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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), should apply to civil *qui tam* actions brought under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA").[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to ensuring a reasonable interpretation of a federal statute affecting businesses, by adhering closely to the plain meaning

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioners and for the respondent have filed with the Court their respective blanket consent letters, consenting to the filing of amicus curiae briefs in support of either or neither party.

of the text. When, as here, a federal statute suspends substantially, if not indefinitely, the statute of limitations for certain offenses against the Government, the scope of that statute should be interpreted narrowly, and according to the ordinary meaning of its terms. As this case illustrates, the removal of certain language in the evolution of a statute should be interpreted with common sense, with careful attention to that statute's text and context, and with the goal of resolving any ambiguities in favor of repose for the defendant. This approach will best preserve the protections afforded a defendant under the applicable statute of limitations, such as the avoidance of stale claims that may no longer be defensible due to the passage of time.

It is clear that the Suspension Act already subjects Government contractors to the risk of long-delayed criminal prosecution over potentially long delayed claims. Evidence and witnesses that may be essential to the contractor's defense may have been lost due to the passage of time during a protracted armed conflict, such as the current situation in Iraq and Afghanistan. Essential evidence may even be lost due to the lengthy armed conflict itself. A decision extending the Suspension Act to civil *qui tam* claims under the FCA would therefore expose potential business defendants to the lingering uncertainty, disruption, and prejudice in having to defend otherwise stale criminal *and* civil claims. In NELF's view, Congress could never have intended such a burdensome result, which would impose substantial costs on businesses and the federal judiciary alike.

In this connection, NELF has filed a number of other amicus briefs in recent cases before this Court, which have addressed similar issues of statutory interpretation that affect businesses.[2]

For these and other reasons discussed below, NELF believes that its brief in this case will assist the Court in deciding the issue whether the Suspension Act should apply to civil *qui tam* claims brought under the FCA.

SUMMARY OF ARGUMENT

The Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), applies exclusively to crimes of contractor fraud against the Government. The Fourth Circuit's opinion to the contrary is based entirely on a misunderstanding of a crucial piece of the Act's statutory history. In 1944, Congress deleted the phrase "*now* indictable

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[2] *See, e.g.*, *Atlantic Marine Constr. Co. v. United States Distr. Ct. for the Western Dist. of Tex.,* 134 S. Ct. 568 (2013) (forum selection clause designating particular federal judicial district generally enforceable, in motion to transfer venue under 28 U.S.C. § 1404(a)); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (standard of but-for causation, and not mixed-motive liability, applies to Title VII retaliation claims); *Vance v. Ball State*, 133 S. Ct. 2434 (2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (absent contrary congressional command, Federal Arbitration Act ("FAA") requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts state law effectively requiring class arbitration as condition for enforcing consumer arbitration agreements).

under existing statutes," which had modified the word "offenses" in the 1921 and 1942 predecessor statutes to the Suspension Act. The lower court concluded that Congress' removal of the phrase "now indictable" in 1944 expanded the meaning of the word "offenses" to include non-indictable, civil claims.

The lower court erred. The operative word here is the adverb "now," and not the word "indictable," which is already subsumed in the ordinary criminal meaning of the word "offense." Therefore, the unusual phrase "*now* indictable" was merely a *temporal* restriction on the word "offenses." The phrase limited the 1921 and 1942 statutes to *past* crimes of contractor fraud. An offense was "*now* indictable" if it had already occurred, and was still timely, when those statutes took effect. Accordingly, when Congress removed the phrase "*now* indictable" in 1944, it simply extended the Suspension Act to *future* offenses of contractor fraud. By no means, then, did the 1944 amendment affect in any way the exclusively criminal meaning of the word "offense."

Significantly, Congress in 1942 borrowed the phrase "*now* indictable," perhaps too hastily, from the 1921 statute, which had extended the criminal statute of limitations for past, post-World War I acts of contractor fraud that were still timely when that statute took effect. In fact, the marginal note for the phrase "now indictable" in the 1921 Session Laws reads: "**Application to prior acts.**" Pub. L. No. 67-92, ch. 124, 42 St. 220 (1921). The legislative history of the 1921 statute confirms further that the phrase "*now* indictable" was intended merely to

restrict the scope of that statute to past, post-war acts that were still timely. Thus, the 1942 statute was also limited to past acts because it borrowed that phrase *verbatim* from the 1921 statute. And the 1944 amendment removed that temporal restriction from the 1942 statute.

