No. 12-1497

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. §3287, and which this Court has instructed must be "narrowly construed" in favor of repose—applies to claims of *civil* fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling.

2. Whether the False Claims Act's first-to-file bar, 31 U.S.C. §3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement, set forth at page II of the Petition for a Writ of Certiorari, remains accurate.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court is under seal and unreported (J.A. 552-583). The district court released an unsealed version of its opinion (Pet. App. 47a-76a) which is unreported but available at 2011 WL 6178878. The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 710 F.3d 171. The order denying the petition for rehearing en banc (Pet. App. 77a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2013. Pet. App. 1a. That court denied a petition for rehearing en banc on April 23, 2013. Pet. App. 77a. The petition for a writ of certiorari was was filed on June 24, 2013, and granted on July 1, 2014. J.A. 245. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App.*, infra*, 1a-14a.

STATEMENT

More than two centuries ago, addressing one of the Republic's earliest *qui tam* statutes, Chief Justice John Marshall wrote that it "would be utterly repugnant to the genius of our laws" if "an individual would remain forever liable" under it. *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805); see also Act of Mar. 22, 1794, 1 Stat. 347, 349. The plaintiff there sought to avoid the two-year statute of limitations by

construing it to apply only to criminal prosecutions and not to civil actions to recover the forfeiture, arguing that it was impractical to bring suit within that period. *Adams*, 6 U.S. (2 Cranch) at 338-339. Writing for a unanimous Court, Chief Justice Marshall rejected an interpretation under which "actions of debt for penalties * * * might, in many cases, be brought at any distance of time," reasoning that "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a [civil] pecuniary forfeiture." *Id.* at 342.

While the great Chief Justice's words are no less true today, see *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (reaffirming *Adams*), a sharply divided Fourth Circuit panel here construed two statutes in a manner no less "repugnant" to bedrock principles of repose, effectively eliminating the statute of limitations for claims of civil fraud against the government, and allowing private plaintiffs to file and refile duplicative claims indefinitely. First, the panel construed the Wartime Suspension of Limitations Act ("WSLA")—a *criminal code* provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. §3287—to apply to *civil* fraud claims brought by private relators, although for decades, all three branches of government understood that provision to apply only to crimes. See pp. 19-27, *infra*. And it did so despite this Court's longstanding insistence that the WSLA be "narrowly construed" in favor of repose, *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953); accord *United States* v.

McElvain, 272 U.S. 633, 639 (1926) (act must "be construed strictly, and held to apply only to cases shown to be clearly within its purpose"), and its rejection of indefinite tolling in an opinion that emphasized that the False Claims Act ("FCA") contains an "*absolute* provision for repose" after 10 years. *Gabelli*, 133 S. Ct. at 1224 (emphasis added).

Under the panel's ruling, *qui tam* defendants face a statute of limitations that has been frozen in time since *at least* 2001 (and possibly 1991) for any possible fraud claim that the government or a self-interested relator might eventually bring under the FCA's "essentially punitive" liability scheme. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). That limitations period will not expire until years after the President or Congress has formally terminated the conflicts in Iraq and Afghanistan—which, as a practical and political matter, may never happen.

Second, the panel vitiated the False Claims Act's first-to-file bar, 31 U.S.C. §3730(b)(5), long understood to provide an essential constraint on *qui tam* actions by encouraging plaintiffs to promptly disclose fraud so the government can investigate, while barring duplicative, parasitic claims that the government can pursue on its own. See, *e.g.*, *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). The panel held that duplicative claims barred at the time of filing can be revived and refiled once earlier suits are dismissed. The panel thus transformed a prohibition on duplicative private claims into a novel "one-case-at-a-time" rule that encourages private relators to delay filing claims to

maximize their dollar value, to disclose information and litigate claims piecemeal, and to refile duplicative complaints indefinitely.

Both holdings are suspect under virtually *any* interpretative approach, because they are divorced from the statute's text, history, and purpose. The panel's maximalist reading dramatically extends potential *qui tam* liability, with "dire effects" (Pet. App. 46a (Agee, J., concurring in part and dissenting in part)) for a broad range of industries, from defense contracting to health care to financial services. The decision ignores this Court's warnings that "extend[ing] [a] limitations period to many decades" "thwart[s] the basic objective of repose underlying the very notion of a limitations period." *Gabelli*, 133 S. Ct. at 1223. Congress could not have intended so radically to "alter the fundamental details" of the WSLA and FCA through the "vague terms [and] ancillary provisions" on which the panel decision rests. *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

A. STATUTORY BACKGROUND

1. The FCA creates a cause of action against "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States * * * a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a)(1) (2006). It authorizes a private "relator" to bring a *qui tam* civil action "in the name of the Government." 31 U.S.C. §3730(b)(1). The relator must, however, initially file a complaint under seal, and serve it on the United States (but, initially, *not* the defendant), with a "writ-

ten disclosure of substantially all material evidence and information the [relator] possesses." *Id.* § 3730(b)(2). The case remains sealed for 60 days (or longer, for good cause), at which point the government may either "proceed with the action" itself, or decline to intervene, "in which case the [relator] * * * shall have the right to conduct the action." *Id.* § 3730(b)(4).

The FCA's "essentially punitive" liability scheme, *Stevens*, 529 U.S. at 784-785, includes treble damages, civil penalties up to $11,000 per claim, attorney fees, and costs. 31 U.S.C. §§ 3729(a), 3730(d)(1); 28 C.F.R. § 85.3(a)(9). It creates a significant financial incentive for private suits: Where, as here, the United States declines to intervene, the relator receives "not less than 25 percent and not more than 30 percent" of the recovery, plus expenses, attorney fees, and costs. 31 U.S.C. § 3730(d)(2).

The FCA also contains reticulated limitations provisions. A *qui tam* action generally "may not be brought * * * more than 6 years after the date on which the [FCA] violation * * * is committed." 31 U.S.C. § 3731(b)(1). The United States may sue within three years of "when facts material to the right of action are known or reasonably should have been known by the [relevant government] official." *Id.* § 3731(b)(2). But Congress paired that discovery rule with an "absolute provision for repose," *Gabelli*, 133 S. Ct. at 1224, providing that "*in no event* [may suit be brought] more than 10 years after the date on

which the violation is committed." 31 U.S.C. § 3731(b)(2) (emphasis added).[1]

In balancing incentives for private relators with statutory limitations on suits, the FCA reflects a careful legislative compromise. "When first enacted, the [FCA] allowed relators to file suits and receive a share of the government's recovery even if they personally did nothing to help expose the alleged fraud." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir. 1998) (discussing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943)). "*Qui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and * * * often brought parasitic lawsuits copied from preexisting indictments." *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 679-680 (D.C. Cir. 1997). In response, Congress amended the FCA in 1943 "to do away with these so-called 'parasitical suits.'" *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978).

Congress amended the Act again in 1986. False Claims Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153; *LaCorte*, 149 F.3d at 233-234. Those amendments, which enacted § 3730(b)(5)'s "first-to-file bar," sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of oppor-

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[1] Courts are divided about whether § 3730(b)(2)'s discovery provision applies to private *qui tam* suits. *E.g.*, *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293-296 (4th Cir. 2008) (adopting majority view that provision applies only where "the United States is a party"; collecting authorities).

tunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress sought to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior" and repetitive suits. *United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003).

The "first-to-file" bar is essential to this compromise. It provides that "[w]hen a person brings an action under [the FCA], 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). The bar serves the "twin goals of rejecting suits which the government is capable of pursuing itself" because it is already on notice of the alleged fraud, "while promoting those which the government is not equipped to bring on its own." *Batiste*, 659 F.3d at 1208; accord *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (bar "ensur[es] that the government has notice of the essential facts of an allegedly fraudulent scheme"); *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied.").

The FCA also contains a "public disclosure bar," which at times relevant here provided that:

> [n]o court shall have jurisdiction over an action under th[e] [FCA] based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, * * * unless the action is

> brought by the Attorney General or the person bringing the action is an original source.

31 U.S.C. §3730(e)(4)(A) (2008). "[O]riginal source" means "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing a [*qui tam*] action." *Id.* §3730(e)(4)(B).[2]

2. The Wartime Suspension of Limitations Act is a World War I- and II-era criminal code provision that 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. It originated in the Nation's "gigantic and hastily organized [wartime] procurement program[s]," *Bridges*, 346 U.S. at 216-219, and reflects Congress's recognition that "'[d]uring the World War[s] many frauds committed against the Government were not discovered until the 3-year statute of limitations [for federal crimes] had almost expired,'" because "'[t]he law-enforcement branch of the Government'" was "'busily engaged in its many duties, including the enforcement of the espionage, sabotage,

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[2] In 2010, Congress amended the public disclosure bar to remove the reference to "jurisdiction" and revise the categories of qualifying disclosures. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §10104(j)(2), 124 Stat. 119, 901 (2010). Those amendments do not apply retroactively, see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010), and the district court found them inapplicable to relator's complaint, which alleges conduct from 2005. J.A. 225-226.

and other laws.'" *Id.* at 219 n.18 (quoting S. Rep. No. 77-1544, at 1-2 (1942)).

Congress first extended the statute of limitations for certain "offenses" shortly after World War I. See Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220. Because that statute was enacted after hostilities terminated (see Joint Resolution, 42 Stat. 105, ch. 40, 1 (July 2, 1921)), Congress did not authorize open-ended tolling, but simply lengthened the normal criminal limitations period from three years to six. See 88 Cong. Rec. 4759 (1942). The statute expressly "relat[ed] to limitations in criminal cases," and provided that:

> No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed. Provided, however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, * * * and now indictable under any existing statutes, the period of limitation shall be six years. * * *

42 Stat. 220. The proviso thus "appli[ed] to offenses theretofore committed and not already barred." *McElvain*, 272 U.S. at 637.

