No.

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

PETITION FOR A WRIT OF CERTIORARI

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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, contrary to the conclusion of numerous courts, the False Claims Act's so-called "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.

PARTIES TO THE PROCEEDINGS

Petitioners Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc., were defendants-appellees below. Respondent, relator Benjamin Carter, was the plaintiff-appellant below.

RULE 29.6 STATEMENT

Petitioner KBR, Inc. is a publicly held corporation that has no parent company, and is the ultimate parent of petitioner Kellogg Brown & Root Services, Inc. (KBR Holdings, LLC is an intermediate parent). KBR, Inc. is also the ultimate parent of petitioner Service Employees International, Inc. (KBR Group Holdings, Inc. and KBR Holdings LLC are intermediate parents). Petitioner Halliburton Company is a publicly held company that has no parent company. Other than as discussed above, no publicly held company owns 10% or more of the stock of any petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc. (collectively, "KBR") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2013. App. 1a. That court denied a petition for rehearing en banc on April 23, 2013. App. 77a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 78a-81a.

INTRODUCTION

Over a vigorous dissent, a divided panel of the Fourth Circuit has 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 the provision is naturally read to apply to "crime[s]," see, *e.g.*, Black's Law Dictionary 1110 (8th ed. 2004) ("offense" means "[a] violation of the law; a crime"). Joining an acknowledged conflict among the courts on the issue, the Fourth Circuit held that "the United States is at war" for purposes of the WSLA even in the absence of a formal declaration, although the Act was written in the context of declared wars and despite Congress's expressed understanding that the pre-2008 Act did not apply to informal conflicts. And it did so contrary to this Court's direction that the WSLA must be "narrowly construed" in favor of repose, *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953), and its recent 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* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (emphasis added).

The enormous practical implications of the panel majority's decision are compounded by the court's equally mistaken construction of the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—long understood to create a "race to the courthouse" that encourages plaintiffs to disclose fraud promptly so the government can investigate, while barring duplicative, parasitic claims. See, *e.g.*, *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005). Deepening a recognized conflict of authority, the court held that duplicative claims barred at the time they are filed can be revived and re-filed once related

prior claims are dismissed, or even once they are reduced to judgment. The panel thus transformed a prohibition on duplicative private claims into a "one-case-at-a-time" rule that, rather than fostering prompt fraud reporting, encourages private relators to delay filing claims to maximize their dollar value.

The panel decision not only exacerbates conflict and confusion among the lower courts on two recurring issues; as a practical matter, it has "dire effects" (App. 46a (Agee, J., concurring in part and dissenting in part)) for a host of industries, from defense contracting to health care to financial services. The Fourth Circuit, which supervises much of the nation's *qui tam* litigation and oversees numerous government agencies and contractors in the Washington, D.C. suburbs, has suspended the running of the statute of limitations for *every* claim of fraud against the government, from at least 2002 to some not-yet (and likely never-to-be) determined point in the future, while simultaneously eliminating any vestige of repose by construing the "first-to-file" bar to permit perpetual refiling of allegations long known to the government from prior suits. The facts of this case amply demonstrate what that means in practical terms: a company having to continue to defend years-old claims in which the government itself has *never* expressed interest, as a relator files and re-files a series of identical complaints raising duplicative allegations until, eventually, all prior related actions have been dismissed, settled, or reduced to judgment.

Put simply, for any entity that has done business with the government in any industry over the past ten years, the panel decision means that the statute of limitations has *not even begun to run* on any of the possible fraud claims that the government or a self-

interested relator might eventually choose to bring. And it will not expire until years after the President or Congress has formally terminated the conflicts in Iraq and Afghanistan—which has not happened yet and, as a practical and political matter, may never happen. Such a reading fundamentally affects the relationship between the government and those who do business with it. This Court's review is urgently needed.

STATEMENT OF THE CASE

1. a. The FCA imposes civil liability for knowingly presenting a false claim to the government for payment or approval. 31 U.S.C. § 3729(a). Its remedial scheme is "essentially punitive in nature," *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-785 (2000), including treble damages and civil penalties, 31 U.S.C. § 3729. The statute authorizes a private "relator" to bring a *qui tam* civil action in the government's name. *Id.* § 3730(b)(1) .

The FCA reflects a careful legislative compromise. While creating a significant financial incentive for relators to file suit, see 31 U.S.C. § 3730(d) (permitting awards of 15-30 percent of recovery plus fees and costs), 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). This serves the "twin goals of rejecting suits which the government is capable of pursuing itself"—for instance, where the government is already on notice of allegations of fraud—"while promoting those which the government is not equipped to bring on its own." *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011); accord *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (first-to-file 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.").

b. 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. The statute originated in the Nation's "gigantic and hastily organized procurement program[s]" during the two World Wars. *Bridges* v. *United States*, 346 U.S. 209, 216-219 (1953). It 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,'" in part because "'[t]he law-enforcement branch of the Government" was "busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.'" *Id.* at 219 n.18 (quoting S. Rep. No. 77-1544, at 1-2 (1942)).

