No. 12-1497

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICES EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN HOSPITAL ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

issues that impact the pharmaceutical industry and frequently participates as amicus in this Court.

Established in 1853, The Clearing House Association L.L.C., is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

The American Hospital Association ("AHA") is a national not-for-profit organization that represents and serves nearly 5,000 hospitals, health care systems, and other health care organizations, plus 43,000 individual members. Its mission is to advance the health of individuals and communities by leading, representing, and serving the hospitals, health systems, and other related organizations that are accountable to the community and committed to health improvement. The AHA provides extensive education for health care leaders and is a source of valuable information and data on health care issues and trends. It also ensures that members' perspectives and needs are heard and addressed in national health policy development, legislative and regulatory debates, and judicial matters. The AHA

also has frequently participated as amicus curiae in cases with important consequences for its members, including cases arising under the FCA.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all states and in all areas of medical specialization.

SUMMARY OF THE ARGUMENT

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences for the Nation's businesses and health care providers if the decision below is not reversed. The Fourth Circuit's combination of two far-reaching errors greatly expands the reach of the FCA. The interpretation of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, has the potential to toll indefinitely all statutes of limitations for all claims involving alleged fraud against the United States. Exacerbating the problem, the Fourth Circuit's interpretation of the so-called "first-to-file" provision of the FCA, 31 U.S.C. § 3730(b)(5), allows relators to file serial, duplicative actions so long as they are not active at the same time. If affirmed, the combined effect of these rulings will invite private plaintiffs and the Government to pursue indefinitely and repeatedly any claim involving alleged fraud against the Government. This elimination of all repose is not

only contrary to law but would impose significant burdens on businesses, hospitals and other health care providers. These entities, many of whom provide needed services to Government agencies and those served by Government programs, will be forced to defend against stale, repetitive, and frequently meritless claims.

The lower court's interpretation of the WSLA vastly expands the statute beyond its intended scope. Whereas the WSLA was intended to prevent criminal fraud prosecutions from lapsing due to the Government's wartime responsibilities, the Fourth Circuit's interpretation covers all FCA claims, whether civil or criminal and whether or not related to any war activities. And because hostilities abroad may never be terminated with the specificity required by the WSLA, that interpretation authorizes potentially indefinite tolling. Not only is such open-ended tolling of civil claims contrary to the purposes of the WSLA, but it is unnecessary, as both private relators and the Government have been able to file increasing numbers of civil FCA claims notwithstanding the nation's military commitments. The only result will be to increase the amount of stale, otherwise time-barred claims, the vast majority of which will prove meritless. This would improperly subject businesses and health care providers to continued uncertainty and the increased costs of defending against old claims, which will ultimately be borne by the consuming public.

The problem is compounded by the Fourth Circuit's erroneous interpretation of the FCA's "first-to-file" bar, which effectively renders inoperable an important statutory mechanism. That interpretation authorizes relators to file the same claims over and

over so long as they are not pending at the same time. Whereas the first-to-file bar was designed to create a "race to the courthouse" that induces whistleblowers to come forward quickly with evidence of fraud, the Fourth Circuit's interpretation permits another duplicative suit to be filed as soon as the prior suit is no longer pending. This encourages serial relators who bring forward no new information to try their luck with duplicative cases, wasting judicial resources. Eliminating the first-to-file bar's protection will subject defendants not only to the initial investigation that follows the first suit, but also years of costly litigation of meritless follow-on claims after the first suit is dismissed. The decision below should be reversed.

ARGUMENT

I. ALLOWING POTENTIALLY LIMITLESS TOLLING FOR A VAST ARRAY OF CIVIL CLAIMS WOULD SIGNIFICANTLY HARM U.S. BUSINESSES AND HEALTH CARE PROVIDERS.

