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The Winner Takes it All, but Who Gets to Play? The False Claims Act's First to File Rule and Jurisdiction

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THE WINNER TAKES IT ALL, BUT WHO GETS TO PLAY? THE FALSE CLAIMS ACT'S FIRST TO FILE RULE AND JURISDICTION

Abstract: In 2019, the United States Court of Appeals for the First Circuit held, in *United States v. Millenium Laboratories, Inc.*, that the False Claims Act's first to file rule is nonjurisdictional. This decision followed those by the United States Courts of Appeals for the Second and D.C. Circuits that came to the same conclusion. These decisions stand in opposition to a number of other circuits that, prior to 2015, held the first to file rule as jurisdictional. This split emerged after the Supreme Court's 2015 decision in *Kellogg Brown & Root Services v. United States ex rel. Carter*, a False Claims Act case where the Court considered the first to file rule after considering other nonjurisdictional items, leading some circuits to infer that the Supreme Court considered the rule nonjurisdictional. In holding the first to file rule nonjurisdictional, the First Circuit followed the Supreme Court's bright line rule preventing jurisdictional treatment absent clear Congressional intent. This Comment argues that the First Circuit's treatment of the first to file rule as nonjurisdictional is correct and fulfills the legislative intent of the False Claims Act while still preventing parties from overburdening the judiciary with opportunistic suits.

INTRODUCTION

From the war profiteers of the Civil War to twenty-first century healthcare reimbursement fraudsters, the False Claims Act (FCA) has been the federal government's best weapon against reimbursement fraud for over 150 years.[1] The FCA imposes liability on any person who "knowingly presents . . . a false or fraudulent claim for payment or approval . . . to an officer, employee, or

[1] *See* False Claims Act, 31 U.S.C. §§ 3729–3733 (2018); United States v. Millenium Labs., Inc., 923 F.3d 240, 244 (1st Cir. 2019) (noting that the False Claims Act's original purpose was to punish fraud during the Civil War and that this continues to be the government's main legal avenue to fight fraud), *cert. denied sub nom.* Estate of Cunningham v. McGuire, No. 19-583, 2020 U.S. LEXIS 338, at *1 (2020); United States *ex rel.* Marcus v. Hess (*Marcus I*), 127 F.2d 233, 235 (3d Cir. 1942) (discussing the legislative history of the False Claims Act), *rev'd on other grounds* United States *ex rel.* Marcus v. Hess (*Marcus II*), 317 U.S. 537 (1943). *See generally* Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), https://perma.cc/V86G-MURS [hereinafter Press Release, U.S. Dep't of Justice]. In 2018, $2.5 billion of the $2.8 billion received under the False Claims Act (FCA) came from the healthcare sector. Press Release, U.S. Dep't of Justice, *supra*. The United States government relies on individual whistleblowers to supplement federal enforcement resources. Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1698 (2015).

agent of the United States."[2] Individuals may file a FCA claim on behalf of the U.S. government; however, the government may decline to intervene in such a suit.[3] When an individual brings an action on behalf of the government it is called a *qui tam* action, and the person bringing the action is called a relator.[4]

The statute permits relators to receive a portion of a *qui tam* settlement.[5] This share can be a significant amount of money as the largest FCA settlements amount to billions of dollars.[6] This is not an easy payday: many relators are individuals who put themselves under a great deal of stress by working covertly with attorneys and government officials to build a case.[7] Despite the resulting stress, a *New England Journal of Medicine* study reported that relators had non-financial motivations for their claims that were instead based on "integrity, altruism or public safety, justice, and self-preservation."[8]

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[2] 31 U.S.C. § 3729(a)(1)(A), (b)(2)(A)(i). "Knowingly," as used in the statute, means a person has actual knowledge of the false information, acts "in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information." *Id.* § 3279(b)(1). The FCA does not require "proof of specific intent to defraud." *Id.* § 3729(b)(1)(B).

[3] *Id.* § 3730(b)(1)–(2). A plaintiff files *in camera* and the court seals the complaint for at least sixty days before the court may order service on the defendant. *Id.* § 3730(b)(2). The Government has sixty days after it receives the complaint and supporting evidence to decide if it wants to join the case. *Id.* In reality, the government generally files a number of extensions and the case can take years to resolve. *See* Aaron S. Kesselheim et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. OF MED. 1753, 1835–36 (2010).

[4] 31 U.S.C. § 3730(c); *Millenium Labs.*, 923 F.3d at 243. The phrase "*qui tam*" comes from the Latin "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who as well for the king as for himself sues in this matter." *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term "relator" also originates from Latin, meaning the person who relates or reports the information to someone else. *Relator*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/relator [https://perma.cc/NXC6-REWE].

[5] 31 U.S.C. § 3730(d)(1). If the Government joins the *qui tam* action, subject to certain limitations, the relator receives between fifteen and twenty-five percent of the settlement depending on how much the relator's evidence and participation aided the prosecution. *Id.*

[6] U.S. Dep't of Justice, Fact Sheet: Significant False Claims Act Settlements & Judgments, Fiscal Years 2009–2016 (Dec. 14, 2016), https://perma.cc/79KQ-APTN (noting that all four FCA settlements that totaled over one billion dollars arose from claims against healthcare companies).

[7] Kesselheim et al., *supra* note 3, at 1835–36. *See generally* Sheelah Kolhatkar, *The Personal Toll of Whistleblowing*, NEW YORKER, Feb. 4, 2019, at 30–41 (detailing the harrowing whistleblowing experience of a particular relator whose cooperation with the federal government cost him his career). A 2010 study looked at a set of seventeen *qui tam* actions and found that individuals within the reported companies made up the majority of *qui tam* relators. Kesselheim et al., *supra* note 3, at 1832. In most cases, these internal relators attempted to fix the conduct themselves or reported the fraudulent conduct internally prior to pursuing a *qui tam* action. *Id.* at 1834. After reporting outside of the company, some of these relators became active participants in the investigation. *Id.* This participation required the relators to go through extreme stress to help gather evidence. *Id.* This included wearing a recording device, traveling to meet with federal officials using their own money, and copying company documents. *Id.* at 1835–36. Moreover, many of these whistleblowers simultaneously attempted to conceal their involvement in the investigation from their coworkers. *Id.*

[8] Kesselheim et al., *supra* note 3, at 1834. In fact, many relators reported putting their financial livelihoods at risk and some faced financial ruin during the years-long course of their respective investigations. *Id.* at 1836. One relator in the study stated: "I just wasn't able to get a job[;] . . . [i]t went

Congress intended to encourage individuals to bring suits through the FCA, rather than through class action suits or separate suits based on the same underlying information.[9] In the absence of clear statutory language, however, at least one case permitted recovery by a relator alleging identical facts to a prior FCA suit.[10] In 1986, Congress rectified this issue by implementing 31 U.S.C. § 3730(b)(5), which limits who may intervene or file additional claims in the *qui tam* action.[11] Courts have interpreted this provision to be a first to file rule.[12] A first to file rule prohibits a court from hearing a case if another court already has jurisdiction based on an earlier filed claim regarding the same issue.[13] The overall goal of the rule is twofold: (1) avoiding identical suits against one defendant while (2) encouraging individuals to report fraudulent activity.[14] The first to file rule also seeks to prevent frivolous suits by countless individuals with knowledge of the same fraud who then share the proceeds.[15] Adding to the complexity, circuit courts have split between treating the first to file rule jurisdictionally and evaluating the rule as part of a well-pleaded complaint.[16] The genesis of this split is the Supreme Court's jurisdic-

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longer and longer . . . . I had to sell the personal home that I was in[;] . . . I had my cars repossessed[;] . . . I lost my 401[k] . . . . I lost everything[,] . . . [a]bsolutely everything." *Id.*

[9] *Millenium Labs.*, 923 F.3d at 244 (quoting S. REP. NO. 99-345, at 25 (1986), *as reprinted in* 1986 U.S.C.C.A.N 5266, 5290).

[10] *See* S. REP. NO. 99-345, at 25 (acknowledging that "there are few known instances of multiple parties intervening in past *qui tam* cases" but expressing a desire to add statutory language to prevent future cases); *see, e.g.*, United States v. Baker-Lockwood Mfg. Co., 138 F.2d 48, 50, 52–53 (8th Cir. 1943) (allowing multiple individual plaintiffs to file FCA claims based on identical facts), *vacated per curiam sub nom.* Nathanson v. United States, 321 U.S. 744, 744 (1944).

[11] 31 U.S.C. § 3730(b)(5); *Millenium Labs.*, 923 F.3d at 244. The additional language added by the 1986 amendment states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5).

