Nos. 22-1245, 22-1246

IN THE

United States Court of Appeals for the First Circuit

UNITED STATES, ex rel. CHERYL LOVELL and WILLIAM MCKUSICK,

Plaintiffs-Appellants,

UNITED STATES, ex rel. GEORDIE SANBORN; STATE OF VERMONT, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MONTANA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TEXAS, STATE OF WISCONSIN, DISTRICT OF COLUMBIA, COMMONWEALTH OF VIRGINIA, STATE OF NEW MEXICO, STATE OF TENNESSEE, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF LOUISIANA, ex rel. CHERYL LOVELL AND WILLIAM MCKUSICK,

Plaintiffs,

V.

ATHENAHEALTH, INC.,

Defendant-Appellee,

JOHN DOES 1-10,

Defendants.

Caption Continued on Inside Cover

Appeal from the United States District Court for the District of Massachusetts

REPLY BRIEF FOR APPELLANTS LOVELL AND MCKUSICK

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UNITED STATES, ex rel. GEORDIE SANBORN,

Plaintiff-Appellant,

UNITED STATES, ex rel. CHERYL LOVELL and WILLIAM MCKUSICK; STATE OF VERMONT, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MONTANA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TEXAS, STATE OF WISCONSIN, DISTRICT OF COLUMBIA, COMMONWEALTH OF VIRGINIA, STATE OF NEW MEXICO, STATE OF TENNESSEE, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF LOUISIANA, ex rel. CHERYL LOVELL AND WILLIAM MCKUSICK,

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INTRODUCTION

When the government intervenes in multiple qui tam actions, encourages the intervened relators to agree to divide the relator share, and successfully brokers a multi-relator settlement with the defendant, the False Claims Act mandates attorney's fees for all relators who shared in the settlement proceeds. In the only court of appeals decision to address this question, the Sixth Circuit rightly held that fees automatically follow from the relator's receipt of a share of proceeds in an intervened case. This statutory fee mandate brooks no exceptions here, where the settlement expressly acknowledged that settling relators would share the proceeds. Nothing in the Act permits a defendant who willingly signed on to a multi-relator settlement to belatedly raise the first-to-file defense at the fee stage. And none of Athena's handful of district court cases, no matter how often mentioned, prove otherwise.

Athena insists it must be able to raise the first-to-file defense at any point, including after settlement, to protect against the specter of relator opportunism. But Athena fights a strawman; no one contends that intra-relator agreements alone entitle relators to fees. Only the government can open the door, by intervening in more than one relator's case. And it is the government that is best positioned—and afforded the statutory authority—to judge whether and when multiple relators are essential to pursuing a complex fraud. For their part, defendants are not hamstrung. They can

fight relators individually and seek dismissal on first-to-file grounds, rather than settle collectively. But they can't do both.

Allowing defendants to secure the benefits of multi-relator settlements but then shirk fees is at odds with the False Claims Act's text and would frustrate the Act's objectives. And while Athena ignores the government's statutorily mandated lead role, cases where the government intervenes in multiple relator actions tend to involve the largest, most complex frauds, where the assistance of multiple relators is crucial for the government to uncover different pieces of the puzzle. Permitting defendants to avoid paying fees in such government-coordinated settlements—even after settling with an agreement expressly acknowledging that all settling relators would share the proceeds—would significantly undercut the government's ability to investigate far-reaching frauds. And it would undermine the deterrence Congress intended mandatory fee awards to provide in precisely the cases where such deterrence is most needed—large complex frauds that the government lacks the resources to uncover on its own.

ARGUMENT

I. The False Claims Act Awards Mandatory Fees To Relators In Intervened Cases Who Receive A Share Of The Proceeds, Especially When A Global Settlement Acknowledges That They Will Share.

The Sixth Circuit got it right. The plain text of the False Claims Act fees provision reveals a two-part bright-line test: if "[1] the Government proceeds with

an action brought by a person under subsection (b), [2] such person shall … receive" a percentage "of the proceeds of the action or settlement of the claim …. Any such person shall also receive … reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(1). Because it is undisputed that Lovell and McKusick "commenced an action in which the government intervene[d]," and "receive[d] a share of the proceeds," *United States ex rel. Bryant v. Cmty. Health Sys., Inc.*, 24 F.4th 1024, 1031 (6th Cir. 2022), they "shall also receive" fees, 31 U.S.C. § 3730(d)(1).

Athena agrees (Br. 14) on the two statutory prerequisites for an award of fees: government intervention and "the relator must have received a share of the proceeds." Yet Athena then largely ignores the import of government intervention while engrafting two atextual requirements on the receipt-of-share requirement—receipt of proceeds directly from the government and satisfaction of the first-to-file bar in § 3730(b)(5). Neither of Athena's demands appear in the statute Congress wrote. Because both statutory conditions for fees are satisfied—intervention and receipt of relator share—Lovell and McKusick are entitled to fees. The government-led settlement agreed to by Athena, acknowledging that both sets of relators would share in the proceeds, eliminates any doubt. *See* Add.28.