The WSLA is a criminal code provision enacted in 1942 to extend the time for government prosecutors to bring charges related to criminal fraud offenses against the United States during times of war. It tolls the statute of limitations for "any offense" involving fraud against the federal Government "[w]hen the United States is at war." 18 U.S.C. § 3287. Until the Fourth Circuit's decision in this case, no circuit court had applied the WSLA to a civil FCA action, much less one brought by a private party. Pet. App. 35a (Agee, J., dissenting).

Under the ruling below, however, the WSLA (1) applies to both civil and criminal claims, even though

it is codified in the criminal code and expressly covers only "offenses"; (2) applies to private parties and not just government prosecutors; (3) applies whenever the United States is engaged in "armed hostilities," regardless whether the hostilities were commenced pursuant to a formal declaration of war; and (4) tolls limitations periods under all statutes involving fraud against the Government until the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities, which may never in fact occur.

Such an interpretation would not significantly aid the fight against actual fraud, which is already well-served by the existing tools available under the FCA and its generous statutes of limitation and repose. Instead, the Fourth Circuit's rule would only empower unaccountable private relators, as well as the Government, to seek to revive decades-old stale civil claims that are otherwise barred by the statute of limitations and repose, imposing significant unwarranted costs on the Nation's businesses and health care providers. By contrast, the true purpose of the WSLA—ensuring that prosecutions of criminal actions are not compromised by the unavailability of prosecutorial resources during periods of war—will be fully served if the statute is properly limited to its intended realm of criminal cases.

A. The Decision Below Erroneously Authorizes Virtually Unlimited Tolling For All Civil FCA Claims.

Even though the WSLA covers only "offense[s]" involving fraud or attempted fraud against the United States, 18 U.S.C. § 3287(1), and is located among the criminal provisions of Title 18 of the U.S. Code, the Fourth Circuit erroneously held that it

applies to civil claims. Pet. App. 14a. As petitioners have explained in detail, the statutory term "offense" plainly covers only criminal offenses, not civil claims. *See* Pet. Br. 19-29.

This result is in accord with the intended purpose of the WSLA, which was enacted to give extra time to government prosecutors "[i]n view of the opportunity to commit such frauds in time of war, and in view of the difficulty of their prompt discovery and prosecution." *Bridges* v. *United States*, 346 U.S. 209, 222 (1953). As the Court has explained, the "fear" that led to the WSLA's enactment "was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late." *United States* v. *Smith*, 342 U.S. 225, 229-29 (1952). "The implicit premise of the legislation is that the frenzied activities, existing at the time the Act became law, would continue until hostilities terminated and that until then the public interest should not be disadvantaged." *Id*. at 229; *see also* S. Rep. No. 77-1544, 2d Sess., at 2 (1942) (WSLA was enacted to ensure that "limitations statute will not operate, under stress of [wartime].").

The Fourth Circuit's ruling expands the reach of the statute far beyond its intended realm. Although the court applied the WSLA in this case because it considered the United States to have been "at war" in Iraq since October 2002, Pet. App. 12a, its interpretation of the WSLA is not restricted to war-related industries or defense contractors. Rather, it covers all FCA actions, which include such disparate areas as health care, banking and financial services and procurement. Thus, since the Fourth Circuit's

ruling private relators and the Government have asserted the WSLA as grounds for tolling limitations in numerous civil cases having nothing to do with the prosecution of war or the military.[2] Moreover, the ruling invites the plaintiffs' bar and the Government to argue that the WSLA covers claims brought under other statutes beyond the FCA. *See*, *e.g.*, 42 U.S.C. § 1320a-7a (health care fraud); 18 U.S.C. § 3287(2)