2. KBR provided logistical services to the U.S. military in Iraq under a multi-year government con-

tract.[1] In 2005, relator Benjamin Carter worked for KBR as a water purification operator in Iraq. 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), but declined to intervene. After the district court dismissed the complaint, Carter amended again, this time alleging false billing for labor costs. App. 4a. Shortly before dispositive motions and 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 held that the first-to-file bar prohibited Carter's lawsuit. *Id.* at 4a-5a.

While Carter's appeal from that dismissal was pending, the California case was dismissed. Carter then refiled his 2008 complaint in a new docket ("*Carter 2010*"). The district court dismissed that version of the complaint in May 2011, holding that *Carter 2008* (then still pending on appeal to the Fourth Circuit) served as an independent first-to-file bar. App. 5a-6a. Carter tactically dismissed his *Carter 2008* appeal and, in June 2011, filed his complaint a third time ("*Carter 2011*"). *Ibid.* The government again declined to intervene.

The district court dismissed *Carter 2011* with prejudice. That court reasoned that yet another related *qui tam* action, *United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 8:07-cv-1487 (D. Md.), was pending at the time *Carter 2011* was filed. And by

[1] Petitioner Kellogg Brown & Root Services, Inc., was the contracting entity.

this time, nearly all of Carter's claims were barred by the FCA's six-year statute of limitations. App. 64a, 74a-75a.

As to tolling, the district court expressed skepticism that the WSLA applies at all to civil claims, given that the term "offense" denotes criminal liability. App. 68a. But the court found it unnecessary to reach that issue, observing that in all but one of the handful of cases applying the WSLA to civil claims (all from the 1950s), the United States was a party. *Id.* at 71a. The court analogized to circuit precedent holding that the FCA's tolling provision, 31 U.S.C. § 3731(b)(2), only applies when the United States is a party, based in part on the "practical difficulties" that arise from tolling private claims. App. 72a-75a (citing *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)).

3. A sharply divided panel of the Fourth Circuit reversed, with each judge writing separately. App. 1a.

a. The majority held expansively that the WSLA's tolling provision applies to all civil actions, including FCA claims brought by private relators in which the United States has declined to intervene. App. 14a. The majority first rejected the possibility that the statute "by its plain terms applies only to criminal cases," despite the statutory limitation to "offense[s] involving fraud" and the provision's codification in title 18. *Id.* at 13a. The majority relied on a 1944 amendment that removed the words "now indictable under any existing statutes" from the statute. See Contract Settlement Act, Pub. L. No. 78-395, 58 Stat. 649, 667 (1944). 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. App. 14a.

The majority also rejected the district court's conclusion that the WSLA only applies 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." App. 15a. The majority reasoned that tolling civil claims by private plaintiffs would advance 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. The panel acknowledged that the phrase "[w]hen the United States is at war" "may appear unambiguous" in requiring a formal declaration of war to initiate tolling, and did not dispute that the statute required formalities to demonstrate hostilities have ceased. App. 10a. But although the WSLA was enacted against the backdrop of formal war declarations, the court rejected a plain-text reading as "unduly formalistic" and "ignor[ing] the realities of today." *Id.* at 10a-11a. Instead, the panel invoked the asserted "purpose of the WSLA" to toll the statute in an undefined class of "circumstances * * * in which fraud can easily be perpetuated against the United States," including those times when the President has "power to enter into armed hostilities." *Id.* at 12a.

b. 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 formally proclaimed a "termination of hostilities," which the panel concluded had not yet occurred. App. 9a-

13a. The panel recognized that Carter's current claims were "barred" by *Duprey* and a second *qui tam* case that were pending when Carter filed his complaint, and acknowledged the longstanding rule that jurisdiction is determined based on "facts as they existed when the claim was brought." *Id.* at 20a-21a. But the panel nonetheless held that the district court should not have dismissed Carter's complaint with prejudice because the related cases had been dismissed during the pendency of Carter's appeal. In the panel's view, "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 *Duprey* and the Texas action had been dismissed, the panel held there was no prospective bar to "Carter from filing an[other] action." *Ibid.*[2]

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. 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. Tolling a relator's claims under the WSLA was inconsistent with "the primary concern motivating Congress": i.e., "the ability of [federal] law enforcement to effectively police fraud against the government during the fog of war," when it is "busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." *Id.* at 40a-41a. Because private relators do not suffer similar resource constraints, Judge Agee concluded that tolling their claims would "directly thwar[t]" the FCA's purpose of "combat[ing] fraud

[2] The panel remanded for the district court to consider the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). App. 22a.

