Because of this, Justice Scalia, in *Steel Co. v. Citizens for a Better Environment*, recognized that “[j]urisdiction’ . . . ‘is a word of many, too many, meanings.’”<sup>83</sup>

Recently, however, the Court has sought to narrow the meaning of the term “jurisdictional.” As Professor Erin Morrow Hawley identified, “the Rehnquist and Roberts Courts have carried out a quiet revolution in the nature and meaning of jurisdiction” by routinely “abandon[ing] [their] treatment of procedural requirements as presumptively jurisdictional.”<sup>84</sup> In carrying out this revolution, the Court has sought to more clearly define and distinguish jurisdiction from the substantive elements of a claim and the procedural requirements to enforce it.<sup>85</sup> As a result, the Court has developed what is colloquially referred to as a “clear statement” rule to help lower courts determine whether a particular rule is jurisdictional. Justice Ginsburg’s unanimous opinion in *Arbaugh v. Y & H Corp.* announced the clear statement rule in this context:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.<sup>86</sup>

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both federal and state law). But see *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (recognizing that not all adjudications on the merits are entitled to claim-preclusive effect).

80. See Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 *Wm. & Mary L. Rev.* 2027, 2033 n.16 (2015).

81. *Id.* at 2041–42.

82. See *id.* at 2038–39.

83. 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); see also Hawley, *supra* note 80, at 2043 (“In the Supreme Court’s view, the federal courts had overused the term [‘jurisdiction’], referring to conditions that did not implicate the adjudicatory authority of the federal courts, and often without squarely considering the question.”).

84. Hawley, *supra* note 80, at 2030.

85. *Id.* at 2043.

86. 546 U.S. 500, 515–16 (2006) (footnote omitted) (citation omitted).

While seemingly straightforward, applying the clear statement rule as a guidepost in interpreting statutes is not without difficulty.<sup>87</sup> Yet, while there is a live debate in the academy about the benefits and detriments of the clear statement rule,<sup>88</sup> the Supreme Court and the lower federal courts have continuously applied the rule while remaining mindful of the murkiness of past rulings regarding jurisdiction.<sup>89</sup>

For example, consider the Supreme Court's recent decisions in *United States v. Kwai Fun Wong*<sup>90</sup> and *Sebelius v. Auburn Regional Medical Center*.<sup>91</sup> In *Kwai Fun Wong*, the rule at issue was § 2401(b) of the Federal Tort Claims Act (FTCA), which states that "a tort claim against the United States 'shall be forever barred' unless it is presented to the 'appropriate Federal agency within two years after such claim accrues' and then brought to federal court 'within six months' after the agency acts on the claim."<sup>92</sup> In *Auburn Regional*, the rule at issue was a 180-day time limit for filing administrative appeals for reimbursement claims related to certain services provided to Medicare patients.<sup>93</sup> In both cases, the Court applied its clear statement rule and held that these rules were nonjurisdictional precisely because neither rule spoke in terms of the federal courts' power to adjudicate the disputes.<sup>94</sup> While these recent cases dealt with time bars, the Supreme Court has not limited its application of the clear statement rule to this type of procedural rule.<sup>95</sup>

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87. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 37–38 (2011) [hereinafter Dodson, *Complexity*] (discussing a number of threshold questions that must be decided before a court can effectively apply the clear statement rule).

88. For further discussion of the clear statement rule, the pros and cons of the Supreme Court's crackdown on jurisdiction, and the dichotomy between jurisdictional and nonjurisdictional rules, see generally Stephen R. Brown, *Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly-States" Test in *Arbaugh v. Y & H Corp.**, 46 Willamette L. Rev. 33 (2009); Dodson, *Complexity*, supra note 87; Dodson, *Hybridizing Jurisdiction*, supra note 71; Dodson, *Removal Jurisdiction*, supra note 60; Dodson, *Mandatory Rules*, supra note 63; Hawley, supra note 80; Wasserman, *Demise*, supra note 74; Howard M. Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643 (2005); Wasserman, *Jurisdiction, Merits, and Procedure*, supra note 63.

89. See Stephen A. Cobb, Note, *Jettisoning "Jurisdictional": Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 Va. L. Rev. 107, 132–33 (2017).

90. 135 S. Ct. 1625 (2015).

91. 133 S. Ct. 817 (2013).

92. *Kwai Fun Wong*, 135 S. Ct. at 1629 (quoting 28 U.S.C. § 2401(b) (2012)).

93. See *Auburn Reg'l*, 133 S. Ct. at 821.

94. See *Kwai Fun Wong*, 135 S. Ct. at 1638 ("Accordingly, we hold that the FTCA's time bars are nonjurisdictional and subject to equitable tolling."); *Auburn Reg'l*, 133 S. Ct. at 821 ("We hold that the statutory 180-day limitation is not 'jurisdictional' . . .").

95. See, e.g., *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) (holding that § 2253(c)(3) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was nonjurisdictional).

## II. A NEW INTERPRETIVE CHALLENGE: DOES THE FIRST-TO-FILE RULE IMPLICATE SUBJECT MATTER JURISDICTION?

Armed with this understanding of the FCA's qui tam provision and first-to-file rule, as well as the jurisdictional versus nonjurisdictional rule dichotomy, this Part turns to how the courts of appeals have considered the first-to-file rule's jurisdictionality. Currently, the circuits are split on whether the first-to-file rule implicates a district court's subject matter jurisdiction: The First,<sup>96</sup> Fourth,<sup>97</sup> Fifth,<sup>98</sup> Sixth,<sup>99</sup> Ninth,<sup>100</sup> and Tenth<sup>101</sup> Circuits have each construed the rule as jurisdictional, while the D.C.<sup>102</sup> and Second<sup>103</sup> Circuits have construed the rule as nonjurisdictional.<sup>104</sup> Therefore, depending on the district in which the case is brought, an FCA case may proceed in very different ways.

This Part proceeds as follows: Section II.A surveys the circuit court opinions prior to 2015, which uniformly identified the first-to-file rule as implicating subject matter jurisdiction. Section II.B examines the D.C. and Second Circuit opinions, which split from the other circuits and held that the rule did not implicate subject matter jurisdiction. Section II.C argues that this split among the circuits, as well as the relatively narrow scope of the D.C. and Second Circuit opinions, has created several open questions for FCA litigants.

### A. *Uniformly Jurisdictional: Circuit Court Opinions Pre-2015*

Prior to 2015, the first-to-file rule was uniformly interpreted as implicating subject matter jurisdiction.<sup>105</sup> Of the six circuits to address this issue, several implicitly assumed that the rule affected subject matter jurisdiction.<sup>106</sup> Others announced that the rule was jurisdictional but did

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96. See *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014).

97. See *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *aff'd in part, rev'd in part on other grounds sub nom. Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015).

98. See *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009).

99. See *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

100. See *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001).

101. See *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

102. See *Heath II*, 791 F.3d 112, 121 (D.C. Cir. 2015).

103. See *Hayes II*, 853 F.3d 80, 86 (2d Cir. 2017).

104. *Id.* at 85.

105. See *supra* notes 96–101 and accompanying text.

106. See, e.g., *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187–90 (9th Cir. 2001) (affirming the district court's dismissal under Rule 12(b)(1) without directly grappling with whether the first-to-file rule implicated subject matter jurisdiction).



not provide detailed analysis of why this was so.<sup>107</sup> The First, Fifth, and Sixth Circuits, however, provided slightly more detailed analyses in *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*,<sup>108</sup> *United States ex rel. Branch Consultants v. Allstate Insurance Co.*,<sup>109</sup> and *Walburn v. Lockheed Martin Corp.*,<sup>110</sup> respectively. In each of these cases, the district court had dismissed the relator's complaints for lack of subject matter jurisdiction.<sup>111</sup> These courts recognized that the jurisdictional rule served to balance two competing policy goals: (1) providing sufficient incentives to encourage private parties to bring suits for the public good, and (2) preventing duplicative lawsuits that do little to serve the public interest because a previously filed claim already provided the government with sufficient notice of the alleged fraud.<sup>112</sup> Beyond citing these policy goals, the courts offered no more analysis to explain why the first-to-file rule divested the district court of jurisdiction to hear follow-on relator-filed FCA complaints.<sup>113</sup>

As these cases show, those circuit courts that have treated the first-to-file rule as a jurisdictional bar have provided relatively little justification for that interpretation. Their analyses were simple and pragmatically focused on the policy goals behind the FCA's qui tam provision; they were not grounded in specific theories of statutory interpretation or in constitutional inquiry.<sup>114</sup> While these courts may have clearly stated that the first-to-file rule implicated subject matter jurisdiction, their opinions also suggest that they were not called upon to specifically confront whether the first-to-file rule was jurisdictional or nonjurisdictional.<sup>115</sup>

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107. See, e.g., *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013) ("Section 3730(b)(5) is jurisdictional and if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction."), *aff'd in part, rev'd in part on other grounds sub nom. Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004) ("[Section 3730(b)(5)] is a jurisdictional limit on the courts' power to hear certain duplicative qui tam suits.")