When that period had elapsed, Congress repealed the 1921 statute. See Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51. But Congress temporarily revived wartime tolling during World War II, providing that:

> the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. * * *

Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

Two years later, with the 1945 expiry date approaching, Congress amended the WSLA again as part of the Contract Settlement Act of 1944, to provide that:

> [t]he running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *

Pub. L. No. 78-395, 58 Stat. 649, 667 (1944). In addition to minor changes in phrasing, the 1944 amendments extended tolling "until three years after the termination of hostilities in the present war," and deleted the phrase "now indictable under any existing statutes," carried over from the 1921 statute. *Ibid.* The 1944 statute specified, however, that the statute "shall apply to acts, offenses or transactions where

the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." *Ibid.*[3]

In 1948, Congress permanently reenacted the WSLA with only minor revisions to remove references to World War II, and placed it in title 18 of the United States Code, a comprehensive collection of the criminal laws. See Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683, 828. The 1948 WSLA closely tracked its predecessors, adding language triggering tolling "[w]hen the United States is at war," and deleting references to "the present war," and "acts" and "transactions," such that the provision applied only to the narrower term "offenses." *Ibid.*

The WSLA remained unchanged until 2008, when Congress expanded the triggering events to include periods when "Congress has enacted a specific authorization for the use of the Armed Forces," and extended the suspension period 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." Pub. L. No. 110-417 § 855, 122 Stat. 4545 (2008) (codified at 18 U.S.C. § 3287 (2009 Supp.)). A Senate Judiciary Committee Report explained that the legislation would "protect American taxpayers from criminal contractor fraud" and "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses," which

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[3] Congress amended the WSLA in October 1944 to cover "offense[s]" including those "committed in connection with the care and handling and disposal of [surplus] property." Surplus Property Act of 1944, Pub. L. No. 78-457, 58 Stat. 765, 781.

had been extended from three to five years. S. Rep. No. 110-431, at 1-2 (2008) (J.A. 198).

B. FACTUAL BACKGROUND

1. Kellogg Brown & Root Services, Inc., and related entities (collectively, "KBR") provided logistical services to the U.S. military in Iraq under a multi-year government contract. In 2005, relator Benjamin Carter worked for KBR as a water purification operator in Iraq. Pet. App. 3a. In 2006, Carter filed a *qui tam* complaint, which he amended in 2008, alleging FCA violations involving contaminated water ("*Carter 2008*"). The government reviewed Carter's complaint under seal pursuant to 31 U.S.C. § 3730(b)(2), and declined to intervene. After the district court dismissed the complaint, Carter amended again, this time alleging false billing for labor costs. Pet. App. 4a. Shortly before trial, the government notified the parties about an earlier-filed *qui tam* action in California that alleged similar timekeeping fraud. Because the claims were related, the district court dismissed Carter's lawsuit under the first-to-file bar. *Id.* at 4a-5a; J.A. 51.

While Carter's appeal was pending, the earlier California case was dismissed. Carter then refiled what he concedes to be "an identical copy" of his 2008 complaint (J.A. 75) in a new docket ("*Carter 2010*"). The district court dismissed that complaint, holding that *Carter 2008* (then still pending on appeal) served as an independent first-to-file bar. Pet. App. 5a-6a; J.A. 100. Carter tactically dismissed his *Carter 2008* appeal and, in June 2011, filed a third copy of his complaint ("*Carter 2011*"), which was "identical to the

complaint filed in [*Carter 2010*] and [*Carter 2008*] except for its title, case number, and signature block." J.A. 221; Pet. App. 6a. The government again declined to intervene. J.A. 155-156.

The district court dismissed *Carter 2011* with prejudice. The court reasoned that yet another related *qui tam* action (this one in Maryland, see J.A. 571) was pending when *Carter 2011* was filed. And by this time, nearly all of Carter's claims were barred by the FCA's six-year statute of limitations. Pet. App. 64a, 74a-75a.

The district court expressed skepticism that the WSLA applies to civil claims because the term "offense" denotes criminal wrongdoing. Pet. App. 68a. But the court found it unnecessary to reach that issue, noting that in all but one of the handful of cases applying the WSLA to civil claims (mostly from the 1950s), the United States was a party. *Id.* at 71a. The court analogized to circuit precedent holding that the FCA's discovery rule, 31 U.S.C. §3731(b)(2), applies only when the United States is a party, based in part on the "practical difficulties" that arise from tolling private claims. Pet. App. 72a-75a.

2. A sharply divided panel of the Fourth Circuit reversed, with each judge writing separately. Pet. App. 1a-46a.

a. The majority held that the WSLA applies to all civil fraud actions, relying on the 1944 deletion of the words "now indictable under any existing statutes." 58 Stat. 667. Because Congress "did not include any [other] limiting language" to replace the deleted text, the panel inferred that "Congress * * * chose for the

Act to apply" to civil claims. Pet. App. 14a. The majority rejected the argument that the WSLA applies only to actions in which the United States is a party, holding that "whether the suit is brought by the United States or a [private] relator is irrelevant." *Id.* at 15a. The majority believed that tolling civil claims by private plaintiffs serves the WSLA's general "purpose" of "root[ing] out fraud against the United States during times of war." *Id.* at 16a.

The panel majority took an equally expansive view of the duration of tolling. It acknowledged that the phrase "[w]hen the United States is at war" "may appear unambiguous" in requiring a formal declaration of war, and did not dispute that the statute required formalities to *end* tolling. Pet. App. 10a. But although the WSLA was enacted against the backdrop of formally declared wars, the court concluded that no formal declaration was required, saying that such an interpretation was "unduly formalistic" and "ignore[d] the realities of today." *Id.* at 11a. Instead, the panel invoked the asserted "purpose of the WSLA" to toll the statute for an undefined class of "circumstances * * * in which fraud can easily be perpetuated against the United States," including times when the President has "power to enter into armed hostilities." *Id.* at 12a. The panel thus held that the statute of limitations on Carter's claims had been tolled since at least Congress's October 2002 authorization for the use of military force in Iraq, and would remain tolled until years after the President or Congress eventually proclaimed a formal "termination of hostilities." *Id.* at 9a-13a.

b. The panel recognized that Carter's current claims were "barred" by earlier *qui tam* cases that were pending when he filed his complaints. Pet. App. 20a-21a. But the panel held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." *Id.* at 22a. Because the earlier actions had been dismissed, nothing prevented "Carter from filing an[other] action." *Ibid.*[4]

c. Judge Agee dissented in part, concluding that the WSLA does not apply to civil *qui tam* cases in which the United States is not a party. Pet. App. 31a (Agee, J., concurring in part and dissenting in part). In his view, tolling "could only be logically applied * * * to an action brought by the United States, not by a private relator," *id.* at 37a, because "the primary concern" animating the WSLA was "the ability of [federal] law enforcement to effectively police fraud against the government during the fog of war," when it is "busily engaged" enforcing "the espionage, sabotage, and other laws." *Id.* at 40a-41a. Because private relators face no similar resource constraints, Judge Agee concluded that tolling their claims would "directly thwar[t]" the FCA's purpose of "combat[ing] fraud quickly." *Id.* at 43a, 45a. The panel's holding, Judge Agee explained, gives relators incentive to delay suit to maximize recovery by letting claims accrue. *Id.* at 44a. Judge Wynn concurred separately to dispute Judge Agee's conclusions. *Id.* at 23a-31a. The Fourth Circuit denied KBR's timely petition for rehearing en banc.

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[4] The panel remanded for the district court to consider KBR's arguments under the public-disclosure bar. Pet. App. 22a.

d. While KBR's petition for certiorari was pending, the district court took additional briefing and argument on KBR's public-disclosure bar argument, 31 U.S.C. § 3730(e)(4), an alternate basis to dismiss with prejudice. The district court concluded that although Carter's fraud allegations had been publicly disclosed before he filed his complaint, J.A. 242, his claims were not "based upon" those disclosures and he qualified as an "original source." Thus, the court denied KBR's public-disclosure motion. Bound by the panel decision, the district court dismissed Carter's complaint without prejudice under the first-to-file bar. J.A. 243.

Four days later, Carter filed a *fourth* copy of his complaint, again essentially "identical to [his] prior pleadings." Mem. Op. 6-7, *United States ex rel. Carter* v. *Halliburton Co.*, No. 1:13-cv-1188 (E.D. Va. May 2, 2014), ECF No. 30. The government again declined to intervene. KBR moved to dismiss on first-to-file grounds. After months of additional briefing and argument—and while lamenting the case's "recurring appearance before the [court]" and "arduous" procedural history—the district court again dismissed (without prejudice) because *Carter 2011* remains "pending" before this Court. *Id.* at 2, 17.

SUMMARY OF ARGUMENT

1. The WSLA's plain text, history, and purpose; the contemporaneous understanding of all three branches of government; and this Court's repeated admonition that it be "narrowly construed," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953); all demonstrate that the WSLA applies only to criminal

cases. The natural and uniform meaning of the word "offense" in the limitations chapter of the criminal code is "a crime," and Congress tailored the WSLA to the criminal statute of limitations.

All agree that from its 1921 enactment (as a statute "relating to limitations in criminal cases") until the Contract Settlement Act of 1944, the WSLA applied exclusively to criminal frauds. Nothing in the 1944 amendment reflects an intent to expand the statute to civil frauds. To the contrary, it addressed the WSLA in a section titled "prosecution of fraud," and four years later, Congress included the WSLA in title 18's comprehensive codification of criminal statutes, which simultaneously classified *all* "offense[s]" as either felonies or misdemeanors. Both the Office of Contract Settlement (established to administer the 1944 act) and the Solicitor General contemporaneously interpreted the 1944 WSLA as limited to crimes.