The temporal function of the phrase "*now* indictable" is also confirmed by the sentence that immediately follows it, in both the 1921 and 1942 statutes. That sentence explained that those statutes would not apply to acts that were time-barred; the statutes would apply only to *timely* past acts. Moreover, the legislative history for the 1921 statute explains that, in so limiting itself to timely past acts, the 1921 statute would thus comply with the *Ex Post Facto* Clause of the United States Constitution.

While the 1944 amendment retained this same sentence appearing in the 1921 and 1942 statutes, it also deleted the "*now* indictable" restriction. This indicates that the 1944 statute was *both* prospective and retrospective, applying to past and future crimes of contractor fraud. This makes sense because the 1942 statute had not suspended offenses occurring after its effective date. Accordingly, the 1944 statute filled this gap in coverage by suspending the limitations period for any timely past offenses, while also suspending any future offenses, including crimes arising under the new Contract Settlement Act of 1944.

The story is completed in 1948, when Congress, during peacetime, enacted a permanent

and entirely *prospective* Suspension Act. Accordingly, Congress in 1948 deleted the sentence, discussed above, that had appeared in the 1921, 1942, and 1944 statutes on the issue of timely past acts. The 1948 legislative history confirms that this sentence, discussing retroactivity, was deleted because it was no longer necessary.

In sum, the Suspension Act has always applied exclusively to crimes of contractor fraud. By deleting the phrase "*now* indictable," Congress in 1944 merely removed a temporal restriction on the word "offenses," which had limited the 1921 and 1942 predecessor statutes to past crimes of contractor fraud. Therefore, the relator's civil *qui tam* complaint in this case is not covered by the Suspension Act and should be dismissed as untimely under the FCA.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT APPLIES EXCLUSIVELY TO CRIMES OF CONTRACTOR FRAUD AGAINST THE GOVERNMENT.

At issue is whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), a Criminal Code provision, suspends the running of the statute of limitations for civil claims of fraud against the Government. The Suspension Act applies to "any *offense* [] involving [contractor] fraud . . . against the United States," and suspends the running of the applicable statute of limitations during, and for five years after, an armed conflict.

18 U.S.C. § 3287 (emphasis added).[3] The False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), in turn,

[3] The Suspension Act provides, in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, ... 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 . . . 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.

18 U.S.C. § 3287 (emphasis added).

The parties apparently dispute whether the current version of the Suspension Act, as amended in 2008, applies to this case, which involves alleged facts occurring in 2005. See *United States ex. rel. Carter v. Halliburton et al.*, 710 F.3d 171, 174-75 (4th Cir. 2013). *See also* Wartime Enforcement of Frauds Act, Pub. L. No. 110-417, § 855, 122 Stat. 4545, 4545-46 (2008) (codified as amended at 18 U.S.C. § 3287) (amending Suspension Act to include congressionally authorized armed conflicts, and to enlarge post-conflict suspension period from three to five years). However, the Court need not reach this issue because the Suspension Act has remained unchanged in its application to "any *offense* [] involving fraud . . . against the United States . . . ." 18 U.S.C. § 3287 (emphasis added). This is the sole statutory language that need be interpreted to

protects the Government from contractor fraud and provides both criminal and civil remedies. 18 U.S.C. § 287 (criminal enforcement);[4] 31 U.S.C. § 3730 (civil enforcement). As part of its civil remedies, the FCA allows private citizens, or "relators," to bring suit on behalf of the Government. 31 U.S.C. § 3730(b). These civil *qui tam* claims under the FCA are subject to a six-year limitations period. 31 U.S.C. § 3731(b)(1).