Athena insists the statute allows it to wiggle out of the deal. But neither the statutory text nor this Court's decision in *United States v. Millennium Labs.*, 923 F.3d 240 (1st Cir. 2019) (*Millennium I*), permits a defendant who has already settled

the case to collaterally attack a relator's receipt of share at the fee-award stage on first-to-file grounds. Athena could have insisted on a single-relator action and litigated the first-to-file defense. But Athena instead chose to enter a government-brokered multi-relator settlement through which all relators received a share of the proceeds. The Act does not permit Athena to walk back that choice, contrary to judicial norms, and reopen the merits at the fee stage.

A. The Government Is the Gatekeeper to Relators' Fees in a Multi-Relator Case.

The first prerequisite for fees is "the Government proceed[ing] with an action brought by a person under subsection (b)." 31 U.S.C. § 3730(d)(1). Athena all but ignores this requirement, and how it makes the government the gatekeeper for any award of a share and fees under § 3730(d)(1).

The intervention requirement puts to rest the strawman of "relators … by private contract to which the government is not a party, manufactur[ing] a statutory right to fees," Athena Br. 13; *see also id.* at 19. Only the government can open the door to § 3730(d)(1) fees by intervening. The government actively exercises this gatekeeping function in False Claims Act cases generally, *see* Opening Br. 39-40, and did so here—putting its imprimatur on Lovell and McKusick's action and actively cooperating with them in building the case against Athena.

The government has near-plenary authority over the conduct of a qui tam action. It may "proceed with an action," 31 U.S.C. § 3730(b)(4)(A), "decline[] to

take over the action," *id.* § 3730(b)(4)(B), or "dismiss the action," *id.* § 3730(c)(2)(A). What's more, if the government does choose to dismiss an action, it can do so on first-to-file or other statutory grounds, *see, e.g.*, *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 215 (D.C. Cir. 2003), or for any reason that does not "transgress[] constitutional limitations" or "perpetrate[] a fraud on the court," *Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 42 (1st Cir. 2022). In short, the government is in the driver's seat. One of its many options—exercised here—is to "proceed with" multiple relator actions, leveraging the distinct information provided by different whistleblowers to investigate a complex fraud, and negotiating a global, multi-relator settlement with defendants. *See Bryant*, 24 F.4th at 1033-34.

When the government opts to intervene in multiple relator actions, the decision is not all or nothing. The government can, and does, separate the wheat from the chaff, intervening in one group of relator actions while declining to intervene in others. *See, e.g.*, *Millennium I*, 923 F.3d at 247 (noting that government intervened in only four of several qui tam actions related to a particular fraud scheme). By declining to intervene in tag-along cases (or intervening only to dismiss), the government helps to ensure that parasitic relators will not share in the proceeds or be compensated with fees. *See Bryant*, 24 F.4th at 1033. Athena does not dispute that the government, when it does pursue a case, benefits from

encouraging multiple relators with distinct, valuable information to keep working on the case, securing additional resources for the investigation, and avoiding diversion of its own attention to first-to-file issues. Opening Br. 10; JA210-JA211; JA263.

This case illustrates these benefits—and the government's active involvement in securing them. As Athena does not contest, the government decided to "proceed with" both relator actions, encouraged the relators to agree to a division of the share, and entered into the global settlement with Athena only after the relators notified the government of their successful sharing agreement. JA167; JA231. As a result, the government benefitted from over 440 hours of continued work by Lovell and McKusick's counsel for two-and-a-half years after they became aware of the Sanborn complaint, including producing documents to the government; preparing supplemental disclosures, a presentation, and memoranda for the government; and consulting with government counsel. *See* JA246-JA252 (time entries from April 13, 2018 to government's "handshake" settlement with Athena on September 25, 2020); JA289-JA291 (same).

Athena contends (Br. 23) this work is insufficiently cooperative because attorneys for the relators did not speak frequently with one another. But whether relators talked often with one another is beside the point; the relevant question is what was the relators' separate utility to the government investigation? Here, as is the norm, the government collaborated with counsel from both actions in a hub-and-

spoke model.

The government judged that collaboration important enough to intervene, and per the statute, it is the government's assessment that matters. Both sides agree that nothing in § 3730(d)(1) turns on a court assessing "relator cooperation" or "helpfulness." Athena Br. 12, 22-23. The statute has only two facial prerequisites—government intervention and receipt of a share of proceeds, 31 U.S.C. § 3730(d)(1), resulting in a two-part bright line test, as articulated by the Sixth Circuit, *Bryant*, 24 F.4th at 1032. No post hoc scrutiny of time records for collaboration is required.