108. 750 F.3d 111 (1st Cir. 2014).

109. 560 F.3d 371 (5th Cir. 2009).

110. 431 F.3d 966 (6th Cir. 2005).

111. See *Wilson*, 750 F.3d at 120; *Branch Consultants*, 560 F.3d at 373; *Walburn*, 431 F.3d at 969.

112. See *Wilson*, 750 F.3d at 117; *Branch Consultants*, 560 F.3d at 376; *Walburn*, 431 F.3d at 970.

113. The First and Sixth Circuits affirmed the lower courts' dismissals for lack of subject matter jurisdiction. See *Wilson*, 750 F.3d at 120; *Walburn*, 431 F.3d at 976. The Fifth Circuit ultimately reversed the lower court's dismissal for lack of subject matter jurisdiction but did so on grounds that the first-to-file rule did not apply to the facts of the particular case. See *Branch Consultants*, 560 F.3d at 380.

114. See *supra* notes 108–113 and accompanying text.

115. This suggests that if, in a future case, these courts are presented with the specific question of whether the first-to-file rule is jurisdictional or nonjurisdictional, they may feel free to take a fresh look at whether the rule does, and should, implicate subject matter

Nevertheless, the district courts in these circuits have continued to apply the rule in a jurisdictional manner.<sup>116</sup> While the Supreme Court did grant a petition for a writ of certiorari related to a first-to-file case in 2014,<sup>117</sup> the petition did not call for the Court to address whether the rule implicated subject matter jurisdiction.<sup>118</sup> Therefore, the Court declined to reach the issue.<sup>119</sup>

B. *Breaking from the Pack: The D.C. and Second Circuits' Opinions*

1. *The D.C. Circuit Moves First: Heath II*. — In 2015, the D.C. Circuit broke from the long-standing practice of treating the first-to-file rule as jurisdictional.<sup>120</sup> In *Heath II*, relator Todd Heath, an auditor of telecommunications bills, filed a claim under the FCA's qui tam provision alleging that AT&T had fraudulently overbilled the Universal Service Fund (USF)<sup>121</sup> over more than a ten-year period.<sup>122</sup> In response, AT&T seized on the fact that this was not Heath's first FCA qui tam suit.<sup>123</sup> In 2008, Heath had filed suit against Wisconsin Bell, a wholly owned AT&T subsidiary.<sup>124</sup> In that case, he alleged that Wisconsin Bell had charged

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jurisdiction. The D.C. Circuit, in *Heath II*, took exactly this approach. See *infra* notes 132–134 and accompanying text.

116. See, e.g., *United States ex rel. Moore v. Pennrose Props., LLC*, No. 3:11-CV-121, 2015 WL 1358034, at \*10 (S.D. Ohio Mar. 24, 2015) (explaining that the “first-to-file bar is a jurisdictional limitation”); *United States ex rel. Williams v. C. Martin Co.*, No. CIV.A. 07-6592, 2013 WL 4519324, at \*5 (E.D. La. Aug. 23, 2013) (discussing the application of “§ 3730(b)(5)’s jurisdictional bar” in the case at hand (quoting *Branch Consultants*, 560 F.3d at 378)).

117. See *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 134 S. Ct. 2899, 2899 (2014) (mem.), granting cert. to *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013).

118. See *Petition for Writ of Certiorari at 3, Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015) (No. 12-1497), 2013 WL 3225969.

119. See *Carter*, 135 S. Ct. at 1978–79.

120. See *Heath II*, 791 F.3d 112, 121 (D.C. Cir. 2015).

121. Telecommunications companies contribute a portion of their revenues to the Universal Service Fund, and the fund, among other things, helps certain institutions to obtain telecommunications services at reduced rates. *Id.* at 116.

122. *Id.* at 117. Heath alleged that AT&T and its subsidiaries engaged in a systematic scheme to submit false claims to the USF by overcharging certain customers who would then pass on those inflated rates to the United States government for reimbursement. *Id.* He further alleged “that AT&T knew that compliance with the lowest-corresponding-price requirement was an express and material condition for reimbursement from the Universal Service Fund, yet it knowingly or recklessly failed to ensure that its employees complied with that requirement.” *Id.* at 118; see also *United States ex rel. Heath v. Wis. Bell, Inc. (Wisconsin Bell II)*, 760 F.3d 688, 689 (7th Cir. 2014).

123. See *Heath II*, 791 F.3d at 118; see also *United States ex rel. Heath v. AT&T, Inc. (Heath I)*, 47 F. Supp. 3d 42, 46 (D.D.C. 2014) (highlighting AT&T's argument at the district court level that this was not the first case that Heath filed).

124. See *Wisconsin Bell II*, 760 F.3d at 690 (“Heath filed this qui tam lawsuit in 2008. He alleged that Wisconsin Bell fraudulently overcharged school districts, libraries and the United States for telecommunication services.”).

certain qualifying customers more than others but nevertheless improperly submitted the reimbursements to the USEF.<sup>125</sup> The U.S. District Court for the Eastern District of Wisconsin originally dismissed the *Wisconsin Bell* case.<sup>126</sup> However, the Seventh Circuit reversed the dismissal,<sup>127</sup> and the case, on remand, was still pending while Heath's case against AT&T was being actively litigated.<sup>128</sup> AT&T moved to dismiss Heath's complaint in the U.S. District Court for the District of Columbia.<sup>129</sup> The court granted the dismissal for want of subject matter jurisdiction,<sup>130</sup> holding that it was barred from considering the suit against AT&T under the FCA's first-to-file rule.<sup>131</sup>

The D.C. Circuit in *United States ex rel. Shea v. Cellco Partnership*, approximately one year before taking up Heath's case, had affirmed a district court's dismissal of an FCA case under Rule 12(b)(1) on first-to-file grounds.<sup>132</sup> In that case, however, the issue of whether the first-to-file rule was jurisdictional was not expressly before the court and was not necessary to resolve the controversy.<sup>133</sup> In *Heath II*, the D.C. Circuit confronted this question head on.<sup>134</sup> Given the significant impact that jurisdictional rules can have on a case, the D.C. Circuit understood the importance of providing clarity on this issue—especially in the face of “recurring confusion in the district courts.”<sup>135</sup>

The D.C. Circuit first considered the text of the first-to-file rule itself. The rule reads, in relevant part, “[N]o person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”<sup>136</sup> The court emphasized that the word “jurisdiction” was wholly absent from the rule's text.<sup>137</sup> Instead, the court concluded that the rule spoke only to “who may bring a private action

125. See *id.* at 689.

126. See *United States ex rel. Heath v. Wis. Bell, Inc. (Wisconsin Bell I)*, No. 08-CV-00724, 2012 WL 4128020, at \*3 (E.D. Wis. Sept. 18, 2012) (dismissing the case pursuant to the public disclosure bar for lack of subject matter jurisdiction).

127. See *Wisconsin Bell II*, 760 F.3d at 689.

128. See *Heath II*, 791 F.3d at 118.

129. See *Heath I*, 47 F. Supp. 3d 42, 43 (D.D.C. 2014).

130. See *id.* at 44.

131. *Id.* at 47.

132. 748 F.3d 338, 344 (D.C. Cir. 2014), vacated, 135 S. Ct. 2376, 2376 (2015) (mem.).

133. Judge Srinivasan, writing separately, recognized this: “The court's affirmance . . . should not be understood as a holding that the first-to-file bar is a jurisdictional limitation.” *Id.* at 345 (Srinivasan, J., concurring in part and dissenting in part).

134. See *Heath II*, 791 F.3d at 119.

135. *Id.* Jurisdictional rules pertain to a court's authority to hear a case in the first place, often require courts to consider issues that the parties have not themselves presented, and may be invoked at any stage of the litigation. See *id.*; see also *supra* notes 65–67 and accompanying text (discussing the effects of jurisdictional rules on court proceedings).

136. 31 U.S.C. § 3730(b)(5) (2012).