The respondent in this case, Benjamin Carter, filed the *qui tam* complaint at issue against the petitioners, Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc. (collectively "KBR"), more than six years after KBR's alleged acts of contractor fraud. *See United States ex. rel. Carter v. Halliburton et al.*, 710 F.3d 171, 174-76 (4th Cir. 2013). The Fourth Circuit held that the Suspension

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decide the central issue, discussed in this brief, of whether the Act applies to civil *qui tam* claims under the FCA.

[4] Section 287 of the Federal Criminal Code, titled "False, fictitious or fraudulent claims," provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287.

Act applied to civil claims of contractor fraud against the Government, and thus allowed Carter to proceed on the merits of his otherwise untimely FCA complaint. *See id*., 710 F.3d at 179-80. In essence, then, the issue here is whether civil claims of contractor fraud against the Government are suspended substantially, if not indefinitely, due to the lengthy and ongoing armed conflicts in Iraq and Afghanistan.

NELF agrees with the arguments already presented by KBR, and by other amici, that the Suspension Act applies only to *crimes* of contractor fraud. NELF does not repeat those arguments here. Instead, amicus argues in detail below that the Fourth Circuit's decision is based entirely on a misunderstanding of a crucial piece of the Suspension Act's statutory history.

A. Congress' Deletion Of The Phrase "Now Indictable" From The Suspension Act In 1944 Merely Removed A Temporal Restriction On The Word "Offenses," Which Had Limited The 1921 and 1942 Predecessor Statutes To Past Crimes of Contractor Fraud.

The Fourth Circuit's decision rests entirely on a misapprehension of a 1944 amendment to the Suspension Act. In 1944, Congress deleted the unusual phrase "*now* indictable under existing statutes," which had modified the words "offenses involving [contractor fraud]" in a 1942 predecessor statute. *See* An Act to suspend temporarily the

running of statutes of limitations applicable to certain offenses, Pub. L. No. 77-706, ch. 555, § 1, 56 Stat. 747, 747-48 (1942) ("1942 statute") (emphasis added)).[5] *See also* Contract Settlement Act of 1944, Pub. L. No. 78-395, ch. 358, § 19(b), 58 Stat. 649, 667 (1944) (deleting "now indictable . . ." phrase from 1942 statute).[6]

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[5] The 1942 statute provided:

> [T]he 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.

56 Stat. at 747-48 (emphasis added).

[6] In particular, § 19(b) of the Contract Settlement Act of 1944 amended the 1942 statute as follows:

> (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,

The lower court concluded erroneously that Congress' removal of the words "now indictable" from the Suspension Act in 1944 expanded the meaning of the word "offenses" in that act to include non-indictable, civil claims. *See Halliburton*, 710 F.3d at 179. The Fourth Circuit is apparently not alone in so interpreting this 1944 amendment. *See id.*, 710 F.3d at 179-80 (citing several other cases reaching same conclusion).

The Fourth Circuit, along with the other courts that have reached the same conclusion, erred by failing to interpret the complete phrase "*now* indictable." Instead, the lower court focused exclusively, and improperly, on the 1944 amendment's removal of the single word "indictable." However, "[i]nterpretation of a word or phrase depends upon reading the *whole statutory text*, considering the purpose and context of the statute, and *consulting any precedents or authorities* that inform the analysis." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) (emphasis added).

> award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract . . . 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.'

58 Stat. at 667, § 19(b) (emphasis added).

The lower court also failed to consider the clear origins of the unusual phrase "*now* indictable." Congress first used the phrase "*now* indictable" in a similar statute enacted in 1921. That statute was enacted on a temporary basis to extend the criminal statute of limitations for *past* offenses occurring immediately after the First World War. *See* An Act to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases, Pub. L. No. 67-92, ch. 124, 42 St. 220 (1921) ("1921 statute").[7] Significantly, the marginal note appearing alongside the phrase "now indictable" in the 1921 Session Laws reads: "**Application to prior acts.**" 42 St. at 220.

The 1942 statute, in turn, borrowed this "*now* indictable" phrase, perhaps too hastily, from the

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[7] The 1921 statute amended the general criminal statute of limitations as follows:

> Sec. 1044. No person shall be prosecuted, tried, or punished for any *offense*, not capital . . . unless the *indictment* is found . . . 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.

