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

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS AND BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CLEARING HOUSE ASSOCIATION L.L.C., AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.2, the Chamber of Commerce of the United States of America ("Chamber"), The Clearing House Association L.L.C. ("The Clearing House"), and the Pharmaceutical Research and Manufacturers of America ("PhRMA") move for leave to file the attached amicus curiae brief in support of petitioners. Petitioners have consented to the filing of the brief.

Respondent, however, has withheld consent, necessitating this motion.

The brief is appropriate and will assist the Court in its consideration of this important case. Amici have a direct interest in this case, as many of their members are potentially subject to the False Claims Act ("FCA") and other fraud-related actions that may be affected by the Fourth Circuit's interpretation of the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("WSLA"), and the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5).

Amici seek to apprise the Court of the negative consequences to the Nation's businesses if that decision is allowed to stand. The Fourth Circuit held that the WSLA (1) applies to both civil and criminal claims, even though it is codified in Title 18 and expressly covers only "offenses"; (2) applies when the United States is engaged in "armed hostilities," regardless whether they were commenced pursuant to a formal declaration of war, Pet. App. 11a-12a; (3) applies to claims by private parties, and not just by the Government; and (4) tolls the running of the limitations period under all statutes involving fraud against the Government until after—if ever—the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities. As explained more fully in amici's brief, these holdings threaten to increase significantly the number of stale and ultimately meritless claims that may be pursued against businesses in a vast array of industries, including health care, government procurement, and banking and finance, particularly because the Fourth Circuit's rationale would allow the WSLA to toll the limitations and repose periods for alleged FCA

violations having nothing to do with wartime contracts.

In addition, the Fourth Circuit incorrectly ruled that the FCA's first-to-file rule is merely a temporary restraint on related suits, lasting only until the prior suit is dismissed or reduced to a judgment, and is thus no longer "pending." The statute was intended to create a race to the courthouse by whistleblowers who have valuable information about fraud and to bar repetitive or copycat suits that waste resources but provide the Government with no new material information. Under the Fourth Circuit's ruling, however, relators can serially file duplicative suits in the hope of financial gain. When coupled with the Fourth Circuit's interpretation of the WSLA, relators no longer have any meaningful time limits for filing FCA claims and are no longer barred from filing serial, duplicative claims. As explained in the brief, the sum effect of these rulings will be to increase the number of aged and duplicative cases that serve only to inflict substantial litigation costs on businesses—and, ultimately, the public—and clog the federal court system.

The Court has routinely granted the Chamber,[1] The Clearing House,[2] and PhRMA[3] leave to partici-

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[1] *See*, *e.g.*, *Oxford Health Plans LLC* v. *Sutter*, No. 12-135 (Dec. 7, 2012); *Genesis Healthcare Corp.* v. *Symczyk*, No. 11-1059 (June 25 2012); *Allison Engine Co.* v. *United States ex rel. Sanders*, No. 07-214 (Oct. 27, 2007); *Texaco Inc.* v. *Dagher*, Nos. 04-805, 04-814 (June 27, 2005); *BASF Corp.* v. *Peterson*, No. 04-81 (May 2, 2005); *Am. Trucking Assocs., Inc.* v. *Michigan Public Serv. Comm'n*, Nos. 03-1230, 03-1234 (Jan. 14, 2005).

pate as amici curiae in FCA and other cases. Leave to file should likewise be granted here.

Respectfully submitted,

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[2] *See, e.g., Cummings* v. *Doughty,* No. 12-351 (Nov. 26, 2012); *RadLAX Gateway Hotel. LLC* v. *Amalgamated Bank,* No. 11-166 (Mar. 9, 2012); *Kiobel* v. *Royal Dutch Petroleum Co.,* No. 10-1491 (Feb. 3, 2012).

[3] *See, e.g.*, *Warner-Lambert Co.* v. *Wakefield*, No. 04-1047 (May 16, 2005); *Andrx Pharmaceuticals, Inc.* v. *Kroger Co*., No. 03-779 (Oct. 12, 2004).

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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

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution

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").

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.

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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. Because only petitioners have consented to the filing of this brief, a motion for leave to file accompanies this brief. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date.