137. See *Heath II*, 791 F.3d at 120.

and when” while saying “nothing about the court’s ‘power’ to consider claims.”<sup>138</sup> Given this textual analysis, the court refused to read jurisdiction into a rule that did not specifically provide it.<sup>139</sup>

The court also cited the structure of the FCA generally to bolster its conclusion that the first-to-file rule was nonjurisdictional.<sup>140</sup> The court identified other provisions within the FCA in which Congress had clearly articulated that it wanted particular procedural bars to “operate with jurisdictional force.”<sup>141</sup> These examples made clear, in the court’s judgment, that Congress was perfectly capable of expressly designating that the first-to-file rule should operate as a jurisdictional bar.<sup>142</sup> In other words, by not including the term “jurisdiction” in the first-to-file rule, Congress made a conscious choice to not implicate jurisdictional issues.<sup>143</sup> Therefore, the court concluded that reading the rule to operate as a jurisdictional bar would cut directly against both the statute’s text as well as Congress’s intent. Based on the combination of its textual analysis, structural analysis, and consideration of the procedural consequences of reading the rule as jurisdictional, the D.C. Circuit ultimately concluded that “[b]ecause nothing in the text or structure of the first-to-file rule suggests, let alone ‘clearly state[s],’ that the bar is jurisdictional . . . we hold that the first-to-file rule bears only on whether a qui tam plaintiff has properly stated a claim.”<sup>144</sup> A petition for writ of certiorari related to this case, which did not ask the Supreme Court to consider the rule’s impact on a court’s subject matter jurisdiction, was denied.<sup>145</sup>

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138. *Id.* (quoting *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015)).

139. *Id.* at 119–21. The court cited several times to cases outlining the Supreme Court’s clear statement jurisprudence, including *Kwai Fun Wong*, 135 S. Ct. at 1632, *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006). For further discussion of these cases, as well as the Supreme Court’s clear statement jurisprudence more generally, see *supra* section I.B.2.

140. See *Heath II*, 791 F.3d at 120.

141. *Id.* The court cited subsections 3730(e)(1) and 3730(e)(2)(A) as examples supporting the proposition. See *id.* Subsection 3730(e)(1) dictates that “[n]o court shall have *jurisdiction* over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.” 31 U.S.C. § 3730(e)(1) (emphasis added). Subsection 3730(e)(2)(A) dictates that “[n]o court shall have *jurisdiction* over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.” *Id.* § 3730(e)(2)(A) (emphasis added).

142. *Heath II*, 791 F.3d at 120–21.

143. See *id.*

144. *Id.* at 121 (second alteration in original) (citation omitted).

145. See *AT&T, Inc. v. United States ex rel. Heath*, 136 S. Ct. 2505, 2505 (2016) (mem.), denying cert. to *Heath II*, 791 F.3d 112; see also *Petition for Writ of Certiorari at i, Heath*, 136 S. Ct. 2505 (No. 15-363), 2015 WL 5607692 (identifying the question presented for appeal).

2. *The Second Circuit Follows Suit*: United States ex rel. Hayes v. Allstate Insurance Co. (Hayes II). — For approximately two years, the D.C. Circuit was the lone circuit on its side of this jurisdictional–nonjurisdictional debate. In *Hayes II*, however, the Second Circuit also adopted the D.C. Circuit’s nonjurisdictional view.<sup>146</sup> In *Hayes*, a relator filed suit, pursuant to the FCA’s qui tam provision, against Allstate as well as a number of other liability insurance companies for perceived violations of their obligations under the Medicare Secondary Payer Act.<sup>147</sup> Specifically, Hayes brought his claim under § 3729(a)(1)(G) and alleged that each of the defendants failed to make certain reimbursement payments to the federal government as part of “a nationwide scheme to defraud Medicare.”<sup>148</sup>

The district court, adopting the recommendation of the magistrate judge assigned to the case, concluded that Hayes had filed his suit in bad faith and therefore dismissed the suit with prejudice as a Rule 11 sanction.<sup>149</sup> On appeal, several defendants argued that the case should have been dismissed on first-to-file grounds because a complaint filed one year before Hayes’s alleged the same general scheme.<sup>150</sup> Even though the district court had not addressed this argument below,<sup>151</sup> the Second Circuit felt an obligation to “satisfy itself not only of its own jurisdiction, but also [of] that of the lower courts in a cause under review.”<sup>152</sup>

Ultimately, the Second Circuit agreed with the D.C. Circuit that the first-to-file rule was not jurisdictional.<sup>153</sup> Like the D.C. Circuit, the Second Circuit emphasized that the rule “does not speak in jurisdictional terms” in direct contrast to other provisions of the FCA.<sup>154</sup> The court especially stressed that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

146. 853 F.3d 80, 86 (2d Cir. 2017).

147. *Id.* at 84.

148. *Id.*

149. United States ex rel. Hayes v. Allstate Ins. Co. (*Hayes I*), No. 12-CV-1015S, 2016 WL 463732, at \*1 (W.D.N.Y. Feb. 8, 2016).

150. *Hayes II*, 853 F.3d at 84–85; see also United States ex rel. Takemoto v. Hartford Fin. Servs. Grp., Inc., 157 F. Supp. 3d 273, 276 (W.D.N.Y. 2016) (adjudicating the first-filed complaint based on the same facts as *Hayes I*), *aff’d* sub nom. United States ex rel. Takemoto v. Nationwide Mut. Ins. Co., 674 F. App’x 92 (2d Cir. 2017). Although the previously filed case had since been dismissed by the time the Second Circuit heard Hayes’s appeal, the defendants nevertheless argued that the first-to-file rule “deprived the district court of subject matter jurisdiction over Hayes’s action from the outset.” *Hayes II*, 853 F.3d at 85.

151. See *Hayes I*, 2016 WL 463732, at \*1.

152. *Hayes II*, 853 F.3d at 84 (alteration in original) (internal quotation marks omitted) (quoting *Arnold v. Lucks*, 392 F.3d 512, 517 (2d Cir. 2004)).

153. See *id.* at 85.

154. *Id.* at 86 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)); see also *supra* notes 136–139 and accompanying text.

generally presumed that Congress acts *intentionally and purposefully* in the disparate inclusion or exclusion.<sup>155</sup> The panel also invoked the Supreme Court's clear statement jurisprudence to bolster its conclusion.<sup>156</sup> The court ultimately held that "a district court does not lack subject matter jurisdiction over an action that may be barred on the merits by the first-to-file rule."<sup>157</sup> Following this decision, a petition for a writ of certiorari, this time specifically calling on the Supreme Court to determine whether the first-to-file rule is jurisdictional, was also denied.<sup>158</sup>

C. *Open Questions Surrounding This Debate Among the Circuits*

The current disagreement among the circuits has created several yet unresolved questions that are important to both relators and defendants alike. These questions primarily fall into one of two categories: those that exist as a direct result of the split among the circuits, and those that are created by the D.C. and Second Circuits adopting a nonjurisdictional first-to-file rule without having occasion to fully decide how such a rule would operate in practice. This section identifies several of each of these effects and discusses them in further detail in subsections II.C.1 and II.C.2, respectively.

1. *Open Questions Resulting Directly from the Circuit Split.* — Depending on the circuit in which an FCA case is filed, defendants face substantially different hurdles to avail themselves of the first-to-file rule's protections.<sup>159</sup> One such hurdle involves the burdens of pleading, production, and persuasion. If the rule implicates subject matter jurisdiction, the relator bears the burden of pleading on this issue.<sup>160</sup> While a relator could

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155. *Hayes II*, 853 F.3d at 86 (emphasis added) (internal quotation marks omitted) (quoting *Kucana v. Holder*, 558 U.S. 233, 249 (2010)). The court also cited 31 U.S.C. §§ 3730(e)(1) and 3730(e)(2)(A) as examples supporting this idea. See *id.* at 86; see also *supra* note 141.

156. Like the D.C. Circuit, see *supra* note 139, the court cited to both *Arbaugh*, 546 U.S. at 515–16, and *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013). See *Hayes II*, 853 F.3d at 86.

157. *Hayes II*, 853 F.3d at 86.

158. See *United States ex rel. Hayes v. Allstate Ins. Co.*, 138 S. Ct. 199, 199 (2017) (mem.), denying cert. to *Hayes II*, 853 F.3d 80; see also *Petition for Writ of Certiorari at i*, *Hayes*, 138 S. Ct. 199 (No. 17-27), 2017 WL 287935 (identifying the question presented on appeal).

159. As an initial matter, under a jurisdictional first-to-file rule, defendants have much wider latitude to invoke the rule and it is possible that the court could even do so on its own behalf. See *supra* note 65 and accompanying text. Further, the discretion of the court is much more limited when confronted with a challenge to its subject matter jurisdiction. See *supra* note 69 and accompanying text. These practical differences between rules that implicate subject matter jurisdiction and those that do not also exist in other legal frameworks. See, e.g., *Cobb*, *supra* note 89, at 140–52 (discussing similar practical differences in the context of Supremacy Clause immunity).