[12] *See* United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan I*), No. CV-92-1282 SVW, 2000 U.S. Dist. LEXIS 22100, at *10 (C.D. Cal. Jan. 20, 2000) ("Section 3730(b)(5) has been interpreted as a 'first to file' rule which sets a jurisdictional bar to any related *qui tam* action.").

[13] *First to File Rule*, BLACK'S LAW DICTIONARY, supra *note* 4 ("The principle that, when two suits are brought by the same parties, regarding the same issues, in two courts of proper jurisdiction, the court that first acquires jurisdiction usually retains the suit, to the exclusion of the other court."). In *qui tam* actions, this determination may not be as simple as determining which party filed first in time. *See, e.g.*, *Cunningham*, 202 F. Supp. 3d at 202 (noting that eight different relators filed separate actions, alleged separate fraud mechanisms, and contended for the proceeds from the settlement). When multiple relators file separate claims against a defendant, a court must undertake a material facts test in which it determines which individual filed the claim containing the material facts that led to the settlement first and thus should receive the monetary reward. *Millenium Labs.*, 923 F.3d at 252–53; *see also* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998) (laying out the material elements test to determine what types of claims were barred by prior actions under the first to file rule).

[14] *Millenium Labs.*, 923 F.3d at 252.

[15] *Id.*

[16] *Id.* at 248–49. Three circuit courts now recognize the first to file rule as nonjurisdictional and evaluate the *qui tam* claim under the well-pleaded complaint standard under Federal Rule of Civil

tional bright line rule requiring clear legislative intent before interpreting a rule as jurisdictional.[17]

The latest court to split from the jurisdictional approach is the First Circuit Court of Appeals in the 2019 case of *United States v. Millenium Laboratories, Inc*.[18] In *Millenium Laboratories*, the First Circuit evaluated claims from relators competing for a share of the government's $227 million FCA settlement with a medical laboratory testing company.[19] The court overturned the district decision as well as circuit precedent by holding that recent Supreme Court opinions and bright line rules show that the first to file rule is nonjurisdictional.[20]

Part I of this Comment gives an overview of the FCA, the material facts test used to evaluate claims under the first to file rule, the nature of jurisdictional rules, and the First Circuit's ruling in *Millenium Laboratories* declaring the first to file rule nonjurisdictional.[21] Part II examines and discusses how the first to file rule originally became jurisdictional and a 2015 Supreme Court case that changed the interpretation of the first to file rule in three different circuits.[22] Lastly, Part III argues that the First Circuit's nonjurisdictional treatment of the FCA's first to file rule is in line with Supreme Court precedent and Congress's legislative policy goals.[23]

Procedure 12(b)(6). *See id.* at 249; United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017) (holding the first to file rule "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 120–21 (D.C. Cir. 2015) (noting that Congress did not reference jurisdiction explicitly in the first to file rule). Nevertheless, a number of other circuits still classify the rule as jurisdictional and will dismiss the case if at any point the judge believes the complainant filed suit after the "true" relator. *E.g.*, United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013), *aff'd in part, rev'd in part sub nom.* Kellogg Brown & Root Servs. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1978 (2015); United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 376 (5th Cir. 2009); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 969–70 (6th Cir. 2005); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004); United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan II*), 243 F.3d 1181, 1183 (9th Cir. 2001).

[17] *See* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013); Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 (2006); *see also* Gonzalez v. Thaler, 565 U.S. 134, 141–43 (2012) (noting a nonjurisdictional presumption when Congress includes particular jurisdictional language in one section of a statute but omits it in another section).

[18] *Millenium Labs.*, 923 F.3d at 251.

[19] *Id.* at 247.

[20] *Id.* at 249–51.

[21] *See infra* notes 24–79 and accompanying text.

[22] *See infra* notes 80–112 and accompanying text.

[23] *See infra* notes 113–141 and accompanying text.

I. THE WINNER TAKES IT ALL: A HISTORY OF THE FCA, THE FIRST TO FILE RULE, AND THE FIRST CIRCUIT'S JURISDICTIONAL INTERPRETATION[24]

Qui tam actions existed in England for centuries before the United States' passage of statutes like the FCA.[25] The Lincoln administration enacted the FCA during the Civil War as a way to curtail war profiteering and military contractor fraud.[26] The FCA endured and evolved to become one of the federal government's most powerful fraud-fighting tools.[27] Section A of this Part discusses the United States' adoption of the FCA and how Congress amended the FCA in 1986 to encourage more whistleblowers.[28] Section B discusses the material facts test developed by the United States Court of Appeals for the Third Circuit.[29] Next, Section C discusses jurisdictional rules and the ramifications for claimants.[30] Lastly, Section D of this Part discusses why the First Circuit broke from precedent and recognized the first to file rule as nonjurisdictional.[31]

A. The FCA's Evolution from Wartime Necessity to Modern Essential

Modern FCA claims usually originate in the healthcare field.[32] This focus on the healthcare industry is not accidental; Congress strengthened the FCA

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[24] *Cf.* ABBA, *The Winner Takes It All*, *on* SUPER TROUPER (Atlantic Records 1980) ("I've played all my cards, and that's what you've done too, nothing more to say, no more ace to play, [t]he winner takes it all, the loser standing small, beside the victory, that's her destiny.").

[25] *Marcus II*, 317 U.S. at 541 n.4. In the United States, *qui tam* actions have been available to bring suits for "arming vessels against friendly powers," "breaches of duty by the Treasurer or the Register of the United States," and "protection of Indians." *Id.*

[26] *Marcus I*, 127 F.2d at 235. The Senator introducing the FCA in 1863 stated "[t]his bill has been prepared at the urgent solicitation of the [military] officers . . . respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war. . . . [F]urther legislation is pressingly necessary to prevent this great evil." *Id.* (quoting CONG. GLOBE, 37th Cong., 3d Sess., 952 (1863)). The corruption of these publicly reimbursed contractors "permitted or encouraged this robbing of the government treasury and cruelty to the American soldier." *Id.* at 236. Eventually, *qui tam* provisions fell out of favor. *Id.* at 235. Many early *qui tam* actions in English law took place between collusive parties, and the entire reward went directly to the *qui tam* informers, creating resentment among those paying. *Id.* This resentment led to legal reforms that eventually phased out or modified the payouts for these claims. *Id*.

[27] *Millenium Labs.*, 923 F.3d at 244; *see* Press Release, U.S. Dep't of Justice, *supra* note 1 (noting the federal government has recovered over $59 billion through FCA claims since 1986). Of the $2.8 billion recovered in 2018, $2.1 billion originated with *qui tam* lawsuits resulting in $301 million in payouts to relators. Press Release, U.S. Dep't of Justice, *supra* note 1. FCA whistleblower activity remained strong in 2018, as relators filed 645 new *qui tam* actions. *Id.*

[28] *See infra* notes 32–40 and accompanying text.

[29] *See infra* notes 41–45 and accompanying text.

[30] *See infra* notes 46–53 and accompanying text.

[31] *See infra* notes 54–79 and accompanying text.

[32] Press Release, U.S. Dep't of Justice, *supra* note 1. In 2018, $2.5 billion of the $2.8 billion recovered under the FCA came from the healthcare industry. *Id.* These recoveries came from a wide range of healthcare entities including drug and medical device manufacturers, laboratories, hospitals, pharmacies, and physicians. *Id.*

whistleblower provisions in 1986 in response to increased healthcare reimbursement fraud.[33] The 1986 amendments sought to supplement scarce government enforcement resources with more relator claims by giving relators the option to take a more active role in the litigation.[34] The amendments also encouraged relators by setting the payout to be between fifteen and twenty-five percent of the recovery if the government intervenes, and between twenty-five and thirty percent of the recovery if the relator litigates the case.[35] Although these changes were a boon for potential relators, Congress also added additional protection for defendants by implementing 31 U.S.C. § 3730(b)(5).[36] Congress added this provision to avoid "multiple separate suits based on identical facts and circumstances."[37] Courts have subsequently interpreted this provision as a first to file rule.[38] Relator *qui tam* actions increased dramatically as a result of these changes.[39] The first to file rule, however, still required that courts apply a test to determine which plaintiff filed first and therefore deserved the relator's share.[40]

B. The Third Circuit's Material Facts Test

The prevailing analysis for determining what falls under the first to file rule comes from the Third Circuit's 1998 decision in *United States ex rel.*

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[33] *See* S. REP. NO. 99-345, at 2 (stating that fraud cases were on a steady rise in Government programs, particularly programs under the Department of Health and Human Services); U.S. DEP'T OF HEALTH & HUMAN SERVS., PROTECTING PUBLIC HEALTH AND HUMAN SERVICES PROGRAMS: A 30-YEAR RETROSPECTIVE, 8–9 (2006) (noting that rapid increases in healthcare fraud convictions in the mid-1980s prompted updates to the FCA).