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

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences for the Nation's businesses if the decision below is allowed to stand. The Fourth Circuit's opinion combined two far-reaching conclusions that would greatly expand the reach of the FCA. First, its interpretation of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, has the potential to indefinitely toll all statutes of limitations for all claims involving alleged fraud against the United States, whether civil or criminal and whether or not those claims are related to any war activities. Second, the Fourth Circuit's interpretation of the so-called "first-to-file" provision of the FCA, 31 U.S.C. § 3730(b)(5), would allow relators to file serial, duplicative actions so long as they are not active at the same time.

As amici argue below, unless the Court intervenes, the combined effect of these rulings will be to invite private plaintiffs and the Government to pursue indefinitely and repeatedly any claim involving

alleged fraud against the Government. The elimination of any repose would impose significant burdens on businesses, which will be forced to defend against stale, repetitive, and frequently meritless claims.

SUMMARY OF THE ARGUMENT

In one sweeping ruling, the Fourth Circuit has allowed private relators to revive stale civil claims against a broad range of business entities and to bring repetitive claims one after another. The court's interpretation of the WSLA authorizes potentially *indefinite* tolling of a vast number of civil claims against a wide range of defendants. That ruling is contrary to the language and purposes of both the WSLA and the FCA, and to precedents of this Court. Moreover, the court's interpretation of the "first-to-file" bar authorizes relators to file the same claims over and over so long as they are not pending at the same time.

By enabling private relators to pursue multiple claims without any meaningful time limitations, the decision below introduces significant unpredictability and uncertainty for U.S. businesses, and requires them to incur substantial costs to defend against otherwise time-barred claims. The ruling, moreover, is not limited to the context of defense procurement. It will affect other industries that are frequent targets of plaintiffs bringing FCA and other fraud-related claims, such as the banking and financial services, pharmaceutical, and health care industries. The Fourth Circuit's decision also facilitates more qui tam actions by unaccountable private relators. The Government intervenes in only a small number of FCA cases, and only a few of those uncover genuine fraud. In the vast majority of cases in which

the government declines to participate, private relators pursue claims that ultimately prove meritless. The ruling below further exacerbates this problem, by suspending limitations periods potentially forever and thereby allowing relators to file otherwise time-barred actions and subject businesses to continued uncertainty and the increased costs of defending against old claims.

The Fourth Circuit's misinterpretation of the FCA's "first-to-file" bar further aggravates these problems. Rather than creating a "race to the courthouse" that induces whistleblowers to come forward quickly with strong 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 a me-too suit, and virtually ensures that businesses will face not just the initial investigation that follows the first suit, but also years of costly litigation of equally meritless, follow-on claims after the first suit is dismissed.

REASONS FOR GRANTING CERTIORARI

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

The WSLA is a criminal code provision, enacted during World War II, that, *inter alia*, 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. Since the statute was enacted, 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 Fourth Circuit's ruling, however, the WSLA (1) applies to both civil and criminal claims, even though it is codified in Title 18 and expressly covers only "offenses"; (2) applies when the United States is engaged in "armed hostilities," regardless whether the hostilities were commenced pursuant to a formal declaration of war, Pet. App. 11a-12a; (3) applies to claims by private parties; and (4) tolls the running of the limitations period under all statutes involving fraud against the Government until after—if ever—the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities. If allowed to stand, this decision will empower the Department of Justice—and encourage private relators—to seek to revive decades-old stale civil claims that are otherwise barred by the FCA's statute of limitations, thereby imposing significant unwarranted costs on the Nation's businesses.

A. The Fourth Circuit's Erroneous Decision Permits Virtually Unlimited Tolling For All Civil FCA Claims.

The breadth of the Fourth Circuit's holding is striking. 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 extends far beyond the military context. And 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 held that it "applies to civil claims." Pet. App. 14a. The court's rationale would thus extend the reach of the WSLA to all civil FCA actions, whether

or not those claims are war-related, including actions regarding such disparate areas as health care, banking and financial services, procurement, energy, and grants, and whether or not those claims involve allegations of actual fraud.[2] Moreover, the broad language of the statute invites the plaintiffs' bar and the Government to argue that the holding covers claims brought under other statutes beyond the FCA.[3]

The decision also authorizes potentially indefinite tolling. The court of appeals held that the WSLA tolled the running of the statute of limitations due to the hostilities in Iraq—without attempting to tie that triggering event to any formal war declaration. Yet under the WSLA, the running of the limitations period is tolled "until 5 years after the termination of hostilities as proclaimed by a Presidential