160. See *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) (holding that the plaintiff "must carry throughout the litigation the burden of showing

satisfy this, at least initially, by simply making “a short and plain statement of the grounds for the court’s jurisdiction,”<sup>161</sup> a defendant can challenge the facts supporting jurisdiction by filing a Rule 12(b)(1) motion to dismiss. If such a factual challenge is made, the relator would then bear the burdens of production and persuasion, by a preponderance of the evidence, to establish that her claim is either the first such claim filed or is *sufficiently different* from a previously filed claim so as not to be barred by the rule.<sup>162</sup> By contrast, under a nonjurisdictional first-to-file rule, a defendant could be required to discover the underlying facts supporting invocation of the rule, plead those facts in her answer, and potentially even produce sufficient evidence to persuade the fact finder that the rule applies.<sup>163</sup>

Another key difference between a jurisdictional and nonjurisdictional first-to-file rule pertains to the substantially different timelines on which a defendant must act. Under a jurisdictional first-to-file rule, there is no formal deadline for a defendant to act or forfeit the rule’s protection—a motion to dismiss for lack of subject matter jurisdiction may be made at any time during the litigation.<sup>164</sup> A nonjurisdictional rule, however, could necessitate much swifter action. Depending on how the rule is determined to operate, a defendant could be required to invoke the rule in as few as twenty days.<sup>165</sup> While defendants would presumably have notice of other similar claims that had previously been filed against them,<sup>166</sup> this time burden is not a trivial one. Even if

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that he is properly in court”); *Demetres v. E.W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015) (“The burden of establishing subject matter jurisdiction rests with the plaintiff.”).

161. Fed. R. Civ. P. 8(a)(1).

162. See *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010) (“When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof.”). “In evaluating a factual attack, a court ‘may consider and weigh evidence outside the pleadings to determine if it has jurisdiction.’” *Charlton v. Comm’r of Internal Revenue*, 611 F. App’x 91, 94 (3d Cir. 2015) (quoting *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000)). For a detailed discussion of what a relator would have to prove to overcome a first-to-file challenge, see *supra* note 54 and accompanying text.

163. Which party bears these burdens under a nonjurisdictional first-to-file rule is also a significant unresolved question. For further discussion of this problem, see *infra* notes 172–174 and accompanying text. For guidance to the lower courts on how best to address this question, see *infra* section III.B.1.

164. See *supra* note 66 and accompanying text.

165. See 31 U.S.C. § 3730(b)(3) (2012) (requiring a responsive pleading no later than twenty days after an FCA complaint is unsealed and served upon the defendant consistent with the requirements of Rule 4 of the Federal Rules of Civil Procedure).

166. See *id.* (requiring defendants to be served after an FCA complaint is unsealed). This does suggest an interesting situation in which a similar claim was filed first but remained sealed at the time the second claim required action. This could effectively force a defendant to waive her ability to raise a first-to-file challenge even though she would have no way of possessing the facts necessary to effectively plead it. However, courts could develop a doctrine to neutralize the negative effects of such a situation. See *infra* section III.B.2.

defendants are not required to invoke the first-to-file rule at the pleading stage, they would still be strongly incentivized to invoke the rule at summary judgment.<sup>167</sup>

The fact that some jurisdictions make it more difficult for defendants to avail themselves of the first-to-file rule's protections could also incentivize forum shopping by relators.<sup>168</sup> Opportunistic relators would likely seek to file suit in the district courts in the D.C. and Second Circuits, which presumably provide relators greater protection from first-to-file challenges. While incentives to forum shop are not always frowned upon in the law,<sup>169</sup> allowing two different constructions of the first-to-file rule to encourage this kind of opportunistic behavior could lead to inequitable application of the *same federal law in different federal courts*. These forum-shopping incentives could prove quite strong since many large companies that contract with the federal government have expansive operations throughout the United States, conceivably making personal jurisdiction available in a wide array of fora.<sup>170</sup>

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167. Otherwise, defendants risk sending a difficult “how similar is it, really?” standard to a jury. See *supra* note 54 and accompanying text. Defendants would likely wish to avoid such a fate, potentially out of fear of bias by juries against corporations. For a detailed discussion of these biases and the potential reasons for them, see generally Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L. Rev. 327 (1998); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 Law & Soc’y Rev. 121 (1996).

168. Courts have, in the past, expressed disapproval of forum shopping. Cf. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (discussing the “twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”).

169. The forum shopping that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), sought to prevent was between the federal and state courts in the *same state*. The Supreme Court has not purported to discourage a plaintiff from selecting which forum among *different states* would be the most advantageous in bringing a claim. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (noting that the principle underlying *Erie* is “uniformity within a state,” while still leaving states with “the right to pursue local policies diverging from those of [their] neighbors”).

170. Consider, for example, Lockheed Martin Corporation, which is the largest defense contractor in the United States. See David Choi, *The Top 9 Biggest Defense Contractors in America*, Bus. Insider (May 25, 2016), <http://www.businessinsider.com/the-top-9-biggest-defense-contractors-in-america-2016-5> [<https://perma.cc/26KC-3FWU>] (noting that Lockheed has been awarded over 66,000 contracts worth more than \$29 billion). Lockheed Martin has significant operations in several states, including both Texas and New York. About Us, Lockheed Martin, <http://www.lockheedmartin.com/en-us/who-we-are.html> [<https://perma.cc/RR3W-V3AG>] (last visited Aug. 12, 2018). This could theoretically make the corporation amenable to suit in federal district courts in those fora under the Supreme Court’s minimum contacts standard for determining specific personal jurisdiction. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process requires only that a defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

Further, Lockheed Martin could be subjected to jurisdiction for any FCA claim, no matter where it occurred, in Maryland under a general jurisdiction theory because both the company’s state of incorporation and principal place of business are in Maryland. See



2. *Open Questions Surrounding a Partially Developed Nonjurisdictional First-to-File Rule.* — Another important consideration are the several yet unresolved questions around the application of a nonjurisdictional first-to-file rule in the D.C. and Second Circuits, as well as in any circuits that might decide to join them. While nonjurisdictional rules plainly have different legal consequences than jurisdictional rules, even within the category of nonjurisdictional rules the legal consequences are not uniform.<sup>171</sup> A district court could, consistent with the D.C. and Second Circuits' opinions in *Heath II* and *Hayes II*, conceivably construe the FCA's first-to-file rule in a number of ways. While the D.C. and Second Circuits answered the critical jurisdictional question, they left several important questions unanswered, providing little guidance for lower courts.

For one, a district court could assign the burdens of pleading, production, and persuasion related to a nonjurisdictional first-to-file rule to either of the parties.<sup>172</sup> For example, the rule could conceivably operate as an affirmative defense, which would thus obligate FCA defendants to comply with Federal Rule of Civil Procedure 8(c)'s requirements or risk waiver.<sup>173</sup> As a general matter, the burden of proof of an affirmative defense, including each of its components, is generally borne by the defendant who seeks to invoke the defense.<sup>174</sup> Conversely, the rule could operate as a de facto element of a relator's FCA claim. Defendants could then allege that another relator's claim was filed first, and relators would bear the burden of showing that they have satisfied the rule's requirements in order to recover.

Additionally, a district court could theoretically determine that some traditional attributes of nonjurisdictional rules should not apply to the first-to-file rule in particular. For example, even though the first-to-file rule is nonjurisdictional, it could nevertheless be construed as mandatory. A mandatory first-to-file rule would still possess the

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BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (“The ‘paradigm’ forums in which a corporate defendant is ‘at home,’ we explained, are the corporation’s place of incorporation and its principal place of business.” (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011))); Corporate Charter, Lockheed Martin, <https://www.lockheedmartin.com/en-us/who-we-are/leadership-governance/board-of-directors/corporate-charter.html> [<https://perma.cc/7DHB-DJVK>] (last visited Oct. 1, 2018) (noting that Lockheed Martin is organized under the Maryland General Corporation Law and has its headquarters in Bethesda, Maryland).

171. See *supra* notes 71–73 and accompanying text.

172. See *supra* notes 160–163 and accompanying text.

173. See *supra* note 78 and accompanying text.

174. See *Defense*, Black’s Law Dictionary (10th ed. 2014) (defining affirmative defense); see also *Dixon v. United States*, 548 U.S. 1, 14–15 (2006) (holding that the baseline common law rule is that defendants bear the burden of proof to establish the affirmative defense of duress absent “overwhelming consensus among federal courts”); *McKelvey v. United States*, 260 U.S. 353, 357 (1922) (“[I]t is incumbent on one who relies on such an exception to set it up and establish it.”).

traditional “nonjurisdictional attributes of being waivable, forfeitable, and consentable,” but, similar to a jurisdictional rule, “if the rule is properly invoked by the party for whose benefit it lies, a court has no discretion to excuse noncompliance.”<sup>175</sup> On the other hand, the rule could operate as a fully nonjurisdictional rule subject to potential equitable exceptions.<sup>176</sup>

Finally, the D.C. and Second Circuit opinions do not confront what preclusive effect, if any, should be given to FCA claims that are decided on first-to-file grounds. Dismissals for lack of subject matter jurisdiction under Rule 12(b)(1) specifically do not constitute judgments on the merits.<sup>177</sup> Dismissals for failure to state a claim under Rule 12(b)(6) or judgments against the relator under Rule 56, however, presumptively do.<sup>178</sup> In the FCA context, claim preclusion poses special problems because a suit by a prior relator with whom a later relator has virtually no relationship may nevertheless preclude the later relator’s suit.<sup>179</sup> Concerns with the preclusive effect of such a judgment are particularly alarming if the first-filed case was dismissed or decided at summary judgment with little to no consideration of the merits of the relator’s claim.

