No. 12-1497

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The responsive briefs lay bare this case's central feature: The Fourth Circuit panel read two laws in a way that effectively repeals the statute of limitations for claims of civil fraud against the government in the post-9/11 world, and gives private relators leave to refile duplicative claims indefinitely. That decision rests on the thinnest textual support, in each instance interpreting a single word in isolation—"offense" for the Wartime Suspension of Limitations Act ("WSLA"); and "pending" for the False Claims Act ("FCA"). The briefs defending that decision are remarkable in two respects.

First, they repeatedly fail to address fundamental arguments about statutory context, structure, and history, beginning with the most basic issue: failure even to *mention* this Court's long-established rule of "narrowly construe[ing]" the WSLA in favor of repose. *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953). Second, the government has reversed its position on *both* questions, seeking expanded liability for a vast range of industries against the backdrop of the billions in FCA settlements that have helped create a self-proclaimed "Profit Center for the U.S. Treasury." U.S. Dep't of Justice Civil Division, FY2013 Budget (Feb. 2012), http://goo.gl/rr6I3N.

But applying ordinary principles of statutory construction would avoid what even respondent evidently now concedes are the untenable practical effects of indefinitely tolling claims having nothing to do with wartime constraints on prosecutorial resources. See Resp.Br.41-43. If Congress truly intends such a result, it would be simple to achieve legislatively. But

this Court should not conclude Congress "alter[ed] the fundamental details" of two critical statutes, *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), on such a scanty textual basis.

ARGUMENT

I. THE WSLA DOES NOT APPLY TO THIS CIVIL CASE

A. Text, Structure, History, And Purpose Limit The WSLA To Crimes

1. *Text*. Carter and the government focus on one word ("offense") in isolation. Because it is sometimes used in other contexts to describe civil violations, they reason that "offense" must carry its broadest possible reading here. U.S.Br.10-12; Resp.Br.18-21. That position is dubious by its own terms, as key definitions show that the broad-sounding phrases Carter carefully excerpts (e.g., "[a] violation of the law"), are "synonymous" with a "crime" and "criminal offense." *Black's Law Dictionary* 1186 (9th ed. 2009) ("1. A violation of the law; a crime, often a minor one. See CRIME. — Also termed *criminal offense*."). *Black's* lists 50-odd examples of "offense" that mean "crime"; while Carter emphasizes one use of the term under "[c]ivil law" systems, see Resp.Br.19, *Black's* plainly uses that term to distinguish *common*-law systems, *not* criminal law. *Black's* 1186-1188 (citing La. Civ. Code).

The government and Carter agree "'offense' * * * sometimes does not" "encompass[] civil violations." U.S.Br.12 n.1; accord Resp.Br.18 ("may be criminal or civil"). That concession is fatal, because the WSLA

must be "narrowly construed" as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society," *Bridges*, 346 U.S. at 215-216, and "appl[ied] only to cases * * * clearly within its purpose." *United States* v. *McElvain*, 272 U.S. 633, 639 (1926). Neither responsive brief even *acknowledges* this bedrock rule of construction, instead inverting it to give "offense" its broadest scope. Resp.Br.21-22 ("narrow interpretation * * * conflicts with the term's broader * * * meaning" (internal quotation mark omitted)); U.S.Br.12 ("broadly applies"). "Even assuming an equal likelihood" Congress intended the "broader reading rather than the narrower [one]," a "rule requiring a narrow construction * * * tips the balance in favor of the narrow reading." *Dep't of Energy* v. *Ohio*, 503 U.S. 607, 626 n.16 (1992).[1]

2. *Context and structure.* Neither Carter nor the government has any response to arguments that (a) reading "offense" in title 18 to include civil violations would render the WSLA's neighboring provisions nonsensical, Pet.Br.21; and (b) Congress has repeatedly amended the WSLA to ensure symmetry with the *criminal*, not civil, statute of limitations, *id.* at 22.

a. That Congress has used "offense" to describe civil violations elsewhere in the Code, or that this Court has used it to describe state common-law rem-

[1] Carter's assertion (Resp.Br.33) that *United States* v. *Grainger*, 346 U.S. 235 (1953), "does not distinguish between civil and criminal proceedings" is curious. *Grainger* addressed whether *criminal* false claims satisfy the prerequisites for WSLA tolling and *never* mentioned the word "civil."

edies (U.S.Br.10-11), does not change the fact that *every instance of "offense" in title 18 denotes a crime*. Pet.Br.20-21.[2] The suggestion that "'Title 18 use[s] the word 'offense' to refer to conduct with both civil and criminal penalties," U.S.Br.13 & n.3; accord Resp.Br.18, overlooks the textual distinction between a criminal "offense" and associated "civil penalty." For instance, 18 U.S.C. §38 specifies "[o]ffenses * * * punish[able] as provided in subsection (b)," which enumerates five levels of criminal "fine[s]" or "imprisonment," while subsection (c) separately authorizes "[c]ivil remedies" against "a person * * * *convicted of* an offense under this section." *Id.* §38(a)-(c) (emphasis added).