42 Stat. at 220 (emphases added and in original).

1921 statute. *See Bridges v. United States*, 346 U.S. 209, 217-19 (1953) (discussing origins of 1942 statute in 1921 statute). Therefore, the 1942 statute was, by operation of its plain terms, also restricted to *past* crimes of contractor fraud. And the 1944 amendment deleted this "*now* indictable" restriction, thereby applying the Suspension Act to *future* offenses of contractor fraud.

Therefore, a proper interpretation of the complete phrase "*now* indictable," informed by its statutory origins, establishes that the phrase functioned merely as a *temporal* restriction on the word "offenses," in the 1921 and 1942 predecessor statutes to the Suspension Act. An offense was "*now* indictable" if it had already occurred, and was still timely, when those statutes took effect. Thus, the 1921 and 1942 statutes were limited to past crimes of contractor fraud, while the 1944 amendment applied the Suspension Act to future crimes. By no means, then, did the 1944 amendment affect in any way the exclusively criminal meaning of the word "offense."

i. The operative word in the statutory phrase "now indictable" is the adverb "now," which indicates that the offense must have already occurred, and still be timely, when the statute took effect.

The starting point here is the plain and *complete* language of the Suspension Act, which, before 1944, required that an offense must be "*now* indictable under any existing statutes" to receive a suspended limitations period. *See* 1942 statute, 56 Stat. at 747-48; 1921 statute, 42 St. at 220. A proper interpretation of the complete phrase "*now* indictable" establishes that the phrase was merely intended as a *temporal* restriction on the word "offenses" in the 1921 and 1942 predecessor statutes. An offense was "*now* indictable" under those statutes if the crime had already occurred, and was still timely, when those statutes took effect.[8]

The salient word here is the adverb "now," and *not* the word "indictable," which is already

[8] Therefore, under the three-year criminal limitations period then in effect, the 1942 statute would have applied only to crimes of contractor fraud that had occurred within three years before that statute's effective date of August 24, 1942. *See* 56 Stat. at 748, § 2 (effective date). *See also* An Act to amend section 1044 of the Revised Statutes relating to limitations in criminal cases, chap. 56, 19 Stat. 32, 32-33 (1876) (three-year criminal limitations period then applicable). In 1954, the criminal limitations period was expanded from three to five years. *See* Act of September 1, 1954, Pub. L. No. 769, ch. 1214, § 10(a), 68 Stat. 1142, 1145 (1954) (codified as amended at 18 U.S.C. § 3282(a)).

subsumed in the ordinary criminal definition of the word "offense." After all, Congress has, from 1921 until the present day, always codified the Suspension Act in the *Criminal Code* and has consistently understood the term "offense" as a synonym for the word "crime." *See* n.7, above. *See also* S. Rep. No. 110-431, at 1-2 (2008) ("This legislation will protect 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.") (discussing 2008 amendment to Suspension Act) (emphasis added); 61 Cong. Rec. H7060 (daily ed. Oct. 31, 1921) (statement of Rep. Graham, sponsor of bill H.R. 8298) ("As the war ended on the 11th of November, 1918, it will be seen that a great many of these *crimes* are already barred by the statute of limitations . . . . However, in the period following the war, . . . *crimes* were committed which are not yet barred . . . . [Thus,] the statute should be so extended that if there has been *crime* the Department of Justice may prosecute.") (emphasis added); Black's Law Dictionary, *available at* http://thelawdictionary.org/offense/ (as visited Sept. 4, 2014) ("offense" includes indictable and non-indictable *crimes*).

Indeed, the adverb "now" heads the entire phrase "*now* indictable under any existing statutes," and is therefore the key word "to finding a single, more uniform interpretation of th[at] statutory phrase . . . ." *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010). Accordingly, the adverb "now" tells us *when* the offense must have been indictable to fall under that statute. With the adverb "now," Congress in

1921 and 1942 designated the statute's effective date as the operative event--i.e., the "now" in "*now* indictable"--for determining which offenses would receive a suspended limitations period. Only this interpretation can give full meaning to the phrase "*now* indictable," while also adhering to the Court's instruction that the Suspension Act should be construed *narrowly* in favor of repose. *See Bridges*, 346 U.S. at 215-16 (discussing same). *See also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S. Ct. 716, 724 (2011) ("[W]e must give effect to *every word* of a statute wherever possible.") (citation and internal punctuation marks omitted) (emphasis added).