### III. ADOPTING A NONJURISDICTIONAL FIRST-TO-FILE RULE AND ESTABLISHING ITS EFFECTIVE ADMINISTRATION

Faced with this landscape, the federal courts can either select (or continue to apply) the jurisdictional construction of the first-to-file rule employed by the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, or the nonjurisdictional construction employed by the D.C. and Second Circuits.<sup>180</sup> Section III.A argues that courts should hold that the first-to-file rule does not divest district courts of subject matter jurisdiction for several reasons. Section III.B identifies several unresolved questions related to a nonjurisdictional first-to-file rule and provides guidance as to how district courts can best address them.

#### A. *Nonjurisdictional: The Better of Two Choices*

This section identifies several reasons that favor adopting the D.C. and Second Circuits’ conception of the FCA’s first-to-file rule. Section III.A.1 builds on the Second and D.C. Circuits’ analyses and argues that

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175. Dodson, *Mandatory Rules*, supra note 63, at 9.

176. In other words, what Professor Dodson would characterize as a nonmandatory rule. See *id.*

177. See Fed. R. Civ. P. 41(b).

178. See supra note 79 (discussing claim preclusion and explaining that not all 12(b)(6) dismissals are entitled to preclusive effect).

179. See *infra* notes 247–248 and accompanying text for further consideration of this issue.

180. See supra sections II.A–.B.

textualist, structural, and intentionalist interpretative principles all support a nonjurisdictional first-to-file rule. Section III.A.2 considers the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>181</sup> and argues that the Court's past characterization of the relator's role in FCA qui tam litigation also supports adopting a nonjurisdictional first-to-file rule. Finally, section III.A.3 argues that even though a nonjurisdictional first-to-file rule would provide less protection from duplicative qui tam suits to FCA defendants than a jurisdictional rule would, such a rule—when considered within the overall statutory framework of the FCA—strikes an appropriate balance between the twin policy goals of the FCA's qui tam provision.<sup>182</sup>

1. *The Text, Structure, and Purpose of the First-to-File Rule: Expanding on the D.C. and Second Circuits' Analyses.* — Understanding the first-to-file rule involves consideration of the statutory text, the legislative history surrounding the rule, and the purpose of both the rule and the FCA more generally. While textualist and intentionalist approaches to statutory interpretation might differ in some instances,<sup>183</sup> with regard to the first-to-file rule both interpretive methods ultimately lead to the conclusion that the rule is nonjurisdictional.

Regardless of one's general theory of statutory interpretation, beginning the interpretive inquiry with the first-to-file rule's text as well as the text of neighboring provisions is appropriate.<sup>184</sup> As both the D.C. and Second Circuits clearly identified, the text of the first-to-file rule “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,” while nearby provisions of the FCA

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181. 529 U.S. 765 (2000).

182. See supra note 112 and accompanying text (identifying these two goals as being the encouragement of citizens to act as private attorneys general on the one hand and preventing duplicative litigation on the other).

183. The weight to afford to text, purpose, and legislative history in statutory analysis is a source of debate for academics and practitioners. For two detailed considerations of the differences between textualism and intentionalism, see generally Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347 (2005); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74 (2000). However, opinions in the academy differ as to whether or not textualists and intentionalists are pursuing the same goal. See Nelson, supra, at 353–54 (“In particular, textualist as well as intentionalist judges routinely seek to identify and enforce the legal directives that an appropriately informed interpreter would conclude the enacting legislature had meant to establish.”); Vermeule, supra, at 82–83 (defining “intentionalist” interpretation as seeking “legislative intent” and “textualist” interpretation as searching “for the meaning of statutory text”).

184. See Kent Greenawalt, *Statutory Interpretation: 20 Questions* 35 (1999) (“No one seriously doubts that interpretation of statutes turns largely on textual meaning.”); Nelson, supra note 183, at 348 (“[N]o critic of textualism believes that statutory text is unimportant.”).

clearly do.<sup>185</sup> Both courts concluded that this fact, coupled with the Supreme Court's clear statement jurisprudence, was enough to hold that the rule was nonjurisdictional.<sup>186</sup> Neither court, however, proceeded to consider other materials beyond the text and structure, such as Congress's legislative purpose.<sup>187</sup>

Even going beyond the text and structure of the FCA, an intentionalist would see little reason to disagree with the conclusion that the first-to-file rule does not implicate a district court's subject matter jurisdiction. This is especially true because the legislative history surrounding the first-to-file rule is unilluminating. The purpose of the rule was to clarify that "only the [g]overnment may intervene in a qui tam action" and 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."<sup>188</sup> The general purpose of the FCA is to combat fraud against the federal government, no matter who may commit it.<sup>189</sup> The FCA's qui tam provision serves the dual purposes of incentivizing relators to file suits, thereby bolstering the government's enforcement resources, and preventing duplicative follow-on litigation by relators that does little to serve the public interest.<sup>190</sup> These general goals do not provide much insight as to how to resolve whether the first-to-file rule divests a district court of subject matter jurisdiction. Indeed, either construction of the rule would arguably further each of these aforementioned purposes. In short, the purpose of the first-to-file rule individually, as well as the purposes of the FCA's qui tam provision and even the FCA generally, provide little reason to diverge from the conclusion to which the rule's text and the Act's structure lead.

Supported by these principles of statutory interpretation, the benefits of holding that the first-to-file rule is nonjurisdictional also counsel toward reaching this conclusion. A nonjurisdictional construction of the rule would ensure that the rule's protections are available to a defendant who properly raises the issue, while at the same time placing the

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185. *Hayes II*, 853 F.3d 80, 86 (2d Cir. 2017) (internal quotation marks omitted) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)); *Heath II*, 791 F.3d 112, 120 (D.C. Cir. 2015) (quoting *Arbaugh* for the same proposition).

186. See *Hayes II*, 853 F.3d at 86; *Heath II*, 791 F.3d at 120–21. For a detailed discussion of the D.C. and Second Circuits' analyses, see *supra* section II.B.

187. See *Hayes II*, 853 F.3d at 84–86; *Heath II*, 791 F.3d at 120–21.

188. S. Rep. No. 99-345, at 25 (1986).

189. See *id.* at 8–9 ("The False Claims Act reaches all parties who may submit false claims. . . . The False Claims Act is intended to reach all fraudulent attempts to cause the [g]overnment to pay out sums of money or to deliver property or services."); S. Rep. No. 96-615, at 3 (1980) (identifying the same goals).

190. See *supra* note 112 and accompanying text.

obligation on the parties to properly put the issue before the court.<sup>191</sup> Eliminating the potentially costly obligation on the courts that comes along with a jurisdictional rule—that is, the duty to raise first-to-file issues *sua sponte*—would conserve judicial resources and promote finality by foreclosing the possibility of a first-to-file objection being raised at a late stage of litigation.<sup>192</sup>

2. *Vermont Agency of Natural Resources v. United States ex rel. Stevens: Also Supporting a Nonjurisdictional First-to-File Rule.* — In addition to both the text and structure of the FCA, the Supreme Court's past characterization of a relator's role in an FCA case provides strong support in favor of finding that the first-to-file rule is nonjurisdictional. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court confronted whether a qui tam relator has standing to sue on behalf of the United States.<sup>193</sup> Before ultimately holding that relators satisfy the constitutional standing requirements, the Court discussed the implications of the FCA providing relators with the power to bring a civil action both on behalf of themselves and the United States.<sup>194</sup> Justice Scalia, writing for the majority, identified two different roles that relators occupy in FCA litigation: partial assignees and litigating agents.<sup>195</sup> Scalia explained that relators operate as partial assignees—because they have their own concrete interest in the litigation—with respect to the portion of the recovery that the relator retains for successfully bringing or prosecuting the FCA suit.<sup>196</sup> Conversely, relators operate as litigating agents with respect to the portion of any FCA recovery that the United States is entitled to retain.<sup>197</sup>

Considering Scalia's characterization of relators, the first-to-file rule can be understood as answering two primary questions: (1) who has the power to act as the government's litigating agent, and (2) to whom has the government assigned a portion of its claim. By its operation, the rule limits the authority to act as the United States' litigating agent to the first relator to file suit.<sup>198</sup> The assignment of a portion of the recovery is thereby also limited to the relator who has the authority to serve as a

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191. See *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (“Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited.”).

192. See Dodson, *Mandatory Rules*, *supra* note 63, at 10; see also *Hayes II*, 853 F.3d at 84 (considering the first-to-file objection for the first time on appeal).

193. 529 U.S. 765, 777–78 (2000).