[34] 31 U.S.C. § 3730(c)(1); S. REP. NO. 99-345, at 23–24 (stating that the main intent of Congress's FCA amendments was to encourage more private enforcement suits). This change acknowledged an issue for many potential reporters: coming forward puts them at personal and financial risk. S. REP. NO. 99-345, at 25. As such, Congress felt that relators deserved to participate more closely with government officials and see the fraud pursued up close. *Id.*

[35] 31 U.S.C. §§ 3730(d)(1)–(2). Previously, relators were only entitled to up to ten percent of the recovery if the government intervened and up to twenty-five percent if they brought it as an individual. S. REP. NO. 99-345, at 27.

[36] 31 U.S.C. § 3730(b)(5); *see* S. REP. NO. 99-345, at 25 (clarifying that only the government may intervene in *qui tam* lawsuits and the FCA does not create an opportunity for class actions or multiple separate suits based on "identical facts and circumstances").

[37] S. REP. NO. 99-345, at 25.

[38] *See, e.g.*, *Lujan I*, 2000 U.S. Dist. LEXIS 22100, at *10 (adopting the view that Section 3730(b)(5) is a first to file rule).

[39] *Id.* at *23–24; *see* Fraud Statistics—Overview Oct. 1, 1986–Sept. 30, 2018, Civil Division, U.S. Dep't of Justice, https://www.justice.gov/civil/page/file/1080696/download [https://perma.cc/4VJH-VQGP] (demonstrating large year-over-year increases in both *qui tam* actions and recovery amounts since 1986).

[40] *See LaCorte*, 149 F.3d at 232 (noting the need to determine the proper interpretation of the first to file rule before evaluating the plaintiff's claims).

LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.[41] There, the Third Circuit considered a challenge by three separate parties attempting to acquire a share of a settlement arising from prior *qui tam* claims by a different set of three parties.[42] The later-filing relators asserted that the court should only apply the first to file rule to claims containing the exact same facts as those supporting a prior claim.[43] The court rejected this argument, becoming the first circuit court to hold that the first to file rule applies, not only to identical claims, but also to claims that state the essential facts of a previously filed claim, even if they include somewhat different details.[44] This came to be known as the material facts test.[45]

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[41] *Lujan II*, 243 F.3d at 1188–89; *LaCorte*, 149 F.3d at 234. Many courts apply the material facts test, also known as the "essential facts test," to determine if a *qui tam* suit violates the first to file rule. *See, e.g.*, *Millenium Labs.*, 923 F.3d at 252–53 (applying the material facts test and determining a later filed claim did not violate the first to file rule because it did not plead the same essential facts as the prior claim); United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 32 (1st Cir. 2009) (noting that all courts that have addressed the first to file rule have used the material facts test (citing *LaCorte*, 149 F.3d at 232–33)); United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217 (D.C. Cir. 2003) (applying the first to file rule to claims with slightly varying facts that alleged the same underlying fraudulent scheme (citing *Lujan II*, 243 F.3d at 1189)).

[42] *LaCorte*, 149 F.3d at 231. All six of the claims alleged that the defendant clinical laboratory operator billed Medicare and Medicaid for unnecessary medical testing. *Id.* The plaintiffs also alleged that the defendant circumvented Medicaid and Medicare spending controls in order to receive additional reimbursement. *Id.* Three different parties filed three different suits in federal courts in Pennsylvania, Texas, and California. *Id.* The courts consolidated these three suits into one action in the Eastern District of Pennsylvania. *Id.* The Department of Justice intervened in the consolidated action and negotiated a $325 million settlement with the defendant. *Id.* Before finalization, however, the second set of relators filed their separate suits in different courts. *Id.* Those actions were also transferred to the Eastern District of Pennsylvania; however, the court did not combine these later suits into the original consolidated case. *Id.*

[43] *Id.* at 232. Two of the later plaintiffs agreed that the settlement agreement covered their allegations but argued that their allegations were not identical to those of the original relators and thus they should share in the claim. *Id.* The trial court disagreed and barred these plaintiffs from sharing in the recovery. *Id.* at 231. The third plaintiff, LaCorte, claimed his allegations differed in at least five respects from the prior suit and settlement agreement. *Id.* The lower court held that one claim about urinalysis testing could move forward as a separate suit, but the settlement agreement covered the other four claims, and thus the first to file rule barred suit for those. *Id.* All three of these later plaintiffs appealed and argued that the first to file rule only barred suits based on identical facts. *Id.* at 232. The defendant medical laboratory company, the government, and the original three plaintiffs asserted that the first to file rule forbade not only identical claims but also claims based on similar facts. *Id.*

[44] *Id.* at 232–33; *see also Lujan II*, 243 F.3d at 1188–89 (rejecting the identical facts test and adopting the material facts test). The Third Circuit Court of Appeals relied on its interpretation of the plain statutory language of "related action based on the facts underlying the pending action." *LaCorte*, 149 F.3d at 232 (quoting 31 U.S.C. § 3730(b)(5)). It agreed with the district court that the first to file rule barred identical as well as similar claims in a later filed suit. *Id.* at 232–33. The court reasoned that barring only identical facts would defeat the legislative purpose of the first to file rule to balance fraud fighting power with preventing frivolous suits. *Id.* at 233.

[45] *Lujan II*, 243 F.3d at 1188.

C. The Power and Peril of Jurisdictional Rules

Further complicating matters, the ability of a federal court to hear a case depends on the circuit's view on whether the first to file rule is jurisdictional.[46] Courts that consider it jurisdictional must dismiss a case for lack of subject-matter jurisdiction at such time the judge believes the relator did not file first.[47] As such, cases may proceed for years before being dismissed for lack of jurisdiction, resulting in a waste of judicial resources.[48] Courts that consider the rule nonjurisdictional, on the other hand, evaluate the first to file rule as part of the well-pleaded complaint standard under Federal Rule of Civil Procedure 12(b)(6).[49]

As a result of the drastic consequences of jurisdictional rules, the Supreme Court has tried to clarify when courts should interpret rules as jurisdictional.[50] The Court adopted a bright line rule to determine if a statutory limitation is ju-

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[46] *See Millenium Labs*., 923 F.3d 248–49. Three circuit courts now recognize the first to file rule as nonjurisdictional and evaluate the *qui tam* claim under the well-pleaded complaint standard under Federal Rule of Civil Procedure 12(b)(6). *See id.* at 249; *Hayes*, 853 F.3d at 85–86 (Second Circuit Court of Appeals); *Heath*, 791 F.3d at 120–21 (D.C. Circuit Court of Appeals). Nevertheless, a number of other circuits still classify the rule as jurisdictional. *E.g.*, *Carter*, 710 F.3d at 181 (Fourth Circuit Court of Appeals); *Branch Consultants*, 560 F.3d at 376 (Fifth Circuit Court of Appeals); *Walburn*, 431 F.3d at 969–70 (Sixth Circuit Court of Appeals); *Grynberg*, 390 F.3d at 1278 (Tenth Circuit Court of Appeals); *Lujan II*, 243 F.3d at 1183 (Ninth Circuit Court of Appeals).

[47] FED. R. CIV. P. 12(b)(1), 12(h)(3); *Millenium Labs.*, 923 F.3d at 249. Jurisdictional rules affect a court's ability to adjudicate a case based on subject-matter jurisdiction. *Unanimous Supreme Court Scolds Lower Court Over Appellate Deadline Rule*, FISHER PHILLIPS: LEGAL ALERT (Nov. 8, 2017), https://www.fisherphillips.com/resources-alerts-unanimous-supreme-court-scolds-lower-court-over [https://perma.cc/4A4T-HJF8]. This issue can have a significant impact on courts and litigants. *See* Henderson v. Shinseki, 562 U.S. 428, 434 (2011) ("Jurisdictional rules may also result in the waste of judicial resources and may [unfairly prejudice] litigants."). Parties may raise subject-matter jurisdiction claims at any time during or after the litigation. *Id.* at 434–35. Moreover, subject-matter jurisdiction can never be waived and a court must act *sua sponte* to dismiss the action if it becomes aware the case lacks subject-matter jurisdiction. FED. R. CIV. P. 12(h)(3).