The unremarked deletion in 1944 of the words "now indictable" did not fundamentally transform this criminal tolling provision. That language ensured the WSLA would not revive criminal charges whose limitations had expired, and it was deleted as redundant in 1944. Congress used far more explicit language to toll civil causes of action. This reading aligns with the WSLA's purpose: to extend the time for criminal prosecutions when law enforcement officials are preoccupied with wartime duties. It is particularly inappropriate to apply the WSLA to *qui tam* actions, because the FCA contains a detailed limitations scheme that includes an absolute 10-year statute of repose, inconsistent with indefinite tolling.

The WSLA's reference to "war," in a statute enacted during and in response to two declared wars, requires a formal declaration, even if modern usage might include other military conflicts. The "dire" practical consequences of the panel's interpretation, under which tolling could extend back a decade or more (and may continue indefinitely), demonstrate that Congress could not have intended such results.

2. Under the plain language of the first-to-file bar, once "a person brings an action," "no person other than the Government may * * * bring a related action based on the facts underlying the pending action." The text is exception free and contains no temporal limitation. In this context, the word "pending" is referential, distinguishing between the earlier- and later-filed actions. This reading is consistent with the first-to-file bar's origin in the 1986 amendments, which serve the twin goals of encouraging prompt disclosure of valuable information about fraud, while discouraging opportunistic plaintiffs who do not contribute to the government's knowledge of, or ability to pursue, fraud. Congress has spoken far more clearly when intending to create a "one-case-at-a-time" rule.

This reading accords with the public disclosure bar and its "original source" exception. The first-to-file and public-disclosure bars apply to overlapping but distinct categories of cases and in different procedural postures. The weight of case law and scholarly opinion rejects the panel's atextual temporal limitation on the first-to-file bar. The one-case-at-a-time rule undermines the bar's purpose by creating incentives to delay filing and disclose information piecemeal, and interferes with resolution of earlier-filed

suits, without protecting defendants from repetitive suits.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT DOES NOT APPLY TO THIS CIVIL CASE

By extending the WSLA to civil fraud claims in a manner that effectively ensures indefinite tolling, the panel's decision conflicts with the WSLA's plain text, history, and purpose, the government's understanding at the time of the statute's enactment, and this Court's decisions "narrowly constru[ing]" that provision as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 215-216.

A. The WSLA's Text, History, And Purpose Limit Its Application To Criminal Cases

1. *Text*. At times relevant here, the WSLA provided that "[w]hen the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." 18 U.S.C. § 3287 (2006).[5] In hold-

[5] The parties disagree about whether the 2008 WSLA amendments apply, given that the complaint was filed in 2011 but alleges conduct from 2005. While broadening the tolling trigger to include "a specific [Congressional] authorization for

ing that the WSLA applies to civil cases, including those brought by *qui tam* relators, the panel ignored the statute's plain text and context, which limit its application to criminal cases.

The panel disregarded the ordinary meaning of the word "offense"—i.e., "[a] violation of the law; a crime." *Black's Law Dictionary* 1110 (8th ed. 2004). Indeed, "[t]he terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably." 22 C.J.S. *Criminal Law* § 3 (1989); accord *American Heritage Dictionary* 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime").

When Congress undertook a comprehensive codification of the nation's criminal laws in 1948, soon after the 1944 amendments on which the panel heavily relied, it placed the WSLA in title 18, which "codifies the federal criminal laws." *Pennsylvania* v. *Nelson*, 350 U.S. 497, 519 (1956); cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code.").[6] The WSLA is within the criminal

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the use of the Armed Forces," and lengthening the period "until 5 years after the termination of hostilities," nothing in the 2008 amendments suggests that the WSLA applies to civil cases.

[6] That year, Congress undertook a parallel recodification of the Judicial Code in title 28, collecting *civil* statutes of limitation without any suggestion of wartime tolling. *See* Pub. L. No. 80-773, 62 Stat. 869, 911, 971, 974 (1948) (collecting the six-year statutes of limitations on actions against the United States or for breach of marshal's bond (§§ 544, 2401) and five-year limitation on actions for a "civil fine, penalty, or forfeiture" (§ 2462)); see also *Hearing on H.R. 1600 and H.R. 2055 Before the Sub-*

code's chapter on "limitations," which has long divided "offenses" into two obviously criminal categories—"capital" and "not capital"—and *every* use of the word "offense" references a crime. 62 Stat. 827-828; 18 U.S.C. §§3281-3301.

Many of the WSLA's neighboring provisions would make no sense if "offense" were read to include civil violations. *E.g.*, 18 U.S.C. §3282(a) ("no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed"). Under normal interpretative principles, limiting the WSLA's use of "offense" to crimes "is reinforced by the fact that the [term] * * * appears elsewhere in the [chapter] in contexts in which it cannot bear the meaning placed on it by [the panel]." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992). And the chapter's uniform usage of "offense" confirms that the word should not be given a special, and far broader, meaning in the WSLA. Cf. *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014) ("Generally, identical words used in different parts of the same statute are * * * presumed to have the same meaning." (internal quotation marks omitted)).[7]

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comm. No. 1 of the H. Judiciary Comm., 80th Cong. 2709 (1947) discussing parallel criminal and civil recodification efforts).

[7] In opposing certiorari, the government could identify no other current title 18 provision that uses "offense" to describe a civil violation. Its only example was 93 years old, see Br. for the U.S. as *Amicus Curiae* Opposing Cert. 9 (citing *United States* v. *Hutto*, 256 U.S. 524 (1921)); even that statute was later amended to indicate that "offense" means only crimes, by classifying less

Limiting the WSLA to criminal offenses accords with the provision's structure, which creates symmetry between the post-hostilities limitations period and the general criminal statute of limitations. The 1944 WSLA suspended limitations "until three years after the termination of hostilities," 58 Stat. 667, at a time when the general criminal statute of limitations was also three years, 18 U.S.C. §582 (1940 ed.). Accord 62 Stat. 828 (same under 1948 WSLA); 18 U.S.C. §582 (1946 ed.). Congress recently amended the WSLA to "exten[d] the statute of limitations to five years after the end of a conflict, making the law consistent with the current statute of limitations for criminal fraud offenses." S. Rep. No. 110-431, at 2 (J.A. 198); 18 U.S.C. §3282(a).

No such symmetry exists for civil frauds. Until Congress enacted 28 U.S.C. §1658 in 1990 (Pub. L. No. 101-650, 104 Stat. 5114) to provide a general statute of limitations for federal causes of action, "the controlling period would ordinarily be the most appropriate one provided by state law." *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975); see also David D. Siegel, *The 1990 Enactment of a Uniform Statute of Limitations on Federal Claims*, West Practice Commentary to 28 U.S.C. §1658 (noting "the vacuum left by the absence of specific statutes of limitations" for federal claims). Although the FCA specifies a limitations period, it is *six years*, see 31 U.S.C. §235 (1946 ed.), not three. And the limitation on actions for a civil "penalty or forfeiture" was *five* years. 28 U.S.C. §791 (1940 ed.) (now codified at 28 U.S.C.

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serious "offense[s]" as "misdemeanors." *Id.* at 10 n.3 (citing 18 U.S.C. §371).

§2462). Nothing in the WSLA or its history suggests an intent to *shorten* the default period for FCA or penalty proceedings once hostilities ceased—or to establish a uniform limitations period for civil frauds only during wartime, while failing to address the "void" of limitations periods otherwise "commonplace in federal statutory law." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483 (1980).

2. *History*. From the WSLA's first enactment in 1921 until at least the Contract Settlement Act of 1944, it clearly applied exclusively to criminal fraud. See Br. for the U.S. as *Amicus Curiae* Opposing Cert. ("U.S.Cert.Br.") 11. The 1921 provision explicitly "relat[ed] to limitations in criminal cases" and modified the general three-year period in which a person could be "prosecuted, tried, or punished, for any offense, not capital," tolling only fraud "offenses * * * now indictable under any existing statutes." 42 Stat. 220.[8]

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[8] The legislative history of the 1921 act contains no indication that civil statutes would be tolled. A House Report noted the Justice Department's ongoing "investigation * * * of various alleged offenses, consisting largely of [wartime] frauds against the Government," and that the need for detailed investigation meant that "a considerable period must elapse before * * * the department may know whether *prosecutions* are justified." H.R. Rep. No. 67-365, at 1 (1921) (emphasis added). It emphasized that tolling would allow the government "not only to make an investigation, but thereafter to begin the necessary *prosecutions*." *Id.* at 2 (emphasis added); accord 61 Cong. Rec. 7060-7061, 7640 (1921). The Report also discussed the Solicitor General's analysis of "ex post facto" limitations on reviving an expired criminal limitations period. H.R. Rep. No. 67-365, at 2. Six years later, Congress repealed the 1921 Act after "the Department of Justice announced * * * that it did not propose to

The 1942 Act "reviv[ed] for World War II substantially the same exception to the general [criminal] statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I." *Bridges*, 346 U.S. at 217. It reenacted the text of the 1921 law almost verbatim, and expressly applied only to criminal fraud "offenses" "now indictable under any existing statutes." 56 Stat. 747-748. Committee reports discussed the 1921 predecessor at length, reiterating its goal of preventing "offenses" from becoming "barred from prosecution." S. Rep. No. 77-1544 (1942); H.R. Rep. No. 77-2051 (1942).