Similarly, 18 U.S.C. §248(b) (U.S.Br.13 n.3) uses the word "offense" only to specify criminal "fine[s]" and "imprison[ment]." The statute separately authorizes "[c]ivil remedies"—not for a civil "offense," but for "conduct prohibited" by statute. Accord 18 U.S.C. §670 (imposing "[c]riminal penalties" for "offense[s]" and "[c]ivil penalties" for "violation[s]"). The sole occurrence of "offense" in defining "[c]ivil [RICO] remedies," 18 U.S.C. §1964 (U.S.Br.13 n.3; Resp.Br.30), is to estop a convicted defendant from denying essential allegations from a "criminal offense." "[O]ffense" in 18 U.S.C. §4243(a) (Resp.Br.30) addresses the consequences of being "found not guilty

[2] The government concedes that the sole exception it has ever identified—the 93-year-old conspiracy statute in *United States* v. *Hutto*, 256 U.S. 524 (1921) —was long ago amended to match title 18's current use of "offense" as a crime. U.S.Br.11-12 n.1.; Pet.Br.21-22 n.7.

only by reason of insanity at the time of the offense"—plainly a criminal meaning.[3]

b. The FCA's use of "offense" (Resp.Br.19-20) undermines the panel's reading. A defendant convicted "in any criminal proceeding charging fraud or false statements" is estopped from "denying the essential elements of the offense"—i.e., the crime—"in any action which involves the same transaction * * * brought under" the civil FCA. 31 U.S.C. §3731(e). Carter inverts the syntax in paraphrasing §3731(e), wrongly suggesting that the statute uses "offense" for the civil proceeding. Resp.Br.20.

c. That the WSLA tolls limitations not only for "offenses involving fraud," 18 U.S.C. §3287(1), but also "offense[s] * * * committed" involving government property and contracts, *id.* §3287(2)-(3), proves nothing. Cf. U.S.Br.18; Resp.Br.21,27. Both categories apply only to "offense[s]," and the description of covered conduct sheds no light on whether "offense" is criminal or civil. That Congress specified "offenses * * * committed" strengthens the criminal connotation. See 18 U.S.C. §371 (criminal conspiracy "to commit any offense against the United States"); *Deal*

[3] 18 U.S.C. §216 (U.S.Br.13 n.3) distinguishes between criminal "punishment[s] for [specified] offense[s]," and a "civil action" arising from "conduct constituting an offense." 18 U.S.C. §1033(a) defines insurance "[c]rimes" and specifies "punishment for an offense," without civil penalties. 18 U.S.C. §2292(c) uses "offense" for criminal conduct subject to fine or imprisonment. Accord *id.* §2339B(d) (referring to an "offense under subsection (a)," carrying criminal penalties of "fine[s]" and "imprison[ment]," distinct from "[c]ivil penalty" under subsection (b)); *id.* §2339C (similar). Other cited provisions never use the word "offense." See 18 U.S.C. §§1595, 2520, 3626, 4248 (Resp.Br.30).

v. *United States*, 508 U.S. 129, 135 (1993) ("It cannot legally be known that an offense has been committed until there has been a conviction."). The WSLA refers not to the civil enforcement provisions in the 1944 amendments, but rather "offenses * * * committed *in connection with*" contracting or disposal of property, 58 Stat. at 781. Thus, there is no necessary inference that the WSLA tolls the limitations for the civil violations defined in those statutes. Cf. Resp.Br.25-26.

Suggesting the Contract Settlement Act ("CSA") "was largely civil in nature" (U.S.Br.17) ignores the WSLA's placement in a section of the 1944 Act entitled "PROSECUTION OF FRAUD," which included new criminal prohibitions on destroying or failing to maintain war records, and against former government employees pursuing claims against the government. 58 Stat. 667-668. Critically, the new criminal records offense, unlike the civil remedies, extended the required recordkeeping period until 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"—language identical to the WSLA's. *Id.* at 667.