Moreover, it would be superfluous to include the word "now" in the phrase "now indictable" if Congress had intended the 1921 and 1942 statutes to apply to future offenses of contractor fraud. After all, most any criminal statute would, *by default*, apply exclusively to future acts. "The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively." *Johnson v. United States*, 529 U.S. 694, 701 (2000).[9]

Clearly, the use of the qualifying adverb "now" was intended to *reverse* this presumption of prospectivity and thereby restrict the application of the 1921 and 1942 statutes to past crimes of contractor fraud. In fact, the House Committee Report accompanying the 1921 statute confirms this

[9] The *Ex Post Facto* Clause provides: "No . . . ex post facto Law shall be passed." U.S. Const., art I, § 9, cl. 3.

point. That report contains a statement from the then Solicitor General that the 1921 statute should be drafted clearly to apply to past and not future acts, thereby overcoming the presumption of prospectivity:

> [C]are should be taken that the amendatory statute should be clearly made *to apply to offenses already committed*, for, in the absence of such clear intendment, there is a tendency on the part of the courts 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. Rep. No. 67-365, at 2 (1921) (emphasis added). *See also Johnson,* 529 U.S. at 701 ("Absent a clear statement of that intent [to apply a criminal statute retroactively], we do not give retroactive effect to statutes burdening private interests").

In sum, the Fourth Circuit erred by disregarding the operative word "now" in the phrase "*now* indictable." In so doing, the lower court isolated the word "indictable" from its immediate context and misinterpreted the 1944 amendment as having expanded the definition of the word "offense" to include non-indictable, civil claims. As a result, the lower court failed to see that the phrase had served merely to restrict the 1921 and 1942 statutes to past offenses of contractor fraud. Accordingly, removal of that phrase in 1944 merely extended the

Suspension Act to future offenses of contractor fraud.

ii. The 1942 statute borrowed the phrase "now indictable" from the 1921 statute, which had extended the criminal limitations period only for past acts of contractor fraud that had occurred immediately after the First World War.

As amicus has noted above, Congress in 1942 borrowed the phrase "*now* indictable under any existing statutes," perhaps too hastily, from the 1921 statute, a temporary post-war statute that was later repealed in 1927. *See* An Act Amending section 1044 of the Revised Statutes of the United States as amended by the Act approved November 17, 1921, Pub. L. No. 70-3, ch. 6, 45 Stat. 51 (1927) (repealing 1921 statute). Indeed, this Court has recognized that the 1942 statute borrowed much from the 1921 statute:

> [The 1942 statute] was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I. . . . In 1942, the reports and proceedings demonstrate a like purpose, coupled with *a design to readopt the World War I policy*.

Bridges, 346 U.S. at 217-19. *See also* S. Rep. No. 77-1544, at 1-2 (1942) (discussing 1921 statute in detail when proposing 1942 suspension statute).

It is clear that the 1921 statute was intended solely to extend the criminal limitations period for *past* offenses of contractor fraud that were still timely, i.e., that were "*now* indictable," when that statute took effect. As amicus has already noted above, the marginal note appearing alongside the phrase "*now* indictable," in the 1921 Session Laws, stated: "**Application to prior acts**." 42 St. at 220.

The legislative history of the 1921 statute further confirms that the phrase "*now* indictable" was intended to restrict the 1921 statute to past offenses of contractor fraud. *See* H. Rep. No. 67-365, at 2 (Solicitor General's statement that 1921 statute should be worded clearly to apply to prior acts). Notably, the 1921 statute was enacted after the First World War, when the (then) three-year criminal statute of limitations had already run for most wartime acts of contractor fraud. *See* 61 Cong. Rec. H7060.[10] *See also* H. Rep. No. 67-365, at 2

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[10] As Congressman Graham, the sponsor of the 1921 bill, explained:

> Section 1044 of the Criminal Code provides a period of limitation of *three years* on almost all offenses against the Government, such as might have been committed at any time *during or since the war*. As the war ended on the 11th of November, 1918, it will be seen that a great many of *these [past] crimes are already barred* by the statute of limitations, the bar having

(discussing same). However, in 1921, the criminal statute of limitations had not yet run with respect to offenses of contractor fraud that had occurred during the immediate aftermath of the First World War, i.e., within the three years after Armistice Day (November 11, 1918), until the statute's effective date of November 17, 1921. *See* 42 St. at 220, § 2 (effective date). *See also* n.7, above; H. Rep. No. 67-365, at 1-2.[11]

> been complete on the 11th of November, 1921, as to all *crimes committed during the war period*. As to all such crimes, no prosecution can now be had. However, *in the period following the war*, and in the things that grew out of the war, *crimes **were** committed which are not yet barred*, and it has been thought useful, inasmuch as the Attorney General is now investigating many of these matters, that the statute should be so extended that if there has been crime the Department of Justice may prosecute.

61 Cong. Rec. H7060 (emphasis added).

[11] In particular, the 1921 House Committee Report states:

> The Department of Justice has been engaged in the investigation . . . of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany *and since its conclusion*. . . . Under the existing statute of limitations, . . . many of these alleged crimes are already barred . . . . *However, as to a very large and considerable number of cases*, if prosecutions might be found necessary, the same could be had if the existing statute were extended so that the Government might have the opportunity, not only to make an

During those three years, 1918 to 1921, the Government maintained a military presence in Europe.[12] This active participation in the war's aftermath gave rise to potential crimes of contractor fraud. *See* 61 Cong. Rec. H7060 ("[I]n the period following the war, and in *the things that grew out of the war*, crimes *were* committed which *are* not yet barred . . . .") (emphasis added). And, as both Congress and this Court have recognized, the exigencies of wartime and its immediate aftermath are the sole justification for extending the limitations period for crimes against the Government. *See Bridges*, 346 U.S. at 218 (discussing H. Rep. No. 67-365, in which "Congress was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program [during the First World War]. It sought to help

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> investigation, but thereafter to begin the necessary prosecutions.

H. Rep. No. 67-365, at 1-2 (quoted in *Bridges*, 346 U.S. at 218 n.17) (emphasis added).

[12] "The United States . . . did not formally end its involvement in the war until the Knox–Porter Resolution was signed on 2 July 1921 by President Warren G. Harding." http://www.quickiwiki.com/en/First_World_War (as visited Sept. 4, 2014). Moreover, "American soldiers remained in Europe for some time [after Armistice Day] as the demobilization continued, guarding against renewed hostilities."
http://www.eur.army.mil/organization/history.htm (as visited Sept. 4, 2014). In particular, U.S. troops entered Germany in December 1918 and occupied that country in some capacity until January 23, 1923. *See id.*

safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution."). *See also Bridges*, 346 U.S. at 219 (discussing Government's general lack of sufficient resources during wartime to investigate and prosecute crimes of contractor fraud, as identified in legislative histories of 1921 and 1942 statutes).

In short, any past offenses of contractor fraud that had occurred during those three years after Armistice Day (1918-1921) were the "*now* indictable" offenses targeted by the 1921 statute. Those offenses would accordingly receive an extended limitations period under the 1921 statute.

However, the nation's involvement in the First World War's aftermath had diminished substantially by November 17, 1921, when the 1921 statute took effect. *See* n.11, above. Thus, there was no longer any war-related urgency to justify extending the limitations period to future crimes of contractor fraud. Accordingly, future offenses were excluded from the 1921 statute, i.e., they were not "*now* indictable." *See* 61 Cong. Rec. H7060 ("[I]n the period following the [First World] war, and in the things that grew out of the war, crimes *were committed* which are not yet barred [in 1921] . . . .") (emphasis added). Thus, the general three-year statute of limitations would apply to those future crimes of contractor fraud.