quickly" and affording the government time to investigate. *Id.* at 43a, 45a. The panel's holding, Judge Agee explained, gives relators "an expansive limitations period" and incentive to delay bringing claims for years to maximize their monetary value by letting claims accrue. *Id.* at 44a. The Fourth Circuit denied KBR's timely petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Panel Has Effectively Eliminated The Statute Of Limitations For Civil Claims of Fraud Against The Government, Contrary To This Court's Precedent And The Text and History Of The WSLA

By effectively repealing the statute of limitations for civil fraud claims, the panel decision breaks sharply from this Court's decisions "narrowly construe[ing]" the WSLA, *Bridges*, 346 U.S. at 216, deepens a division of authority in the lower federal courts, and marks a watershed expansion of FCA and civil fraud liability. This Court's review is needed to resolve doctrinal conflict and confusion and avoid "dire effects" (App. 46a (Agee, J., concurring in part and dissenting in part)) on a wide range of industries.

A. The Panel Disregarded This Court's Instruction That The WSLA Be "Narrowly Construed"

The panel's expansive interpretation of the WSLA breaks from this Court's decisions requiring a narrow construction of that statute.

Bridges v. *United States*, 346 U.S. 209, 215 (1953), rejected an attempt to expand wartime tolling beyond the WSLA's statutory text and purpose. There, the

government brought criminal charges for conspiracy and false statements during a naturalization proceeding, "none of [which] involve[d] the defrauding of the United States in any pecuniary manner." *Id.* at 212-214, 221. The prosecution invoked the WSLA in seeking to revive the time-barred claims. This Court held that the indictment must be dismissed, rejecting the invitation to expand WSLA tolling to the circumstances of that case, citing case law as well as textual and historical evidence that the WSLA is limited to pecuniary frauds. *Id.* at 220-221.

In so doing, the Court articulated interpretative principles for the WSLA that apply equally here. *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)). The Act's history and origin "emphasiz[e] the propriety of its conservative interpretation," and evidence no congressional "purpose to swallow up the three-year limitation to the extent necessary to reach" the government's position in that case. *Id.* at 216. The justification for tolling, the Court recognized, was 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." 346 U.S. at 219 n.18 (quoting S. Rep. No. 77-1544, at 2 (1942)). There was no warrant, the Court concluded, to expand WSLA tolling beyond the statutory text and purpose. *Id.* at 220.

In *United States* v. *Smith*, 342 U.S. 225, 230 (1952), this Court took a similarly narrow view, refusing to "strai[n] the language of the [WSLA] to sus-

pend the running of the statute beyond the emergency which made the suspension seem advisable." The Court rejected the government's invitation to apply the WSLA to crimes committed after the date of termination of hostilities, explaining that the statute reflects a "fear * * * that the law-enforcement officers would be so preoccupied with the 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 222-229 (emphasis added). The Court declined to rely on policy considerations (there, a purported need to toll offenses "committed during the post-hostilities period") to "alte[r] * * * the statutory scheme." *Id.* at 228-229. Justice Clark's concurrence emphasized that "Congress intended to give the Department [of Justice] more time to apprehend, investigate, and prosecute offenses occurring 'under the stress of present-day events' of the war," and rejected applying the statute to "cases ha[ving] nothing to do with the war or the reconversion thereafter." *Id.* at 230 (Clark, J., concurring). See also *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," a "consequenc[e]" "that Congress certainly would not have tolerated").

The panel's approach cannot be reconciled with *Bridges* and *Smith*'s requirement of a "narro[w] constru[ction]" of the statute, because the panel bypassed numerous other readings that would not have led to a dramatic expansion of WSLA tolling. For example, the panel did not give the term "offense" its ordinary meaning (a criminal offense), instead interpreting the statute as if it used the far broader word "claim." See, *e.g.*, Black's Law Dictionary 1110 (8th

ed. 2004) ("offense" defined to mean "[a] violation of the law; a crime" and synonymous with "criminal offense"); American Heritage Dictionary 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime"). The panel similarly declined to give effect to the WSLA's codification in title 18, or its historical purpose of accommodating delays caused by burdens on criminal prosecutors, which Congress has noted time and again when modifying and reenacting the provision. See, *e.g.*, S. Rep. No. 110-431, at 1-2 (2008) (purpose of legislation is to "protect American taxpayers from criminal contractor fraud" and "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses"); *Smith*, 342 U.S. at 228-229 (noting "fear" that "crimes of fraud * * * would be forgotten until it was too late"); *id.* at 228-229 n.2 (noting legislative history of 1942 enactment and 1944 amendment). Instead, the panel tolled civil fraud claims indefinitely, adopting an open-ended definition of the term "war," despite recognizing that the "unambiguous" statutory text might be construed to require a formal declaration. The panel's maximalist approach is the antithesis of a "conservative interpretation" or "narro[w] constru[ction]." *Bridges*, 346 U.S. at 216.