[48] *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153; *Arbaugh*, 546 U.S. at 513–14. A judge may dismiss a claim for lack of subject-matter jurisdiction after the jury returns a verdict for the plaintiff, even if the defendant did not raise the claim at any prior point in the litigation. *See Arbaugh*, 546 U.S. at 504 (noting that the lower court's dismissal of the plaintiff's claim for lack of subject-matter jurisdiction occurred after the jury returned a verdict for the plaintiff when the defendant raised the jurisdictional issue of employer size in a Title VII case).

[49] *See Millenium Labs.*, 923 F.3d at 249; Hayes, 853 F.3d at 85–86 (holding the first to file rule "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"); *Heath*, 791 F.3d at 120–21 (noting Congress did not reference jurisdiction explicitly in the first to file rule). The well-pleaded complaint standard does not allow the court to act *sua sponte* and restricts the timing of dismissal to when there are motions to dismiss, motions for summary judgment, or motions for directed verdicts. FED. R. CIV. P. 12(b)(6), 12(h)(1)–(3); Andrew J. Hoffman et al., *First Circuit Reverses Course on its First-to-File Rule*, DLA PIPER: LITIGATION ALERT (May 9, 2019), https://www.dlapiper.com/en/us/insights/publications/2019/05/first-circuit-reverses-course-on-its-first-to-file-rule/ [https://perma.cc/J9MV-2AEZ].

[50] *See Auburn Reg'l Med. Ctr.*, 568 U.S. at 153 (stating that absent clear congressional intent, courts should treat rules as nonjurisdictional); *Arbaugh*, 546 U.S. at 515–16 (same).

risdictional: courts must inquire if Congress clearly stated the rule is jurisdictional and only then treat it as such.[51] This inquiry does not require Congress to use specific statutory language or "incant magic words" to create a jurisdictional rule.[52] Rather, courts consider previous interpretations of similar provisions and Congress's use of jurisdictional language elsewhere in the statute.[53]

D. The First Circuit's Shift to Nonjurisdictional Treatment of the First to File Rule

The First Circuit confronted the issue of jurisdiction under the FCA's first to file rule in *Millenium Laboratories*.[54] In *Millenium Laboratories*, the government settled an FCA claim with the defendant urinalysis company for $227 million plus interest and designated 15% as the relator's award.[55] The settlement did not indicate how the nearly $34 million payout would be divided among the eight relators.[56] The main relator at issue in the court's material facts test was Robert Cunningham, the first of the eight relators to file an FCA claim against Millennium.[57] Cunningham, an attorney, worked as a compliance officer at a rival testing company.[58] He filed suit in December of 2009 in the United States District Court for the District of Massachusetts.[59] Meanwhile, relator Mark McGuire, a former third-party medical center employee, filed his

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[51] *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153; *Arbaugh*, 546 U.S. at 514–15; *see also Gonzalez*, 565 U.S. at 141–43 (holding a rule was nonjurisdictional because of the general presumption that Congress acts intentionally when it includes particular jurisdictional language in one section of a statute but omits it in another section of the same act).

[52] *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153–54.

[53] *Id.*; *Gonzalez*, 565 U.S. at 143. As a result of this bright line rule, the Supreme Court in recent years took many rules that were once considered jurisdictional and held they are nonjurisdictional. *See, e.g.*, *Auburn Reg'l Med. Ctr.*, 568 U.S. at 152 (holding that filing an administrative appeal after a 180-day statutory deadline was not a jurisdictional issue); *see also Gonzalez*, 565 U.S. at 137 (holding that neglecting to indicate the requisite constitutional issue in a certificate of appealability does not remove the subject-matter jurisdiction of the appeals court); *Arbaugh*, 546 U.S. at 514–15 (holding that the statutory requirement for employer size in Title VII claims was nonjurisdictional).

[54] *Millenium Labs.*, 923 F.3d at 244.

[55] *Id.* at 247. The complaints alleged that the defendant, Millennium Laboratories, induced excessive and unnecessary methods of drug testing that resulted in fraudulent government reimbursement. *Id.* at 245–47. Millennium Laboratories did not raise the first to file issue and agreed to the settlement before the district court ruled on Mark McGuire's cross-claim. *Id.* at 248. As such, although the case names Millennium Laboratories as a party, the only issue left to litigate was who should receive the relator monetary award. *Id.* at 247–48.

[56] *Cunningham*, 202 F. Supp. 3d at 202. Of the eight relator claims, the government chose to intervene in three. *Id.*

[57] *Id.* at 201–02.

[58] *Id.* Robert Cunningham alleged that Millennium submitted unnecessary testing claims and lied about their necessity. *Id*. In addition, Cunningham claimed Millennium induced doctors to seek fraudulent government reimbursement. *Id.* The government did not intervene in Cunningham's case. *Id.* at 202. Eventually, however, his claims were either jurisdictionally barred or dismissed for lack of particularity. *Millenium Labs.*, 923 F.3d at 246.

[59] *Cunningham*, 202 F. Supp. 3d at 201.

qui tam suit in January 2012.[60] After the settlement finalized, McGuire filed a cross-claim seeking a declaratory judgment awarding him the entire payout.[61] In response, four of the seven other relators filed motions to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) based on the first to file rule's jurisdictional bar.[62] At the time of the district court's decision in 2016, the First Circuit still treated the first to file rule as a jurisdictional issue.[63]

The Massachusetts District Court's material facts analysis determined that Cunningham's claim provided the notice that resulted in the government's inquiry and that McGuire's claim contained the essential facts or same elements of fraud described in Cunningham's earlier suit.[64] This notice standard, later rejected by the appeals court, is not part of the usual material facts test in the First Circuit.[65] Nevertheless, the district court held that the first to file rule jurisdictionally barred McGuire's claim under Rule 12(b)(1).[66]

On appeal, the First Circuit reversed and held, for the first time in its jurisdiction, that the first to file rule was nonjurisdictional.[67] Instead, the court evaluated the first to file rule based on whether the plaintiff filed a well-

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[60] *Id.* at 202. Similar to Cunningham, McGuire's action also alleged Millennium requested fraudulent reimbursement and induced physicians to seek fraudulent government reimbursement. *Id.* The government intervened in McGuire's case. *Id.*

[61] *Id.* McGuire claimed he was the first relator to file a *qui tam* complaint that alleged the facts that led to the settlement and thus that he was the first to file and should receive the full relator share. *Millenium Labs.*, 923 F.3d at 248.

[62] FED. R. CIV. P. 12(b)(1); *Cunningham*, 202 F. Supp. 3d at 202; Under Federal Rule of Civil Procedure 12(b)(1), a party may assert that the court lacks subject-matter jurisdiction over the claim and thus cannot hear the case. FED. R. CIV. P. 12(b)(1). Here, the parties filing the motion claimed that the court could not hear McGuire's cross-claim because it violated the first to file rule and thus, based on circuit precedent, the court lacked jurisdiction over it. *Millenium Labs.*, 923 F.3d at 248.

[63] *Millenium Labs.*, 923 F.3d at 203 (citing United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014)); *see also* United States *ex rel.* Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014) (holding the FCA's first to file rule is jurisdictional).

[64] *Cunningham*, 202 F. Supp. 3d at 205. The district court held Cunningham's claim sufficiently alleged the relevant fraud discussed in the settlement agreement. *Id.* The settlement agreement covered "excessive and unnecessary" urine drug tests ordered by physicians and physician referrals in violation of the Stark Law and the Anti-Kickback Statute. *Id.* at 202.

[65] *Millenium Labs.*, 923 F.3d 254 (holding that "mere notice" of a different fraud that the government did not pursue is not enough to trigger the FCA's first to file rule).