When Congress amended the WSLA in the Contract Settlement Act of 1944, it reused the earlier text, under a section titled "PROSECUTION OF FRAUD" which also created a new criminal offense for destruction of records. 58 Stat. 667. The 1944 Act replaced a fixed 1945 end date (56 Stat. 748) with tolling until "three years after the termination of hostilities in the present war," consistent with the general criminal statute of limitations. And it expanded covered "offense[s]" to include those "committed in connection with" contracts "related to the prosecution of the present war." 58 Stat. 667. While the Act deleted the phrase "now indictable under any existing statutes," it elsewhere specified that the tolling "shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet run." *Ibid.*

Nothing in the 1944 statutes or their legislative history reflects any intent to transform what had

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attempt any further prosecution of" alleged "war frauds," the "offenses giving rise to the statute." H.R. Rep. No. 70-16, at 1 (1927).

been uniformly understood as a *criminal* tolling provision to apply expansively to all civil frauds. *Bridges* described the 1944 amendments as "insert[ing] * * * more specific references to war contracts and to the handling of property under the Surplus Property Act of 1944," 346 U.S. at 217 n.15, with no reference to civil tolling. The same is true of the Contract Settlement Act's extensive legislative history.[9]

Four years later, when Congress comprehensively recodified the criminal law to "mak[e] it easy to find the criminal statutes," 94 Cong. Rec. 8721 (1948), it placed the WSLA in the new criminal code's chapter on "limitations," confirming the statute's continued criminal purview. 62 Stat. 828; accord S. Rep. No. 80-1620, at 2427 (1948) (legislation's purpose was "to codify and revise the laws relating to Federal crimes and criminal procedure"). Cf. *Hendricks*, 521 U.S. at 361. At the same time, Congress confirmed that "offense" described only crimes, consistent with the term's contemporaneous meaning. See *Black's Law Dictionary* 1232 (4th ed. 1951) ("A crime or misdemeanor; a breach of the criminal laws."). Congress

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[9] See, *e.g.*, H.R. Rep. No. 78-1708 (1944) (Conference Report); S. Rep. No. 78-836, at 5 (1944) (penalty language "supplement[s] the provisions contained in the criminal code"); 90 Cong. Rec. 6060 (1944) (statement of Rep. Gwynne) (bill's penalty provisions, including suspension of limitations, "written in accordance with the old-fashioned criminal rules"); *id.* at 6111 (statement of Rep. Sumners) ("The Judiciary Committee reported legislation extending the statute of limitations as to these war frauds so that those guilty of such fraud would not escape because of the confusion incident to the war."); accord Edmund Webster Burke, *War Contract Termination: The Contract Settlement Act of 1944*, 23 Chi.-Kent L. Rev. 107, 148 (1945).

divided offenses into two strictly criminal categories: Capital crimes and those punishable by more than a year in prison were felonies, and "*any other* offense is a misdemeanor," 62 Stat. 684 (emphasis added) (codified at 18 U.S.C. § 1) (repealed 1984).

Federal courts viewed the post-1944 WSLA as "substantially the same as" the original (exclusively criminal) 1921 statute. *United States* v. *Obermeier*, 186 F.2d 243, 256 & n.60 (2d Cir. 1950); accord *Marzani* v. *United States*, 168 F.2d 133, 136 (D.C. Cir. 1948) (language "the same as" 1921 "predecessor"). And in the years following the 1944 amendments, the Executive Branch understood the WSLA to be a criminal provision. The Office of Contract Settlement—the agency Congress created to administer the Contract Settlement Act, see 58 Stat. 651—explained that under the 1944 Act, "[t]he running of statutes of limitation *on criminal prosecutions* was suspended until three years after the war." Office of Contract Settlement, *A History of War Contract Terminations & Settlements* 19 (July 1947) (emphasis added), *available at* http://goo.gl/lpQMFC.

And at a time when the government had been litigating WSLA cases continuously since its enactment, the Department of Justice represented to this Court that although the 1944 amendments suspended "limitations on *criminal* violations of the Surplus Property Act," "[b]y contrast, Congress provided no suspension of limitations on *civil* actions under Section 26 [of the Act]." U.S.Br. 8, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362) ("*Koller* U.S.Br.") (emphasis added). The *Koller* brief contrasted the Surplus Property Act's criminal and civil provisions in arguing that civ-

il provisions were compensatory and thus (at that time) subject to *no* statute of limitations. And the brief specifically discussed the sequence of enactments resulting in the WSLA's then-current wording and how the 1944 amendments changed the text. *Id.* at 26-27.

The same understanding was evident at the time of the 2008 amendments. The Senate Judiciary Committee described the legislation's purpose as "protect[ing] American taxpayers from *criminal* contractor fraud by giving investigators and auditors the time they need to thoroughly review contracts related to the ongoing conflicts in Iraq and Afghanistan." S. Rep. No. 110-431, at 1-2 (emphasis added) (J.A. 198). It described the 1940s statutes as having "extended the time prosecutors had to bring charges relating to criminal fraud offenses," and explained that the 2008 amendments would make the WSLA "consistent with the current statute of limitations for criminal fraud offenses." *Id.* at 2; see also *id.* at 2 n.2 (citing 1946 criminal indictment as example of WSLA being a "vital" tool for "prosecutors" to "pursu[e] war profiteers").

3. *Purpose*. The panel's expansive interpretation of the WSLA is also irreconcilable with this Court's understanding of the Act's purpose—to extend the time for criminal prosecutions. In *Bridges*, this Court explained that the WSLA "sought to help safeguard the treasury from [wartime] frauds by increasing the time allowed for their discovery and *prosecution*." 346 U.S. at 218 (emphasis added). Noting that "Congress was concerned with the exceptional opportunities to defraud the United States that were inherent

in its gigantic and hastily organized procurement program," *Bridges* explained that in wartime, "[t]he law-enforcement branch of the Government is * * * busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." *Id.* at 218, 219 n.18 (quoting S. Rep. No. 77-1544, at 2). For that reason, "the present 3-year [criminal] statute of limitations may [not] afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government." *Ibid.*

Bridges further explained that the 1944 WSLA "readopt[ed]" the policy of its World War I predecessor: to extend the "general *criminal* statute of limitations" for fraud claims. 346 U.S. at 218-218 & n.18. The Court cautioned that "[t]he purpose of the [WSLA] is *not* that of generally suspending the three-year statute, *e.g.*, in cases of perjury, larceny, and like crimes," but rather *only* for cases of "fraud against the Government" "in view of the difficulty of their prompt discovery and prosecution." *Id.* at 222 (emphasis added).

Similarly, *United States* v. *Smith*, 342 U.S. 225, 230 (1952), declined to "suspend the running of the statute beyond the emergency which made the suspension seem advisable," and thus refused to cover crimes committed after hostilities ceased. The Court viewed the statute as reflecting a "fear * * * 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." *Id.* at 228-229 (emphasis added). Justice Clark's concurrence empha-

sized that "Congress intended to give the Department [of Justice] more time to apprehend, investigate, and prosecute offenses." *Id.* at 230 (Clark, J., concurring).

B. The Unremarked Deletion Of The Words "Now Indictable" Did Not Fundamentally Transform A Criminal Tolling Provision

1. In extending the WSLA to civil cases, the panel relied almost exclusively on the 1944 deletion of the phrase "now indictable under any existing statutes." Pet. App. 8a, 13a-14a. And the government has, with the benefit of hindsight—and billions in potential FCA revenues[10]—recently abandoned its contrary historical understanding and embraced that position. See U.S.Cert.Br. 11. That view is plainly wrong.

This Court construed identical "now indictable" language in the WSLA's predecessor as serving to limit tolling "to offenses * * * not already barred." *United States* v. *McElvain*, 272 U.S. 633, 637 (1926). That language simply ensured that the WSLA would not revive criminal charges whose statutes of limitations had lapsed, a constraint Congress recognized since its earliest efforts at wartime tolling; indeed, Congress likely included such language because the Solicitor General had warned against reviving expired claims before the 1921 enactment. See note 8, *supra*; H.R. Rep. No. 67-365, at 2 (1921) (discussing *ex post facto* limitations). Because the 1944 statute had a prospective focus (extending tolling to "three

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[10] See, *e.g.*, Dep't of Justice, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013).

years after the termination of hostilities," 58 Stat. 667) and because limitations had been tolled since 1942, *ex post facto* concerns would have been less prominent. Moreover, the "now indictable" language was unnecessary because the 1944 statute included other language to address that purpose, specifying that "[t]his section * * * shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." 58 Stat. 667. Congress likely deleted the language as redundant.

There is no need to guess how Congress would have drafted a tolling provision for both criminal and civil matters: It did so two months after enacting the WSLA. That provision tolled not "offenses," but rather "*violations* of the antitrust laws * * * now indictable *or subject to civil proceedings*." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added). The idea that Congress would transform an exclusively criminal tolling provision into one encompassing all civil frauds through the ambiguous step of deleting two words—without any other reference in statutory text or legislative history—runs counter to the rule that "Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) *Wimberly* v. *Labor & Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 518-519 (1987) (Congress does not "transform the scope" of legislation through a minor and ambiguous textual change—particularly for a statute this Court has repeatedly directed be "narrowly construed").[11] It is

[11] The government has argued that the 1944 amendments were part of a larger statute that was "largely civil in nature," and

particularly implausible that Congress, in enacting "one of the most carefully considered pieces of legislation ever to have been enacted by Congress" (Sen. James E. Murray, *Contract Settlement Act of 1944*, 10 Law & Contemporary Probs. 683, 683 (1944)), would have undertaken such a radical expansion of wartime tolling without any comment.[12]

Construing the 1944 Act to tacitly extend the WSLA to civil actions is inconsistent with contemporaneous Executive Branch practice, Congress's decision to include it in the criminal code's limitations chapter, and its decision to define "offense" in title 18 to include only crimes. See pp. 19-27, *supra*. Moreo-

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reflected a purpose "to better protect the government from [contracting] fraud." U.S.Cert.Br. 11-12. But the criminal nature of "offense" in the WSLA is confirmed by the title of the relevant section of the Contract Settlement Act: "PROSECUTION OF FRAUD," § 19(b), 58 Stat. 667. And this Court characterized the 1944 Act as extending the WSLA to "offenses of the type likely to be committed during the post-hostilities period." *Smith*, 342 U.S. at 227-228; accord *Koller* U.S.Br. 26-27 (Surplus Property Act added "criminal prosecutions for violations of the Surplus Property Act * * * to the list of *prosecutions*" covered by the WSLA (emphasis added)).