[2] *See*, *e.g.*, *United States ex rel. Landis* v. *Tailwind Sports Corp.*, --- F. Supp. ---, No. 10-cv-00976, 2014 WL 2772907, *20 (D.D.C. June 19, 2014) (WSLA did not toll FCA limitations in U.S.-intervened case involving Lance Armstrong's cycling sponsorship agreements); *United States ex rel. State of Texas* v. *Planned Parenthood Gulf Coast, Inc.*, --- F. Supp. 2d ---, No. H-12-3505, 2014 WL 1933554, *7 (S.D. Tex. May 14, 2014) (WSLA tolled FCA limitations in non-intervened health care case); *Weslowski* v. *Zugibe*, --- F. Supp. 2d ---, No. 12-cv-8755 (KMK), 2014 WL 1612967, *11 (S.D.N.Y. Mar. 31, 2014) (WSLA did not toll FCA limitations in FCA retaliation case); *Hericks* v. *Lincare, Inc.*, No. 07-387, 2014 WL 1225660, *14 n.16 (E.D. Pa. Mar. 25, 2014) (WSLA did not toll FCA limitations in non-intervened health care case); *United States ex rel. Bergman* v. *Abbot Labs.*, No. 09-4264, 2014 WL 348583, *16 (E.D. Pa. Jan. 30, 2014) (WSLA did not toll limitations in non-intervened health care case); *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 613-14 (S.D.N.Y. 2013) (WSLA tolled FCA limitations in U.S.-commenced home mortgage case); *United States ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-245, 2013 WL 3893323, *7 (W.D. Pa. July 26, 2013) (WSLA did not toll FCA limitations in non-intervened health care case); *United States ex rel. Paulos* v. *Stryker Corp.*, No. 11-0041-CV, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (WSLA tolled FCA limitations in non-intervened health care case); *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 597-609 (S.D. Tex. 2012) (WSLA tolled FCA limitations in U.S.-commenced case involving bank statements). *See also United States* v. *Movtady*, --- F. Supp. 2d ---, No. 13-cv-2227 (JMF), 2014 WL 1357330, *5 n.4 (S.D.N.Y. Apr. 7, 2014) (holding in alternative that WSLA tolls limitations in U.S.-commenced case involving home mortgages, although issue not raised by Government).

(WSLA also applies to any "offense * * * committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States").

The decision below also potentially authorizes *indefinite* tolling of all FCA claims. The Fourth Circuit held that the WSLA tolled the running of the statute of limitations due to the hostilities in Iraq, without tying that triggering event to a formal war declaration. Where the WSLA applies, limitations periods are tolled "until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress," 18 U.S.C. § 3287(3). [3] This formal declaration has not yet happened for the Iraq hostilities, and may never come. Indeed, since the attacks of September 11, 2001, the United States has been continually engaged in numerous undeclared "armed hostilities," Pet. App. 12a, in Afghanistan, Iraq, and other countries—none of which has been terminated through the formalities set forth in the WSLA. *See also* Barbara Salazar Torreon, Congressional Research Service, *Instances of Use of United States Armed Forces Abroad*, 1798-2014 (Jan. 13, 2014) (www.fas.org/sgp/crs/natsec/R42738.pdf) (listing more than 330 U.S. foreign military operations in 216 years). Hence, the Fourth Circuit's interpretation of the WSLA would result in potentially limitless tolling of the limitations period for all FCA cases whenever the United States has

[3] The prior version required similar formalities to terminate tolling. *See* 18 U.S.C. § 3287 (2006). As noted in the petition (Pet. 17 n.4) it is unnecessary to decide which version applies to this case.

determined that, notwithstanding a state of armed conflict, it is not so significant that it warrants a formal declaration of war or peace.

By tolling civil limitations periods in this way, the Fourth Circuit's decision, if affirmed, would create incentives that are contrary to the FCA's purposes. The FCA, through the first-to-file bar discussed below, "reflects Congress' explicit policy choice to encourage prompt filing and, in turn, prompt recovery of defrauded funds by the United States." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 313 n.11 (2010) (Sotomayor, J., dissenting). But if the WSLA is applied to civil cases brought by private relators, those relators could "'have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery.'" Pet. App. 37a-38a (Agee, J., dissenting) (citation omitted). Suspending limitations periods for private relators would "undermine the very purpose of the *qui tam* provisions of the FCA," which are "'to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not.'" *Id.* at 38a (citation omitted).