[66] *Cunningham*, 202 F. Supp. 3d at 206. The court agreed with McGuire that Millennium violated the FCA when it altered its incentive structure for doctors by offering free tests and encouraging the physicians to seek insurance reimbursement, all in an effort to avoid Medicaid's revised reimbursement rules for multiple tests. *Id.* This new incentive structure, not the structure underlying Cunningham's claim, formed the basis for the settlement agreement. *Id.* Nevertheless, the court disagreed with McGuire's cross-claim that this constituted "a wholly different fraud" from Cunningham's allegation and thus held Cunningham's description of the fraud included "all the essential elements" of the conduct in the settlement agreement. *Id.*

[67] *Millenium Labs.*, 923 F.3d at 248–49.

pleaded complaint.[68] The court cited several reasons for this decision, chief among them being the Supreme Court's 2015 decision in *Kellogg Brown & Root Services v. United States ex rel. Carter*.[69] The Supreme Court decision itself did not state the first to file rule was nonjurisdictional.[70] Rather, the structure of the *Kellogg* opinion led the First Circuit to interpret that the Court was addressing the rule on nonjurisdictional terms.[71] Specifically, the Supreme Court addressed the first to file rule only after discussing a nonjurisdictional statute of limitations issue.[72] If the Supreme Court intended to interpret the first to file rule as jurisdictional, the First Circuit inferred, it would have taken it up prior to the statute of limitations issue, because jurisdiction would have been necessary to hear the rest of the case.[73] Thus, subject-matter jurisdiction was not at issue in the Court's decision-making process.[74] The First Circuit also applied the Supreme Court's bright line rule and held that there was no indication Congress meant for the rule to be jurisdictional.[75]

After making this procedural determination, the First Circuit applied *LaCorte*'s material facts test to determine if Cunningham was indeed the first to file.[76] In contrast to the district court, the First Circuit held McGuire's claim did not contain the same material facts as Cunningham's because the two

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[68] *Id.* at 251 (citing *Heath*, 791 F.3d at 121).

[69] *See id.* at 249 (recognizing that recent case law from the Supreme Court and other federal circuit courts casts doubt on the First Circuit's previous recognition of the first to file rule as jurisdictional) *See generally Kellogg*, 135 S. Ct. at 1978 (reviewing a first to file issue after a statute of limitations issue).

[70] *Kellogg*, 135 S. Ct. at 1978; *see Millenium Labs.*, 923 F.3d at 249.

[71] *Millenium Labs.*, 923 F.3d at 249 (citing *Kellogg*, 135 S. Ct. at 1970).

[72] *Kellogg*, 135 S. Ct. at 1978; *Millenium Labs.*, 923 F.3d at 249. In *United States ex rel. Heath v. AT&T, Inc.*, decided in 2015, the D.C. Circuit stated that the *Kellogg* opinion structure, combined with the lack of statutory language, supported its holding that the first to file rule is nonjurisdictional. 791 F.3d at 120–21.

[73] *Millenium Labs.*, 923 F.3d at 249. The D.C. Circuit Court of Appeals and the Second Circuit Court of Appeals also cited *Kellogg* to support holding the first to file rule nonjurisdictional. *Hayes*, 853 F.3d at 85–86; *Heath*, 791 F.3d at 120–21.

[74] *See Millenium Labs.*, 923 F.3d at 249.

[75] *Id.* at 250 ("Neither statutory text nor context nor legislative history suggests otherwise."). The court stated that prior circuit cases finding the first to file rule jurisdictional did not apply the Supreme Court's bright line test and thus held no precedential value. *Id.* In applying this test, the First Circuit first analyzed the statutory text and observed no language indicating a jurisdictional rule. *Id.* Next, the court looked to the surrounding provisions in the statute that explicitly referenced jurisdiction. *Id.* The presence of specific jurisdictional language elsewhere in the statute led the First Circuit to reason that Congress intended other parts of the statute to act jurisdictionally, but not the first to file rule. *Id.* Lastly, the court reviewed the legislative history and held that a nonjurisdictional first to file rule still met Congress's intent to prevent too many actions based on identical underlying facts. *Id.* at 250–51.

[76] *Id.* at 252–53; *see LaCorte*, 149 F.3d at 232–33. The court's goal in this analysis was to determine whether Cunningham's complaint contained "all the essential facts of the fraud McGuire alleged." *Millenium Labs.*, 923 F.3d at 252. Specifically, the First Circuit held that McGuire's complaint covered fraud that involved a different testing method that occurred during a different phase of the testing process. *Id.* at 254.

claims alleged different frauds accomplished through different methods.[77] As such, McGuire successfully established he was the first to file a claim alleging the material facts of the fraud stated in the settlement.[78] The First Circuit therefore reversed the district court's decision and remanded the case.[79]

II. The Name of the Game: The Ninth Circuit Sets the Rule but the Supreme Court Turns the Tide[80]

Case law created the first to file rule's jurisdictional treatment, not Congress.[81] Section A of this Part discusses how an influential Ninth Circuit Court of Appeals decision led to the rise of treating the first to file rule as a jurisdictional rule.[82] Section B reviews recent Supreme Court jurisprudence that ignited the nonjurisdictional shift in federal courts, leading to the First Circuit Court of Appeals' decision in 2019 in *United States v. Millenium Laboratories, Inc*.[83]

A. The Ninth Circuit Charts the Course

One of the first courts to review the first to file rule was the Eastern District of Virginia in its 1989 decision in *United States ex rel. Erickson v. American Institute of Biological Sciences*.[84] In *Erickson*, the court reviewed a number of issues related to a government employee's *qui tam* suit against a private contractor.[85] The first to file issue arose because the defendant had already filed its own False Claims Act's (FCA) *qui tam* action against a separate subcontractor based on the same underlying facts.[86] The court analyzed the issue of first to file at the end of its opinion, after deciding other dispositive issues that would have led to the dismissal of the case regardless of the first to file analysis.[87] This analysis did not state the first to file rule was jurisdictional,

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[77] *Millenium Labs.*, 923 F.3d at 254. The government's settlement with Millennium reflected this version of the fraud, rather than Cunningham's version. *Id.*

[78] *Id.*

[79] *Id.* at 255.

[80] *Cf.* ABBA, *The Name of the Game*, *on* ABBA The Album (Atlantic Records 1977) ("Got a feeling, you give me no choice, but it means a lot to me . . . [s]o I wanna know, what's the name of the game?").

[81] *See* 31 U.S.C. § 3730(b)(5) (2018) (lacking jurisdictional wording in the statute); *infra* notes 84–96 and accompanying text. *See generally* False Claims Act, 31 U.S.C. §§ 3729–3733.

[82] *See infra* notes 84–98 and accompanying text.

[83] *See infra* notes 99–112 and accompanying text; *see also* United States v. Millenium Labs., Inc., 923 F.3d 240, 249–51 (1st Cir. 2019), *cert. denied sub nom.* Estate of Cunningham v. McGuire, No. 19-583, 2020 U.S. LEXIS 338, at *1 (2020).

[84] 716 F. Supp. 908, 918–19 (E.D. Va. 1989).

[85] *Id.* at 911. The private contractor was working on a government project attempting to develop a malaria vaccine. *Id.* at 910.

[86] *Id.* at 911.

[87] *Id.* at 919 (noting that the plaintiff's failure to observe the statute's mandatory filing and service requirements compelled dismissal). The opinion's structure was similar to that of the Supreme

rather, it stated that the FCA's new provision under 31 U.S.C. § 3730(b)(5) established a first in time rule.[88] Ultimately, the court barred the plaintiff's claim because it alleged the same facts as the prior complaint.[89]

A decade later in 2001, the Ninth Circuit looked to the *Erickson* decision in *United States ex rel. Lujan v. Hughes Aircraft Co*.[90] There, the plaintiff alleged violations of the FCA stemming from the defendant military contractor mischarging the government for project costs.[91] The defendant challenged the claim under the first to file rule and contended that another relator brought a similar suit, thereby barring this plaintiff's action.[92] The United States District Court for the Central District of California cited the *Erickson* decision and determined the first to file rule was a jurisdictional bar.[93] On appeal, the Ninth Circuit affirmed, without further analysis, that the first to file rule was jurisdictional and thus subject to a motion to dismiss for lack of subject-matter jurisdiction.[94] The court upheld the lower court's decision that the plaintiff's claim

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Court's opinion in *Kellogg Brown & Root Services v. United States ex rel. Carter*, which led the United States Court of Appeals for the D.C. Circuit to infer the first to file rule was nonjurisdictional. *See id.*; *see also* 135 S. Ct. 1970, 1978 (2015) (considering the first to file issue after a nonjurisdictional statute of limitations issue); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 121 n.4 (D.C. Cir. 2015) (citing *Kellogg* to support nonjurisdictional treatment of the FCA's first to file rule).

[88] 31 U.S.C. § 3730(b)(5) (2012); *Erickson*, 716 F. Supp. at 918–19 (stating the statute establishes a first in time rule, which blocks subsequent *qui tam* suits based on the same underlying facts). The difference between a first in time rule and a first to file rule is unclear from the court's decision. *Erickson*, 716 F. Supp. at 918–19. The opinion did not discuss a jurisdictional component as part its "first in time" rule. *Id.*

[89] *Erickson*, 716 F. Supp. at 919. The court found that this first in time rule clearly barred the claims regarding improper bonus payments to a government contractor because they relied on the same facts supporting a prior claim. *Id*. For a separate FCA fraud claim, the court concluded more information was necessary to determine if the claims relied on the same underlying facts. *Id.* at 919.