Congress's general intent to use "all practicable methods * * * to detect and prosecute fraud," 58 Stat. 649 (U.S.Br.17), does not mean Congress pursued that purpose at all costs; the statutory text is consistent with a criminal-only reading.[4] Carter and the

[4] The CSA's civil enforcement mechanisms "prevent improper payments," 58 Stat. 649, and deter fraud with or without tolling. See §§ 8(d), 13(a), 18(a), 58 Stat. 656, 660, 666 (penalty for overstatement; audits; recordkeeping).

government ignore that Congress contemporaneously established tolling for "violations of the antitrust laws * * * now indictable *or subject to civil proceedings*," 56 Stat. 781 (emphasis added). And the government concedes the WSLA's military-justice analogue, 10 U.S.C. §843(f), applies only to criminal violations (U.S.Br.12 n.2). That Congress separately enacted §843(f) indicates it believed the WSLA's application was *limited to title 18*.[5]

3. *History*. Carter and the government all but ignore the statute's 1921 origins. See Resp.Br.24 ("Congress enacted the WSLA in 1942"); U.S.Br.16 (same). For good reason: That law unquestionably authorized only criminal tolling, and this Court's construction of it (again ignored) undercuts their theory that subsequent amendments radically expanded the statute's scope. See Pet.Br.23-29; NDIA Br.6-13.

a. The lynchpin of the responsive briefs' historical argument is Congress's unremarked 1944 deletion of "now indictable under any existing statutes." But the suggestion that "now indictable" "had limited the WSLA's application to criminal fraud offenses" (U.S.Br.17) is foreclosed by *McElvain*, 272 U.S. at 637, which read the materially indistinguishable language of the 1921 statute as limiting tolling "to offenses * * * not already barred." The panel's reading deprives the phrase of independent meaning: the

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[5] See *Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1044 (1949) (statement of Felix Larkin, Ass't Gen. Counsel, Dep't of Defense) ("it is not clear that [the WSLA] applies to court-martial cases by virtue of being in title 18"); H.R. Rep. No. 81-491, at 22 (1949); S. Rep. No. 81-486, at 19 (1949).

1921 statute explicitly applied only to "limitations in criminal cases." 42 Stat. 220.

KBR identified several other readings of "now indictable under any existing statutes" (and its deletion) far more "sound" (U.S.Br.19) than the panel's transformative interpretation. Congress may have included the phrase to make especially clear that tolling applied to conduct that had already taken place, given cases requiring a "clear intendment" to do so. H.R. Rep. No. 67-365, at 2 (1921). Focusing on only a part of the deleted phrase (see U.S.Br.17 ("[t]he 'now indictable' language"); Resp.Br.25 (similar)), distorts its meaning. Conduct indictable "under any existing statutes" refers to offenses that had already occurred, and excludes violations of later-enacted statutes. Practice had clarified the provision's meaning by 1944. Pet.Br.31 n.12. That Congress made its intent particularly clear even at the risk of repetition (cf. U.S.Br.19) is unsurprising, as the Solicitor General's admonitions weighed heavily in drafters' consideration. Pet.Br.29-31 & n.12.[6]

b. The government offers a revisionist history of the CSA, speculating that Congress would have wanted to toll civil fraud limitations. U.S.Br.17-18. But the 1944 statute referred not to an "offense" simpliciter, but an "offense against the laws of the United States," 58 Stat. 667, a phrase consistently used to describe crimes—and which this Court does *not* apply to civil actions. See 18 U.S.C. §3231 (granting dis-

[6] Congress alternatively may have understood that deleting "now indictable" expanded tolling to conduct postdating the CSA. See NDIA Br.6; NELF Br.9-24.

trict courts criminal jurisdiction "of all offenses against the laws of the United States"); *Tafflin* v. *Leavitt*, 493 U.S. 455, 464 (1990) ("civil RICO claims are not 'offenses against the laws of the United States,' §3231, and do not result in the imposition of criminal sanctions").

