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,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), *Amicus* National Defense Industrial Association ("NDIA") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioners. This motion is necessary because Respondent has withheld consent to the filing of the NDIA's brief. Petitioners have consented to the filing of the brief.

The NDIA is a non-partisan, non-profit organization whose membership consists of 90,000 individuals and 1,780 companies, including some of the nation's largest defense contractors. The NDIA has filed numerous briefs as an *amicus* in this Court.

Because a substantial percentage of all False Claims Act ("FCA") lawsuits target defense contractors, the NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress' intentions. Accordingly, the NDIA has a significant interest in the Fourth Circuit's decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013). The decision dramatically extends – and potentially eliminates – the six-year statute of limitations period for relators in FCA suits, and guts the FCA's "first-to-file" requirement. The decision thus permits untimely, repetitive, and harassing lawsuits, and bestows upon relators unwarranted leverage in extracting settlements from the NDIA's members. At bottom, the Fourth Circuit's decision will encourage relators to file redundant and frivolous claims and discourage relators from bringing meritorious claims promptly.

Because the NDIA is uniquely positioned to comment on the importance of the decision below to the defense industry, it offers a useful perspective on the issues before this Court. The NDIA thus respectfully requests that the Court grant this motion for leave to file the attached brief *amicus curiae* in support of Petitioners.

July 26, 2013 Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit organization whose membership consists of 90,000 individuals and 1,780 companies, including some of the nation's largest defense contractors.[1] Because a substantial percentage of all False Claims Act ("FCA") lawsuits target defense contractors, the NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress' intentions.

Accordingly, the NDIA has a significant interest in the Fourth Circuit's decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013). The decision dramatically extends – and potentially eliminates – the six-year statute of limitations period for relators in FCA suits, and guts the FCA's "first-to-file" requirement. The decision thus permits untimely, repetitive, and harassing lawsuits, and bestows upon relators unwarranted leverage in extracting settlements from the NDIA's members. At bottom, the Fourth Circuit's decision will encourage relators to file redundant and frivolous claims and discourage relators from bringing meritorious claims promptly.

Although the decision applies only within the

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[1]No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received timely notice of *amicus*' intent to file this brief. Although Petitioners have consented to the filing of this brief, Respondent has not so consented, and a motion for leave to file pursuant to Rule 37.2(b) accompanies this brief.

Fourth Circuit, there is a large defense industry presence in that area, and the FCA's permissive venue rules permit nearly every relator to bring a claim in a Fourth Circuit district court. Moreover, the Fourth Circuit's decision already has been cited by relators in other circuits who are seeking to revive their untimely FCA claims. For these reasons, *amicus* has a critical interest in obtaining prompt review of the decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus NDIA submits this brief in support of Petitioners urging the grant of the writ of certiorari to the Fourth Circuit's decision applying the Wartime Suspension of Limitations Act ("WSLA") to civil claims, including *qui tam* suits arising out of the FCA.

The decision below warrants review because it is of enormous consequence to the defense contracting community and because it is clearly erroneous. As Petitioners establish, the Fourth Circuit's decision essentially eliminates the statute of limitations for FCA claims by holding that the WSLA tolls such claims until Congress or the President formally terminates all declared wars. The decision also transforms the FCA's "first-to-file" requirement into a "one-suit-at-a-time" rule by permitting relators to bring claims based entirely on allegations from cases that were previously dismissed.

The consequences of the Fourth Circuit's decision for contractors, the government, and, ultimately,

taxpayers, are obvious and dramatic. Freed from the statute of limitations, relators with meritorious FCA claims will delay filing those claims in order to pursue larger damages awards, thereby undermining the government's ability to promptly identify and address instances of fraud. Meanwhile, relators *without* meritorious claims – already the vast majority – will not be barred from bringing their claims repeatedly, or in an untimely fashion, and will be able to seek damages stretching back for years. The result will be increased costs for the government (in the form of more undetected fraud) and increased settlement and litigation costs for contractors, all of which ultimately will be borne by taxpayers.