[90] United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan II*), 243 F.3d 1181, 1183 (9th Cir. 2001); *Erickson*, 716 F. Supp. at 918–19; *see* United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan I*), No. CV-92-1282 SVW, 2000 U.S. Dist. LEXIS 22100, at *10 (C.D. Cal. Jan. 20, 2000) (citing *Erickson*, 716 F. Supp. at 918). These decisions took place prior to the Supreme Court's establishment of a bright line test for jurisdictional rules. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 (2006) (implementing the bright line rule in 2006); *Lujan II*, 243 F.3d at 1183 (confirming the jurisdictional nature of the first to file rule in 2001).

[91] *Lujan I*, 2000 U.S. Dist. LEXIS 22100, at *4–5.

[92] *Id.* at *7.

[93] *Id.* at *10 ("Section 3730(b)(5) has been interpreted as a 'first to file' rule which sets a jurisdictional bar to any related *qui tam* action" (citing *Erickson*, 716 F. Supp. at 918–19)). The district court's opinion did not, however, explain how it inferred from *Erickson* that the rule was jurisdictional. *See id.* The district court also pointed to the policy goals of the 1986 amendments to prevent *qui tam* actions from turning into class action suits while still encouraging relators to come forward to aid in recovery. *Id.*

[94] *Lujan II*, 243 F.3d at 1186. The Ninth Circuit adopted the lower court's jurisdictional decision without further analysis, simply referring to the statutory provision as "the 31 U.S.C. § 3730(b)(5) [first to file] jurisdictional bar." *Id.* The Ninth Circuit also adopted the material facts test to determine if the plaintiff's claim was jurisdictionally barred by the first to file rule. *Id.* at 1188–89 (citing United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 233–34 (3d Cir. 1998)).

was based on the same material facts as the prior claim and thus jurisdictionally barred by the first to file rule.[95]

The Ninth Circuit's decision in *Lujan* influenced other circuits, as it became the citing decision stating the FCA's first to file rule is a jurisdictional bar.[96] Some of these decisions also occurred prior to the Supreme Court's 2006 creation of a bright line rule in *Arbaugh v. Y & H Corp.* and provided no further elaboration on why the rule is jurisdictional.[97] Post-*Arbaugh* decisions holding the rule jurisdictional do not discuss the bright line rule and instead rely on circuit precedent to maintain the jurisdictional approach.[98]

B. The Supreme Court Signals a Change

In 2015, the Supreme Court's decision in *Kellogg Brown & Root Services v. United States ex rel. Carter* ignited a change in the way courts thought about the first to file rule.[99] The Court confronted a *qui tam* case that the United States Court of Appeals for the Fourth Circuit had barred under the first to file rule.[100] The main focus of the Court's FCA analysis was on the definition of the word "pending" in the statute, rather than any jurisdictional component.[101] The import of this analysis, however, is where it occurred in the opinion: after a nonjurisdictional statute of limitation issue.[102] This opinion structure indicated that the Court may not consider the FCA's first to file rule as jurisdictional.[103]

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[95] *Id.* at 1189.

[96] *See, e.g.*, Walburn v. Lockheed Martin Corp., 431 F.3d 966, 969–70 (6th Cir. 2005) (citing *Lujan II*, 243 F.3d at 1187); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004) (citing *Lujan II*, 243 F.3d at 1183). Some of these decisions then became the citing decisions for later circuits that also found the first to file provision to be jurisdictional. *See, e.g.*, United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013) (citing *Walburn*, 431 F.3d at 970 to conclude the first to file rule is jurisdictional), *aff'd in part, rev'd in part sub nom. Kellogg*, 135 S. Ct. at 1970.

[97] *Arbaugh*, 546 U.S. at 514–15; *see e.g.*, *Walburn*, 431 F.3d at 969–70 (decided in 2005); *Grynberg*, 390 F.3d at 1278 (decided in 2004).

[98] *Arbaugh*, 546 U.S. at 514–15; *see e.g., Carter*, 866 F.3d at 203 n.1 (recognizing the ongoing circuit split over the jurisdictional nature of the first to file rule but continuing the jurisdictional approach based on circuit precedent); *Cunningham*, 202 F. Supp. 3d at 202 (same).

[99] *See infra* notes 104–107 and accompanying text (discussing how *Kellogg*'s structure influenced the D.C. Circuit to find the first to file rule nonjurisdictional).

[100] *Kellogg*, 135 S. Ct. at 1974. In this case, the plaintiff filed suit against contractors that provided water purification systems to the U.S. military in Iraq. *Id.* The plaintiff alleged the contractors fraudulently charged the government for nonexistent or poorly executed service. *Id.* The government decided against participation in the suit. *Id.*

[101] *Id.* at 1978–79. The defendants moved to dismiss claims based on underlying facts similar to the facts in other cases dismissed in other jurisdictions. *Id.* The Supreme Court stated the word "pending" meant that a dismissed case did not bar later claims based on similar or identical facts. *Id.* Thus, the earlier case dismissed for failure to prosecute did not bar the current claim from moving forward. *Id.* at 1979.

[102] *See Kellogg*, 135 S. Ct. at 1978; *Heath*, 791 F.3d at 121 n.4 (stating it was noteworthy that the Supreme Court addressed the FCA's first to file rule after a nonjurisdictional statute of limitations

A month later, in *United States ex rel. Heath v. AT&T, Inc.*, the D.C. Circuit issued a clear opinion: the FCA's first to file rule was nonjurisdictional.[104] In making this determination, the D.C. Circuit noted the influence of *Kellogg* and took into account the Supreme Court's bright line rule.[105] In applying the bright line rule, the court stated that the FCA first to file provision lacked jurisdictional language and that no support for this view existed in the legislative history.[106] As such, the court held that defendants must now raise a first to file challenge under Federal Rule of Civil Procedure 12(b)(6) instead of Rule 12(b)(1).[107]

The First and Second Circuit Courts of Appeals cited this D.C. Circuit opinion in their later decisions holding the first to file rule to be nonjurisdictional.[108] Prior to *Millenium Laboratories*, decided in 2019, the First Circuit acknowledged that *Kellogg* created some uncertainty in its jurisdictional interpretation of the first to file rule.[109] The *Kellogg* and *Heath* opinions influenced the First Circuit to turn this uncertainty into a solid nonjurisdictional stance.[110] The court recognized these opinions first in its reasoning for overturning the jurisdictional interpretation before going on to discuss the application of the

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issue and nothing in the opinion used jurisdictional terms). Of note, however, is that, in its rehearing of *Kellogg*, the Fourth Circuit Court of Appeals continued to hold that the first to file rule was jurisdictional. *Carter*, 866 F.3d at 203 n.1.

[103] *See Kellogg*, 135 S. Ct. at 1978; *Heath*, 791 F.3d at 121 n.4.

[104] *Kellogg*, 135 S. Ct. at 1970 (decided May 26, 2015); *Heath*, 791 F.3d at 119 (decided June 23, 2015).

[105] *Heath*, 791 F.3d at 120, 121 n.4. The opinion noted that "the Supreme Court addressed the operation of the first-to-file bar on decidedly nonjurisdictional terms, raising the issue *after* it decided a nonjurisdictional statute of limitations issue." *Id.* at 121 n.4.

[106] *Id.* at 120 ("When Congress wanted limitations on False Claims Act suits to operate with jurisdictional force, it said so explicitly."). The court went on to point out several other places in the False Claims Act, such as § 3730(e)(1) and § 3730(e)(2), where Congress did specifically indicate those rules were jurisdictional. *Id.* With regards to the first to file rule, however, the court noted that Congress did not reference jurisdiction expressly, thereby making the rule nonjurisdictional. *Id.* at 120–21.

[107] FED. R. CIV. P. 12(b)(6). Unlike under Federal Rule of Civil Procedure 12(b)(1), a court does not have a *sua sponte* responsibility under Rule 12(b)(6) to dismiss the case if it believes the first to file rule bars the suit. *Id.* R. 12(h)(2)–(3). A Rule 12(b)(6) defense may be raised in an answer or any other pleading allowed by Rule 7(a) through a motion for judgment on the pleadings under Rule 12(c) or at trial. *Id.* R. 12(h)(2).

[108] *Millenium Labs.*, 923 F.3d at 244; United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 85 (2d Cir. 2017).

[109] *Millenium Labs.*, 923 F.3d at 250; *see* United States *ex rel.* Kelly v. Novartis Pharms. Corp., 827 F.3d 5, 12 n.9 (1st Cir. 2016) (declining to definitively confirm the first to file rule was jurisdictional in favor of deciding the case on separate issues); United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 6 n.2 (1st Cir. 2015) (same).