194. See *id.* at 771–73.

195. See *id.* at 772–74.

196. See *id.*

197. See *id.* at 772.

198. See 31 U.S.C. § 3730(b)(5) (2012).

litigating agent on behalf of the United States.<sup>199</sup> Neither of these concepts appears to implicate subject matter jurisdiction.

These limitations speak only to who may bring a claim and who is entitled to a portion of any judgment—in other words, whether a particular relator has a valid claim for relief. They do not speak to the traditional subjects of jurisdictional rules.<sup>200</sup> Rather, the first-to-file rule, like other nonjurisdictional “merits rules,” simply defines “*who is entitled to sue whom*, for what, and for what remedy” under the FCA.<sup>201</sup> In this way, the first-to-file rule limits the relator’s power, not the court’s.

The Federal Rules of Civil Procedure reinforce the conclusion that the first-to-file rule’s limitation on who may serve as the United States’ litigating agent, and correspondingly who is entitled to a portion of any judgment, does not implicate subject matter jurisdiction. While all parties are required to plead “a short and plain statement of the grounds for the court’s jurisdiction,”<sup>202</sup> the Federal Rules generally do not require a party to allege in its pleadings that it has the “authority to sue or be sued in a representative capacity.”<sup>203</sup> Further, while parties are required to allege in their pleadings a “claim showing that [they are] entitled to relief,” this requirement is distinct from the jurisdictional pleading requirement.<sup>204</sup> Based on the structure of the pleading rules, the Advisory Committee seems to have contemplated that a party’s authority to litigate is distinct from the court’s jurisdiction.

3. *A Nonjurisdictional First-to-File Rule and Balancing the Twin Policy Goals of the FCA’s Qui Tam Provision.* — The FCA’s qui tam provision seeks to strike an appropriate balance between two competing policy goals: encouraging private citizens to file suits and preventing duplicative litigation.<sup>205</sup> In deciding whether to treat the first-to-file rule as nonjurisdictional, courts should consider the effects that such a rule would have on

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199. See *id.* § 3730(d)(1)–(2).

200. See *supra* notes 63–64 and accompanying text (discussing such subjects).

201. Wasserman, Demise, *supra* note 74, at 950 (emphasis added) (quoting John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 *Geo. L.J.* 2513, 2515 (1998)). “A plaintiff prevails on her claim when applicable law permits her to sue this defendant for this conduct and entitles her to this remedy; she fails on her claim if applicable law does not permit suit against this defendant for this conduct or for this remedy.” *Id.*; see also Wasserman, Jurisdiction, Merits, and Procedure, *supra* note 63, at 1548 (“Merits, by contrast, are defined by who can sue whom, what real-world conduct can provide basis for a suit, and the legal consequences of a defendant’s failure to conform . . . to its legal duties.”).

202. Fed. R. Civ. P. 8(a)(1).

203. See Fed. R. Civ. P. 9(a)(1)(B).

204. Fed. R. Civ. P. 8(a)(2).

205. See *supra* note 112 and accompanying text.

this balancing.<sup>206</sup> Even though construing the first-to-file rule as nonjurisdictional is both preferable as a matter of statutory interpretation and most consistent with the Supreme Court's past pronouncements about the proper role of relators in FCA litigation, questions remain about whether such a rule will afford sufficient protection to defendants or succeed in deterring frivolous litigation.<sup>207</sup> Even those who favor a nonjurisdictional first-to-file rule would likely concede that a jurisdictional construction would provide the most protection against duplicative suits.

However, while a nonjurisdictional rule could make it more difficult for defendants to avail themselves of the first-to-file rule, sufficient protections still exist. A nonjurisdictional first-to-file rule would not, in any way, impede defendants from moving to dismiss for failure to state a claim under Rule 12(b)(6), and it is far from a formality for a relator to clear this hurdle given the Supreme Court's Rule 12(b)(6) jurisprudence.<sup>208</sup> Even if a relator with a less-than-meritorious claim survives a motion to dismiss, summary judgment still imposes a significant barrier to recovery.<sup>209</sup> Because § 3730(b)(3) of the FCA requires that complaints be served on defendants pursuant to Rule 4 after they have been unsealed, FCA defendants would presumably possess the requisite facts to support such a motion.<sup>210</sup> Therefore, construing the first-to-file rule as nonjurisdictional strikes an appropriate balance between allowing defendants to dispose of frivolous, unmeritorious claims before trial while also serving the FCA's general truth-finding function.

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206. See, e.g., *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014) (noting that the first-to-file rule also serves the purpose of advancing these goals).

207. See *supra* section II.C.

208. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . ." (alteration in original) (citation omitted) (first quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957); then quoting Fed. R. Civ. P. 8(a)(2)); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (extending *Twombly's* rule beyond the antitrust context).

209. At this stage of the case, relators must show that there is a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("It follows from these settled principles that if the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). The exact nature of how summary judgment will operate here depends on which party is assigned the burden of proof. See *infra* section III.B.1.

210. See 31 U.S.C. § 3730(c)(3) (2012).

The government's right to intervene in any case filed under the FCA also serves a critical role in balancing these two competing goals. Because the government must be served with not only the complaint but also a written record disclosing all the material evidence,<sup>211</sup> the government occupies valuable territory in the middle of the relator–defendant relationship. It has at least sixty days before it must make the critical decision of whether to intervene,<sup>212</sup> and in making this decision it can consider not only the potential merits of the specific case at bar but also whether the case alleges conduct that is materially the same as what has been alleged in other previously filed cases.<sup>213</sup> Due to the FCA's service requirement, as well as the government's extensive experience litigating FCA cases, the government is in a unique position to make a reasoned determination, even if resource constraints may prevent it from being able to intervene in all FCA qui tam cases.<sup>214</sup> And whether a matter of causation or simply correlation, it is clear that government intervention bears a strong relationship with outcomes for FCA litigants.<sup>215</sup>

B. *A Nonjurisdictional First-to-File Rule Applied: Providing Guidance to the Lower Courts*

While a nonjurisdictional first-to-file rule may be preferable for each of the foregoing reasons, adopting such a rule does not resolve, and could actually create, several ambiguities surrounding its application. This section considers several of these open questions and proposes solutions to help guide district courts as to how best to operationalize a nonjurisdictional first-to-file rule. Section III.B.1 considers whether the burdens of pleading, production, and persuasion to invoke the rule should rest with the relator or the defendant. Section III.B.2 examines whether the rule should be subject to equitable exceptions or should be construed as mandatory.<sup>216</sup> Section III.B.3 addresses concerns related to the claim-preclusive effect to give decisions made on first-to-file grounds.

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211. *Id.* § 3730(b)(2).

212. See *id.* § 3730(b)(2)–(4).

213. In many of these cases, it is possible that the government is the only party that may be able to adequately answer this question. FCA cases may remain under seal for significant portions of time, during which the follow-on relator and even the court are unlikely to know of the suit. See *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 795 (S.D.N.Y. 2017), *rev'd on other grounds*, 2018 WL 3763731 (2d Cir. Aug. 9, 2018).

214. See *supra* note 41 and accompanying text (discussing the relatively low rate at which the government intervenes in FCA qui tam suits).

215. See *supra* notes 40–44 and accompanying text (discussing the wide disparity in outcomes depending on the government's intervention).

216. This Note uses the term “mandatory rule” as construed by Professor Dodson. See Dodson, *Mandatory Rules*, *supra* note 63, at 9. Professor Dodson notes that his characterization differs from the characterization advanced by Justice Souter, who envisioned some place for equitable exceptions. Compare *Bowles v. Russell*, 551 U.S. 205,



1. *The Burdens of Pleading, Production, and Persuasion.* — The FCA's text and legislative history provide little help in determining whether the relator or the defendant should bear the burdens of pleading, production, and persuasion related to the first-to-file rule.<sup>217</sup> However, based on the rule's substance and the facts that would be needed to establish that it applies, courts would be wise to hold that the rule operates as an affirmative defense. Doing so would assign each of the aforementioned burdens to the defendant.<sup>218</sup>

While the first-to-file rule is not specifically enumerated in Rule 8(c), the way the rule operates arguably falls within 8(c)'s catchall statement that "a party must affirmatively state any avoidance or affirmative defense."<sup>219</sup> While Rule 8(c) does not provide much guidance to determine what falls within the ambit of its catchall statement, the first-to-file rule has generally been found to include two types of defenses: (1) those admitting the allegations in the complaint for the sake of argument but suggesting another reason why the plaintiff is not entitled to recover, and (2) those containing allegations outside of the plaintiff's prima facie case.<sup>220</sup> The first-to-file rule arguably could fit either definition.