In extending the WSLA to civil cases, the panel relied on a 1944 amendment deleting the phrase "now indictable under any existing statutes" from language describing the "offenses" subject to tolling. App. 8a, 13a-14a. But this Court's admonishments of narrow construction involved the post-1944 statute. See *Bridges*, 346 U.S. at 211-212 (involving conduct that occurred in 1945); *Smith*, 342 U.S. at 226 (conduct occurred in 1947). And a mere four years after the 1944 amendment, Congress enacted a comprehensive

recodification and reorganization of the federal criminal law that confirmed the WSLA's criminal focus. That enactment "include[d] all pertinent laws" in title 18—including the WSLA under its current citation, 18 U.S.C. § 3287—to "mak[e] it easy to find the criminal statutes." 94 Cong. Rec. 8906 (daily ed. June 18, 1948). Plainly, Congress in 1948 saw nothing in the recent deletion of "now indictable under any existing statutes" that expanded the statute beyond its criminal scope. The Senate Judiciary Committee took a similar view when it revised the statute in 2008, explaining that the 1940s statute "extended the time prosecutors had to bring charges relating to criminal fraud offenses." See S. Rep. No. 110-431, at 2.

Nor does the deletion of "now indictable" compel the panel's holding. That change may simply have indicated that the WSLA would not revive criminal claims whose statutes of limitations had already lapsed, a concern that began to diminish once the war and tolling ended, or to extend tolling to non-felony criminal offenses. Contrary to the panel's view, courts should not presume that Congress has "transform[ed] the scope" of a statute to encompass both criminal *and civil* fraud through a minor (and ambiguous) textual change—particularly for a statute this Court has directed be "narrowly construed." *Wimberly* v. *Labor & Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 518-19 (1987); *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions—it

does not, one might say, hide elephants in mouseholes.").[3]

B. The Panel Ignored *Gabelli*'s Rejection Of Indefinite Tolling

The panel's position is also at odds with the recent decision in *Gabelli*, where this Court squarely rejected a claim to indefinite tolling of a statute of limitations. *Gabelli* held that the five-year statute of limitations applicable to claims of investment fraud runs from the date the offense is complete, not when the fraud is discovered. 133 S. Ct. at 1219. In a portion of its analysis central to that holding, this Court observed that statutes that expressly allow tolling (e.g., to account for delays in discovering a violation) typically "couple that rule with an absolute provision for repose." *Id.* at 1224. This Court specifically cited as an example of an "*absolute* provision for repose," *id.*,

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[3] The panel also relied on a handful of cases from the 1950s (and one recent unpublished district court decision) applying the WSLA to civil claims. App. 14a. In all but one of those cases, the United States itself was a plaintiff. The sole court of appeals decision to allow tolling applied the WSLA to civil claims (or assumed it would apply) without analyzing the question or even acknowledging the possibility it would be limited to criminal cases. See *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954). *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), concluded that "the history of the Suspension Act from its genesis * * * is persuasive to the conclusion that Congress intended only to toll the running of existing statutes of limitations as a bar to *criminal* prosecutions," *id.* (emphasis added), and in reversing on other grounds, the court of appeals did not revisit that conclusion. See *United States* v. *Weaver*, 207 F.2d 796 (5th Cir. 1953). *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546, 551 (D.D.C. 1956), held that the civil claims were untimely even with WSLA tolling, so any statement about applying that statute in the civil context was dicta.

the FCA's discovery rule, under which the United States may bring a civil claim "3 years after the date" material facts are (or should have been) known—"*but in no event* more than 10 years after the date on which the violation is committed," 31 U.S.C. § 3731(b)(2) (emphasis added).

The panel's authorization of indefinite tolling of FCA claims pursuant to the WSLA is impossible to square with this Court's understanding that the statute provides "an absolute provision for repose." 133 S. Ct. at 1224. In the panel's view, the WSLA has already tolled fraud claims for at least 11 years (i.e., since 2002), and the opinion identifies no principle limiting its application to Operation Iraqi Freedom. On 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). App. 10a-13a; see also *id.* at 29a (Wynn, J., concurring) (concluding that "extended or indefinite limitations period is warranted" and noting that "Congress has elected to entirely do away with limitations periods" for particularly heinous crimes such as murder and terrorism). And because its opinion applies equally to claims brought by the government and private relators, the panel effectively allowed a 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); *Gabelli*, 133 S. Ct. at 1224; contra *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Indefinite tolling also conflicts with *Gabelli*'s criticism of requiring defendants to face liability "not only

for [six] years after their misdeeds, 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*'s affirmation of repose in the context of civil penalties aligns with the FCA's own repose provision protecting defendants against damages and penalties after 10 years, and is consistent with other circuits' conclusion that "Congress certainly would not have tolerated" using the WSLA to effect such an expansion of the ordinary statutory limitations period. *Klinger*, 199 F.2d at 646 (L. Hand, J.).

