

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, ex rel. MARK CHRISTOPHER TRACY,  
*Applicant,*

v.

EMIGRATION IMPROVEMENT DISTRICT, et al.,  
*Respondents.*

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**Application for an Extension of Time to File a Petition  
for a Writ of Certiorari to the United States Court of  
Appeals for the Tenth Circuit**

**To the Hon. Neil M. Gorsuch,  
Circuit Justice for the Tenth Circuit**

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME  
COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE TENTH CIRCUIT:

Pursuant to Rule 13.5, counsel for Mark Christopher Tracy respectfully requests a 30-day extension of time, up to and including March 1, 2023, in which to file its petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit issued on November 1, 2022. Tracy did not file a petition for rehearing in the Tenth Circuit. In the absence of an extension, the deadline to file the petition for a writ of certiorari will expire on January 30, 2023. This Court's jurisdiction would be invoked under 8 U.S.C. § 1254(1).

1. The case concerns the tolling provisions of the statute of limitations under the False Claims Act (FCA) and whether, when a party seeks damages as a result of the false claim actually being paid, such damages are an essential element to an FCA violation such that the statute of limitations does not begin to run until the false claim is actually paid. Petitioner Tracy filed the underlying lawsuit on behalf of the federal government pursuant to the *qui tam* provisions of 31 U.S.C. § 3730(b). He originally filed the lawsuit on September 26, 2014. His third amended complaint—the operative one—raises one false claim act count against multiple defendants, including the Emigration Improvement District (EID), a Utah Special Service District. EID, conspiring with others, fraudulently induced the Utah administrator of the federal drinking Water State Revolving Fund (DWSRS) to grant it a \$1.86 million loan based upon a duplicitous water claim stripped from the only active military cemetery created by an Act of Congress and used for the construction, remediation, and massive

expansion of a luxurious private urban development. The loan was ostensibly to be used for helping 67 residents in Emigration Canyon, Utah. According to EID, the residents needed access to a community water system because their private wells had pollution problems. The loan, EID continued, would address these problems through the building of several large-diameter commercial wells, which were predicted in hydrology studies misrepresented and withheld from the federal government to dewater senior perfected water rights and the Emigration Canyon stream “with almost certainty.” In fact, the loan served as nothing more than a front for EID to enrich certain private actors at the expense of the existing low-income residents of Emigration Canyon. Tracy sought not only civil penalties but also damages from the actual payment of the yet outstanding DWSRS loan to EID. The Government declined to intervene in the case.<sup>1</sup>

It is undisputed that EID submitted its final claim for release of construction retainage funds on September 13, 2004—that is, ten years and thirteen days before Tracy filed his lawsuit on September 26, 2014. It is also undisputed that the government paid EID construction retainage funds on or after September 29, 2004—that is, less than ten years before Tracy filed his lawsuit on September 26, 2014. The defendants below moved to dismiss on the ground that the FCA’s statute of limitations barred the case. That statute provides that no civil action may be brought

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<sup>1</sup> After the Government declined to intervene, the district court issued an order (Doc. 200) directing, among other things, that the parties “serve all notices of appeal upon the United States.” The Government did not participate in the proceedings in the Tenth Circuit, but in an abundance of caution Tracy is serving this application upon both the Solicitor General of the United States and the United States Attorney for the District of Utah.

either “(1) more than 6 years after the date on which the violation of section 3729 is committed or (2) more than 3 years after the date when facts material to the action are known or reasonably should have been known . . . but in any event no more than 10 years after the date on which the violation is committed.” 31 U.S.C. § 3731(b).

Despite the fact that Tracy was (and is) seeking damages for the actual payment of the false claim, the district court concluded that the term “violation” did not include the payment of the false claim. Accordingly, it dismissed the case.