[12] Alternatively, the "now indictable" language may have reflected the Solicitor General's concern in 1921 that "care should be taken that the amendatory statute should be clearly made to apply to offenses already committed" because of courts' "tendency * * * to hold that the amendatory statutes are prospective and that it was not the legislative intent to make them apply to crimes already committed." H.R. Rep. No. 67-365, at 2. By 1944, there was an established practice of applying the WSLA to already-committed crimes, and the 1944 statute's prospective focus (authorizing tolling until "three years after the termination of hostilities," 58 Stat. 667) reduced the significance of crimes already committed.

ver, under the government's own view, extending the WSLA to civil frauds was unnecessary for the government to protect its interests. During the post-war era, the government took the position that *no statute of limitations applied* to compensatory civil suits brought by the government (as opposed to actions for penalties or forfeitures, 28 U.S.C. §2462), unless Congress had provided otherwise. See *Koller* U.S.Br. 8, 28-29; *E.L. DuPont DeNemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924) (action by the United States "is subject to no time limitation, in the absence of congressional enactment clearly imposing it").

2. Moreover, the panel's maximalist reading conflicts with this Court's admonitions that the WSLA must "be construed strictly, and held to apply only to cases shown to be clearly within its purpose." *McElvain*, 272 U.S. at 639. In rejecting one attempt to expand wartime tolling beyond the statutory text and purpose, *Bridges* explained that because "[t]he [WSLA] creates an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," it must be "'narrowly construed.'" 346 U.S. at 215-216 (quoting *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1932)). This Court understood the Act's history and origin to "emphasiz[e] the propriety of its conservative interpretation," and found no congressional "purpose to swallow up the three-year limitation to the extent necessary to reach" the government's expansive position in that case. *Id.* at 216.

Smith similarly refused to "strai[n] the language of the [WSLA]" to expand tolling to crimes committed after hostilities ended. 342 U.S. at 229-230. The

Court declined to rely on policy considerations to "alte[r] * * * the statutory scheme." *Id.* at 228-229. Earlier decisions are to the same effect. *E.g.*, *Scharton*, 285 U.S. at 522 ("liberally interpreted in favor of repose"); *United States* v. *Noveck*, 271 U.S. 201, 204 (1926) (no WSLA tolling "unless the purpose so to do is plain"); accord *United States* v. *Klinger*, 199 F.2d 645, 646 (2d Cir. 1952) (L. Hand, J.) (rejecting an interpretation of the WSLA that would "more than doubl[e] the existing period of limitation," which "Congress certainly would not have tolerated"); *Bridges*, 346 U.S. at 221 (1942 reenactment of WSLA "carried with it" this Court's decisions interpreting the 1921 provision).

The panel's approach cannot be reconciled with "narro[w] constru[ction]," because it bypasses narrower readings of the WSLA that avoid a dramatic expansion of tolling. Most notably, the panel could have given "offense" its ordinary meaning (a crime), consistent with the WSLA's codification in title 18 and its historical purpose of accommodating wartime law-enforcement burdens. See, *e.g.*, S. Rep. No. 110-431, at 1-2 (J.A. 198-199); *Smith*, 342 U.S. at 228-229 (noting "fear" that "crimes of fraud * * * would be forgotten until it was too late").

3. The panel also erred by relying on a handful of lower-court cases, mostly from the 1950s, applying the WSLA to civil claims. Pet. App. 14a.

As the panel acknowledged, *United States* v. *Weaver*, 107 F. Supp. 963, 965-966 & n.7 (N.D. Ala. 1952), interpreted the post-1944 WSLA, and held that because "the history of the [statute] from its genesis * * * is persuasive to the conclusion that the

Congress intended only to toll the running of existing statutes of limitations as a bar to criminal prosecutions," it "ha[d] no effect upon" civil statutes of limitations. In reversing on an alternate ground (that the statute of limitations for penalties was inapplicable), the Fifth Circuit did not revisit the district court's WSLA interpretation. See *United States* v. *Weaver*, 207 F.2d 796, 798 (1953).

Nothing in the handful of lower-court decisions applying the WSLA to civil claims warrants a contrary result. The two court of appeals decisions to suggest (or assume) the WSLA applies to civil claims did so without acknowledging the possibility it would be limited to criminal cases, or analyzing the authorities discussed above. See *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954).[13] The principal holding of *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), is irrelevant: the court lacked "'jurisdiction to proceed'" because the suit was "based upon 'evidence or information in the possession of the United States' at the time the suit was brought." *Id.* at 549 (quoting 31 U.S.C. §232(C) (1952 ed.)). *McCans* separately concluded, in the alternative, that the civil claims were untimely even *with* WSLA tolling. *Id.* at 551. Any statement about applying the WSLA in the civil context was thus doubly

[13] *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959) held that the government's claims were not subject to any statute of limitations; in a footnote, it suggested in dicta that the claims would have been timely if tolled.

dicta, and unlitigated to boot: The defendant had "concede[d]" the WSLA's applicability. *Id.* at 551.[14]

C. Indefinite Tolling Is Particularly Inappropriate For *Qui Tam* Actions

The panel's extension of WSLA tolling to *qui tam* claims is also irreconcilable with the FCA's express limitations provisions—and with the WSLA's recognized purposes.

The FCA imposes a general six-year limitation period. It allows tolling of suits by the United States alone for three years after material facts "are known * * * by the [responsible] official of the United States," but provides that an FCA action may be brought "*in no event* more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b) (emphasis added). This Court recently described this provision as an "absolute provision of repose." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013).

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[14] The main holding of *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 598-600 (S.D. Tex. 2012), is also irrelevant: that fact questions remained regarding the FCA's three-year discovery rule. In applying the WSLA to the government's civil claims, the court relied heavily on 1950s cases and the deletion of "now indictable," without considering many of the textual and historical arguments discussed *supra*. Accord *United States* v. *Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955). *Dugan & McNamara, Inc.* v. *United States*, 127 F. Supp. 801, 803-804 (Ct. Cl. 1955), declined to consider the relevance of the 1948 recodification, because tolling under the 1944 act was sufficient. Other cases simply did not consider whether the WSLA applies to civil suits. *E.g.*, *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954).

"Statutes of repose * * * generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014). But without explaining why tolling a "statute of limitations" also extended a statute of repose, see Pet. App. 8a-16a, the panel held that the WSLA has already tolled fraud claims for more than a decade (i.e., since 2002), and indeed, the opinion identifies no principle limiting its application to Operation Iraqi Freedom. To the contrary, the panel's reasoning may support tolling since the beginning of U.S. operations in Afghanistan (i.e., 2001) or even Operation Desert Storm (1991). Pet. App. 10a-13a; see also *id.* at 29a (Wynn, J., concurring) (concluding that "extended or indefinite limitations period is warranted"). The panel thus effectively allowed the WSLA's general criminal-code tolling provision to supersede the FCA's specific mandate that claims be brought "in no event more than 10 years" after the alleged violation, 31 U.S.C. § 3731(b)(2). Contra *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Indefinite tolling conflicts with *Gabelli*'s concern about requiring defendants to face liability "not only for [six] years * * *, but for an additional uncertain period into the future." "'[E]xtend[ing] the limitations period to many decades,'" *Gabelli* explained, was "'beyond any limit that Congress could have contemplated'" and would "'thwar[t] the basic objective of repose underlying the very notion of a limitations period.'" 133 S. Ct. at 1223 (quoting *Rotella* v. *Wood*,

528 U.S. 549, 554 (2000)). *Gabelli* is consistent with other courts' conclusion that "Congress certainly would not have tolerated" using the WSLA to transform so radically the ordinary limitations period. *Klinger*, 199 F.2d at 646 (L. Hand, J.).

Congress's failure to address the WSLA's interaction with the FCA's statute of limitations is a strong indication that wartime tolling applies only in criminal cases. There is no evidence Congress anticipated wartime tolling when it enacted the FCA's current statute of limitations in 1986, which modified the historical six-year period to provide a discovery rule for claims brought by the United States, and imposed a 10-year absolute repose provision. A House Report explained pointedly that "the Committee did not intend to allow [even] the Government to bring fraud actions *ad infinitum*, and therefore imposed the strict 10 year limit on [FCA] cases." H.R. Rep. No. 99-660, at 25 (1986); accord *id.* at 32. And Congress's decision to add a discovery rule in 1986 reflected a different strategy for addressing the government's lack of resources to investigate fraud promptly, again suggesting WSLA tolling was not available.

To grant *private* plaintiffs—to whom Congress did not clearly extend even the FCA's discovery rule—indefinite WSLA tolling is particularly inconsistent with Congress's scheme. There is no indication that Congress believed private relators experience the same resource constraints during wartime as government prosecutors and investigators. Pet. App. 40a-41a. Indefinite tolling of private claims would "directly thwar[t]" the FCA's purpose of "combat[ing]

fraud quickly." *Id.* at 43a, 45a (Agee, J., concurring in part and dissenting in part).