This Court should not wait to address this issue. Although the decision applies only within the Fourth Circuit, that is not a meaningful limitation on its scope. Most defense contractors are located within the Fourth Circuit, and the venue rules of the FCA will make it easy for relators to take advantage of the Fourth Circuit's decision.

The Fourth Circuit's decision is as incorrect as it is momentous. The NDIA fully agrees with Petitioners' arguments as to why the lower court misinterpreted both the WSLA and the FCA, but writes separately to emphasize the breadth of the court's errors in reading the WSLA to apply to civil fraud claims. That interpretation defies the text, structure, and history of the statute. It cannot be squared with the WSLA's reference to any "offense" against the United States – a term that refers only to criminal claims. It disregards Congress' placement

of the WSLA in Title 18 of the United States Code, which is dedicated to criminal statutes. And it ignores Congress' own pronouncements in 1942, 1946, and 2008 that the WSLA covers criminal claims alone. In the face of such overwhelming evidence of Congress' intent, the Fourth Circuit's expansion of the WSLA to cover civil claims based solely on an ambiguous 1944 amendment was clearly erroneous.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS OF VITAL IMPORTANCE TO THE DEFENSE INDUSTRY.

The Fourth Circuit dramatically expanded the reach of the WSLA by holding that it tolls the statute of limitations for any *civil* claim of defrauding the government for as long as the United States is considered at war. The court also gutted the FCA's "first-to-file" requirement by permitting FCA claims to be re-filed even after a similar (or identical) claim had been dismissed or had proceeded to judgment. Both independently and together, these holdings have enormous practical implications for the defense industry.

FCA litigation is already characterized by a very high percentage of relator suits in which the government declines to intervene, and a correspondingly low percentage of suits that are proven to be meritorious. *See* Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf (last visited July 18, 2013) ("Fewer than

25% of filed qui tam actions result in an intervention") ("*False Claims Act Cases*"); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1251 n.22 (2012) ("90% of intervened cases achieve imposition, while 90% of declined cases do not.").

These unmeritorious suits are a drain on defense contractors and taxpayers, and the decision below will exacerbate that problem in at least three ways. *First*, the decision below encourages savvy relators to wait as long as possible to bring their claims in order to maximize the potential damages award. That outcome not only undermines the FCA's primary purpose of "combat[ting] fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not," *United States ex rel. Sanders v. North American Business Industries, Inc.*, 546 F.3d 288, 295 (4th Cir. 2008), but also produces considerable uncertainty for the defense industry. The indefinite tolling makes it more likely that relevant documents will have been lost, and that potential witnesses will have died, left the company, or otherwise become unavailable. All the while, relators – who know that they intend to bring a FCA claim, while contractors obviously do not – can retain the key documents to support their cases and time the filing of their complaints to maximize the strength of their claims. Contractors' additional costs of defending against untimely and meritless FCA claims ultimately will be borne by taxpayers.

Second, and relatedly, the Fourth Circuit's

decision will improperly increase relators' leverage in settlement negotiations by permitting them to file claims seeking substantially greater damages, thereby creating a strong incentive for defense contractors to settle even unmeritorious claims.

Consider a hypothetical relator's fraud claim on a contract running from 2001-2013, with ten million dollars in annual payments. Before the Fourth Circuit's decision, the relator's total claim would be limited to six years of payments under the FCA's statute of limitations, *see* 31 U.S.C. § 3731(b)(1), resulting in a total claim of sixty million dollars. But with the indefinite extension of the statute of limitations under the Fourth Circuit's interpretation of the WSLA, the relator can seek damages reaching back twelve years to the beginning of the contract, resulting in a total claim of 120 million dollars. Even if a contractor believes that claim to be unmeritorious, the greater potential exposure may cause it to settle to avoid the risk of that significant loss. And as relators start seeing the defense industry settling even questionable claims, it will create only a greater incentive for relators to bring stale claims that assert enormous damages. The Fourth Circuit's decision ultimately will put the defense industry in an untenable position, and will drive up the cost of contracting for the government without any concurrent reduction in fraudulent conduct.