Rather, as *Bryant* elucidates, by making government intervention the first prerequisite for fees, Congress placed the government in a gatekeeping role to decide whether claims are "worthy of prosecution." *Bryant*, 24 F4th at 1039. And because *Bryant* "turn[ed] on statutory interpretation," *id.* at 1031, its bright-line rule applies here too; any purportedly different facts are irrelevant (*contra* Athena Br. 31-32). Here, as in *Bryant*, the government recognized that Lovell and McKusick's participation (and that of their counsel) added value. The government therefore worked with both sets of relators in investigating Athena's fraudulent conduct and intervened in Lovell and McKusick's action along with Sanborn's. The government then actively managed a global settlement to which Athena agreed, and in which all relators shared the proceeds. Athena benefitted from this settlement, obtaining a dismissal with prejudice of all claims, including Lovell and McKusick's non-

intervened claims. And Athena did not protest the participation of multiple relators (until after the ink was dry).

B. Where All Parties Acknowledge that Multiple Relators Will Share the Proceeds, those Relators Have Received the Relator Share, Regardless of the Payment Mechanism.

1. Though loathe to afford any meaning to the government's intervention, Athena affords talismanic significance to the administrative mechanism by which the government shared the proceeds, arguing (Br. 19-21) that the government's disbursement of funds to Sanborn conclusively establishes that only Sanborn received a relator share, and Sanborn forwarding Lovell and McKusick's share does not count. This fails both textually and factually.

Textually, Athena has no answer for the fact that § 3730(d)(1) requires only that payment of the relator share "shall be made from the proceeds," without requiring expressly or implicitly that payment be made directly by the government. *See* Opening Br. 20-22. As the Supreme Court reasoned in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1475 (2020)—and Athena ignores—the ordinary meaning of the word "from" does not imply "directly" from. The Sixth Circuit agrees: "nothing in § 3730(d)(1) … requires … that the government directly transfer the proceeds to all the relators." *Bryant*, 24 F.4th at 1033. Athena points to no text requiring the relator share to be paid directly by the government.

Instead, Athena argues (Br. 11, 21) that a relator cannot have *received* the

relator share if he was not *entitled* to it, and entitlement is confined to the first-to-file relator. Athena's view that the non-jurisdictional first-to-file defense may be raised by a defendant at any time is inconsistent with the statute and not encompassed by *Millennium I*. *See* pp. 13-22, *infra*. It also cannot be squared with Athena's position that the government's choice of payee conclusively establishes the relator-share recipients.

In fact, Athena's argument means the government's payee choice does not matter at all. If the statute permits a defendant to avoid paying fees after settlement by belatedly litigating whether a relator was first, then defendants could raise that defense even for the relator who was paid directly by the government. Likewise, even in single-relator settlements, Athena's logic would require that defendants be allowed to raise first to file at the fee stage. No doubt wary of upsetting the apple cart to that degree, Athena never hints that this is so, but if passing the (belatedly raised) first-to-file bar is essential for a relator to qualify as having received a share of proceeds, then Athena's interpretation permits defendants to question the government's direct payees, too.

Stated another way, either it is *receipt* of funds from the proceeds or *statutory entitlement* to them that matters for the mandatory award of fees. The statute chooses receipt. *See Bryant*, 24 F.4th at 1031. And on the question of which relators *received* a share of proceeds, it is an administrative distinction that makes no legal difference

whether the government agrees to pay multiple relators directly (as Athena allows, Br. 20), or agrees to pay one relator on the encouraged and acknowledged understanding that the payee relator will disburse a share to others (as happened here, Add.28). Allowing relators to agree to share allocation (at the government's option), rather than forcing the government to parcel it out, is of great practical benefit to the government but has no legal significance. Again, the government is in the driver's seat.

The *Shire Regenerative* case cited by Athena (Br. 20) illustrates as much. Athena agrees that the multiple *Shire* relators are entitled to fees, because the government paid the share directly to multiple relators after the court adopted the government's share-allocation proposal. *See United States v. Shire Regenerative Med., Inc.*, Nos. 8:11-cv-176 et al., 2017 WL 6816615, at *3 (M.D. Fla. Nov. 20, 2017). But the government did so only after the relators failed to reach a sharing agreement (despite government encouragement), and the government would have "honor[ed] an agreement among all the Relators that allocates the Settlement Proceeds differently." *See id.*, Dkt. No. 118-1 (Dep't of Justice Letter, May 22, 2017, at 2, 10). Athena's statutory reading would supply starkly different fee consequences had the relators agreed, as the government urged, than if they did not (as happened). But nothing in paragraph (d)(1)—or anywhere else in the statute—makes fees turn on this administrative distinction or dictates that the government must pay a relator

directly for a share of proceeds to trigger fees.