These perverse outcomes are predictable given that private relators seeking windfall gains have different incentives than the criminal prosecutors to whom the WSLA was actually directed. If the statute is properly limited to criminal cases, prosecutorial discretion may help prevent overreaching in bringing stale criminal charges. Yet applying the WSLA to civil claims would allow private relators to litigate, on the Government's behalf, otherwise time-barred civil cases that the Government itself has deemed

unworthy of further pursuit. As courts outside the Fourth Circuit have held, applying the WSLA to civil FCA claims is contrary to the WSLA's true purposes. *See Bergman*, 2014 WL 348583, at *16 ("the WSLA does not toll the FCA's statute of limitations for relators without the government's intervention, especially when those cases do not involve military or war-related contracts"); *Emanuele*, 2013 WL 3893323, at *7 (holding that the WSLA does not apply to relator-initiated FCA claims "where the United States is not a party").

Such an expansion of tolling is unsupported by the recognized purpose of the WSLA to provide a wartime, resource-drained Government with additional time to pursue and prosecute criminal fraud offenses. *See Smith*, 342 U.S. at 228 (under WSLA, "offenses occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities"). Unlike with government prosecutors, there is no similar concern that private civil relators will face a drain on their resources or be otherwise distracted by activities relating to wartime duties, thereby preventing the timely filing of civil FCA claims. Tolling is thus a complete boon for civil relators.

Nor do civil FCA cases, even when brought by the Government, raise the concern that animates the WSLA—that parties might avoid punishment for serious criminal offenses during time of war. *See id.* at 229. Moreover, civil cases are not subject to the speedy trial clause of the Sixth Amendment or the Speedy Trial Act, 18 U.S.C. §§ 3161-74, which would otherwise limit the Government's ability to delay criminal prosecutions due to wartime exigencies.

And the Government does not need tolling of limitations for civil *qui tam* FCA cases as a result of resource constraints. That is because the Government, for good cause, can (and almost always does) obtain repeated extensions to keep a case under seal to facilitate its investigation. *See* 31 U.S.C. § 3730(b)(3). Although the FCA provides only for a 60-day seal period, *qui tam* cases remain under seal for an average of 13 months. *See* Jan. 24, 2011 Letter from DOJ & HHS to Hon. Charles E. Grassley at 14 (available at www.taf.org/DOJHHS-joint-letter-to-Grassley.pdf).

Finally, the Fourth Circuit's decision is also contrary to the Court's recognition that the FCA contains an "absolute provision for repose" after 10 years. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013); *see* 31 U.S.C. § 3731(b) (a civil action may be brought "*in no event* more than 10 years after the date on which the violation is committed") (emphasis added). By overriding that limitation, the Fourth Circuit has effectively abolished the congressionally imposed constraints on the FCA. *See United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) ("*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation."); *see also Rotella* v. *Wood,* 528 U.S. 549, 554 (2000) (rejecting a rule that would have "extended the limitations period to many decades, and so beyond any limit that Congress could have contemplated" and "would have thwarted the basic objective of repose underlying the very notion of a limitations period").

B. Unlimited Tolling Would Unnecessarily Threaten U.S. Businesses And Health Care Providers With Stale And Meritless Claims.

Indefinite tolling of limitations for civil FCA claims is not necessary to root out actual fraud, and would instead subject U.S. businesses to unpredictable liability for aged claims—the vast majority of which have no merit—and require them to incur ever-increasing costs to defend against those claims.