C. The Decision Below Deepens A Conflict Of Authority And Sows Confusion On An Important Threshold Issue

The panel decision deepens confusion and conflict in lower federal courts about whether WSLA tolling "[w]hen the United States is at war" applies in the absence of a formal declaration.[4] As the panel cor-

[4] The parties disagree about whether a 2008 amendment to the WSLA applies, given that the complaint was filed in 2011 but alleges conduct from 2005. The pre-amendment statute applies "[w]hen the United States is at war" and tolls "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). In 2008, Congress amended the WSLA to cover periods "[w]hen the United States is at war or 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." Wartime Enforcement of Fraud Act, Pub. L. No. 110-

rectly acknowledged, "courts are in conflict" on this question. App. 10a. Compare *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"); and *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011) (holding that "the United States was not 'at war' [under the pre-2008] * * * WSLA, as there had been no Congressional declaration of war"); and *United States* v. *Western 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), with *United States* v. *Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008) ("the 'at war' provision of the [WSLA] was intended to capture any authorized military engagement that might compromise or impede the government's ability to investigate allegations of fraud" even without formal declaration of war); and App. 11a ("the Act does not require a formal declaration of war").

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417 § 855, 122 Stat. 4545 (2008) (codified at 18 U.S.C. § 3287 (2009 Supp.)). The panel did not decide which version of the statute applies to respondent's claims, concluding that both extend to civil actions. The panel also concluded that the United States was "at war" under either version, and so did not address the amended language referring to an "authorization for the use of the Armed Forces." App. 10a-13a. The questions presented in this petition—whether the WSLA tolls civil claims brought by private plaintiffs, and whether the panel was correct in determining the statutory suspension period had been triggered—apply to both versions of the statute, and thus this Court similarly need not address the applicability of the 2008 amendment.

"[T]he existence of a conflict between the decision of a court of appeals and that of a district court" is "a factor tending to reinforce" the need for certiorari review, particularly where the decisions demonstrate "lower court confusion over an otherwise important question." Eugene Gressman et al., Supreme Court Practice 256-258 (9th ed. 2007). In *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978), for instance, this Court granted certiorari based on a conflict between a court of appeals and a single district court. And in *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974), this Court cited "evenly divided" district court decisions as a reason for granting certiorari.

Those principles support certiorari here. In addition to a square conflict of holdings between a court of appeals and three district courts about whether a congressionally-declared war is necessary to trigger tolling, lower courts have relied on vastly different analytical approaches. *Shelton*, for instance, observed that "[t]he Judicial Branch of the United States has no constitutional power to declare a war," and relied on evidence from practice and history that the WSLA "does not appear to have ever been used" during post-1945 conflicts, such as Vietnam. 816 F. Supp. at 1135. *Shelton* declined to rely on "[w]hether an armed conflict is a war for the purposes of military rules and regulations," which it found "distinct" from the inquiry "for civilian purposes." *Ibid.* By contrast, *Prosperi* required what one judge termed "extensive post-hoc factual determinations" (*Western Titanium*, 2010 WL at 2650224, *3) on a range of issues, including: (1) the extent of Congress's authorization for the President to act; (2) whether the conflict is deemed a "war" under other definitions of the term and international law; (3) the conflict's size and scope; and (4)

the diversion of resources that might have been expended on investigating frauds against the government. 573 F. Supp. at 449. That these diverse approaches threaten to "entangl[e]" the Judiciary in an "are[a] reserved for the [political] Branches," *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989)—the declaration of a state of war—demonstrates the importance of the issue.

The lack of internal coherence in the panel's decision sows further confusion. In contrast to the panel's loose, "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 the reality 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)) for the political branches 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.

Finally, in wading into the difficult and fundamentally political question of when a war begins and ends, the panel strangely ignored what the legislative branch had to say on the question. The panel gave no weight to Congress's understanding of the WSLA's scope and purpose during the 2008 amendments, which 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 (2008) (view of Senate Judiciary Committee).

D. This Issue Is Important And Recurring

The enormous practical consequences of the panel's decision reinforce concerns about its (atextual) interpretation. Wholly apart from the decade-long tolling from the conflict in Iraq explicitly embraced by the panel decision (contrary to the FCA's "absolute" 10-year statute of repose, *Gabelli*, 133 S. Ct. at 1224), the panel's analysis suggests other, 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 "given that the U.S. has rarely experienced complete peace for more than five years, the Fourth Circuit's reading of the law would expand the statute of limitations nearly indefinitely * * *." Dietrich Knauth, *4th Circ. Shows Expired FCA Claims Can Haunt Contractors,* Law360 (Mar. 27, 2013).