2. Factually, Athena is also off base when it continually refers to Lovell and McKusick's receipt of proceeds through a "private sharing agreement." *See, e.g.*, Br. 19. As Athena recites on the very same page, the sharing agreement was not "private"—all parties acknowledged that Lovell, McKusick, and Sanborn would share in the proceeds. Add.28. Far from designating the payment to Sanborn as the sole relator share, the government-led settlement agreement—that all parties, including Athena, signed—specified that all relators were claiming a share. *Id.*; *see* Opening Br. 22-23.

Though pointed out in the Opening Brief (at 24 n.4), Athena fails to acknowledge that these settlement terms distinguish this case from the quartet of district court cases (two of them unpublished) on which Athena repeatedly relies (Br. 14-15, 20, 25). In none of these non-binding cases did all parties acknowledge that the relator seeking fees would share in the proceeds. In one of them, the relator seeking fees had not received any proceeds, by private agreement or otherwise. *See United States ex rel. Greenwald v. Kool Smiles Dentistry, PC*, 2018 U.S. Dist. LEXIS 156477, *7 (D. Conn. Sept. 12, 2018) (relator seeking fees "offers no documentation of the existence of any such [sharing] side agreements among relators, including himself"). In another two, the agreements designated the payments by the government as the only relator share, with no mention of other

relators sharing. *See United States ex rel. McNeil v. Jolly*, 451 F. Supp. 3d 657, 666 n.16 (E.D. La. 2020) ("The Relators Settlement Agreement stated that the government "intends to award a share only to Relators Bergeron and McNeil[.]"); *United States v. NextCare, Inc.*, No. 3:11cv141, 2013 U.S. Dist. LEXIS 14668, at *7 (W.D.N.C. Feb. 4, 2013) ("There is no dispute that the Federal and State Settlement Agreements reference only Relator Granger as receiving a Relator's share of the settlement proceeds.").

The fourth case Athena relies on, *United States ex rel. Allstate Ins. Co. v. Millennium Labs., Inc.*, 464 F. Supp. 3d 449 (D. Mass. 2020) (*Millennium II*), is even further afield, for all the reasons given in the Opening Brief (at 32 n.5) but elided by Athena. The settlement agreement left the relator share to be "apportioned by the Court in the absence of agreement." 464 F. Supp. 3d at 451. In the ensuing inter-relator dispute, this Court held that only one relator was entitled to the full share. *Millennium I*, 923 F.3d at 252. The district court then denied fees to a relator in whose case the government had *not intervened*—and thus who could not conceivably claim entitlement to fees under § 3730(d)(1)—and who received any funds only by "separately enter[ing] into a private sharing agreement." *Millennium II*, 464 F. Supp. 3d at 451-52. The facts here—where the government intervened, encouraged sharing, and the settlement agreement signed by all parties so specified, could not be more different.

Where, as in Athena's inapposite cases, any agreement to share is made solely between relators—without the acknowledgement or endorsement of the government and the defendant—it might make sense to treat a relator's receipt of funds from another relator differently from funds paid by the government. But where, as here, relators entered a sharing agreement at the government's urging as part of a government-led settlement, and especially where, as here, all parties explicitly acknowledged that the proceeds of the intervened actions would be shared, Add.28, there is no basis for failing to apply the statutory bright-line rule: fees are available when relators receive a share of proceeds from a government-intervened action.

C. First-to-File Defenses Are Settled When the Case Settles.

The drumbeat of Athena's response is that regardless of the settlement terms, Lovell and McKusick could not have received a relator share under § 3730(d)(1) because they were not first to file under § 3730(b)(5). Paragraph (d)(1), Athena argues, incorporates paragraph (b)(5) by referring to "an action brought by a person under subsection (b)," and under paragraph (b)(5), "no person … may bring a related action based on the facts underlying [a] pending action."

Putting to one side, for now, the textual anomalies created by Athena's interpretation, first to file is a waivable defense, *Millennium I*, 923 F.3d at 249-50, as Athena does not dispute. Athena likewise does not contest that settlement forfeits waivable defenses. *Jalbert v. U.S. Secs. & Exch. Comm'n*, 945 F.3d 587, 594 (1st

Cir. 2019). And also beyond dispute is that Athena did not raise a first-to-file defense to Lovell and McKusick's claims. Instead, it settled.