Although the United States remains engaged in conflicts abroad, no wartime exigencies have prevented the Government or private relators from seeking to recover for alleged civil fraud. FCA claims are at all-time high, and both the Government and private relators have demonstrated that they have ample time and resources to devote to the effort. At the end of 2013, the Department of Justice ("DOJ") noted that fighting civil fraud was a "high priority," and trumpeted "another banner year" for FCA enforcement. DOJ, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013) (www.justice.gov/opa/pr/2013/December/13-civ-1352.html) ("*DOJ 2013 Press Release*"). Thus, by its own terms, the Government's efforts to combat alleged fraud have not been bridled by war.[4]

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[4] Despite its successes, the Government has nonetheless still decided to invoke the WSLA with frequency. *See* Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1 (noting that the Government's "use of that law has more than doubled" just since 2008, and the Government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined).

Nor have *qui tam* relators experienced any wartime fatigue. For nearly a decade—even though the country has been continually engaged in hostilities abroad—*qui tam* FCA litigation has been expanding dramatically. From 2006, when respondent Carter filed his first *qui tam* complaint, until 2013, over 300 *qui tam* actions have been filed annually. DOJ, *Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2013*, at 1-2 (2013) (www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). In the 2013 fiscal year, the number dramatically increased by over 100 (13.4%), up to 753. *Id.* at 2. That is an average of more than fourteen new lawsuits filed every week under a single federal statute.

Government defense contractors, such as the petitioners in this case, are an increasing target of *qui tam* suits. FCA *qui tam* claims involving the Defense Department jumped by 35% in the fiscal year 2013. DOJ, *Fraud Statistics—Department of Defense: Oct. 1, 1987 – Sept. 30, 2013*, 1-2 (2013). The DOJ pronounced last year "a record year for procurement fraud matters." *DOJ 2013 Press Release*, *supra*. Furthermore, it is possible that FCA relators may attempt to use the WSLA not only to toll the running of the FCA's statute of limitations, but indirectly to evade the six-year limitation on contract disputes by presenting otherwise barred contract claims as FCA claims. *See* David M. Nadler & Joseph R. Berger, *Fourth Circuit Decision On WSLA Paves Way For FCA Forum Shopping And More Stale Claims*, 55 Government Contractor ¶ 168 at 3 (June 5, 2013).

The health care industry also continues to be a primary target of FCA suits. *See* James J. Belanger & Scott M. Bennett, *The Continued Expansion of the*

False Claims Act, 4 J. Health & Life Sci. L. 26, 28 (2010). Recent FCA amendments have caused an "explosion" of *qui tam* suits against health care companies. *See* Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 Penn. St. L. Rev. 77, 96 (2011). Of the 13,766 FCA cases brought between 1987 and 2013, 6,053, or nearly 44%, have involved the health care industry. DOJ, *Fraud Statistics – Health and Human Services Oct. 1, 1987 – Sept. 30, 2013* at 2 (2013). In fiscal year 2013, 500 out of 753 new *qui tam* FCA matters (over 66%) involved the Department of Health and Human Services as the primary client agency. *Id.* Notwithstanding the nation's military commitments, the Government has consistently increased its budgetary requests for combatting alleged health care fraud. Scott Becker & Molly Gamble, *The Growth of Healthcare Fraud Qui Tam Lawsuits*, Becker's Hospital Review (Nov. 26, 2013) (www.beckershospitalreview.com/legal-regulatory-issues/the-growth-of-healthcare-fraud-qui-tam-lawsuits.html).

Thus, there is no need to indefinitely toll civil FCA claims during the country's ongoing military hostilities, as both *qui tam* relators and the Government have had no difficulty filing such claims with increasing regularity. Allowing such tolling would instead only subject businesses and health care providers to additional stale claims, the vast majority of which will prove meritless. American businesses, like the Government and the American public, have an interest in rooting out fraud. There is strong evidence, however, that the vast majority of *qui tam* relator suits are meritless, serving only to inflict costs on businesses (and ultimately the