When Congress adopted the same "now indictable" language in the 1942 statute, it simply "readopted the [same] World War I policy," *Bridges*, 346 U.S. at 219, and thereby restricted the 1942

statute, perhaps unwittingly, to *past*, timely offenses of contractor fraud. That is, the 1942 statute applied only to offenses that had occurred within three years before that statute's effective date of August 24, 1942. *See* 56 Stat. at 748, § 2 (effective date). Indeed, the legislative history of the 1942 statute suggests an uncritical, virtually wholesale adoption of the language of the 1921 statute. *See Bridges*, 346 U.S. at 217-19. *See also* S. Rep. No. 77-1544, at 1.

iii. By deleting the phrase "now indictable" in 1944, Congress simply removed the temporal restriction to past offenses from the 1942 statute and thereby applied the Suspension Act to future offenses of contractor fraud.

Importantly, the 1944 amendment to the Suspension Act corrected this apparent drafting error in the 1942 statute by deleting the phrase "*now* indictable." In so doing, Congress applied the Suspension Act to future offenses of contractor fraud, i.e., offenses occurring after the statute's effective date (July 21, 1944). *See* 58 Stat. at 670, § 24(a) (statute effective twenty days after enactment). *See also id*. at 671 (statute enacted July 1, 1944). Congress apparently recognized in 1944 that it made no sense to limit a wartime suspension statute to past offenses of contractor fraud when the country was in the midst of a second world war of uncertain duration.

Congress had another compelling reason to delete the "*now* indictable" restriction in 1944. In that year, Congress passed the Contract Settlement Act, mentioned above. Pub. L. No. 78–395, ch. 358, 58 Stat. 649 (1944). The Contract Settlement Act created new substantive rights for Government contractors, to ensure the "speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement . . . ." 58 Stat. at 649, § 1(b). But the Contract Settlement Act also protected the Government from fraudulent abuse of those new contract settlement rights, including the criminal prosecution of any such offenses. *See* 58 Stat. at 668, § 19(d).

Consequently, the Contract Settlement Act amended the 1942 suspension statute by adding this new category of crimes of contract settlement fraud. 58 Stat. at 667, § 19(b)(2). *See also Bridges*, at 217 n.15 ("This [1942 statute] was amended in 1944 by the insertion of more specific references to war contracts . . . ."). By definition, these were new offenses that could only occur after the Contract Settlement Act's effective date (July 21, 1944). Thus, these offenses of contract settlement fraud were not "*now* indictable" when the 1942 statute took effect. Accordingly, Congress in 1944 deleted the phrase "*now* indictable." 58 Stat. at 667, § 19(b). In so doing, Congress allowed the Suspension Act to apply to new crimes arising under the Contract Settlement Act and the FCA.

B. Other Statutory Language Occurring *Verbatim* In The 1921 And 1942 Statutes Confirms That The Phrase "Now Indictable" Merely Restricted Those Statutes To Past Crimes Of Contractor Fraud.

Lest any doubt remain about the purely temporal function of the phrase "*now* indictable," that phrase is immediately followed, in both the 1921 and 1942 statutes, by the same sentence: "This Act shall apply to acts, offenses, or transactions *where the existing statute of limitations has not yet fully run,* but [the Act] shall not apply to acts, offenses, or transactions which are *already barred* by the provisions of existing laws." (emphasis added).[13]

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[13] Clearly, the words "offenses," "acts," and "transactions," as used in the sentence above, are all referring exclusively to *crimes* of contractor fraud against the Government. After all, the 1921 statute enlarged the general *criminal* statute of limitations with respect to such offenses. *See* n.7, above. Moreover, the accompanying 1921 House Committee Report uses the words "offense," "transaction," and "crime" interchangeably when discussing the need to enlarge the criminal limitations period for post-war acts of contractor fraud:

> The Department of Justice has been engaged in the investigation . . . of various alleged *offenses*, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged *offenses* grew out of the *contractual relation* of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds.

42 St. at 220 (1921); 56 Stat. at 747-48 (1942). This sentence, appearing *verbatim* in the 1921 and 1942 statutes, clarifies that those two statutes applied exclusively to past ("*now* indictable") offenses that were still timely under the three-year criminal statute of limitations then in effect. That is, neither statute would revive past offenses that were already time-barred.