Qui tam actions, of course, must meet "objective statutory criteria" (Athena Br. 20), and a defendant has the right to so insist. But the critical question here is not *whether* a defendant may object to a qui tam action on first-to-file grounds, but *when*. The fee stage—after the government has intervened and coordinated a settlement, and after the relator has shared in the proceeds—is too late. An "attorney-fees dispute should not allow the litigants to revisit claims they settled and dismissed … years ago." *Bryant*, 24 F.4th at 1037.

Athena protests that the upshot of Lovell and McKusick's (and the Sixth Circuit's) interpretation of the False Claims Act is that "*defendants* will be forced to litigate first to file." Br. 46 (emphasis in original). Just so. That is a statutory feature, not a bug. But the statute does not permit defendants to wait to litigate first to file until after securing their with-prejudice and comprehensive dismissals under a global settlement, thereby obtaining expansive relief beyond what dismissal on first-to-file grounds would have afforded them. Nothing in the statutory text or this Court's precedent authorizes such sandbagging.

1. *Lovell and McKusick have not forfeited any arguments based in the terms of the settlement agreement.*

To dispatch with Athena's various forfeiture arguments at the outset:

Lovell and McKusick argued in the district court that all parties acknowledged

the relator sharing agreement, and "[i]f the defendant wants to raise a non-jurisdictional challenge to a relator's complaint, it should be required to do so pre-settlement and not allowed to raise it post-settlement; such challenges are merits defenses and a defendant [cannot] adjudicate them post-settlement." Mem. in Support of Fee Mot., Dkt. 83, at 7, 15 (Apr. 16, 2021). Lovell and McKusick's argument that settlement waives the defendant's ability to raise a first-to-file defense is preserved (*contra* Athena Br. 36).

As for Athena's argument regarding the settlement agreement preserving its right to make a first-to-file defense at the fee stage (Br. 36-37), that is a red herring. The settlement agreement permits Athena to make any statutory argument against fees, whether spurious or not. But the agreement does not expand the scope of the statute or give Athena any defense from mandatory fees beyond what the text of § 3730(d) itself provides. Add.25. Nothing in § 3730(d)(1) permits a defendant that has already settled an intervened case as part of a global multi-relator settlement to avoid fees by belatedly raising a first-to-file objection. Athena's decision to settle is what forfeited its first-to-file defense, not the terms of the clause reserving Athena's challenge to fees.

2. The text of the Act's fee provision does not condition fees on satisfaction of the first-to-file bar.

As for the statute, the sole textual hook for Athena's argument that settling defendants can raise a first-to-file defense at the fee stage is the reference to

"subsection (b)" in the phrase "[i]f the Government proceeds with an action brought by a person under subsection (b)." 31 U.S.C. § 3730(d)(1); *see* Athena Br. 15-16. This reference cannot bear the weight Athena places on it, because it does not "refer[] to the satisfaction of the first-to-file rule … as [a] condition[] for the receipt of attorney fees." *Bryant*, 24 F.4th at 1034-35.

Athena insists that § 3730(d)(1) "plainly incorporates by reference subsection (b) without limitation," Br. 16, relying on *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924). But the text does not support this sweeping incorporation. Although this Court has interpreted the reference to subsection (b) to permit relators to litigate share *entitlement* post-settlement, *Millennium I*, 923 F.3d at 252, there is no basis to read it to permit defendants to raise a first-to-file defense post-settlement to avoid paying fees to relators who have already *received* their share of proceeds.

In *Panama Railroad*, the Supreme Court noted that a "generic reference" to another statute "incorporate[es] one statute or system of statutes into another," but the question remains what "is fairly covered by the reference." 264 U.S. at 391-92. Here, § 3730(d)(1) does not include a generic reference to, e.g., the requirements of subsection (b). Instead, subsection (b) is referenced for a limited purpose—to describe the type of "action" in which the government intervened—*i.e.*, an "action brought by a person under subsection (b)" (a private action), as opposed to an action brought under subsection (a) (a government action). *See* Opening Br. 26-27; *Bryant*,

24 F.4th at 1035.

Athena resorts to the general principle that cross-reference to a section generally includes its subsections. *See Actelion Pharms. Ltd. v. Matal*, 881 F.3d 1339, 1345 (Fed. Cir. 2018). But the phrase "an action brought … under" a section has a narrower natural reading; it implies an action commenced under that section, not one meeting all of its requirements. *See Salazar v. Maimon,* 750 F.3d 514, 518 (5th Cir. 2014). In *Salazar*, the Fifth Circuit interpreted a statute specifying that "any court ordering the return of a child pursuant to an action brought under section 11603" shall award fees. *Id.* The court read "brought under" to mean that fees were required in actions commenced under the relevant section, regardless of whether the action satisfied that section's substantive requirements. *Id.* Read properly in context, the plain meaning of the textual reference to subsection (b) is narrow, and primarily serves to distinguish the type of action to which the qui tam award provision applies.