public). More than 76% of FCA actions brought between 2006-2013 were *qui tam* relator actions, with such actions accounting for 89% of the total in 2013. *Fraud Statistics: Overview*, *supra*, at 1-2. Once its investigation is complete, the United States historically has declined to participate in approximately 78% of these *qui tam* suits. Christina O. Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 971 (2007) (study of suits from 1987-2004). Tellingly, from 1987-2013, *qui tam* actions in which the Government declined to intervene accounted for only 3.6% of total *qui tam* monetary settlements and judgments. *Fraud Statistics: Overview*, *supra*, at 1-2. For the health care industry, *qui tam* cases in which the Government declines to participate result in less than 2.4% of all recoveries. *Fraud Statistics: Health and Human Services*, *supra*, at 1-2.

The vast majority of *qui tam* cases declined by the Government are meritless. According to a comprehensive empirical analysis, 92% of cases in which the U.S. declined to intervene were dismissed without recovery. Broderick, *supra*, at 975 (using data from 1987 to 2004). Thus, less than 10% of non-intervened private *qui tam* actions actually result in recovery, with more than 90% being dismissed as frivolous or otherwise without merit. *Id.*; *see also* Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 9 (2007). As explained above, *supra* at 12, the FCA itself provides the Government with the ability to delay *qui tam* cases if necessary to facilitate its own investigation. And when the Government does not intervene, it almost always allows relators to proceed with claims that the

Government has deemed unworthy of its own participation. Although the DOJ has the authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss any *qui tam* suit, it rarely does so, allowing a substantial majority of *qui tam* relator cases to proceed unabated. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2007-08). "[T]he result is that the government does not dismiss, and relators are permitted to proceed with, thousands of non-meritorious qui tam suits." *Id.*

American businesses and health care providers undergo significant hardship—both financial and reputational—as a result of meritless *qui tam* FCA claims. Defending against an FCA claim is very costly and requires a "tremendous expenditure of time and energy." Canni, *supra*, at 11 n.66. As demonstrated by the present case, these meritless lawsuits can continue for years before dismissal. Further, the defendant may also be motivated to settle, despite the lack of merit, to avoid the potentially enormous expenditures of money and time needed to defend such suits. *Id.* at 11-12.

Similarly, defendants suffer significant reputational harm from these meritless lawsuits. Because "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices," *id.* at 11, businesses that rely on contracting with the Government unnecessarily have their reputations damaged. *Id.* at 10-11. Ultimately, the costs of the litigation in the vast majority of relator *qui tam* cases, "outweigh[s] any benefit to the public." Rich, *supra*, at 1264. Most non-intervened

suits "exact a net cost," as defendants must expend financial resources to defend against meritless claims and suffer unwarranted damage to their reputations. *Id.*; *see also* Canni, *supra*, at 2.

Allowing defendants to be subjected to an uncertain range of claims that were long since understood to have been time-barred exacerbates the problems caused by meritless *qui tam* litigation. The Fourth Circuit's WSLA ruling has already precipitated the assertion of the WSLA in numerous other cases. *See supra* note 2. Were this Court to extend that ruling across the country, the impact could be substantial. The WSLA would have tolled the statute of limitations since at least October 2002 when Congress authorized the President to use military force in Iraq. Pet. App. 12a. Moreover, before 2002 the United States engaged in other similar undeclared "armed hostilities," *id.*, such as the armed conflict in Afghanistan that begin in 2001 or even the Persian Gulf War that began in 1991. These conflicts have yet to be formally terminated in the manner set forth in the WSLA, leading to the possibility that plaintiffs will seek to assert even older claims, sprouting further litigation.