Third, the Fourth Circuit's gutting of the FCA's "first-to-file" requirement will likely lead to a sharp increase in the number of redundant and harassing

suits. With no first-to-file bar or statute of limitations, relators will continue to file the same complaint over multiple years. The current case is a prime example of that phenomenon. The respondent, Benjamin Carter, who worked for a government contractor in Iraq in 2005, filed three identical claims in 2006, 2008, and 2011. Pet. App. 49a-53a. Although the government repeatedly refused to intervene and similar cases were pending when Mr. Carter filed the initial claim in 2006, the defense contractor nevertheless had to defend the same claim three separate times. Under the lower court's decision, relators like Mr. Carter could repeatedly file decade-old claims with little merit.

Again, even if such claims are patently frivolous, it is expensive for contractors (and time-consuming for courts) to address them. Contractors may opt to settle with relators even if their claims are baseless simply to put an end to their repetitive lawsuits. That is not the outcome Congress envisioned for the FCA, and it will only further clog the already congested dockets of the federal courts.

This Court should not delay in addressing this issue. While the decision below applies only in the Fourth Circuit, that is not a meaningful constraint on its reach. Not only is the defense industry highly concentrated in the Circuit, but because the FCA allows relators to bring claims "in any judicial district in which the defendant . . . can be found, resides, [or] transacts business," 31 U.S.C. § 3732(a), relators likely will flock to the courts of the Fourth Circuit to attempt to revive claims that would be

dismissed as barred or untimely elsewhere.

In sum, the decision threatens dire effects on the defense industry with little corresponding benefit for the government. It will subject contractors to massive damage claims reaching back for years, ratcheting up the pressure on contractors to settle even unmeritorious claims and allowing relators to strategically delay informing the government of their allegations of fraud. It will substantially increase uncertainty, as contractors could face FCA claims based on conduct many years in the past. And it will encourage redundant and harassing litigation, thereby wasting the resources of both the defense industry and the courts.

The lower court's ruling is not a minor reworking of the FCA; it fundamentally alters the balance Congress struck between the interests of purported whistleblowers and government contractors. The defense industry – and the country – will suffer as a result.

II. THE DECISION BELOW IS INCORRECT.

Petitioners contend that the Fourth Circuit misinterpreted both the FCA and the WSLA in numerous respects. The NDIA agrees.

As Petitioners have explained, the lower court's interpretation of the FCA's "first-to-file" requirement is incompatible with the text and purpose of 31 U.S.C. § 3730(b)(5). The Fourth Circuit's reading misconstrues the word "pending" in Section 3730(b)(5) and undermines the unquestioned purpose of the statutory provision – to prevent

relators from bringing multiple suits based on factual allegations of which the government is already aware. *See* Pet. 29-30.

The NDIA also writes separately to highlight one of the Fourth Circuit's basic errors in statutory construction: its ruling that the WSLA applies not just to criminal claims, but to civil claims as well. That conclusion is fundamentally inconsistent with the text, structure, and legislative history of the WSLA, and defies this Court's admonishment that the WSLA should be "narrowly construed." *Bridges v. United States*, 346 U.S. 209, 215-16 (1953).

Statutory construction begins with the text of the statute, *see Carter v. United States*, 530 U.S. 255, 271 (2000), and here, the text is clear. The WSLA applies to "any *offense* involving fraud or attempted fraud against the United States." 18 U.S.C. § 3287 (emphasis added). Because the "terms crime, offense, and criminal offense are all said to be synonymous, and ordinarily used interchangeably," Black's Law Dictionary 1186 (9th ed. 2009) (internal quotation marks omitted), the text of the WSLA plainly limits its application to claims of criminal fraud. And because "the statute's language is plain," the Court must "enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

The placement of the WSLA within the United States Code corroborates its plain meaning. The statute is part of Title 18, which "codifies the federal criminal laws." *Pennsylvania v. Nelson*, 350 U.S. 497, 519 (1956). That is compelling evidence that Congress intended to limit the application of the

WSLA to criminal fraud claims alone. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (finding that placement of a state law within the probate code, instead of the criminal code, supported interpretation that the law was meant to create a civil proceeding rather than a criminal proceeding).