Reading the reference to "subsection (b)" to sweep in all of subsection (b)'s provisions for any inquiry under § 3730(d)(1), as Athena would do (Br. 27-28), leads to a hopeless tangle. Because Athena's reading "would render [the statute] unworkable or unthinkable or both," *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2364 (2022), it should be rejected.

Athena contends (Br. 16) that Lovell and McKusick's action is not "an action brought by a person under subsection (b)" because of the first-to-file bar in paragraph

(b)(5). But if Lovell and McKusick's action was not "an action brought by a person under subsection (b)," then the government could *not* have intervened in it, because the only statutory authorization for intervention is also within subsection (b). 31 U.S.C. § 3730(b)(4)(A). Thus, Athena's interpretation would bar the government from intervening in Lovell and McKusick's action, which—if it were so—would make § 3730(d)(1) inapplicable altogether. Yet Athena insists that § 3730(d)(1) is the operative provision that bars fees—an impossibly circular result.

Reading the reference to subsection (b) to permit defendants to raise first-to-file defenses at the fee stage, moreover, creates anomalous results whereby fees in intervened cases are subject to post-settlement first-to-file defenses but fees in non-intervened cases are not. *See* Opening Br. 27-28. Athena largely waves away the anomalies as what Congress must have intended. Athena Br. 28. Alternatively, Athena supposes the anomalies are overcome by a different cross-reference—in the non-intervened fee provision—to "an action under this section," 31 U.S.C. § 3730(d)(2), which Athena assumes (Br. 29) likewise requires "private parties [to] face the limits contained in subsection (b)."

Athena's struggles to avoid anomalous results reveal the weaknesses in its mere-mention-incorporates-all-requirements theory. If the reference to "an action under this section" in § 3730(d)(2) means courts must police "the limits" of subsection (b) (or, for that matter, all of § 3730) at the fee-award stage, then, contrary

to settled understandings of how fee proceedings are supposed to work, fee disputes would become opportunities to litigate (or re-litigate) the entirety of a claim on the merits—or all of the procedural requisites, anyway.

That is not only inconsistent with fundamental background principles of law that fee disputes should not require the "hypothetical relitigation" of already-settled cases, *Guglietti v. Sec'y of Health & Hum. Servs*., 900 F.2d 397, 403 (1st Cir. 1990), it contradicts the role of § 3730(d) in the statutory structure. Subsection (d) is about "award[s] to qui tam plaintiff[s]" in *completed* cases—cases in which there are already "proceeds of the action or settlement of the claim." 31 U.S.C. § 3730(d)(1); *id.* § 3730(d)(2) ("proceeds of the action or settlement"); *id.* § 3730(d)(3) ("proceeds of the action"). "[S]ection 3730(d) only comes into play at the conclusion of a case, after the action has already proceeded to a judgment or a settlement." *Roberts v. Accenture*, 707 F.3d 1011, 1017-18 (8th Cir. 2013).

Once proceeds have been awarded, compliance with the "limits" of § 3730 has been resolved: threshold prerequisites to "bringing" a suit have been either litigated with the action, forfeited, or settled. Reading the mere mention of "subsection (b)" or "this section" to re-open every procedural requisite to (re-)review at the fee-award stage turns subsection (d)'s role upside down, from tying up loose ends in closed cases to re-opening the entire case for scrutiny. *Cf. Roberts*, 707 F.3d at 1018 ("We find nothing in the [False Claims Act's] statutory text to support this

type of *post hoc* use of Rule 9(b) to deny a relator the right to a share of the settlement proceeds in an action in which the government intervenes.").

The False Claims Act's fee-awarding provision does not brook such re-opening at the fee stage. Instead, it makes plain that fees are mandatory, and follow automatically from receipt of proceeds in government-intervened actions. Nothing in the statute authorizes applying the first-to-file bar to reexamine validity of a share the relator has already received. "Any such person" who receives a relator share "shall also receive" reasonable fees. 31 U.S.C. § 3730(d)(1).

3. *No First Circuit precedent allows settling defendants to spring a first-to-file defense on relators to avoid fees after entering a global multi-relator settlement.*

The fact that all parties—relators, the government, and defendant—settled rather than litigating who was first to file distinguishes this case from *Millennium I*. There, some of the relators litigated share entitlement on first-to-file grounds, and did so after settlement. Why? Unlike the government and defendants, relators face difficulties in contesting first to file before settlement, due to inability to intervene in one another's cases. JA210-JA211. Athena overreads *Millennium I*, contending (Br. 15-16, 27) that because second-in-time litigating relators were in that case "statutorily disqualified from receiving the relator's share," second-in-time relators in intervened cases who already received their agreed-upon share are barred from receiving fees. *Millennium I* does not extend so far.