2. In affirming the district court, the Tenth Circuit acknowledged that at least one other court—the Court of Federal Claims—has concluded that the FCA’s statute of limitations does not begin to run until the government actually makes payment on a false claim and that if a plaintiff is seeking damages, this additional element also constitutes a violation of the FCA. (Op.9). *See Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998). But the Tenth Circuit then concluded that it was unaware of any actual circuit split on this matter. (Op.9). To the contrary, the Second Circuit has explicitly held that where the plaintiff is seeking damages, the statute of repose does not begin to run until the government actually makes a payment on the false claim. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993), *cert. denied*, 508 U.S. 973, 113 (1993). According to the Second Circuit, the FCA’s “limitations period . . . begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.” *Id.* (quoting *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 829 (S.D. N.Y. 1986)). It thus recognizes, unlike the Tenth Circuit, that a violation of the FCA depends on the nature of the relief sought. If a party is not seeking any damages, the statute of limitations begins to run at the time

the claim is submitted, because at that point all of the elements necessary to the violation have been carried out. On the other hand, if a party is seeking damages following a payment, the statute of limitations cannot begin to run until payment is actually made, as until that point no violation has actually occurred. The Third Circuit has implicitly recognized the same. *See United States v. Klein*, 230 F.Supp. 426, 441-42 (W.D. Pa. 1964), *order aff'd*, 356 F.2d 983 (3d Cir. 1966). The First and Fifth Circuits, by contrast, have come down on the same side as the Tenth Circuit. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *Smith v. United States*, 287 F.2d 299, 304 (5th Cir. 1961). At least one law professor, furthermore, has recognized that a split exists between the federal appellate courts on this matter. *See* Joel D. Hesch, *A Comprehensive Analysis of the False Claim Act's Unique Statute of Limitations: The Supreme Court's ruling in Cochise Consultancy, Inc. was a Good Start But Left Much to Do*, 70 Syracuse L. Rev. 773, 780 (2020); *see also* Scott K. Zesch, *When Does Statute of Limitations Begin to Run in Action under False Claims Act (31 U.S.C.A. §§ 3729-3733)*, 139 A.L.R. 645 § 4 (1997).

3. Undersigned counsel respectfully requests a 30-day extension of time to file a petition for a writ of certiorari, up to and including March 1, 2023. Undersigned counsel was recently retained in this matter, and did not represent Tracy in the lower courts. In addition, undersigned counsel—a solo appellate practitioner—has two other briefing deadlines in the Missouri Court of Appeals due at the end of January that would make this Court's current deadline of January 30, 2023, difficult to meet. Specifically, undersigned counsel has a briefing deadline of January 26, 2023, in *State v. Bodenhamer*, No. ED110766, and a briefing deadline of January 27, 2023, in *State*

*v. Wiggley*, No. ED110950. This case presents important and complex issues regarding the statute of limitations for the FCA and whether damages are an element under the FCA and how the statute of limitations is calculated in cases of implied false certification and fraudulent inducement recognized by this Court. *See United Health Servs., Inc. v. US ex rel. Escobar*, 579 U.S. 176, 186 (2016) (“[I]mplied false certification theory can ... provide a basis for [False Claims Act] liability”); *US ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) (“The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.”), *superseded on other grounds as stated in Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 412 (2011). The requested extension would enable undersigned counsel to devote the necessary time to research the legal issues and write a petition that addresses them in the depth and scope they deserve.

Accordingly, Tracy respectfully requests an extension of time up to and including March 1, 2023, in which to file his petition for a writ of certiorari.

Respectfully submitted,

/s/ John M. Reeves

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*Mark Christopher Tracy*

Date: January 11, 2023

## CERTIFICATE OF SERVICE

I, John M. Reeves, a member of the bar of this Court, certify that on January 11, 2023, the following parties were served copies of the Application for Extension of Time in which to File a Petition for Writ of Certiorari via presentation to third-party carrier FedEx for next-day delivery and via electronic mail:

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I also certify that on January 11, 2023, the following parties, who were appellees at the Tenth Circuit but who did not participate in that appeal, and who were never represented by counsel, have been served at their last known addresses via delivery to third-party carrier FedEx for next-day delivery:

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I further certify that, in accordance with 31 U.S.C. § 3730(3) and the order of the district court (Doc. 200), the following persons have been served with a copy of the application via presentation to third-party carrier FedEx for next-day delivery and via electronic mail:

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