In determining whether a particular defense must satisfy Rule 8(c)'s requirements, Professors Charles Alan Wright and Arthur R. Miller argue that courts must often consider "policy, fairness, and in some cases probability."<sup>221</sup> In the case of the first-to-file rule, each of these considerations favors construing the rule as an affirmative defense. As a matter of policy, requiring the defendant to plead a first-to-file defense is appropriate because a defendant's reliance on the first-to-file rule says nothing about the wrongfulness of their conduct and instead relies on facts outside of those the plaintiff is likely to plead. Indeed, invoking the first-to-file rule would not "controvert the [relator's] proof" of wrongdoing at all.<sup>222</sup> Fairness also supports requiring defendants to affirmatively plead the defense because defendants are in a much better position than

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216–17 (2007) (Souter, J., dissenting) ("While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion."), with Dodson, *Mandatory Rules*, supra note 63, at 9 & n.41 ("Allowing a 'mandatory' rule to be subject to equitable discretion would render the 'mandatory' moniker meaningless, for there would be nothing 'mandatory' about it.").

217. See supra section II.C.2.

218. See supra notes 173–175 and accompanying text.

219. Fed. R. Civ. P. 8(c).

220. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271 (3d ed. 2018).

221. *Id.*

222. See *Winforge, Inc. v. Coachmen Indus., Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) (internal quotation marks omitted) (quoting *Brunswick Leasing Corp. v. Wis. Cent., Ltd.*, 136 F.3d 521, 530 (7th Cir. 1998)).

relators to identify duplicative suits.<sup>223</sup> Further, the fact that first-to-file issues are not part of the typical elements required to establish liability under the FCA counsels in favor of requiring the party relying on this unusual occurrence to “plead it affirmatively so that the usual assumptions may be indulged in as a matter of course wherever there is no such claim.”<sup>224</sup>

Construing the rule as an affirmative defense would impose a stiff burden on defendants to plead the defense in their responsive pleadings twenty days after the complaint is served on them.<sup>225</sup> However, while this would give defendants a short window in which to invoke the rule’s protections, defendants are routinely able to raise affirmative defenses of claim preclusion within the same time window.<sup>226</sup> Defendants would theoretically have notice of similar claims that have been filed against them, and they face similar incentives to seek out and identify filed claims as they do to identify past judgments for the purposes of claim preclusion.<sup>227</sup> Consequently, requiring this of defendants would not impose too substantial a burden on them.

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223. This is primarily because the defendants would have been served process of any other pending suits under Rule 4. See *supra* note 210 and accompanying text; see also *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 795 (S.D.N.Y. 2017) (“[T]here are likely to be many cases—like this one—in which neither the relator nor the court is in a position to know about an earlier-filed action.”), *rev’d on other grounds*, 2018 WL 3763731 (2d Cir. Aug. 9, 2018).

It is worth noting that the first-to-file rule’s text does not require that the later-filed claim be made against the same defendant. See *In re Nat. Gas Royalties Qui Tam Litig.* (CO2 Appeals), 566 F.3d 956, 961 (10th Cir. 2009). However, the identity of the defendant is arguably a material fact that would sufficiently distinguish a later-filed claim from the first-filed one to render the first-to-file rule inapplicable. See, e.g., *id.* at 962 (“The defendant’s identity is a material element of a fraud claim. Two complaints can allege the very same scheme to defraud the very same victim, but they are not the same claim unless they share common defendants.”); *United States v. Berkeley Heartlab, Inc.*, 225 F. Supp. 3d 487, 507 (D.S.C. 2016) (“[A] later-filed action is not based on the facts of a pending action when it identifies a new defendant who is not a subsidiary of an already-named defendant.”).

Yet, several courts have applied the first-to-file rule to different defendants if they are part of the “same corporate family.” See *CO2 Appeals*, 566 F.3d at 962; *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1280 n.4 (10th Cir. 2004) (applying the first-to-file rule even though the later-filed complaint named some new, related corporate entities that were not listed as defendants in the first-filed suit); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003) (“Hampton thinks her complaint differs significantly from Boston’s because it named different defendants. . . . But these are not differences in the material elements of the fraud.”).

224. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1409 (9th Cir. 1995) (internal quotation marks omitted) (quoting 5 *Wright & Miller*, *supra* note 220, § 1271, at 445).

225. See 31 U.S.C. § 3730(b)(3) (2012).

226. See Fed. R. Civ. P. 8(c) (enumerating “res judicata” as an affirmative defense subject to the rule’s requirements); see also *infra* note 247 (discussing claim preclusion and its application in FCA litigation).

227. Cf. *infra* note 247 (discussing claim preclusion and the protections it provides).

2. *Mandatory or Subject to Equitable Exception?* — Another important consideration for a nonjurisdictional first-to-file rule is whether it should be mandatory or potentially subject to equitable exceptions. The text of the FCA's first-to-file rule supports adopting the more rigid mandatory construction of the rule, as do the policy concerns behind the rule's adoption. Construing the rule in this manner strikes an appropriate balance between the flexibility provided by a nonjurisdictional rule and the rigidity of a jurisdictional one.<sup>228</sup>

The rule's text evinces Congress's intent to limit the discretion of the district courts to permit such cases to go forward.<sup>229</sup> Allowing equitable exceptions would do little to further the qui tam provision's information-sharing and deterrence functions.<sup>230</sup> A duplicative suit, even if meritorious and brought in good faith, would not provide the government with new information critical to uncovering the extent of the fraud or prosecuting the case.<sup>231</sup> If it did provide important new information, the first-to-file rule would not apply.<sup>232</sup> Permitting a later-filed case to go forward might even overincentivize relators to bring qui tam actions; the fact that a different suit was filed first demonstrates that sufficient incentives already exist to spur plaintiffs to action. Rather, permitting such cases to go forward would simply punish defendants twice for the same conduct. If Congress had intended to create exceptions to the first-to-file rule, it could have provided for them within the FCA's framework.<sup>233</sup>

Holding that the first-to-file rule is not subject to equitable exceptions is not likely to destroy the effectiveness of the FCA. After all, several circuits have already recognized that the rule is not subject to exception,<sup>234</sup> albeit for the wrong reasons,<sup>235</sup> and the FCA's utility has not

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228. See *Wood*, 246 F. Supp. 3d at 795 (“The more sensible approach, supported by the language and structure of the FCA, is to treat the first-to-file rule as a non-jurisdictional (albeit mandatory) rule.”).

229. See 31 U.S.C. § 3730(b)(5) (stating that “no person other than the Government may intervene or bring a related action based on the facts underlying the pending action” (emphasis added)).

230. See supra notes 35–36 and accompanying text.

231. See supra notes 50–52 and accompanying text.

232. See supra note 54 and accompanying text.

233. Indeed, many textualists would argue strongly against reading beyond the statute's text to infer unstated exceptions. See Nelson, supra note 183, at 400–01 (discussing the differences between textualists and intentionalists related to this issue).

234. See, e.g., *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 33 (1st Cir. 2009) (“The ‘first-to-file’ rule is ‘exception-free’ . . .” (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001))); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005) (stating that the first-to-file bar is “exception-free”); *Lujan*, 243 F.3d at 1183 (“We hold that § 3730(b)(5) establishes an exception-free, first-to-file bar.”).

235. See supra section III.A.

been severely undermined.<sup>236</sup> While there is some historical tradition of reading certain nonjurisdictional rules to accommodate equitable exceptions even if the rule's text does not explicitly provide for them,<sup>237</sup> it does not necessarily follow that such exceptions should be assumed to apply to *all* nonjurisdictional procedural rules. "If one assumes that Congress generally means its statutory directives to be just as rule-like as they seem on the surface," then for certain especially rule-like procedural bars—like the first-to-file rule—reading ad hoc exceptions into the rule could be construed as disparaging a duly made legislative decision.<sup>238</sup>

Additionally, while there is potential for harsh consequences in specific cases, the inflexibility of a mandatory construction of the first-to-file rule has its own benefits.<sup>239</sup> Such an interpretation would promote compliance with the rule's terms and strengthen a relator's incentives to file suit quickly, thus providing the government with critical information in a timely fashion.<sup>240</sup> Mandatory rules also constrain judicial discretion, which would increase uniformity and fairness across FCA cases.<sup>241</sup> Finally, refusing to permit equitable exceptions would allow for conservation of judicial resources by avoiding any need to litigate these issues.<sup>242</sup>

One situation in which an equitable exception could theoretically be warranted, however, is when a similar claim to the later-filed suit was filed first but that complaint remained under seal at the time the defendant's responsive pleading was required in the later-filed suit.<sup>243</sup> A strict application of the first-to-file rule in this case could lead to a defendant effectively being forced to waive the rule's protections when it would have been impossible for them to know the facts necessary to assert the defense. Even in this situation, though, an equitable exception would not be necessary because the Federal Rules of Civil Procedure already provide a resolution. Rule 15, which provides parties with opportunities

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236. The billions of dollars recovered under the FCA in recent years, even before *any* circuit adopted a nonjurisdictional first-to-file rule, evinces this. See *supra* notes 21–22 and accompanying text.

