No.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
ex rel. LITTLE AND MOTAGHED, PETITIONERS

v.

TRIUMPH GEAR SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Tenth Circuit commit reversible error in its dismissal of a case because original John Doe Plaintiffs were considered intervenors and not original plaintiffs under pseudonyms?

B. Can an appellate court on an interlocutory review consider factual issues involving jurisdiction and proceed to the factual merits of an appeal when the matter under appeal was the denial of a motion to dismiss for the lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) which did not involve the consideration of factual issues by the District Court?

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OPINIONS BELOW

The Tenth Circuit's opinion is reported at *United States ex. rel. Little v. Triumph Gear Systems, Inc.*, 870 F.3d 1242 (2017), (10th Cir. September 18, 2017), and reproduced at Pet. App. 1a of the appendix to this petition. ("Pet. App."). The District Court decision denying defendants' motions to dismiss is reported at 2018 WL 262834, D. Utah, and reproduced at Pet. App. 21A. The Tenth's Circuit Order denying Petitioners' Request for Rehearing En Banc is reproduced at Pet. App. 41a.

JURISDICTION

The Tenth Circuit entered its judgment on September 18, 2017, (10th Cir.ROA16-4152 Document: 01019871263). and on October 16, 2017 denied petitioner's Motion for Rehearing En Banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RELEVANT PROVISIONS INVOLVED

The Federal False Claims Act ("FCA") provides, in relevant part, that:

> [A]ny person who— (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; 2 is liable to the United States Government for a civil penalty plus 3 times the amount of damages which the Government

sustains because of the act of that person. 31 U.S.C. § 3729(a)(1) (2010).

STATEMENT

Little and Motaghed, as John Doe Plaintiffs, along with Joe Blyn, appearing under his real name, filed this *qui tam* action in the District of Utah on October 1, 2012, pursuant to 31 U.S.C. § 3729 *et seq.* with jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345. (10th Cir. ROA A1-Doc 010179705793). The United States declined to intervene. (10th Cir ROA A4-010179705793). On November 2, 2015, Little and Motaghed filed their Third Amended Complaint (10th Cir ROA A4-Doc 010179705793). On April 26, 2016, the district court denied the Defendant's Motion to Dismiss the Third Amended Complaint. (10th Cir. ROA A9-Doc 010179705793 and Petitioner's App. 21a) and 2018 WL 262834, D. Utah. Defendant appealed under 28 U.S.C. § 1291. (10th Cir. ROA A11-Doc 010179705793). The Tenth Circuit Reversed the District Court with instructions to dismiss the case. (Petitioner's App. 1a and 10th Cir. ROA 16-4152-Doc 01019878126363). A petition for rehearing en banc was denied on October 16, 2017. (Petitioner's App. 41a and 10th Cir. ROA 10505784).

Plaintiffs filed a Motion to set aside Judgement of the Tenth Circuit and to allow a Fourth Amended Complaint (Docket Number 98). On January 2, 2018, the District Court denied Plaintiffs motion to set aside the judgment and file a Fourth Amended Complaint (Docket Number 101).

SUMMARY OF ARGUMENT

This petition involves significant constitutional questions of whether a district court or appellate court can entertain the facts of a complaint when it rules it does not have subject matter jurisdiction under Rule 12(b)(1) because the Court found that the John Doe Plaintiffs under a factual inquiry were barred by the First to File bar even though they were named in the original complaint under pseudonyms. The Tenth Circuit in its opinion stated, "Little and Motaghed intervened in this action when they filed the amended complaint. That intervention was barred by the FCA's first-to-file rule."

This decision is a conflict between the Tenth Circuit Court of Appeals and the D.C. Circuit Court of Appeals. See *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015) *cert. denied*, --- U.S. --- (2016).

The following statements made in this Court's opinion show that factual determinations form the basis for the dismissal of the claims under the first-to-file rule of § 3730(b)(5).1 These determinations required that the Court factual determinations went beyond the scope of the face of the Complaint.

The decisions of both the district court and the appellate court in this matter have far reaching implications that would undermine the public's confidence in the FCA's ability to reach and correct fraud in the military procurement industry and fundamentally change the judicial precedence of pseudonyms as plaintiffs in cases. The Tenth Circuit

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[1] All references are made to pages of the Court's opinion at Doc. 01019871263.

Court of Appeals in its Opinion stated erroneously and ignoring the typed faced complaint that "Blyn was the sole named plaintiff in the original complaint" and completely ignored the pseudonym plaintiffs named in the original complaint. Yet, simultaneously found that because Blyn was the only original plaintiff, concluded John Does' Little and Motaghed intervened when they were named in the original complaint and provided the bulk of the material statements in the original and Third Amended Complaint giving them original source status under the FCA.