The unwarranted costs of defending against *qui tam* claims by private relators are even greater for stale claims. Statutes of limitations "embody a 'policy of repose, designed to protect defendants.'" *Lozano* v. *Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Burnett* v. *New York Cent. R. R. Co.*, 380 U. S. 424, 428 (1965)). Statutes of limitation and repose "foster the 'elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Id.* (quoting *Rotella*, 528 U.S. at 555); *John R. Sand & Gravel*

Co. v. *United States*, 552 U.S. 130, 133 (2008) (limitations "protect defendants against stale or unduly delayed claims"). They protect not only defendants but also courts from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

Permitting claims under the FCA to be tolled potentially *ad infinitum* would create significant uncertainty as to the range of possible liability businesses might face. Businesses will also never know when they may "close the books" on any particular matter, requiring additional costs to preserve evidence and plan for unknown contingencies. And they will incur significant expenses in attempting to defend against decades-old claims. These are exactly the kind of difficulties that the FCA's statutes of limitations and repose were enacted to avoid. Indefinite tolling of civil FCA claims is inconsistent with the language of the WSLA, is wholly unnecessary, and would serve only to swamp businesses with an increasing number of stale, meritless claims whose litigation costs must ultimately be borne by the American public. The Fourth Circuit's decision authorizing such tolling should be reversed.

II. THE FIRST-TO-FILE BAR DOES NOT ALLOW DUPLICATIVE, SERIALLY-FILED CLAIMS.

The error of the Fourth Circuit's WSLA ruling is compounded by its erroneous interpretation of the FCA's first-to-file bar. Lifting the "first-to-file" bar whenever a first-filed case is no longer active

improperly encourages the filing of multiple, duplicative claims seriatim. And because the WSLA was held to toll limitations even for private FCA claims, under the lower court's rule relators may serially file duplicative claims indefinitely.

The first-to-file bar provides: "When a person brings [a *qui tam* FCA] action * * * 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). This bar is absolute—"no person other than the Government may * * * bring a related action"—and it takes effect immediately upon the filing of the first case. *See United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (Section 3730(b)(5)'s plain language is "exception-free").

Contrary to the decision below, the statute provides no end point for application of the first-to-file bar against related cases. The statutory words "pending action" impose no time limit, but rather are just a means of specifying the first-filed action. As the D.C. Circuit recently concluded, "[t]he simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343-44 (D.C. Cir. 2014). The first-to-file rule bars new suits "even if the initial action is no longer pending," and "pending action," as used in the statute, is "shorthand for first-filed action," and does not mean something like "still active action." *Id.*; *see also United States ex rel. Powell* v. *Am. Intercont'l Univ., Inc.*, No. 1:08-CV-2277-RWS, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012) (the word "'pending' is used as a short-hand for the first-filed action, and 'pending' was used instead of some other term so that the courts would

compare the first-filed action's most recent allegations with the second-filed action's complaint").

The bar on related cases takes effect as soon as the first action is pending, and nothing in the statute terminates that bar when that action is concluded. If Congress wanted to say that the bar applies only "while the earlier-filed action is pending," Congress would have said precisely that. *See Shea*, 748 F.3d at 344 (contrasting other statutes in which Congress has used the term "pending" to bar suits on a temporal basis and concluding that "Congress excluded similar language in the first-to-file bar").

This is in accord with the purpose underlying *qui tam* FCA actions. "A whistleblower sounds the alarm; he does not echo it." *United States ex rel. Green* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995) (citation omitted). The statute "awards the spoils to those vigilant enough to blow the whistle first, not to every whistle-blower." *United States ex rel. Batiste* v. *SLM Corp.*, 740 F. Supp. 2d 98, 102 (D.D.C. 2010), *aff'd*, 659 F.3d 1204 (D.C. Cir. 2011). "[O]nce the Government has notice of potential fraud, the purposes of the FCA are vindicated" and "the policies behind the statute do not support successive suits simply because the first suits were dismissed." *Powell*, 2012 WL 2885356, at *5. As the D.C. Circuit has reasoned:

> The resolution of a first-filed action does not somehow put the government off notice of its contents. On the other hand, reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions. Such duplicative

> suits would contribute nothing to the government's knowledge of fraud.