Given the inconsistency between its interpretation and the plain meaning of the WSLA, it is no surprise that the Fourth Circuit hardly analyzed the statutory text or structure at all. Instead, the court relied almost exclusively on a minor 1944 amendment to the WSLA, which deleted the qualifier "now indictable under existing statutes" from the statutory reference to "offenses." In the Fourth Circuit's telling, that single deletion changed the WSLA from a statute that only applied to criminal fraud claims to one that applied "to all actions involving fraud against the United States." Pet. App. 14a.

The circuit court read far too much into the 1944 amendment. The fundamental purpose of the WSLA was to extend the statute of limitations for criminal claims. The Senate report accompanying the 1942 bill that enacted the WSLA specifically referenced the "*criminal* statute of limitations," and noted that the bill would give the government more time to "*prosecute* frauds." S. Rep. No. 77-1544, at 1-2 (1942) (emphases added). The statute accordingly imposed a three-year limitations period to bring claims following the termination of a war; a period that matched the standard, three-year statute of limitations for criminal fraud offenses at that time.

Id. Congress' purpose was not lost on this Court, which noted that Congress passed the WSLA out of concern that "law-enforcement officers would be so preoccupied with prosecution of the war effort that the *crimes of fraud* perpetrated against the United States would be forgotten until it was too late." *United States v. Smith*, 342 U.S. 225, 228-29 (1952) (emphasis added).

Against that backdrop, it is implausible that, just two years after enacting the WSLA, Congress would have dramatically expanded the statute to cover civil claims simply by deleting the phrase "now indictable under any existing statutes." The Fourth Circuit's contrary claim ignores the basic principle that Congress does not fundamentally alter a statutory provision in "so cryptic a fashion," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); that Congress, in other words, does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had wished to apply the WSLA to all civil fraud claims against the government, it surely would not have been so coy. There are any number of ways Congress could have covered civil claims less obliquely.[2]

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[2] The Fourth Circuit's reading of the 1944 amendment to cover civil FCA claims also cannot be squared with Congress' attempt to rein in FCA claims in the early 1940's. In 1943, this Court held that the FCA allowed a private relator to bring suit even if the suit was based entirely on a previous investigation by the government. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48 (1943). Both the Attorney General and Congress balked at the Court's ruling. Their dissatisfaction

Moreover, the Fourth Circuit's reasoning overlooks much more compelling alternative explanations for the 1944 amendments. The 1942 act that introduced the WSLA was a temporary measure that only applied the statutory tolling period to World War II. *See* S. Rep. No. 77-1544, at 1 (1942) (updating expiration date of World War I version of WSLA to "June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate"). Congress enacted the 1944 amendment in part to eliminate the need to renew the act in future declared wars. *See* Act of July 1, 1944, ch. 358, 58 Stat. 649, 667. In that context, Congress likely eliminated the phrase "now indictable under any existing statutes" because it wished to make the WSLA permanent, and the term "existing statutes" was only needed if the statute's applicability was expressly time-limited. In addition, given that the deleted phrase is redundant with the term "offense," Congress may well have viewed it as surplusage and removed it in an effort to streamline the statute.