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[2] Since its 1986 amendment, the civil FCA is no longer a true fraud statute requiring specific intent, and instead covers allegations of mere reckless disregard and deliberate ignorance. *See* 31 U.S.C. § 3729(b)(1) ("For purposes of this section—the terms 'knowing' and 'knowingly' * * * require no proof of specific intent to defraud."). The WSLA, however, should be "limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged*." *Bridges* v. *United States*, 346 U.S. 209, 221 (1953) (emphasis in original); *see also United States* v. *Grainger*, 346 U.S. 235, 243 (1953) (holding that for the WSLA to apply, an offense must require as an "essential ingredient * * * the element of deceit that is the earmark of fraud" and indicating that the WSLA may not be thus applicable to the false statement provision of the criminal FCA).

[3] *See*, *e.g.*, 42 U.S.C. § 1320a-7a (health care fraud); 18 U.S.C. § 3287(2) (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").

proclamation, with notice to Congress, or by a concurrent resolution of Congress," 18 U.S.C. § 3287(3), a formal declaration that has not yet happened and may never come.[4] 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 several 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*, 1798-2013 (May 3, 2013) (www.fas.org/sgp/crs/natsec/R42738.pdf) (listing more than 330 U.S. foreign military operations in 215 years). Hence, the Fourth Circuit's interpretation of the WSLA would result in potentially limitless tolling of the limitations period for all qui tam cases whenever the United States has 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 limitations in this way, the Fourth Circuit's decision creates "incentives contrary to the purposes of the FCA." Pet. App. 37a (Agee, dissenting) (citing *U.S. ex rel. Sanders* v. *N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)). As Judge Agee noted, relators would "have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Id.* at 37a-38a (Agee, J., dissenting). And "[c]ritically," suspending limita-

[4] 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.

tions periods for private relators would "undermine the very purpose of the *qui tam* provisions of the FCA," namely, "'to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not.'" *Id.* at 38a (quoting *Sanders*, 546 F.3d at 295).

Such 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 and requires formal declarations to be invoked, prosecutorial discretion may help prevent overreaching in bringing stale criminal charges. Yet the Fourth Circuit's ruling allows private relators to litigate, on the Government's behalf, otherwise time-barred civil cases that the Government itself has deemed unworthy of further pursuit.

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 criminal fraud-related offenses. Pet. 12-13. Furthermore, that tolling is unnecessary in the civil FCA context, because the Government can obtain for good cause repeated extensions to keep a case under seal while it attends to other matters. 31 U.S.C. § 3130(b)(3). But the tolling is a boon for civil relators, who are not charged with prosecuting a war effort, and therefore have no similar resource-based restraints.

As the petition explains, *see* Pet. 10-17, the Fourth Circuit's decision contradicts this Court's prior

holdings on the WSLA,[5] and tolls FCA limitations in a manner contrary to the Court's recent recognition that the FCA contains an "absolute provision for repose" after 10 years. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013). By overriding that limitation, the Fourth Circuit has effectively abolished the congressionally imposed constraints on the FCA. *See United States* v. *Midwest Generation, LLC*, --- F.3d ---, 2013 WL 3379319, *2 (7th Cir. July 8, 2013) (Easterbrook, J.) ("*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 Threaten U.S. Businesses With Stale And Meritless Claims.

The Fourth Circuit's sweeping WSLA holding is likely to harm American businesses subject to suit under the FCA and other fraud-related statutes. The decision enables private relators to pursue claims without any meaningful time limitations, thereby subjecting U.S. businesses to unpredictable liability for aged claims and requiring them to incur ever-increasing costs to defend against those claims.

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[5] *See Bridges*, 346 U.S. at 216 ("The legislative history of this exception [embodied in the WSLA] emphasizes the propriety of its *conservative interpretation*. It indicates a purpose to suspend the general statute of limitations only as to war frauds of a pecuniary nature or of a nature concerning property.") (emphasis added)

Even before this decision, civil FCA litigation was expanding dramatically. From the time respondent filed his first qui tam complaint in 2006 until 2012, over 300 qui tam actions a year have been filed. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2012*, 1-2 (2012) (www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). By 2012, the number had increased dramatically to 647 per year. *Id.* at 2. The Fourth Circuit's decision tolling the FCA's statute of limitations indefinitely will only increase those numbers.