237. This is perhaps most pronounced in the case of nonjurisdictional statutes of limitations, which are frequently interpreted to accommodate "equitable tolling." See *Holland v. Florida*, 560 U.S. 631, 645 (2010) (holding that AEDPA's statute of limitations was subject to equitable tolling even though the statute did not specifically provide for it); *Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling" . . . ." (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990))).

238. Nelson, *supra* note 183, at 400; cf. Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 *Harv. J.L. & Pub. Pol'y* 61, 68 (1994) ("Using legislative history and an imputed 'spirit' to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law.").

239. See Dodson, Mandatory Rules, *supra* note 63, at 10.

240. See *id.*

241. See *id.*

242. See *id.*

243. See *supra* note 166 (identifying this issue).

to amend their pleadings, is sufficient to address this concern because defendants can be afforded a chance to plead the defense once they become aware of the critical facts (that is, once they are served with the previously sealed complaint).<sup>244</sup> Courts should freely give defendants leave to amend in this situation, as justice would seem to require it.<sup>245</sup>

3. *The Preclusive Effect of Claims Decided Under a Nonjurisdictional First-to-File Rule.* — Yet another challenge that courts might face related to a nonjurisdictional first-to-file rule pertains to what, if any, preclusive effect to give FCA claims that are decided against relators on first-to-file grounds. Because these decisions would presumably be made under Rule 12(b)(6) or Rule 56, they would ordinarily constitute judgments on the merits and could potentially operate to preclude later-filed cases—and perhaps even the first-filed case—alleging similar facts.<sup>246</sup> Claim preclusion generally requires three elements: “(1) an identity of the parties or their privies; (2) [an] identity of the cause of action; and (3) a final judgment on the merits.”<sup>247</sup> However, the extent to which decisions

244. See Fed. R. Civ. P. 15(a)(2).

245. See *id.*

246. See *supra* notes 177–179 and accompanying text.

247. *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 649 F.3d 539, 547 (7th Cir. 2011) (alteration in original) (internal quotation marks omitted) (quoting *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008)).

Under the doctrine of claim preclusion, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Once a court enters a valid final judgment on the merits, the original claim merges with the judgment and thus cannot be relitigated going forward. See Restatement (Second) of Judgments §§ 18–19, 24 (Am. Law Inst. 1982).

To determine what constitutes the “same claim,” courts generally employ a fact-based, pragmatic approach: the “transaction or occurrence test.” See, e.g., Fed. R. Civ. P. 13(a)(1)(A); *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 316 (2011). The Restatement (Second) of Judgments § 24 identifies several criteria potentially relevant to this inquiry, and this test reaches beyond the exact issues previously litigated.

Claim preclusion’s “same claim” component would presumably be satisfied because, for the first-to-file rule to apply, there must be sufficient factual similarity between the first-filed and later-filed complaints. See *supra* note 54 and accompanying text. This requisite factual similarity likely would satisfy claim preclusion’s “transaction or occurrence” standard, discussed *supra*.

The “same party” requirement could also be satisfied because, no matter who brings the claim, the action is brought in the government’s name and the government can participate in the action through intervening. See 31 U.S.C. §§ 3730(b)(1)–(2) (2012). However, while the “same party” requirement would likely be satisfied if the government files a subsequent suit based on similar facts, it is less clear that this should also be true for a subsequent relator-filed suit. Compare *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (“Only when the initial action concludes without prejudice (or covers a different transaction) will a later suit—by the original relator, a different relator, or the Department of Justice—be permissible.”), with *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 456 (5th Cir. 2005) (asserting that “a dismissal against one relator may not necessarily preclude another relator from bringing the same suit on behalf of the government”).

on first-to-file grounds should constitute judgments on the merits and whether subsequent suits by relators satisfy claim preclusion's "same party" requirement are unclear and would often require fact-intensive inquiry.<sup>248</sup>

Nevertheless, the applicability of claim preclusion related to complaints decided on first-to-file grounds rests on one major assumption: that district courts will dismiss such cases *with prejudice*. District courts can avoid the difficulties of assessing the potential claim-preclusive effect of dismissals under the first-to-file rule by simply stating that these dismissals are *without prejudice*. Dismissing without prejudice would be appropriate because it would bar the refiling of the second relator's suit so long as the first-filed case remains pending without also preventing a potentially meritorious claim from being refiled should the first-filed claim fall flat. Dismissals without prejudice, by definition, do not operate as judgments on the merits and thus would not be entitled to any claim-preclusive effect.<sup>249</sup> This approach has already been adopted by at least one district court and has been approved by both the D.C. and Second Circuits.<sup>250</sup>

Yet, while the first-to-file rule would not then bar the second relator from refiling her suit, her claim could still be subject to any potential claim-preclusive effects of the first-filed case.<sup>251</sup> The district courts would need to make difficult judgments about the preclusive effects of the

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248. For example, note that *Semtek International, Inc. v. Lockheed Martin Corp.* identified that not all judgments "upon the merits," as defined by Rule 41(b), are entitled to claim-preclusive effect. See 531 U.S. 497, 504–05 (2001). In the first-to-file context, this would likely require fact-intensive, case-by-case evaluations by district courts and would likely not produce uniform results. Compare *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913–14 (4th Cir. 2013) (holding that dismissal of an FCA complaint pursuant to a settlement agreement did not preclude subsequent suits alleging materially the same conduct by both the government and relators), with *Chovanec*, 606 F.3d at 362 (recognizing that claim preclusion could bar a later-filed complaint alleging the same material facts even though the previous case proceeded to settlement).

Even to the extent that claim preclusion is available in FCA litigation, however, a later-filed qui tam suit dismissed on first-to-file grounds should not be able to preclude the first-filed case from proceeding to a judgment. Permitting this would completely undermine the purpose of the FCA's qui tam provision and would effectively leave the government with no opportunity to litigate.

249. See *Semtek*, 531 U.S. at 505.

250. See *United States ex rel. Wood v. Allergan, Inc.*, No. 17-2191-CV, 2018 WL 3763731, at \*6 (2d Cir. Aug. 9, 2018) ("While the statute does not include a provision mandating dismissal when there is a violation, the clear import of the language is that dismissal is required."); *United States ex rel. Shea v. Celco P'ship*, 863 F.3d 923, 929–30 (D.C. Cir. 2017) (holding that dismissal without prejudice, rather than providing the relator with leave to amend, was the appropriate remedy); *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 160 F. Supp. 3d 16, 30 (D.D.C. 2015) ("Compliance with § 3730(b)(5) requires dismissal of Plaintiff's action without prejudice so that he may refile now that Verizon I is no longer pending.>").

251. See *Chovanec*, 606 F.3d at 362 ("And if the action is related to and based on the facts of an earlier suit, then it often cannot be refiled—for, once the initial suit is resolved and a judgment entered (on the merits or by settlement), the doctrine of claim preclusion may block any later litigation.>").

first-filed case. However, the resolution of the first-filed case would likely have reached the underlying claims' merits. The district court would thus avoid having to consider what preclusive effect to give to a case that was decided with likely little to no consideration of the merits of the action.<sup>252</sup> And while this may result in meritorious second-filed cases never being able to proceed—because the first-filed case reached a merits judgment, thereby precluding later-filed claims—this is wholly consistent with the FCA's vision. Congress, in strengthening the qui tam provisions of the FCA, intended to better harness the interests of private litigants for the *benefit of the government*, not to provide relators with a cause of action for harms that they have suffered individually.<sup>253</sup>

#### CONCLUSION

The FCA's first-to-file rule has provided interpretive challenges for courts in the past, but recently a new interpretive dilemma has arisen: Does the rule have the power to divest the district courts of subject matter jurisdiction? The circuits have split on this issue and have created several as-yet unresolved questions that are important to both relators and defendants alike. This Note suggests that the federal courts should adopt a nonjurisdictional first-to-file rule, as advocated by the D.C. and Second Circuits, for three reasons: (1) textualist, structural, and intentionalist principles of statutory interpretation each support a nonjurisdictional first-to-file rule; (2) a nonjurisdictional construction is most consistent with the Supreme Court's past discussion of the role of relators in FCA qui tam cases; and (3) a nonjurisdictional first-to-file rule still provides sufficient protection to FCA defendants. While adopting a nonjurisdictional version of the first-to-file rule would create several uncertainties, this Note offers suggestions for how to resolve several of these open questions. Adopting this nonjurisdictional construction, as well as the proposed guidance for employing it, would allow the district courts to ensure uniformity in applying the rule while also remaining faithful to the policy goals that motivated Congress to amend the FCA in 1986.

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252. This is because the first-to-file rule essentially operates as an avoidance defense and does not consider the merits of the defendant's conduct. See *supra* section III.B.1. By comparison, it seems more likely that the first-filed case would reach the merits.

253. See *supra* notes 1, 34–36 and accompanying text.