There is no dispute that if a settlement does *not* resolve the relator share, only the first filer can claim it. *Millennium I*, 923 F.3d at 252.[1] As explained in the Opening Brief, however (at 30-32), the *Millennium I* Court did not address the question presented here. This case asks *when* a defendant must raise the first-to-file statutory disqualification or, stated another way, whether the share-entitlement issue is forfeited or overcome by events once a defendant agrees to a settlement acknowledging that the relators will share in the proceeds rather than litigate first to file—as Athena did here, Add.28.

Bryant, the only case to have addressed the issue here, held that the statute does not permit settling defendants to spring first-to-file defenses at the fee stage. The Sixth Circuit concluded that there was "no reason" to "appl[y] the first-to-file rule … because the government, relators, and defendants all settled their claims together," including all issues related to the relator share. 24 F.4th at 1037. The court considered its holding fully consistent with this Court's *Millennium I* decision. *Id.* at 1038.[2]

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[1] Athena also cites (Br. 21) a district court case, *United States v. Novo Nordisk, Inc.*, Nos. 11-74 et al., 2019 U.S. Dist. LEXIS 59885, *44-45 (D.D.C. Apr. 8, 2019). That case, too, holds only that when relators litigate the share, the first filer alone can claim it.

[2] Other courts of appeals' cases cited in *Millennium I* and by Athena (Br. 16) did not resolve this question. *See* Opening Br. 32; *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 237 (3d Cir. 1998) (declining to address whether relators can agree to divide relator share); *United*

The Sixth Circuit's rule makes sense. Athena benefited from settling (*contra* Br. 37-39). While insisting that the dismissal of Lovell and McKusick's non-intervened claims means nothing, such dismissal was undisputedly more than Athena would have secured had it opted to litigate first to file, rather than settle, because Lovell and McKusick were the first filers for those claims. Athena also fails to grapple with how the with-prejudice dismissal of the claims that were subject to first-to-file objection is more valuable to Athena than the without-prejudice result Athena would have secured through litigation. *See* Opening Br. 29-30.

Bottom line: Athena would reap the benefits of settling a multi-relator case, yet post-settlement insist on only one relator. The Act does not authorize such gamesmanship. Although the first-to-file bar, when raised at the right time, protects defendants from "multiple separate suits based on identical facts and circumstances" (including attendant fees), *Millennium I*, 923 F.3d at 244, it is not a get-out-of-settlement-consequences-free card.

D. Awarding Fees to Sharing Relators in Government-Intervened Settlements Best Serves the Policies Underlying the False Claims Act.

As explained in the Opening Brief, the government (spanning all branches, and the federal fisc) most benefits by a bright line rule hewing to the False Claims

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States ex rel. Shea v. Cellco P'ship, 863 F.3d 923 (D.C. Cir. 2017) (addressing only whether a single relator who brought a second suit should have been permitted to amend his complaint after his first suit was resolved).

Act's two textual prerequisites for fees—intervention and receipt of a share of proceeds. *See* Opening Br. 35-37. The government benefits from larger recoveries in complex, nationwide frauds that require years of work by teams of multiple relators and their counsel to uncover. "[A]llowing relators to recover fees in broad-reaching fraud[s] … help[s] the government by incentivizing multiple relators and their counsel to prosecute a case that the government may not be able to pursue on its own." *Bryant*, 24 F.4th at 1035. The judiciary benefits from protecting the finality interests that underpin the policy favoring settlement, and Congress benefits by having the statute enforced as written.

Athena insists that the speculative risk of relator opportunism outweighs any benefits. Focusing on the actual risk-benefit calculus reveals the weakness of Athena's rejoinders.

The record here—which Athena offers nothing to undercut—is that sharing agreements in intervened actions, and the fees that routinely accompany them, are common and essential to successful multi-relator, complex fraud cases. JA211; JA218; JA264; *see also* Amicus Br. for Taxpayers Against Fraud Education Fund 12-14 ("TAFEF Br."). Most large recoveries like those that Athena trumpets as proving the False Claims Act works (Br. 44-45) depend upon multi-relator cooperation, and multi-relator cooperation hinges on the incentives provided through appropriate negotiation of relator share and the mandatory fee awards that follow.

The government's multi-relator collaborative investigation of nationwide frauds often yields global settlements like this one, where multiple relators share in the proceeds and are therefore awarded fees. *See* Opening Br. 11.

Athena likewise ignores that requiring defendants to cover the cost of anti-fraud enforcement through payment of attorney's fees yields the deterrence that Congress intended by including mandatory fee awards in the statute. *See* Opening Br. 47-48; TAFEF Br. 11-12. When the government intervenes and brokers a global settlement after relying on multiple relators' work, the defendant signs on, and the relators receive their agreed-upon share of the proceeds, fees should automatically follow. Permitting the defendant, after settling the case, to balk at fees for all but one relator would authorize under-deterrence for the worst frauds. The Act does not allow, much less require, this upside-down result.