D. The WSLA's Reference To "War" Requires A Formal Declaration

The panel also erred by holding that the WSLA's authorization of tolling "[w]hen the United States is at war," 18 U.S.C. §3287, applies without a formal declaration. Instead, the panel broadly authorized tolling in "circumstances * * * in which fraud can easily be perpetuated against the United States," including times when the President has "power to enter into armed hostilities." Pet. App. 12a.[15]

The scope of the WSLA's "at war" reference is also subject to the bedrock requirement of "narro[w] construc[tion]," *Bridges*, 346 U.S. at 215-216, and should be "held to apply only to cases shown to be clearly within its purpose," *McElvain*, 272 U.S. at 639. Thus, even if the phrase might be read, in isolation or other statutory contexts, to include non-declared military conflicts, a rule of "strict construction," *ibid.*, requires a more limited interpretation. Accord *United States* v. *W. Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224, at *1, 3-4 (S.D. Cal. July 1, 2010) ("a narrow construction of the term 'at war' in the WSLA requires a finding that it encompasses only those wars which have been formally declared by Congress," not including conflict in Iraq).

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[15] The panel concluded that the United States was "at war" under both the pre- and post-2008 versions of the WSLA, and so did not decide which version applies and did not address the amended language referring to an "authorization for the use of the Armed Forces." Pet. App. 10a-13a.

In any event, as the panel itself acknowledged, "the meaning of 'at war'" is facially "unambiguous." Pet. App. 10a; see, *e.g.*, *United States* v. *Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) ("[f]or the Persian Gulf conflict to have amounted to a war under 18 U.S.C. §3287, Congress should have formally recognized that conflict as a war"). Even if "contemporary usage of the term 'war' may have broadened in light of the subsequent military conflicts in Korea, Vietnam, the Persian Gulf and Afghanistan, the WSLA originated during a time of formally declared war and during a time period during which it was probably more commonly understood that the United States came to be in a state of war only through a formal declaration of war." *W. Titanium,* 2010 WL 2650224, at *4; accord *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011).[16] The WSLA was enacted in response to two formally declared world wars, and one version of the statute explicitly tied tolling to "the prosecution of the present war," 58 Stat. 667, using the term to reference a congressionally declared "war."

The panel's reading has the further defect of rendering the 2008 amendments all but meaningless: Congress's careful extension of WSLA tolling to a particular kind of authorization of the use of military force, 123 Stat 2475, would be swallowed up by the panel's expansive reading of "at war," which is used in both the pre- and post-amendment statute. Contra

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[16] Historical context thus distinguishes later-enacted statutes. See Pet. App. 11a (citing 28 U.S.C. §2416 (enacted Pub. L. No. 89-505, §1, 80 Stat. 305 (1966)) and 50 U.S.C. §1829 (enacted Pub. L. No. 103-359, tit. VIII, §807(a), 108 Stat. 3452 (1994)).

Stone v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, [courts must] presume it intends its amendment to have real and substantial effect."). The panel also ignored evidence that the 2008 amendments reflected an understanding that the "military operations in Iraq and Afghanistan" were "likely exempt from" WSLA tolling because of the absence of a formal declaration of war. S. Rep. No. 110-431, at 4 (J.A. 202) (view of Senate Judiciary Committee); *W. Titanium*, 2010 WL 2650224, at *4; see also U.S.Cert.Br. 16 ("until the WSLA was amended in 2008, there was substantial doubt whether the statute could apply absent a formal declaration of war").

Requiring a formal declaration relieves courts of the difficult and politically charged task of deciding when an undeclared conflict begins and ends. See *Shelton*, 816 F. Supp. at 1135 ("[t]he Judicial Branch of the United States has no constitutional power to declare a war"). That Congress historically did not ask courts to make such judgments is a good indication that the panel erred. Cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) ("sometimes 'the most telling indication of [a] severe constitutional problem * * * is the lack of historical precedent' for Congress's action" (quoting *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

Disregarding the ordinary meaning of "at war" will inevitably require "extensive post-hoc factual determinations" (*W. Titanium*, 2010 WL 2650224, at *3) on a range of issues, *e.g.*: (1) the extent of Congress's authorization for the President to act; (2) whether the

conflict is a "war" under other definitions and international law; (3) the conflict's scope; and (4) the diversion of resources away from investigating frauds. *United States* v. *Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008) (applying these factors in concluding that United States was "at war" during Iraq and Afghanistan conflicts). That approach, like the panel's here, would "entangl[e]" the Judiciary in an "are[a] reserved for the [political] Branches," *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989).

E. "Dire" Practical Consequences Further Undermine The Panel's Rationale

The "dire effects" (Pet. App. 46a (Agee, J., concurring in part and dissenting in part)) of the panel's interpretation of the WSLA highlight the extent of its departure from a rule of "narrow construction" and demonstrate that Congress could not have intended such results.

Although this case involves the conflict in Iraq, the panel's analysis suggests that even earlier conflicts may have triggered ongoing tolling. The first Persian Gulf War, for instance, was initiated by a congressional authorization for the use of military force, not a formal declaration of war, see Pub. L. No. 102-1, 105 Stat. 3 (1991), and ended with a cease-fire memorialized in communications to the U.N. Security Council, see U.N. Doc. S/22485 (Apr. 11, 1991), not a presidential proclamation or concurrent resolution. See, *e.g.*, Barbara Salazar Torreon, Cong. Research Serv., RS21405, *U.S. Periods of War and Dates of Current Conflicts* 5-6 (2012) (noting lack of "official end date" for Persian Gulf War). There is no reason

the panel's logic could not be extended back another decade or more. And because the WSLA does not textually limit its sweep to claims involving defense contracting or the war effort, the panel's decision will be (and already has been) cited to revive time-barred private claims in cases having "nothing to do with [any] war," *Smith*, 342 U.S. at 230 (Clark, J., concurring), from financial institutions to healthcare providers to medical implement- or drug-makers.[17]

While the panel relied on a vague "purpose"-based interpretation of the requirements to *begin* tolling, it strictly enforced the statute's textual formalities for *ending* tolling. That asymmetry virtually ensures indefinite tolling, and ignores that the President and Congress have little incentive to disclaim wartime powers or to end undeclared hostilities in the formal way contemplated in the WSLA, particularly as tolling "is at most a tertiary consideration" (App. 26a (Wynn, J., concurring)) in times of armed conflict. That is particularly true for the conflict against al Qaeda, which arguably preceded the attacks of September 11, 2001, and shows no signs of abating. The necessary implication of the panel's reading is to deny those who contract with the government the fundamental interests in repose. And it requires contractors to indefinitely preserve records of long-ago

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[17] *E.g.*, *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (invoking WSLA to toll fraud claims against bank); *United States ex rel. Carroll* v. *Planned Parenthood Gulf Coast, Inc.*, Civ. No. H-12-3505, 2014 WL 1933554, at *7 (S.D. Tex. May 14, 2014) (family planning clinic); *United States ex rel. Paulos* v. *Stryker Corp.*, Civ. No. 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (medical device manufacturer).

events and transactions and subjects them to the ongoing risk of suit by the government or self-interested relators at a distance of any number of years.

II. THERE IS NO BASIS FOR THE FOURTH CIRCUIT'S ATEXTUAL ONE-CASE-AT-A-TIME RULE

Compounding the practical effects of indefinite wartime tolling, the panel eviscerated the FCA's "first-to-file" bar, 31 U.S.C. §3730(b)(5), allowing relators to sidestep this crucial limitation on duplicative lawsuits by re-filing a copy of their complaint after an earlier case is dismissed—or, for that matter, reduced to judgment. That reading is at odds with the statutory text, purpose, and history, which establish an "exception-free" bar, and express no intent to create the kind of unpredictable, "on-again-off-again" jurisdictional regime that the panel sanctioned.

A. The Statutory Text And History Impose No Temporal Limitation On The First-To-File Bar

1. Under the first-to-file bar, "[w]hen a person brings an action under [the FCA], 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). The plain text speaks in absolute terms: The bar applies beginning "[w]hen a person brings an action," and, from that point forward, "no person other than the Government may * * * bring a related action." The language is "exception-free," *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). The

first-to-file bar "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." 1 John T. Boese, Civil False Claims and Qui Tam Actions § 4.03[C][2][b] (4th ed., 2012). "Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts. * * * To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute." *Lujan*, 243 F.3d at 1187-1188.

In this context, the word "pending" functions referentially, "to distinguish" between the two different actions mentioned in the statute: the "earlier-filed action" (which is "pending" from the time it is filed) and any "later-filed action" (which, by definition, was not "pending" when the first-filed case was filed). *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014). In other words, "pending" is "used as a short-hand for the first-filed action," *United States ex rel. Powell* v. *American InterContinental Univ., Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012). "The simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *Shea*, 748 F.3d at 343.

This reading is confirmed by the sentence's syntax, in which the phrase "'based on the facts underlying the pending action' merely clarifies 'related action.'" *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). The word "pending"

thus imposes no time limit on operation of the bar, but rather identifies the facts which will no longer support a claim: those "underlying the pending action."[18] The bar would certainly be indefinite if it simply read, "no person other than the Government may intervene or bring a related action." It is implausible that Congress implicitly put a time limit on that bar, and created an unpredictable and shifting jurisdictional landscape, through the oblique mechanism of describing the scope of what claims are "related." Cf. *Whitman*, 531 U.S. at 468.

The panel read the first-to-file bar as if it provided that "when a person brings an action under this subsection, no person other than the Government may intervene or bring a related action, *while the first action remains pending*." *Shea*, 748 F.3d at 344. But where Congress has intended to bar suits only so long as an earlier-filed action remains pending, it has said so expressly. See, *e.g.*, 28 U.S.C. §1500 (barring suits in the Court of Federal Claims while the plaintiff "*has pending* in any other court any suit or process against the United States" based on the same claim (emphasis added)); 42 U.S.C. §300aa-11(a)(5)(B) (no person may bring a vaccine-related claim in the Court of Federal Claims if he or she "*has pending* a civil action for damages for a vaccine-related injury or

[18] It is therefore not dispositive that, in isolation, "pending" can mean "[b]egun, not yet completed." *Black's Law Dictionary* 1021 (5th ed. 1979). The question is not whether the first-filed action here was "pending" at some point, but rather *when* that case needed to be "pending" to trigger the first-to-file bar, and whether the bar has an expiration date.

death" (emphasis added)); *Shea*, 748 F.3d at 338.[19] Courts have interpreted these provisions "to prevent simultaneous dual litigation." *E.g.*, *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd, *Keene Corp.* v. *United States*, 508 U.S. 200 (1993).