The Tenth Circuit's finding that Blyn was the sole relator/plaintiff in the original complaint and that Little and Motaghed "shedding" their anonymity under their previous pseudonyms were then intervenors is reversible error and in conflict with the D.C. Circuit finding the First to File Bar is not jurisdictional.

Compounding the argument is that if Blyn was not in the case where is record of his voluntary dismissal as required by the DOJ and the Court under the FCA statute. This intervention also contradicts this Courts holding in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. ---, 135 S.Ct. 1970 (2015).

REASONS FOR GRANTING THE PETITION

A. Is it reversible error that the factual findings *de novo* by the Tenth Circuit that reversed the district court's findings that John Doe Plaintiffs' could proceed in the case after their pseudonyms were removed from the Original Complaint in the First Amended Complaint warrant remand back to the district court for further findings of fact?

The Court's finding of fact that "**Joe Blyn was the sole named plaintiff in the original complaint**" belies the John Doe pseudonyms placed on the face of the complaint caption and in the complaint, itself, that are self-evident from the document itself and the court docket. First, if there are factual issues related to whether, in fact, Little and Motaghed were two of the three John Doe plaintiffs, this requires a factual determination which the Appellate Court cannot make under a *de novo* appellate review.

Second, when a plaintiff or plaintiffs seek to file a complaint as a John Doe, the proper procedure is not to file a Complaint in the plaintiff's proper name and then seek permission for leave to proceed to appear as a John Doe plaintiff, this procedure would render fruitless any attempt to protect a privacy interest. If plaintiffs seeking to appear anonymously had to seek or receive "the district court's permission to appear anonymously,"2 the plaintiff will lose the very anonymity that he or she sought to protect. The ordinary course is that a complaint is filed by a John Doe plaintiff and the defendant challenges that status. This ordinary course of events is precisely what

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[2] Doc. 01019871263, p. 12.

occurred in the case cited by this Court, *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1244-1245 (10th Cir. 1989) (per curiam):

> In detailing the allegations against the defendants, **the complaint does not further specify the names** of the individual members of the NCBA whose rights were allegedly violated, and counsel for the NCBA stated during oral argument that this was to protect the anonymity and first amendment freedom of association of these individuals allegedly recognized by this court.

Id. (Emphasis added). In this case, the John Doe plaintiffs (Little and Motaghed) voluntarily eliminated the need for the defendant to seek disclosure of their names by the filing of the First Amended Complaint with the attendant result that this Court improperly rejected their status as John Doe plaintiffs.

The use of John Doe plaintiffs is an accepted practice. *See Roe v. Wade*, 410 U.S. 113 (1973), *John Doe Agency v. John Doe Corp.*, 932 U.S. 146, 149 (1989), *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (9th Cir. 1992) (*Qui ta*m action), *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d. 185 (2nd Cir. 2008). This Court discussed the use of pseudonym designations in *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir.), cert. den. 444 U.S. 856 (1979) and concluded:

> While the issue is not free from doubt we think all cases we reviewed implicitly, at least, recognize that identifying a plaintiff only by a

> pseudonym is an unusual procedure, to be allowed only where there is an important privacy interest to be recognized. It is subject to a decision by the judge as to the need for the cloak of anonymity.

If the John Doe designation was inappropriate, the remedy would be to require Little and Motaghed to appear by name, not to dismiss the case. *See Coe v. U.S. Dist. Court for Dist. of Colorado*, 676 F.2d 411 (10th Cir. 1982) (Original proceeding) (Petitioner/plaintiff appeared under a fictitious name, *id.* at 412). After reviewing petitioner's arguments in favor of utilizing a fictitious name, this Court concluded:

> We thus hold that the District Court did not err in finding that Dr. Coe's interest in privacy is outweighed by the public interest. It is our view that by balancing the need advanced by Dr. Coe to maintain individual and professional privacy rights against the right of the public to know all of the facts surrounding the formal proceedings posited with the Board, the privacy interest does not outweigh the public's interest.

Id. at 418. In this case, Little and Motaghed appeared voluntarily in the First Amended Complaint before the issue was presented to the District Court and were named in the original complaint under pseudonyms.

Little and Motaghed's voluntary appearance, relinquishment of their John Doe status, does not support the dismissal of this case. The Tenth Circuit committed reversible error in its findings of fact not in the record and the John Doe plaintiffs named in the original complaint are not superfluous names in the

original complaint without original source material, that is material to the False Claims Act allegations in the Third Amended Complaint that was not dismissed by the District Court.

The Court dismissed the case after making factual conclusions related to the status of Little and Motaghed regarding the first-to-file rule. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

This petition for a writ of certiorari should be granted because it would render Roe v. Wade, a landmark case, as being untenable for pseudonym plaintiff/s to remain anonymous for privacy reasons while seeking justice in the Courts of America in future cases.

Respectfully submitted,
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