The panel's decision is already having serious practical effects, and the issue is of growing importance as the WSLA is increasingly cited to revive stale claims. Because the WSLA does not textually limit its sweep to claims involving defense contracting or the war effort, relators in non-intervened *qui tam* lawsuits have cited the decision in seeking to re-

vive time-barred claims in cases having "nothing to do with [any] war," *Smith*, 342 U.S. at 230 (Clark, J., concurring).[5] The theory adopted by the court below "is gaining traction, including in cases outside the defense industry," Andrew Schilling, Michelle Rogers, & Ross Morrison, *Wartime Suspension of Limitations Act Suspends Statute of Limitations in False Claims Act Cases* (May 2, 2013), available at http://www.jdsupra.com/legalnews/wartime-suspension-of-limitations-act-su-50700/, and could be applied in any civil case, from financial institutions to healthcare providers to medical implement- or drug-makers. The government in particular is aggressively employing the WSLA outside the defense context. "[T]he government's use of the law has more than doubled" just since 2008, and the government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined. See Reed Albergotti, *U.S. Uses Wartime Law to Push Cases Into Overtime*, Wall St. J., Apr. 16, 2013, at C1.

The panel decision will have a disproportionate effect on nationwide FCA jurisprudence given the concentration of *qui tam* cases in the Fourth Circuit. Even before the panel's decision, relators favored

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[5] See, *e.g.*, Relator's Supplemental Opp'n to the Defs.' Mot. to Dismiss, *United States ex rel. Emanuele* v. *Medicor Assocs., Inc.*, No. 10-cv-245 (W.D. Pa. Mar. 29, 2013) (Docket No. 84) (private relator citing Fourth Circuit's decision to avoid dismissal of untimely claims involving Medicare and Medicaid reimbursement); Reena Dutta, *Old Fraud Claims May Still Be Actionable Under Wartime Suspension of Limitations Act* (Mar. 27, 2013) ("As a result of this decision, courts will likely be seeing older fraud claims brought under the act."), available at http://blog.thewhistleblowerattorney.com/2013/03/27/old-fraud-claims-may-still-be-actionable-under-wartime-suspension-of-limitations-act/.

courts in that jurisdiction: The two Fourth Circuit district courts comprising the Washington D.C. suburbs, where numerous government agencies and contractors are headquartered, are among the top ten venues nationwide for *qui tam* actions. See Gov't Accountability Office, *Qui Tam* Cases Filed in U.S. District Courts at 27 (2006), available at http://www.gao.gov/new.items/d06320r.pdf. That preference will become more pronounced given the panel's relator-friendly decision and the FCA's flexible nationwide venue provision. See 31 U.S.C. § 3732(a) (case "may be brought in any judicial district in which the defendant * * * can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred").

The panel decision thus has grave implications for potential fraud defendants, by requiring them to defend against stale fraud claims years or even decades later, as memories fade and helpful evidence is lost. It places intolerable burdens on companies, by requiring them to either retain documents indefinitely or risk discarding records that may only become relevant years later when an unforeseen fraud claim is filed. The panel's interpretation also raises due process concerns, by extending indefinitely a statute of limitations after the relevant conduct has occurred, regardless of whether the statute has already run for those claims. See, *e.g.*, *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (retroactive "manipulat[ion]" of statutes of limitation may "offend the Constitution"); *William Danzer & Co.* v. *Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 637 (1925) (retroactive extension of limitations period can implicate due process). The panel majority's interpretation has fundamental

implications for the government's relationships with potential contractors.

II. The Panel Has Transformed the FCA's "First-to-File" Bar Into A "One-Case-At-A-Time" Rule, Contrary To The Conclusion of Numerous Courts

Compounding the practical effects of indefinite tolling, the panel eviscerated the statutory "first-to-file" bar, allowing relators to sidestep this crucial limitation on duplicative lawsuits by re-filing a copy of their complaint after the earlier case is dismissed—or, for that matter, after it is reduced to judgment. That position cannot be reconciled with the conclusions of numerous courts of appeals, which prohibit a relator from evading the first-to-file bar through similar procedural maneuvers, and it squarely conflicts with the holding of several lower courts.

A. The Panel Decision Conflicts With Decisions Of Other Courts

The panel's conclusion that the first-to-file bar does not prohibit refiling duplicative actions after earlier actions are dismissed accords with decisions of the Seventh and Tenth Circuits. See *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-964 (10th Cir. 2009). But it departs from the conclusion of numerous other courts that have held that duplicative claims prohibited by the first-to-file bar may not be evaded by procedural maneuvers; as the Fifth Circuit concluded, "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).