Government defense contractors, a regular target of qui tam suits, stand to face even more claims as a result of the Fourth Circuit's decision. For example, 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).

But the reach of the Fourth Circuit's decision interpreting the WSLA is not restricted to war-related industries or defense contractors; it would equally apply to civil cases involving a wide array of industries.

For example, the health care industry has been 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. R. 77, 96 (2011). Of the 12,913 FCA cases brought between 1987 and 2012, 5,527, or nearly 43% have involved the health care industry. U.S. Dep't of Justice, *Fraud Statistics – Health and Human Services Oct. 1, 1987 – Sept. 30, 2012* at 2 (2012). In fiscal year 2012, 412 out of 647 new qui tam FCA matters involved the Department of Health and Human Services as the primary client agency. *Id*. The Fourth Circuit decision invites many more such actions as relators assert the WSLA as a basis to toll health care suits, as one recently did in a case against several medical providers. *See* Relator's Supp. Opp. to Mot. to Dismiss at 2, *United States ex. rel Tullio Emanuele* v. *Medicor Assocs*., No. 10-245E (W.D. Pa. filed March 29, 2013).

The financial services industry has also begun to feel the effect of the Fourth Circuit's decision. In mid-2012, the Department of Justice similarly argued for suspension of limitations under the WSLA in its civil FCA claims against financial services companies involving commodity payment guarantees. *See United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 600-08 (S.D. Tex. 2012). Since the Fourth Circuit's decision, the Government has also asserted that the WSLA tolls the operation of the statute of limitations in a case alleging fraud of a domestic lending program. *See* Mem. of Law of the U.S. in Opp. to Wells Fargo Bank, N.A.'s Mot. to Dismiss at 46-48, *United States* v. *Wells Fargo Bank, N.A*., No. 12-CV-7527 (S.D.N.Y. filed Oct. 9, 2012).

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). Approximately 75% of FCA actions brought between 2006-2012 were qui tam relator actions, with such actions accounting for 82% of the total in 2012. *Fraud Statistics: Overview*, *supra*, at 1-2. Once its investigation is complete, the United States traditionally declines to participate in approximately 78% of these 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 1987-2012, qui tam actions in which the government declined to intervene accounted for only 3.2% 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 2.1% of all recoveries. *Fraud Statistics: Health and Human Services*, *supra*, at 1-2. According to a comprehensive empirical analysis, 92% of cases in which the U.S. declined to intervene were dismissed. Broderick, *supra* at 975 (using data from 1987 to 2004).

Less than 10% of private qui tam actions actually result in recovery. *Id.* And of the remaining more than 90%, a large majority are 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). Thus, the vast majority of qui tam cases declined by the government are meritless. Although the Department of Justice has the authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss any qui tam suit, it rarely does so, leaving a substantial majority of private qui tam relator cases

to proceed in litigation. *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.").

American businesses undergo significant hardship—both financial and reputational—as a result of these 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 a suit. *Id.* at 11-12.

Similarly, businesses suffer significant reputational harm from these meritless lawsuits. Since "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 government contracting 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. [M]ost non-intervened suits exact a net cost," as business defendants must expend financial resources to defend against meritless claims and suffer unwarranted damage to their reputations. Rich, *supra*, at 1264; *see also* Canni, *supra*, at 2.

The Fourth Circuit's decision, if allowed to stand, will multiply all these harms. In the Fourth Circuit, home to numerous government contractors and financial institutions, operation of the WSLA has 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, *see* Pet. 16, 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, *see id.* at 16, 21, leading to the possibility that plaintiffs will seek to assert even older claims. Allowing businesses to be subjected to an uncertain range of claims that were long since understood to have been time-barred will only exacerbate the problems businesses face from meritless qui tam litigation.

Moreover, the unwarranted costs of defending against qui tam claims by private relators are even greater for stale claims. Statutes of limitations and repose "protect defendants and the 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). By allowing claims under the FCA to be tolled potentially *ad infinitum*, the Fourth Circuit's ruling eviscerates these benefits. Furthermore, businesses will never know when they may "close the books" on any particular matter. And they will incur significant costs 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.