This interpretation is borne out by the House Committee Report to the 1921 statute, which contains a detailed discussion of how the proposed statute would not offend the *Ex Post Facto* Clause of the United States Constitution:

> There is no legal question as to the right of the Congress to thus extend the period of the statute [to past acts that are still timely]. . . . [T]he general rule seems to be that where the statute of limitations has not fully run, . . . the legislature may extend the period of limitation and such law does not violate the ex post facto law of the Constitution or any other right of the defendant.

> Many of these *transactions* require the most minute investigation in order to ascertain the exact facts . . . . Under the existing statute of limitations, . . . many of these *alleged crimes* are already barred . . . .

H. Rep. No. 67-365, at 1-2 (emphasis added).

67 H. Rep. No. 67-365, at 2. It should be noted that Congress' understanding of the *Ex Post Facto* Clause in 1921 was entirely consistent with the Court's modern precedent. *See Stogner v. California,* 539 U.S. 607, 616-17 (2003) (holding that *Ex Post Facto* Clause bars revival of expired criminal claim, but expressing approval of statute extending limitations period for prior act that is still timely).

The 1944 statute retained this same sentence, appearing in the 1921 and 1942 statutes, that distinguished between timely and untimely past acts. However, the 1944 statute also eliminated the phrase "*now* indictable," as amicus has discussed above. This indicates that the 1944 statute was both prospective and retrospective in reach. The 1944 statute applied prospectively because Congress deleted the phrase "*now* indictable" and thereby removed the *exclusively* retrospective restriction on the statute's scope. But the 1944 statute also applied retrospectively because it retained the sentence discussing the statute's application to timely past acts.

The 1944 statute's dual scope--both prospective and retrospective--makes sense because, as amicus has noted, the 1942 statute had been limited to past ("*now* indictable") offenses. Therefore, the 1942 statute did not suspend offenses occurring after its effective date (July 24, 1942), even though World War II was still ongoing. Accordingly, the 1944 statute filled this gap in coverage by suspending any past "offenses . . . where the existing statute of limitations has not yet fully run," i.e., acts

occurring between July 24, 1942 and the 1944 amendment's effective date (August 24, 1944).

The story is completed in 1948, when Congress, during peacetime, enacted a permanent and entirely *prospective* Suspension Act. Wartime Suspension of Limitations Act, Pub. L. 80-772, ch. 645, § 3287, 62 Stat. 683, 828 (1948) (codified as amended at 18 U.S.C. § 3287) (suspending offenses of contractor fraud "when the United States is at war . . .").[14] Tellingly, Congress in 1948 deleted the sentence, discussed above, that distinguished between timely and untimely past acts in the 1921, 1942, and 1944 statutes. The Revision Notes to the 1948 statute confirms that this sentence discussing past acts was deleted because it was no longer necessary:

> The phrase "when the United States is at war" was inserted at the beginning of this section to make it permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future. This permitted the elimination of references to dates *and to the provision [appearing in the 1921, 1942, and 1944 statutes] limiting the application of the section to transactions not yet fully barred.*

18 U.S.C. § 3287, Historical and Statutory Notes (Revision Notes and Legislative Reports) (1948).

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[14] Notably, the 1948 statute has remained unchanged to the present day, for purposes of the issue discussed in this brief. *Compare* 62 Stat. at 828, § 3287 *with* 18 U.S.C. § 3287.

In conclusion, the Fourth Circuit's decision rests entirely on a misapprehension of the meaning of the phrase "*now* indictable," and its removal in 1944. The Suspension Act has always applied exclusively to "offenses," i.e., *crimes* of contractor fraud against the Government. Contrary to the lower court's interpretation, Congress' deletion of the phrase "*now* indictable" in 1944 did not alter in any way the exclusively criminal meaning of the word "offense." Instead, the 1944 amendment merely removed the temporal restriction to *past* offenses that had limited the scope of the 1921 and 1942 statutes. In so doing, the 1944 amendment merely extended the Suspension Act to future offenses of contractor fraud. Therefore, the relator's civil *qui tam* complaint in this case should be dismissed because it is both untimely under the FCA and outside the scope of the Suspension Act.

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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