Shea, 748 F.3d at 344. There is "no reason why the rule should be read to bar a related claim one day but not the next." *Id.*

"Once the government is put on notice of its potential fraud claim"—which happens when the first action is filed—"the purpose behind allowing qui tam litigation is satisfied." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). *See also Lujan*, 243 F.3d at 1188 ("Dismissed or not, [the first-filed] action promptly alerted the government to the essential facts of a fraudulent scheme-thereby fulfilling a goal behind the first-to-file rule."); *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (Congress intended to prohibit "copycat actions that provide [the Government] no additional material information").

The Fourth Circuit's interpretation of the first-to-file bar, however, frustrates this statutory design and "create[s] perverse incentives and 'reappearing' jurisdiction." *Powell*, 2012 WL 2885356, at *5. The statute intentionally facilitates a "race to the courthouse" because "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 377, 378 (5th Cir. 2009) (quotation omitted). If the first-to-file bar ends when the first action is dismissed, however,

> a race to the courthouse would not occur as subsequent relators would wait hoping that the first-filed action would be dismissed, and fraud would continue to occur in the interim. Moreover,

> a relator would be able to file, dismiss, and re-file identical *qui tam* actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action.

Powell, 2012 WL 2885356, at *5.

Businesses, moreover, would be subjected to serial, duplicative claims without any corresponding public benefit. Indeed, as the D.C. Circuit has noted, one of the purposes of the first-to-file bar is "'rejecting suits which the government is capable of pursuing itself.'" *Shea*, 748 F.3d at 342 (quoting *Batiste*, 659 F.3d at 1208). When the Government determines there is merit to a suit, it can pursue it, but most of the time it does not. As noted above, the private *qui tam* cases in which the Government does not intervene comprise a large majority of FCA cases but account for only a miniscule percentage of total recoveries. *See supra* at 15-17. But these are the kind of cases most likely to be kept alive by the Fourth Circuit's ruling. The first-filed suit will have already put the Government on notice of the potential fraud, giving it the opportunity to investigate and intervene. When the Government does not intervene, the relator will often voluntarily dismiss that suit without a preclusive judgment. *See Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). Yet if the Court were to adopt the Fourth Circuit's ruling, future relators (including repeat relators) will be able to bring duplicative claims even though the Government—the real party in interest—has already been alerted to the alleged fraud and has declined to pursue it. *See* Pet. App. 22a.

Such a rule will inflict substantial costs on businesses defending duplicative suits without any

appreciable gains in ferreting out actual fraud, and further burden the U.S. court system. Every suit filed drains resources from all involved, and repetitive suits by private relators simply clog the courts. The first-to-file bar is a recognition by Congress that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). This parasitism imposes burdens on the defendants that must engage in expensive litigation to respond to them, and on the courts that must handle repetitive litigation, all for "information that was already in the government's possession." *Id.*

Serial relators have been commonplace in FCA suits ever since Congress raised the percentages of damages recoverable to relators and authorized treble damages in the 1980s. More than two dozen people or groups have filed five or more *qui tam* suits since 1986, with one entity bringing at least 35 *qui tam* suits against health care companies. *See* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014. If affirmed, the Fourth Circuit's interpretation of the first-to-file rule would embolden these serial relators, imposing unnecessary costs on defendants and courts while doing little to uncover fraud. Respondent Carter has already filed four complaints containing the same allegations, which were also the subject of three other prior *qui tam* actions. Pet. Br. 58. Each time, the Government has declined to intervene. *Id.* And yet, if the decision below is allowed to stand, neither the statute of limitations nor the first-to-file provision would bar him from filing another case with the same allegations, more than eight years

after the underlying events. Pet. App. 22a. The first-to-file rule was intended to prevent such burdensome litigation once the Government is already alerted to an alleged fraud. The court's ruling below, by contrast, affirmatively fosters it.

CONCLUSION

For the foregoing reasons, and those in the petitioner's brief, the Court should reverse the judgment below.

Respectfully submitted,

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