II. THE FIRST-TO-FILE BAR DOES NOT SUBJECT BUSINESS TO DUPLICATIVE, SERIALLY FILED FCA CLAIMS

The error of the Fourth Circuit's WSLA ruling is compounded by its erroneous interpretation of the FCA's first-to-file bar. Either decision by itself would warrant this Court's intervention; when taken together, the case for certiorari is manifest. Lifting the "first-to-file" bar when a case is no longer active would improperly encourage the filing of multiple, duplicative claims. And because the WSLA was held to toll limitations even for private FCA claims, 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.

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 one court rightly explained, 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." *U.S. ex rel. Powell* v. *Am.*

Intercontinental Univ., Inc., No. 1:08-CV-2277-RWS, 2012 WL 2885356 at *4 (N.D. Ga. July 12, 2012). The bar on related cases takes effect as soon as the first action is pending, but 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.

This is in accordance with the purpose underlying qui tam FCA actions. "[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." *Id.* at *5. "A whistleblower sounds the alarm; he does not echo it." *U.S. ex rel. Green* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995) (citation omitted). "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 U.S. ex. rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) ("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.").

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." *U.S. ex. rel.*

Branch Consultants v. *Allstate Ins. Co.*, 560 F.3d 371, 377, 378 (5th Cir. 2001) (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 refile 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. As noted above, 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 12-14. 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 under 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. The result will be to inflict substantial costs on

businesses defending duplicative suits without any appreciable gains in ferreting out actual fraud.

The facts of this case illustrate well the problems entrenched by the Fourth Circuit's decision. Respondent Carter has already filed three complaints containing the same allegations, which were also the subject of three other prior qui tam actions. Pet. 6-7. Each time, the Government has declined to intervene. *Id.* And yet, the court below has now held that neither limitations nor the first-to-file provision bars him from filing a fourth 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, by contrast, affirmatively fosters it.

III. THE COURT SHOULD NOT DELAY RULING ON THESE IMPORTANT ISSUES.

The Court has decided several FCA cases in recent years. *See*, *e.g.*, *Schindler Elevator* v. *U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011) (FCA's public disclosure bar); *Graham Cty. Soil* v. *U.S. ex rel. Wilson*, 559 U.S. 280 (2010) (public disclosure bar); *U.S. ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009) (time for filing appeal when U.S. declines to intervene in FCA action); *Allison Engine Co.* v. *U.S. ex rel. Sanders*, 553 U.S. 662 (2008) (plaintiff's burden under 31 U.S.C. §§ 3729(a)(2) and (a)(3)). This case is as important, if not more important, than those cases because the Fourth Circuit's decision threatens to increase significantly the number of FCA claims that relators and the Government may pursue.

The Court has also recognized the importance of statutory limitations periods in civil enforcement cases similar to FCA cases. In *Gabelli*, the Court noted the "importance of time limits on penalty actions," and refused to graft a discovery rule on to a general statute of limitations when doing so would expose defendants to SEC enforcement actions for "an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223. *See also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 354 (1991) (describing proper limitations period for Rule 10b-5 claims as an "important issue"); *Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (Stevens, J., dissenting) (dissent from summary disposition in EEOC case on grounds that "possible violations of two time limitations imposed by Congress" was "an important issue [that] may escape our attention").

Nor should the costs of the ruling below be dismissed as merely the ruling of a single circuit, for the Fourth Circuit is a particularly important venue for FCA litigation Now that the Fourth Circuit has held that both the Government and private relators can obtain limitless tolling under the FCA in civil cases and can file multiple actions on the same claims, new cases will flood to district courts within that Circuit. Even before this ruling the Fourth Circuit was host to two of the most popular venues for FCA claims because many government agencies and contractors reside or do business there. *See* Pet. 23. The FCA's liberal venue provisions also permit many relators to file (or refile) their cases in a district court in the Fourth Circuit in order to take advantage of the ruling. *See* 31 U.S.C. § 3732(a) (case "may be brought in any judicial district in

which the defendant * * * can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred"). Once these cases are filed (or refiled), it can take years to clear them out, and only at great cost to the businesses who must repeatedly defend against these claims. The Court should grant the petition now to correct the errors of the court below before they cause further harm to the Nation's businesses.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should issue a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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