While minimizing the benefits of multi-relator cooperation with the government, Athena overplays the risks of multi-relator opportunism. Athena first insists (Br. 41-42) that "forc[ing] defendants to pay attorneys' fees to relators who raise the same set of facts as another relator" would undermine the anti-opportunism goals of the first-to-file bar. This makes little sense. Awarding fees to settling relators in a government-led global settlement would not "force" defendants to pay anything; the parties agree that defendants can litigate first-to-file if they so choose (as can the government). *See Bryant*, 24 F.4th at 1038 (acknowledging that the first-to-file rule

applies when "either defendants [timely] contest relators' claims or the government contests the relators' receipt of a share").

What Athena can't do is locate any binding authority that authorizes defendants to settle first and raise defenses later. And the absence of any such authority makes a great deal of sense. Such sandbagging, if rewarded, not only wreaks havoc with finality and judicial economy, it necessarily causes relators and their counsel to hesitate to cooperate with the government when next asked to collaborate in pursuing a sprawling fraud.

Athena also posits (Br. 42-43) that collusion among relators' counsel will spawn opportunistic litigation. Here again—as with the strawman of relators "manufacturing" fees among themselves—Athena ignores the most central player in any global multi-relator settlement: the government. Government intervention is a meaningful check against parasitic litigation that Athena effectively discounts. *See* Opening Br. 39-40; *Bryant*, 24 F.4th at 1033 (requirement of government intervention and a successful claim "render[s] the pool of possible relators significantly less than infinite"); TAFEF Br. 14, 19-20. Athena offers no reason to suppose that the government will intervene in cases where relators have "contributed little to nothing" (Br. 42).

The government's involvement is also the answer to Athena's (wrong) assertion that awarding fees to relators who share in the settlement proceeds would

demand that district courts evaluate each relator's "helpfulness" at the fee stage. *See* Athena Br. 47-49. The Act charges the government with determining whether a relator's contributions to a collaborative investigation merit intervention. That government judgment (coupled with receipt of a share of the proceeds) dictates the entitlement to fees—not any post hoc subjective assessment of "helpfulness" by the district court. *See* pp. 7-8, *supra*.[3]

The rule urged by Lovell and McKusick (and adopted by the Sixth Circuit) is thus just as "bright line" as Athena's: intervention and receipt of a share of proceeds (here, acknowledged by all parties). But the rules are very disparate in their consequences. Athena's proposed rule would hamper multi-relator collaboration with the government, impede judicially-favored settlements, and undermine the full deterrence contemplated by the statute. The rule adopted by the Sixth Circuit and urged by Lovell and McKusick, in contrast, would encourage private support for the government's anti-fraud activities, while protecting against parasitic litigation.

Ultimately, because the text of the statute is plain, because Athena's atextual interpretation would create a host of anomalous results, because statutory objectives are served by awarding fees to relators that have received proceeds from intervened cases, and because "fee-shifting statutes should not be read to 'darken prospects for

[3] District courts do assure fees are reasonable, 31 U.S.C. § 3730(d)(1)—yet one more check against opportunism.

settlement,'" *Pérez-Sosa v. Garland*, 22 F.4th 312, 323 (1st Cir. 2022) (citing *Evans v. Jeff D.*, 475 U.S. 717, 735 (1986)), this Court should endorse the Sixth Circuit's approach.

II. Lovell And McKusick Are Entitled To All Reasonable Fees Incurred In The Intervened Action.

Athena acknowledges that Lovell and McKusick seek fees for their billing claims, in which the government did not intervene but which were also resolved in the global settlement, and does not dispute that Lovell and McKusick were first to file on those claims. *See* Athena Br. 40 n.1. Athena asserts the government did not investigate those claims, *id.*, but the record reflects that the government informed Lovell and McKusick otherwise. JA230. Beyond this record-controverted assertion, Athena rests on its response to Sanborn's consolidated appeal (No. 22-1246). Athena Br. 40 n.1. Lovell and McKusick stand on their opening arguments and adopt by reference the arguments made in Sanborn's reply brief on this issue. *See* Fed. R. App. P. 28(i).

CONCLUSION

The order denying attorneys' fees should be reversed.

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Respectfully submitted,

s/Hyland Hunt

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that:

1. The foregoing brief is in 14-point Times New Roman proportional font and contains 6,466 words, excluding the parts exempted by Fed. R. App. P. 32(f), and thus complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the type-volume of Fed. R. App. P. 32(a)(7)(B).

2. On August 18, 2022, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
Hyland Hunt

August 18, 2022