Because the statute was *always* limited to crimes, there is no need to identify post-1944 authority "limit[ing] the WSLA's reach." U.S.Br.20. Carter and the government again conspicuously disregard key evidence. Congress recodified the WSLA in 1948 along with a chapter of "general provisions," the very first of which—18 U.S.C. §1—defined "offense" to mean *either* "a felony" or "misdemeanor." 62 Stat. 684; cf. U.S.Br.12 n.1 (calling less-serious offense "misdemeanor" suggests "offense" "means 'crime'"). Placing the WSLA in title 18, with its own definition and consistent usage of "offense," implicates well-established interpretative principles. "[A]dding new definitions of terms previously undefined, is a common way of amending statutes." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 381 (2004). The 2008 amendments left the WSLA in title 18, with its *still*-uniform usage of "offense," and within a chapter treating "offenses" as either "capital" or "non-capital." 18 U.S.C. §§3281-3282.[7]

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[7] The reference to "investigators and auditors" (U.S.Br.22) follows concerns about barring "criminal actions in investigations of contracting fraud," see S. Rep. No. 110-431, at 4 (2008), and is consistent with a criminal focus. See *Donaldson* v. *United States,* 400 U.S. 517, 534 (1971) ("indict[ment] and [p]rosecut[ion] * * * necessarily depend on the result of th[e] au-

c. The responsive briefs also ignore the contemporaneous understanding of the agency administering the CSA that the statute tolled limitations for "criminal prosecutions." See Pet.Br.26. And they conflict with the government's position in *Koller* v. *United States*, that Congress "provided no suspension of limitations with respect to civil actions [under the 1944 amendments]"—because "[no] statute of limitations was [then] applicable to a[] [civil] action under that Section." U.S.Br.28, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362).[8] The government's suggestion that its now-abandoned position reflected ignorance of arguments it now finds persuasive is contradicted by the record.[9]

Congress in 2008 did not "acquiesce" in the position of a handful of half-century-old lower-court decisions. Resp.Br.23. This Court is "loath to replace the plain text and original understanding of a statute" by

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dit"). Civil liability is not generally seen as "bring[ing]" a defendant "to justice." S. Rep. No. 110-431, at 4.

[8] The reference to "offenses cognizable under this *statute*," S. Rep. No. 78-1057, at 14 (1944), refers not to civil remedies in the Surplus Property Act ("SPA") (cf. U.S.Br.22; Resp.Br.27-28), but *criminal* offenses tolled under that Act's "Statute of Limitations," 56 Stat. 781. The Report uniformly refers to the SPA as the "act," distinct from the "statute of limitations." S. Rep. No. 78-1057, at 4, 6, 10, 12, 13, 14, 15.

[9] The government declined to "withdraw [its] statement" (U.S.Br.20 n.6) limiting the WSLA to criminal prosecutions even after petitioner raised the sequence of enactments resulting in the "delet[ion]" of "'now indictable,'" the predominantly civil enacting legislation, and despite explicitly acknowledging cases applying the WSLA to civil claims. Tr. of Oral Arg., pts. 1 & 2, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362), at http://goo.gl/dpRtAz.

such an inference, absent "overwhelming evidence" that Congress considered the "precise issue." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001). That standard is not satisfied by decades-old trial court dicta conflicting with the Executive Branch's contemporaneous interpretation, see p. 10, *supra*, where the WSLA lay moribund for sixty years, and there is no evidence Congress considered and endorsed the "precise issue."

4. *Purpose*. Carter and the government cannot link civil tolling (for government fraud litigators, much less private ones) with the WSLA's purpose of providing investigators and prosecutors additional time when the "*law-enforcement branch* of the Government is * * * engaged in its many [wartime] duties," such as "the enforcement of the espionage, sabotage, and other laws." *Bridges*, 346 U.S. at 219 n.18 (emphasis added). Private relators encounter *no* such resource constraints. Only by abstracting the statutory purpose beyond recognition—as a panacea for *any* "misconduct that threaten[s] the public fisc," U.S.Br.23—can the government justify its complete inversion of "narro[w] constru[ction]," *Bridges*, 346 U.S. at 215-216.

The government meekly asserts that relators "may" have difficulty obtaining "necessary evidence," U.S.Br.15, citing no supporting authority. Most FCA claims involve domestic conduct unrelated to war, see Pet.Br.42 n.17; nearly *half* involve *health care*. Chamber Br.15. The record number of suits (*id.* at 13) suggests that wartime exigencies are not impairing the government and relators. Carter does not suggest that wartime conditions made *him* "unable to

pursue [his] FCA fraud action," Resp.Br.37, first filed *within a year* of the alleged false claims, Pet.App.3a-4a. He since filed verbatim copies of one complaint. The WSLA's only role here would be to relieve Carter from the first-to-file bar.[10]

B. The Panel Eviscerated The FCA's Statutes Of Limitations And Repose

Congress clearly expected the WSLA to toll the general criminal statute of limitations, its neighbor in a chapter on "[l]imitations." See 18 U.S.C. §3282(a); U.S.Br.13. But the WSLA cannot coexist with the FCA's detailed and specific limitations periods, which *already provide* for tolling where the government has difficulty investigating through a "discovery rule," while guarding against "fraud actions *ad infinitum*" (H.R. Rep. No. 99-660, at 25 (1986)) with a ten-year statute of repose. See 31 U.S.C. §3731(b).