United States ex rel. Lujan v. *Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), is illustrative. There, the district court dismissed the relator's claims because an earlier-filed related case was pending when the relator filed her action. *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, No. 92-cv-1282, 2000 WL 33775399 (C.D. Cal. Jan. 20, 2000). Despite the fact that the earlier-filed case was later dismissed, the court held that allowing the relator's claims to go forward "would strip the provision of meaning," because § 3730(b)(5) "create[s] a 'first to file' rule which would prevent multiple separate suits based on the same claims." *Id.* at *3. "[A]llow[ing] subsequent *qui tam* lawsuits to be filed as long as the previously-filed *qui tam* actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5)." *Ibid.* The Ninth Circuit affirmed, holding that § 3730(b)(5) constitutes "an exception-free, first-to-file bar" consistent with the "dual [statutory] purposes" of "promot[ing] incentives for whistle-blowing insiders and prevent[ing] opportunistic successive plaintiffs," 243 F.3d at 1187.

The First Circuit, in *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 32-34 (1st Cir. 2009), similarly affirmed the dismissal of claims on first-to-file grounds even when the prior suit had been dismissed before the date of the subsequent complaint. Accord *United States ex rel. Koerner* v. *Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 450 n.8 (E.D. La. 1996) (dismissed action would remain preclusive under the first-to-file bar). The leading False Claims Act treatise takes the same view, explaining that the rationale for applying the first-to-file bar

when an earlier-filed complaint is dismissed during the pendency of a later-filed case "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." See John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.03[C][2][b] (4th ed., CCH 2012). As the treatise explains, even when an earlier-filed case has been dismissed without being unsealed, "the fundamental purpose of the first-to-file bar has been satisfied in such cases, because—dismissed or not, and unsealed or not—they have 'alerted the government to the essential facts' of an alleged fraud on the government." *Ibid.* (quoting *Grynberg*, 390 F.3d at 1279).

Other courts have held that a relator cannot evade the first-to-file bar by staying an action pending the potential dismissal of an earlier-filed case, or reviving barred claims through amendment. See, *e.g.*, *Makro Capital of Am., Inc.* v. *UBS AG*, 543 F.3d 1254, 1260 (11th Cir. 2008) (relator cannot avoid first-to-file bar through "relation back" under Rule 15 because the private plaintiff "is merely acting as a stand-in for the government" and the "corresponding government-initiated action would have involved only a single suit"); *United States ex rel. Ortega* v. *Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14 (D.D.C. 2003) ("Amendment does not provide a back door to avoid this exception-free [first-to-file] bar"). The panel here approved an approach that is materially indistinguishable from the rationale of, and outcome in, those cases: having re-filed his complaint three times following repeated dismissals, Carter is now invited to file a fourth copy of a virtually identical complaint. Serial re-filing defeats the first-to-file bar just as

surely as restating allegations through amendment or reviving a complaint held in abeyance.

Based on similar reasoning, several district courts have squarely held that the first-to-file bar prevents a relator from re-filing his complaint once an earlier-filed case is dismissed. *United States ex rel. Shea* v. *Verizon Bus. Network Servs., Inc.*, 904 F. Supp. 2d 28 (D.D.C. 2012), appeal pending (No. 12-7133) (D.C. Cir.), dismissed a relator's complaint with prejudice after extensive briefing on the first-to-file issue. The court rejected the relator's position that he could re-file a copy of his complaint "the next day" because the earlier-filed case had since been dismissed. *See* Order, *Shea*, No. 1:09-cv-1050 (D.D.C. Dec. 27, 2012) (Docket No. 67). Similarly, *United States ex rel. Powell* v. *Am. InterContinental Univ. Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012), held that the panel's position here "would create perverse incentives and 'reappearing' jurisdiction," allowing "a relator * * * to file, dismiss, and re-file identical *qui tam* actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action." The panel decision also conflicts with the practice of district courts nationwide, which *routinely* dismiss claims with prejudice under the first-to-file bar.[6] That widespread practice cannot be squared

[6] See, *e.g.*, *United States ex rel. Ortega* v. *Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 20-21 (D.D.C. 2003) (dismissing complaint "with prejudice in its entirety," with portion of dismissal based on "the first-to-file rule of § 3730(b)(5)"); *United States ex rel. Pfeifer* v. *Ela Med., Inc.*, No. 07-cv-1460, 2010 WL 1380167, at *15 (D. Colo. Mar. 31, 2010) (dismissing claims "with prejudice under the first-to-file bar"); see also *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*

with the decision below. Under the panel's view, no case can *ever* be dismissed with prejudice on first-to-file grounds, because every earlier-filed case will eventually proceed to final judgment or face dismissal, and thus will no longer be pending.