Neighboring FCA provisions provide a stronger textual basis for barring an action only while another is pending. See 31 U.S.C. §3730(e)(3) (barring action "based upon allegations or transactions which *are the subject of* a civil suit or an administrative civil money penalty proceeding in which the Government *is already* a party" (emphases added)); *Shea*, 748 F.3d at 338 (Srinivasan, J., concurring in part and dissenting in part) (reading §3730(e)(3) to apply only "during pendency" of civil action or administrative proceeding). Because Congress used different language for the first-to-file bar, this Court should "presum[e] that Congress act[ed] intentionally and purposely" in that choice. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

2. This reading is also consistent with the origin of the first-to-file bar in the 1986 amendments. As noted, the FCA originally allowed relators to bring parasitic suits and claim a share of recovery even if they did nothing to expose the alleged fraud. *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical*

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[19] Cf. 8 U.S.C. §1101(a)(15)(V)(ii)(II) (defining classes of "nonimmigrant aliens" to include persons granted preferential status as a spouse or child of an alien lawfully admitted for permanent residence, so long as an application for a visa or adjustment of status "remains pending").

Labs., Inc., 149 F.3d 227, 233 (3d Cir. 1998) (citing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943)). After the 1943 amendments eliminated "parasitical suits," *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978), the 1986 amendments sought a "golden mean" between incentives for "whistle-blowing insiders with genuinely valuable information" and discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

The 1986 amendments evidence no intent to bar repetitive suits only while an earlier-filed action remained pending, or to allow an infinite series of suits. The House Report accompanying the bill containing the ultimately enacted first-to-file language described the bar in categorical terms: "[w]hen an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The corresponding Senate Report explained that the first-to-file bar reflects the fact that "private [*qui tam*] enforcement under the civil [FCA] is not meant to produce * * * multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5290.

The drafters of the 1986 amendments plainly understood how to write a "one-case-at-a-time" rule. The House bill (which included the first-to-file language ultimately enacted) *also* contained a separate provision stating that "'[i]f a claim has been filed under section 6 of the Contract Disputes Act of 1978, an

action may not be brought under th[e] [FCA] * * * based on the same matter that is the subject of the claim * * * . *The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken * * *, there has been a final decision on the merits*.'" H.R. Rep. No. 99-660, at 4 (1986) (quoting H.R. 4827, emphasis added). Showing that the drafters understood the practical complexities of this sequencing rule, the bill further provided that the FCA's statute of limitations "shall be stayed during the period in which th[is] prohibition * * * is in effect." *Ibid.*

Had drafters intended the first-to-file bar to function as a one-case-at-a-time rule, they surely would have used the language already developed for this Contract Disputes Act provision—as they did in proposing a sequencing rule for a parallel administrative remedy. See H.R. Rep. No. 99-660, at 13 (using same language to bar FCA administrative remedy during pendency of Contract Disputes Act claims). While these provisions were later deleted as unnecessary "as part of [a] [legislative] compromise," 132 Cong. Rec. 22,336 (1986), Congress's consideration of them *at the same time* as the first-to-file bar underscores the implausibility of Congress creating such a sequencing rule through the use of a single word ("pending") in a clause that textually serves to describe the scope of the bar ("based on the facts underlying the pending action").

3. Rejecting an expiry date for the first-to-file bar best reads the FCA's various limitations on *qui tam* actions "as a symmetrical and coherent regulatory scheme," "fit[ting] * * * all parts into an harmonious

whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks and citations omitted).

Section 3730 addresses in detail the conflicts and inefficiencies that could result when the government and a relator pursue the same fraud. See 31 U.S.C. § 3730(b)(2) (allocating responsibility by, *e.g.*, requiring relator to serve the government with a "written disclosure of substantially all material evidence and information the person possesses," and providing 60-day period for the government to investigate); *id.* § 3730(c)(2) (court may limit the relator's witnesses, testimony, or examination, or even exclude the relator outright, if it "would interfere with or unduly delay the Government's prosecution of the case"). The FCA tellingly lacks any similar provisions addressing the complications from seriatim litigation of related claims by two relators, suggesting that Congress understood the first-to-file bar would be ongoing from the moment the first action was filed.

This reading of the first-to-file bar in no way undermines "the intended operation of the [FCA's] public-disclosure bar" in 31 U.S.C. § 3730(e)(4). *Shea*, 748 F.3d at 348 (Srinivasan, J., concurring in part and dissenting in part). By their plain terms, the first-to-file and public-disclosure bars apply in different procedural postures and to different (if partly overlapping) sets of cases.

Procedurally, the first-to-file bar requires only "compar[ing] the relator's complaint with the allegedly first-filed complaint." *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009); *Shea*, 748 F.3d at 342; see also *In re Natural Gas*

Royalties Qui Tam Litig. (CO2 Appeals), 566 F.3d 956, 964 (10th Cir. 2009) ("quickly and easily determinable, simply requiring a side-by-side comparison of the complaints"). The public disclosure bar, by contrast, often requires resolving fact-intensive issues such as whether the relator's claims were "based on" disclosed information and whether relator was an "original source." *United States ex rel. Jamison* v. *McKesson Corp.*, 649 F.3d 322, 326 (5th Cir. 2011). While both provisions generally "function[] to weed out parasitic claims," the first-to-file bar has the "additional purpose of creating an incentive for relators with valuable information to file—and file quickly." *Natural Gas Royalties*, 566 F.3d at 961; *Wisconsin* v. *Amgen, Inc.*, 516 F.3d 530, 532 (7th Cir. 2008) ("Congress didn't want these bounty hunters piling into the first-filed suit and fighting over the division of the spoils, or, to the same end, bringing separate such suits.").

In some respects, the first-to-file bar sweeps more broadly. The "public disclosure" bar applies only where "allegations or transactions" have previously been "public[ly] disclos[ed]," including in "a criminal, civil, or administrative hearing." 31 U.S.C. § 3730(e)(4)(A) (2008). A first-filed case under seal does not trigger the public disclosure bar, but does implicate the first-to-file bar. See J.A. 36, 51. And under the post-2010 FCA, the public disclosure bar is triggered by disclosures in a "Federal criminal, civil or administrative hearing" only if "the Government or its agent is a party," 31 U.S.C. § 3730(e)(4)(A)(i) (2011), *e.g.*, has intervened. See *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 931

(2009). Thus, a non-intervened prior *qui tam* will trigger the first-to-file bar but likely not trigger the public disclosure bar, even after unsealing.

In other circumstances, however, the public disclosure bar can have broader application. While the first-to-file bar applies only after the filing of "an action under th[e] FCA," the (pre-2010) public disclosure bar is triggered by information revealed in "a criminal, civil, or administrative hearing," "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," and publications by the "news media." § 3730(e)(4)(A). The first-to-file bar has no application in those circumstances, and thus no effect on the operation of the public disclosure bar and its original source exemption.

At most, the first-to-file bar may apply to a small *subset* of actions also covered by the public disclosure bar and its original source exemption, see *Shea*, 748 F.3d 350 (Srinivasan, J., concurring in part and dissenting in part), but that slight overlap hardly renders § 3730(e)(4) "superfluous," *id.* at 347, or a "dead letter," *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 137 (2007). That Congress allowed an "original source" exemption for the public disclosure bar, but not the first-to-file bar, is unsurprising, given that the first-to-file bar's triggering event (the relator's disclosure of "substantially all material evidence" to the Attorney General, 31 U.S.C. § 3730(b)(2)) has far greater significance for the government's knowledge and ability to pursue fraud independently. The government will not receive a similar disclosure in a general "criminal, civil, or adminis-

trative hearing," even when (under the post-2010 FCA) "the Government or its agent is a party," such as in an enforcement action. And because a *qui tam* suit "puts the machinery of the courts in motion, * * * the government cannot ignore the charges for political or administrative reasons, including lack of resources or low priority." *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the S. Judiciary Comm.*, 99th Cong. 91 (1986). "If a suit makes a claim for compensation without revealing anything new, then it is sensible to block it under § 3730(b)(5) even if the relator is an 'original source.'" *United States ex rel. Chovanec* v. *Apria Healthcare Grp. Inc.*, 606 F.3d 361, 364 (7th Cir. 2010).

B. The Panel's Reading Conflicts With The Statutory Purpose

The first-to-file bar's function and purpose must be understood in light of Congress's repeated *qui tam* amendments, "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010). Congress recognized that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," by allowing *qui tam* suits to proceed based on "information that was already in the government's possession." *Quinn*, 14 F.3d at 649. To reduce those costs, Congress legislated with the "twin goals of re-

jecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 653.

The first-to-file bar represents a critical tool for "strik[ing] the appropriate balance between * * * encourag[ing] whistleblowers to come forward with allegations of fraud and [preventing] copycat actions." *Batiste*, 659 F.3d at 1210; *Graham Cnty.*, 559 U.S. at 294. The provision's plain text, read in light of Congress's "goals" under the FCA, *Quinn*, 14 F.3d at 653, dictates that "once a qui tam suit has been filed under the FCA, the first-to-file bar prohibits any subsequent would-be relator from filing a case based on the same underlying facts." 10A Fed. Proc. Forms § 34:550 (2013).