Whatever Congress' exact rationale for the 1944 amendment may have been, post-1944 developments

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ultimately led to a 1943 law that curtailed relators by prohibiting *qui tam* suits based on information gleaned from a government investigation. *See* Francis Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 Cath. U.L. Rev. 935, 941-42 (1993). It defies logic for Congress to have expanded (or even eliminated) the limitations period for relators just months after sharply restricting relators' ability to bring FCA claims.

demonstrate that the Fourth Circuit's speculative explanation is incorrect. In 1948, four years after the 1944 amendment that purportedly expanded the WSLA to civil claims, Congress placed the WSLA into Title 18 of the United States Code, which was dedicated then (as now) to criminal statutes. *See* Act of June 25, 1948, ch. 645, 62 Stat. 683. And that same year, Judge Learned Hand reaffirmed that the purpose of the WSLA – "as amended in 1944" – was to not "let *crimes* pass unpunished which had been committed in the hurly-burly of war." *United States v. Gottfried*, 165 F.2d 360, 367-68 (2d Cir. 1948) (emphasis added).

Indeed, some fifty years later, Congress still regarded the WSLA as pertaining solely to criminal offenses. In passing the 2008 amendment to the WSLA, Congress noted that the statute "protect[ed] American Taxpayers from *criminal* contractor fraud." S. Rep. No. 110-431, at 1-2 (2008) (emphasis added). The 2008 amendment modified the WSLA's trigger to cover not only declared wars, but also congressionally authorized conflicts, so that the statute would permit the government to bring "*criminal* actions in investigations of contracting fraud" in the early years of the Afghanistan and Iraq wars. *Id.* at 4 (emphasis added). And the 2008 amendment increased from three to five years the WSLA's limitations period for bringing claims following the termination of a war, reflecting the increase from three to five years in the standard statute of limitations for criminal fraud provisions. *Id.* at 5.

Interpreting the WSLA to apply to civil claims also makes little sense given Congress' underlying rationale for the statute. Congress sought to toll the statute of limitations for criminal fraud claims during times of war because uncovering and prosecuting those claims while simultaneously expanding procurement programs placed great demands on the government. *See Bridges*, 346 U.S. at 218-19 (the WSLA "sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution"). Civil fraud claims do not present the same concerns. In the vast majority of FCA cases, the government does not even intervene. *See False Claims Act Cases* ("Fewer than 25% of filed qui tam actions result in an intervention"). Indeed, this case illustrates the point precisely: the government elected not to intervene, so there is no need for concern about over-taxing the government's prosecutorial resources. And in those instances when the government does intervene, its burden of proof in a civil FCA case is far less onerous – and thus its need to commit investigatory and litigation resources is much lower – than it would be in a criminal case. The Fourth Circuit's expansion of the WSLA to civil claims thus is unrelated to the statute's animating purpose.

Moreover, the Fourth Circuit's expansion of the statute fails to take into account the very real differences between the situation during World War II, when the statute was enacted, and today. World War II of course was an all-encompassing struggle that demanded the full resources and attention of all branches of government, including law enforcement.

In that context, it made sense to allow the government to wait until after the conflict to bring claims, particularly criminal fraud claims that required substantial commitments of time and resources to prosecute. Under the Fourth Circuit's new view of the statute, however, the FCA's statute of limitations will be tolled for civil as well as criminal claims for the potentially open-ended period of combat operations during the nation's war on terror. This is so even though private relators – and the government itself – have demonstrated their ability to file a multitude of FCA claims while those operations are ongoing. In this context, the Fourth Circuit's decision to effectively eliminate the FCA's statute of limitations goes far astray from the WSLA's original purpose and context.

In sum, in 1942, 1948, and 2008, Congress both explicitly and implicitly restricted the scope of the WSLA to criminal fraud claims. It never once expressed any desire to expand the WSLA to civil fraud claims, and never hinted that the WSLA had such a broad reach. Moreover, it would not advance Congress' purpose in enacting the WSLA to expand the statute's coverage to civil claims. Nevertheless, the Fourth Circuit found that the deletion of an ambiguous statutory phrase in 1944 effected a massive expansion of the scope of the WSLA such that all civil fraud claims involving the government – including those brought exclusively by private parties – were tolled for years, or potentially, indefinitely. That reading of the WSLA defies all basic principles of statutory interpretation.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant certiorari to review the decision below.

July 26, 2013

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