B. The Panel's Decision Is Wrong

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 (*Sanders*, 546 F.3d at 295; accord App. 37a-38a (Agee, J., dissenting))—and to re-plead those claims repeatedly, even if related claims have been litigated in other cases in a manner sufficient to put the government on notice of the allegations. But "[o]nce 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; see also *ibid.* ("Once 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."); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 568, 571-572 (10th Cir. 1995); *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (first-to-file bar applies where initial suit provides "sufficient notice for the government to initiate an investigation"). "[D]uplicative

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States ex rel. Becker v. *Tools & Metals, Inc.*, No. 05-cv-0627, 2009 WL 855651, at *14 (N.D. Tex. Mar. 31, 2009); *Her* v. *Regions Fin. Corp.*, No. 07-cv-2017, 2008 WL 5381321, at *3 (W.D. Ark. Dec. 22, 2008); *United States ex rel. Harris* v. *Alan Ritchey, Inc.*, No. 00-cv-2191, 2006 WL 3761339, at *7 (W.D. Wash. Dec. 20, 2006); *United States ex rel. Friedman* v. *Eckerd Corp.*, 183 F. Supp. 2d 724, 725 (E.D. Pa. 2001); *United States ex rel. Wilson* v. *Emergency Med. Assocs. of Ill., Inc.*, No. 01-cv-4558, 2000 WL 34026709, at *2-3 (N.D. Ill. Sept. 24, 2000).

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." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998).

If the first-to-file bar is transformed into a simple sequencing rule, it provides no incentive for relators to file promptly. App. 37a-38a (Agee, J., dissenting); contra *id.* at 30a (Wynn, J., concurring). Nor does it encourage relators to disclose in their first suit all information about potential fraud. The panel's interpretation thus *undermines* the statutory purpose of helping the government promptly to pursue fraud.

The panel concluded its reading was warranted because the first-to-file bar provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may * * * bring a related action based on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5), and the prior actions at issue here were no longer "pending" at the time of its decision. But, by its own terms, the statutory term "pending" is not a time limit on the jurisdictional bar, but a drafting short-hand to distinguish between first-filed action ("the facts underlying the pending action") and any subsequent matter. *Powell*, 2012 WL 2885356, at *4. If Congress had intended the bar to apply only "while the first-filed action is pending," it surely would have said so explicitly.

The legislative history of the provision also undermines the panel's cramped interpretation. The Senate Committee Report accompanying the False Claims Amendments Act of 1986 that added the bar explicitly states that *qui tam* "enforcement * * * is not meant to produce * * * multiple separate suits based

on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986). The House Report also weighs against the panel's approach by omitting any mention of the word "pending" from its explanation that under the first-to-file bar, "[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). Had that word been meant as a substantive limit on the bar, rather than as a description of the first-filed action, the legislative history would be expected to reflect that fact.

III. This Case Is An Attractive Vehicle For Resolving Both Issues

This case is an excellent vehicle to provide guidance to lower courts about one of the most frequently litigated limits on FCA claims, and application of the WSLA, which has mushroomed in importance in recent years. KBR presented both issues to the district court and court of appeals, and both issues were fully briefed and squarely decided. Both issues involve pure questions of law for which there are no unresolved factual issues that might prevent a definitive resolution. This Court has the benefit of three separate opinions concerning the judgment below outlining different bases for decision, in addition to extended discussions of the WSLA and FCA in recent case law.[7]

This case is a particularly appropriate vehicle because its facts illustrate the interaction of the first-to-

[7] See, *e.g.*, *United States* v. *Prosperi*, 573 F. Supp. 2d 436 (D. Mass. 2008) (WSLA); *United States* v. *Shelton*, 816 F. Supp. 1132 (W.D. Tex. 1993) (same); *Lujan*, 243 F.3d at 1188 (first-to-file); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 963 (same); *Poteet*, 552 F.3d at 515 (same).

file bar and the statute of limitations. The procedural history of this litigation—which is now in its seventh year, and which involves a relator who has filed three *identical copies* of his complaint after a series of dismissals and is now invited to file a fourth—brings into sharp relief the practical consequences of an overbroad application of the WSLA and an unduly narrow construction of the FCA's first-to-file bar. The threat of an "infinite series of claims," *Branch Consultants*, 560 F.3d at 378, is anything but hypothetical here, providing this Court a concrete set of facts against which to determine the appropriate role of wartime tolling together with the FCA's first-to-file bar.[8]

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[8] That the panel remanded to the district court to address the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), is no obstacle to this Court's resolution of these issues. That provision serves as a textually independent bar for actions "based upon the public disclosure of allegations or transactions." *Ibid.* Thus, the issues in the petition are outcome-determinative: if this Court were to reverse the panel on either the WSLA or the first-to-file issues, it will eliminate the need for a remand. And regardless of how the district court rules on public disclosure, the panel's precedential decision on the WSLA and the first-to-file bar will continue to support efforts by relators nationwide to revive and maintain otherwise-untimely fraud claims. "The possibility that [a party] might ultimately" prevail on other grounds "would not prevent the Court from addressing the questions presented in the petition. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply Br. for the Fed. Pet'rs 10-11, *Salazar* v. *Patchak*, 132 S. Ct. 2199 (2012) (11-247) (citing *Skinner* v. *Switzer*, 131 S. Ct. 1289, 1300 (2011); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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