[110] *See Millenium Labs.*, 923 F.3d at 249 (discussing *Kellogg* and *Heath* to support the proposition that "new developments cast serious doubt on our prior characterization of the first-to-file rule as jurisdictional").

bright line rule.[111] Thus, though the First Circuit wavered in prior decisions, the presence of the Supreme Court and D.C. Circuit decisions appeared to push the First Circuit to find the first to file rule nonjurisdictional.[112]

III. FACING ITS WATERLOO: JUDICIAL POLICY AND LEGISLATIVE INTENT SUPPORT NONJURISDICTIONAL TREATMENT OF THE FIRST TO FILE RULE[113]

The United States Court of Appeals for the First Circuit's decision in 2019 in *United States v. Millenium Laboratories, Inc.* accomplished two major policy goals.[114] Part A discusses how the nonjurisdictional approach achieves the first of these goals by removing an unnecessary application of judicial restriction.[115] Part B discusses how the nonjurisdictional approach maintains the legislative intent for the False Claims Act's (FCA) first to file rule to encourage whistleblowing without encouraging latecomers' opportunistic suits.[116]

A. Removing Unnecessary Jurisdictional Restrictions

The first policy goal—removing unnecessary judicial restrictions from jurisdictional rules—follows the Supreme Court's institution of a bright line test.[117] The First Circuit's shift to nonjurisdictional treatment in *Millenium Laboratories* adheres to this bright line test and carries the support of statutory language.[118] The plain language of the first to file rule does not speak of juris-

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[111] *Id.* at 249–50. The First Circuit also recognized it had never truly questioned whether the first to file rule was jurisdictional; it only seemed to make a decision in dicta. *Id.* at 250. After critically evaluating its position, the court determined that prior rulings failed the bright line rule and thus should no longer be followed. *Id.*

[112] *See id.* at 250; *see also* Barry Bridges, *Second Whistleblower Deemed First-to-File in False Claims Suit*, NEW ENGLAND IN-HOUSE (Aug. 26, 2019) ("[T]he panel was persuaded by the U.S. Supreme Court's 2015 decision in [*Kellogg*]"), https://newenglandinhouse.com/2019/08/26/second-whistleblower-deemed-first-to-file-in-false-claims-suit/ [https://perma.cc/Q3FE-2PRP].

[113] *Cf.* ABBA, *Waterloo*, *on* WATERLOO (Atlantic Records 1974) ("I feel like I win when I lose . . . finally facing my Waterloo.").

[114] *See infra* notes 117–141 and accompanying text (arguing that the policy goals of removing unnecessary judicial restrictions and restoring the balance between plaintiffs and defendants underlie the First Circuit's decision).

[115] *See infra* notes 117–127 and accompanying text.

[116] *See infra* notes 128–141 and accompanying text.

[117] *See* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (stating the Supreme Court adopted the bright line test, based on an inquiry into Congressional intent, to reduce jurisdictional rules); Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 (2006) (discussing the bright line test for jurisdictional rules). The Supreme Court has overturned a number of jurisdictional classifications using this analysis. *See, e.g.*, *Auburn Reg'l Med. Ctr.*, 568 U.S. at 154 (instituting a 180-day statutory deadline for filing administrative appeals); Gonzalez v. Thaler, 565 U.S. 134, 141–43 (2012) (requiring a judge to indicate the requisite constitutional issue in a certificate of appealability); *Arbaugh*, 546 U.S. at 514–15 (highlighting the statutory requirement for size of employer in Title VII claims).

[118] *See* 31 U.S.C. § 3730(b)(5) (2018) ("[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."); *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153 (adopting the bright line rule);

diction.[119] That is not the end of the inquiry, however, because Congress does not need to "incant magic words" for a provision to be jurisdictional.[120] Throughout the False Claims Act, Congress was clear when it intended for a provision to be jurisdictional.[121] The fact that Congress chose to mark those provisions as jurisdictional but not the first to file rule is a clear sign Congress did not intend for it to be jurisdictional.[122]

Conversely, the United States Court of Appeals for the Ninth Circuit did not have the benefit of this bright line rule 2001 when it decided *United States ex rel. Lujan v. Hughes Aircraft Co.*[123] In light of this bright line rule, however, the Ninth Circuit's holding in *Lujan* becomes questionable due to the FCA's lack of clear jurisdictional language.[124] Additionally, the Ninth Circuit provided little reasoning for upholding the district court's opinion in *Lujan*, which held the first to file rule was jurisdictional in one sentence, written in passive voice, and drew support from the 1989 decision in *United States ex rel. Erickson v. American Institute of Biological Sciences*.[125] It is no surprise the district court wrote in the passive voice: the *Erickson* court's decision did not state the

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United States v. Millenium Labs., Inc., 923 F.3d 240, 249–51 (1st Cir. 2019) *cert. denied sub nom.* Estate of Cunningham v. McGuire, No. 19-583, 2020 U.S. LEXIS 338, at *1 (2020) (noting the Supreme Court's bright line rule in addition to the nonjurisdictional implication of *Kellogg Brown & Root Services v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978-79 (2015). *See generally* False Claims Act, 31 U.S.C. §§ 3729–3733.

[119] 31 U.S.C. § 3730(b)(5).

[120] *See Auburn Reg'l Med. Ctr.*, 568 U.S. at 153–54 (noting the analysis must also consider factors such as prior rulings on the provision and use of jurisdictional language elsewhere in the statute before declaring a rule jurisdictional).

[121] *See, e.g.*, 31 U.S.C. § 3730(e)(1) ("No court shall have jurisdiction over an action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces."); *id.* § 3730(e)(2) (stating that no jurisdiction exists in claims brought against certain government officials if the government knew of the information at the time of the claim); *see also* United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112 120–21 (D.C. Cir. 2015) (holding that Congress clearly indicated the jurisdictional provisions elsewhere in the False Claims Act (FCA)). *See generally Gonzalez*, 565 U.S. at 141–43 (noting that when Congress specifically uses jurisdictional language in one section of a statute but does not use it in another section of the same statute it does so purposefully).

[122] *See* 31 U.S.C. § 3730(b)(5); *Heath*, 791 F.3d at 120 (stating that the FCA's language shows Congress was clear when it wanted jurisdictional limits).

[123] *See generally* United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan II*), 243 F.3d 1181 (9th Cir. 2001) (predating *Arbaugh* by five years). The Supreme Court most clearly began to delineate the bright line rule in 2006. *See Arbaugh*, 546 U.S. at 511 (noting a lack of disciplined use of jurisdiction for rules without clear statutory language or Congressional intent).

[124] 31 U.S.C. § 3730(b)(5); *see Arbaugh*, 546 U.S. at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *Lujan II*, 243 F.3d at 1186 (holding the first to file rule was jurisdictional).

[125] *See Lujan II*, 243 F.3d at 1186; United States *ex rel.* Lujan v. Hughes Aircraft Co. (*Lujan I*), 2000 U.S. Dist. LEXIS 22100, at *10 (C.D. Cal. Jan. 20, 2000) ("Section 3730(b)(5) has been interpreted as a 'first to file' rule which sets a jurisdictional bar to any related *qui tam* action." (citing United States *ex rel.* Erickson v. American Inst. of Biological Scis., 716 F. Supp. 908, 918–19 (E.D. Va. 1989)).

first to file rule creates a jurisdictional bar; rather, it merely stated 31 U.S.C. § 3730(b)(5) is a first in time rule.[126] As such, *Lujan*, the landmark case upon which many circuits relied in determining the first to file rule was jurisdictional, is far from definitive judicial reasoning.[127]

B. The Material Facts Test Continues to Prevent Opportunistic Suits

Removing the jurisdictional element meets the second policy goal of the first to file rule by restoring the balance between encouraging plaintiffs to file *qui tam* suits and protecting defendants from duplicative suits.[128] The new treatment of first to file challenges will occur at the time specified for failure to state a claim challenges under Federal Rule of Civil Procedure 12(b)(6).[129] This will keep first to file challenges contained to predictable points in the litigation and prevent potential surprise dismissals for lack of jurisdiction based on defense motions or *sua sponte* actions of the court.[130] *Lujan*'s jurisdictional interpretation attempted to adhere faithfully to Congress's purpose in enacting the first to file rule and avoid creating class action suits or multiple separate suits on the same set of facts.[131] This decision had the opposite effect, however,

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[126] *See Erickson*, 716 F. Supp. at 918. Further, the *Erickson* court addressed the first to file rule after nonjurisdictional issues, such as the FCA's filing and service requirements. *Id.* at 911–12. The *Erickson* court noted the dispositive force of those requirements and only addressed the first to file issue in case the plaintiff successfully appealed the filing and service requirements. *Id.* at 918–19. Similar to the D.C. Circuit's logic in *United States ex rel. Heath v. AT&T, Inc.*, the structure of the *Erickson v. American Institute of Biological Sciences* opinion indicates the court did not consider the first to file rule jurisdictional. *See Heath*, 791 F.3d at 121 n.4 (noting the Supreme Court raised the first to file issue after the nonjurisdictional statute of limitations issue (citing *Kellogg*, 135 S. Ct. at 1978); *Erickson*, 716 F. Supp. at 918–19 (addressing first to file issue after other dispositive issues).