By prohibiting relators from filing successive *qui tam* suits related to an earlier-filed case, the first-to-file bar "serves two purposes: 'rejecting suits which the government is capable of pursuing itself,' and 'promoting those which the government is not equipped to bring on its own,'" by "encourag[ing] whistleblowers to approach the government and file suit as early as possible." *Shea*, 748 F.3d at 342-343 (quoting *Batiste*, 659 F.3d at 1208). The first-to-file bar "creates a race to the courthouse," *LaCorte*, 149 F.3d at 234, and encourages prompt disclosure by "rewarding the first [relator] to [file suit]," *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005). By rewarding *only* the first to file, the *qui tam* provisions "encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R.

Rep. No. 99-660, at 23 (1986). Conversely, the bar prevents relators from sharing a *qui tam* recovery when the government has already been "put on notice of the potential fraud claim." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004).

The bar serves the broader "purpose of the *qui tam* provisions of the False Claims Act," H.R. Rep. No. 99-660, at 23 (1986): i.e., promptly "put[ting] the government on notice of potential fraud being worked against the government, but * * * bar[ring] copycat actions that provide no additional material information." *Batiste*, 659 F.3d at 1210. "[A]n exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs." *Lujan*, 243 F.3d at 1187.

These purposes would be undermined by a temporal limitation. "[R]esolution of a first-filed action does not somehow put the government off notice of its contents." *Shea*, 748 F.3d at 344. "Dismissed or not, [the earlier-filed] action promptly alert[s] the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *Lujan*, 243 F.3d at 1188. "Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied." *Grynberg*, 390 F.3d at 1279; accord *Batiste*, 659 F.3d at 1210 (first-to-file bar applies where initial suit provides "sufficient notice for the government to initiate an investigation"). "On the other hand, reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the gov-

ernment 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.

Rather than encouraging prompt disclosure of material information to the Attorney General, the panel's "one-case-at-a-time" rule encourages plaintiffs "to allow false claims to build up over time" to maximize the value of the alleged fraud. *United States ex rel. Sanders* v. *N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008); accord Pet. App. 37a-38a (Agee, J., dissenting)). And it creates an incentive to disclose information (and litigate claims) piecemeal. See, *e.g.*, *Shea*, 748 F.3d 340-341 (same relator brought identical claims involving different agencies seriatim). As the facts here illustrate, the panel's holding encourages relators to re-plead claims repeatedly, even if other cases put the government on notice of the allegations. "[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *LaCorte*, 149 F.3d at 234. Allowing serial complaints, the United States has observed, "waste[s] Government resources" by requiring investigation of repetitive claims and "dilut[ing] the Government's recoveries without providing any benefit." U.S. Br. 19, *Chovanec* v. *United States*, 606 F.3d 361 (7th Cir. 2010) ("*Chovanec* U.S. Br."), http://goo.gl/uscYwn. The panel's interpretation thus *undermines* the statutory purpose of helping the government promptly pursue fraud.

Even if the bar applies while the first-filed case is pending, the prospect of subsequent suits will affect incentives in the first suit. Defendants will be less willing to settle an initial case if they anticipate duplicative later suits (or will settle for less money to reserve funds for future suits), increasing litigation costs and decreasing potential bounties for the first-filing relator and the government. Allowing relators to circumvent the first-to-file bar thus harms *all* participants in the *qui tam* process except the parasitic subsequent relators, by "(1) forcing the first relator to enter into agreements to share their recovery with later-filing relators in order to avoid battles like those that occurred in [*LaCorte*]"[20] and thereby "(2) reducing the recovery to relators who were first to file; (3) providing rewards to relators who did not merit a share of the recovery" by providing new information; and "(4) increasing the overall costs of litigation for all involved." Boese § 4.03[C][2][b].

There is no assurance that claim preclusion will protect defendants from repetitive litigation. Cf. *Shea*, 748 F.3d at 349 (Srinivasan, J., concurring in part and dissenting in part). Defendants at a minimum will be forced to litigate complex preclusion questions. A second relator not party to the first suit may argue he is not precluded by the first relator's actions. Compare *ibid.* (asserting that "the plaintiff in a *qui tam* action is the United States"), with *Eisenstein*, 556 U.S. at 931 (the United States "is not a

[20] In *LaCorte*, later plaintiffs interposed objections to the (not-yet-finalized) settlement of an earlier-filed case, seeking a portion of the first relator's bounty. Boese § 4.03[C][2][a][i] & nn. 668-672.

'party' to an FCA action * * * unless it has exercised its right to intervene in the case"). If the first-filed case settles, its preclusive effect will vary depending on the terms of the settlement. *E.g.*, *United States ex rel. May* v. *Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013) (holding that settlement resolving first-filed *qui tam* did not preclude subsequent relators where "[n]either th[ose] [r]elators nor the government were parties to or intended beneficiaries of the Release"). Under KBR's reading of the first-to-file bar, by contrast, "[o]nce an initial *qui tam* complaint puts the government and the defendants on notice of its essential claim, all interested parties can expect to resolve that claim in a single lawsuit." *Grynberg*, 390 F.3d at 1279.

Thus, the weight of reasoned decisions have concluded that "allow[ing] an infinite number of copycat *qui tam* actions * * * cannot be reconciled with § 3730(b)(5)'s goal of preventing parasitic [suits]." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009); see *Shea*, 748 F.3d at 343; *Lujan*, 243 F.3d 1181; *United States ex rel. Pfeifer* v. *Ela Med., Inc.*, No. 07-cv-1460, 2010 WL 1380167, at *15 (D. Colo. Mar. 31, 2010); *United States ex rel. Torres* v. *Kaplan Higher Educ. Corp.*, No. 09-cv-21733, 2011 WL 3704707, at *6 (S.D. Fla. Aug. 23, 2011); *United States ex rel. Friedman* v. *Eckerd Corp.*, 183 F. Supp. 2d 724, 725 (E.D. Pa. 2001).[21]

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[21] That two courts of appeals have suggested otherwise cannot overcome the weight of textual, contextual, and historical authority. The "focus in the *Chovanec* litigation was the relatedness of the actions rather than the meaning of pendency," *Shea*, 748 F.3d at 344; the Seventh Circuit stated without explanation

* * *

We end where we began: this case is now in its eighth year of litigation, after relator has filed what he concedes are four *identical copies* of a single complaint, only to have each case dismissed seriatim after arduous (and expensive) briefing, factual development, and argument. Relator did nothing to advance the government's ability to pursue the allegations, given the numerous prior disclosures such as the first-filed California action. But he now remains free to file a fifth version of the same complaint, subjecting KBR to ever-mounting defense costs and clogging the district court's docket. The threat of an "infinite series of claims," *Chovanec*, 606 F.3d at 362, is fully realized here, and—together with the wall of textual, historical, and judicial authority discussed above—demonstrates why the panel's flimsy rationale and sweeping interpretations cannot possibly reflect how Congress intended either the WSLA or first-to-file bar to operate.

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or textual analysis that "§ 3730(b)(5) applies only while the initial complaint is 'pending,'" *Chovanec*, 606 F.3d at 365. *Natural Gas Royalties*, 566 F.3d at 960, did not involve a dismissed first-filed case at all; the court addressed the issue in dicta, as part of a discussion of whether two suits were "related" and whether a defendant not named in an earlier-filed case can invoke the first-to-file bar.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

1. Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220 provides:

An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, November 17, 1921.

2. Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51 provides:

An Act Amending section 1044 of the Revised Statutes of the United States as amended by the Act approved November 17, 1921 (chapter 124, Forty-second Statutes at Large, page 220).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1044 of the Revised Statutes of the United States, as amended by the Act approved November 17, 1921 (chapter 124, Forty-second Statutes at Large, page 220), be amended so as to read as follows:

"Sec. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided*, That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information."

Approved, December 27, 1927.

3. Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748 provides:

AN ACT To suspend temporarily the running of statutes of limitations applicable to certain offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, August 24, 1942.

4. Act of Oct. 10, 1942, Pub. L. No. 77-740, ch. 589, 56 Stat. 781 provides:

AN ACT To suspend until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945, or until such earlier

time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, October 10, 1942.

5. Contract Settlement Act of 1944, Pub. L. No. 78-395, ch. 358, 58 Stat. 649, 667 provides, in pertinent part:

PRESERVATION OF RECORDS; PROSECUTION OF FRAUD

SEC. 19.

* * *

(b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U.S.C., Supp. II, sec. 590a), is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, in-

terim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

* * *

6. Surplus Property Act of 1944, Pub. L. No. 78-457, ch. 479, 58 Stat. 765, 781 provides, in pertinent part:

STATUTE OF LIMITATIONS

SEC. 28. The first section of the Act of August 24, 1942 (56 Stat. 747), as amended, is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or

settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

7. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683, 828 (codified at 18 U.S.C. § 3287 (2006)) provides:

§ 3287. WARTIME SUSPENSION OF LIMITATIONS

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the

war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section.

8. 18 U.S.C. § 3287 (2009 Supp.) (as amended by Wartime Enforcement of Fraud Act, Pub. L. No. 110-417, § 855, 122 Stat. 4545 (2008)), provides:

§ 3287. Wartime Suspension of Limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended 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.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

9. 31 U.S.C. § 3730 (2012) provides, in pertinent part:

Civil actions for false claims

* * *

(b) ACTIONS BY PRIVATE PERSONS.— (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it

receives both the complaint and the material evidence and information.

* * *

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.

* * *

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement

is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

* * *

9. 31 U.S.C. § 3730 (2008) provides, in pertinent part:

(e) CERTAIN ACTIONS BARRED.

* * *

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

* * *

10. 31 U.S.C. § 3730 (2010) (as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010)) provides, in pertinent part:

(e) CERTAIN ACTIONS BARRED.

* * *

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

* * *

11. 31 U.S.C. § 3731 provides, in pertinent part:

False claims procedure

* * *

(b) A civil action under section 3730 may not be brought—

(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 right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * *

12. 31 U.S.C. § 3732 provides, in pertinent part:

False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

* * *