[127] *See Lujan I*, 2000 U.S. Dist. LEXIS 22100, at *10; *see, e.g.*, Walburn v. Lockheed Martin Corp., 431 F.3d 966, 969–70 (6th Cir. 2005); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004). These circuits' decisions then became the citing decisions for other circuits that later held the first to file provision was jurisdictional. *See, e.g.*, United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013) (citing *Walburn*) (stating the first to file rule is jurisdictional), *aff'd in part, rev'd in part sub nom. Kellogg*, 135 S. Ct. at 1970.

[128] *See Millenium Labs.*, 923 F.3d at 251. The change in treatment of the first to file rule does not alter the evaluation of potential duplicate claims under the material facts test, rather, it limits the defense's options on when to file such a challenge. *See id.* at 250–51 (holding the first to file rule should be evaluated under a well-pleaded complaint standard, then applying the material facts test in the same manner as prior precedent).

[129] *Id.* at 251; *see* FED. R. CIV. P. 12(b)(6). A Rule 12(b)(6) defense may be raised in an answer or any other pleading allowed by Rule 7(a), through a motion for judgement on the pleadings under Rule 12(c), or at trial. *Id.* R. 12(h)(2).

[130] *See Millenium Labs.*, 923 F.3d at 249 ("Characterizing a rule as jurisdictional renders it unique in our adversarial system."). A challenge under Federal Rule of Civil Procedure 12(b)(1) may be raised at any time and a court must raise it if, at any time, it determines the matter lacks subject-matter jurisdiction. FED. R. CIV. P. 12(h)(1), 12(h)(3). Meanwhile, the court does not have a *sua sponte* responsibility under Rule 12(b)(6) to dismiss the case if it believes the first to file rule bars the suit. *Id.* R. 12(h)(2)–(3).

[131] *See Lujan I*, 2000 U.S. Dist. LEXIS 22100, at *11.

as FCA defendants suddenly gained a powerful tool they could dispatch at any time to remove potentially duplicative *qui tam* suits.[132] This resulted in the dismissal of cases long into the course of litigation.[133] The retention of such a power by defendants not only runs the risk of wasting judicial resources,[134] but it also creates additional uncertainty for relators who are already under tremendous financial and emotional strain while spending years pursuing these cases.[135]

Further, nonjurisdictional treatment would not go so far as to permit the class action suits or multiple identical suits Congress sought to avoid by enacting § 3730(b)(5).[136] First, a plaintiff still must file a well-pleaded complaint and failure to do so would result in dismissal of the claim under Federal Rule of Civil Procedure 12(b)(6).[137] Second, the material facts test remains in place to prevent opportunistic latecomers from violating the first to file rule.[138] This judicial test creates a defense against multiple suits with identical or materially

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[132] *See supra* note 47 and accompanying text (discussing the unfair impact jurisdictional rules have on FCA plaintiffs).

[133] *See, e.g.*, *Cunningham*, 202 F. Supp. 3d at 201–02 (granting a motion to dismiss seven years after Cunningham's initial compliant and four years after McGuire's complaint); *Lujan II*, 243 F.3d at 1184–86 (dismissing an FCA claim nearly nine years after the initial filing).

[134] *See Auburn Reg'l Med. Ctr.*, 568 U.S. at 153 (noting that subject-matter jurisdiction objections can be raised at any time, that parties may not waive subject-matter jurisdiction, and that late subject-matter jurisdiction objections waste judicial resources and unfairly prejudice litigants); *see also* Henderson v. Shinseki, 562 U.S. 428, 434–35 (2011) (same).

[135] *See supra* notes 7–8 and accompanying text (summarizing *New England Journal of Medicine* and *New Yorker* interviews with whistleblowers and the distress they experienced after coming forward); *see e.g.*, Steven Brill, *America's Most Admired Lawbreaker*, HUFFINGTON POST HIGHLINE (Sept. 7, 2019, 2:15 PM), https://highline.huffingtonpost.com/miracleindustry/americas-most-admired-lawbreaker [https://perma.cc/UB66-N7S9] (detailing the experience of victims and relators in the FCA case against Johnson & Johnson). When whistleblowers are inside the company, they can choose to report secretly through the FCA *qui tam* process but typically remain at their jobs because any relator payout may be years away. *See* Kesselheim et al., *supra* note 3 (describing the secretive lives whistleblowers had to lead to avoid detection by co-workers).

[136] *See Heath*, 791 F.3d at 121 (noting the court conducts a parallel evaluation of the claims and asks "whether the later complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the first complaint") (internal quotations omitted). This comparison operates just the same in a nonjurisdictional environment as it has when the first to file rule is considered jurisdictional; the only change is that the court evaluates the issue under the well-pleaded complaint standard rather than upon a motion to dismiss for lack of subject-matter jurisdiction. *Id.* at 120–21.

[137] *See* FED. R. CIV. P. 12(b)(6); *Heath*, 791 F.3d at 121 ("[T]he [first to file] rule bears only on whether a *qui tam* plaintiff has properly stated a claim."). As several Supreme Court decisions demonstrate, the well-pleaded complaint standard may still set a high bar for plaintiffs. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding, in a discrimination case, a well pleaded complaint must meet a plausibility standard that requires the plaintiff's pleading to include facts that allow the court to reasonably infer the defendant's liability); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (stating, in an anti-trust action, the plaintiffs failed to state a claim because the complaint did not present plausible grounds to infer a collusive agreement occurred).

[138] *See Millenium Labs.*, 923 F.3d at 251–54 (applying the material facts test after holding the first to file rule is nonjurisdictional).

similar facts to prior suits.[139] The shift to nonjurisdictional treatment does not change the nature of this tool for FCA defendants, it merely changes the timing in which they must raise the claim.[140] The change to a nonjurisdictional interpretation creates more predictable timing, thereby giving relators a better sense of the road ahead, and ultimately fulfills the original 1863 FCA goal of preventing the "great evil" of fraud against the United States.[141]

CONCLUSION

The United States Court of Appeals for the First Circuit's 2019 decision in *Millenium Laboratories* not only follows a course set by the Supreme Court and the United States Courts of Appeals for the D.C. Circuit, it also fulfills a promise stretching back over 150 years: individuals should have a fair mechanism to challenge fraud. The plain language of the FCA's 1986 amendments, spurred by rampant healthcare fraud, provided this fair balance by increasing incentives for *qui tam* relators while providing protection to defendants against opportunistic latecomers seeking to duplicate prior suits. The courts tipped this scale of fairness, particularly the *Lujan* court and the subsequent courts that followed it, when they ruled that the first to file rule was jurisdictional. The shift to a nonjurisdictional interpretation, as demonstrated by the First Circuit, restores the balance and follows the Supreme Court's bright line rule for statutory interpretation of jurisdictional rules.

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[139] *See id.* at 252 ("This conclusion . . . aligns with the policies underlying the [first to file] rule."). The congressional record indicates the FCA's first to file rule was meant to exclude subsequent suits based on "identical facts and circumstances." S. REP. NO. 99-345, at 25 (1986). As such, the material facts test provides a more robust defense against opportunists than an identical facts test. *See* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 233 (3d Cir. 1998) (rejecting the identical facts test in favor of the material facts test because the plain language of the statute states "related action," not "identical action"); *supra* note 43 (discussing the identical facts test).

[140] *See Millenium Labs.*, 923 F.3d at 251 (noting that courts should evaluate the claim under the material facts test to determine if it is a well-pleaded complaint rather than as a jurisdictional bar); *Heath*, 791 F.3d at 121 (same).

[141] *See* CONG. GLOBE, 37th Cong., 3d Sess., 952 (1863) (arguing the FCA was necessary to stop the "great evil" of fraud against the Union).