Carter and the government do not dispute that this Court recognized 31 U.S.C. §3731(b) as an "absolute" ten-year statute of repose. See Pet.Br.35. Instead, they ask this Court to disregard that portion of §3731(b) because Carter's complaints were filed within ten years of the relevant conduct. Resp.Br.36-37; U.S.Br.14-15. But this Court interprets statutes to ensure that provisions work together as "a symmetrical and coherent regulatory scheme," fitting "*all* parts into an harmonious whole"—not just those that

[10] The government can investigate already-filed *qui tam* cases without wartime tolling. Cf. Resp.Br.37-38. The statute of limitations is no bar once a case has been timely filed, and the FCA expressly allows the government to obtain extensions when it needs more time to investigate. 31 U.S.C. §3730(b)(3).

apply in a given case. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added). This Court routinely considers hypothetical situations to ensure an interpretation makes sense under other circumstances. Exceeding the statute of repose is not hypothetical: The panel held that the FCA's limitations period has been tolled well over a decade. Pet.App.10a-13a.

C. Carter Cannot Minimize The Dire Consequences Of The Panel's Rule

The responsive briefs' efforts to downplay the severe practical effects of the panel's ruling have no basis in reality. The suggestion that "the WSLA is rarely invoked" (Resp.Br.40) is disproven by the flurry of invocations during the pendency of this case. See Pet.Reply2 & n.3; Pet'rs Supp.Br; *U.S. ex rel. Silver* v. *Omnicare, Inc.*, No. 11-cv-1326, 2014 WL 4827410, at *8 (D.N.J. Sept. 29, 2014). The government's use alone has more than doubled since 2008. Pet.22. Carter is likewise wrong that the WSLA will be invoked "only" when a relator "is stationed overseas, or witnesses or evidence [are] otherwise involved in the war." Resp.Br.40-41. Self-interested relators are invoking the WSLA in cases having nothing to do with war. Pet.Br.42 n.17.

Belatedly recognizing that the panel decision's "dire effects" (Pet.App.46a (Agee, J., concurring in part and dissenting in part)) render its statutory interpretation implausible, Carter suggests for the first time that the WSLA applies only to war-related frauds. Resp.Br.41-43. No court has accepted that theory; several rejected it outright. *E.g.*, *United*

States v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 633 (S.D.N.Y. 2013).

Whether or not the 2008 WSLA applies (which the parties dispute, contra Resp.Br.43 n.13), the panel's expansive reading of "at war" matters. It is far broader than, and thus renders meaningless, the express post-2008 provision for congressional authorization of use of military force, dramatically expanding the scope of tolling. See S. Rep. No. 110-431, at 4 ("Th[e] [2008] amendment is not intended to apply to * * * military actions not specifically authorized by Congress.").[11]

II. CARTER CANNOT DEFEND THE PANEL'S ONE-CASE-AT-A-TIME RULE

A. The First-To-File Bar's Text And Structure Impose No Temporal Limitation

1. Though Carter and his *amici* feign fidelity to statutory language, they show little interest in the first-to-file bar's full text, which Carter grudgingly quotes *once* near the end of his brief. See Resp.Br.48. Instead, their "textual" arguments mainly consist of repeating one word—"pending"—divorced from its context.[12] See Resp.Br.50-51; U.S.Br.26; cf. *Abramski*

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[11] Carter did not press his relation-back theory below, and forfeited his equitable tolling claim by belatedly raising it in district court. Resp.Br.44-46. Neither Carter's brief in opposition nor the panel mentioned those issues, and they are not before this Court.

[12] Carter selectively (mis)quotes §3730(b)(5), suggesting that it refers to "*a* 'pending action,'" Resp.Br.49 & n.14 (emphasis added), not "*the* pending action," §3730(b)(5) (emphasis added).

v. *United States*, 134 S. Ct. 2259, 2267 (2014) (reading "words not in a vacuum, but with reference to the statutory context, structure, history, and purpose"). Carter and his *amici* strain to make "pending" the provision's centerpiece. But in truth it is a subsidiary qualifier, serving only to describe *what facts* the bar on "related action[s]" covers: namely, "the facts underlying the pending action." 31 U.S.C. §3730(b)(5).[13]

KBR's interpretation thus does not render the word "pending" "superfluous." Resp.Br.48; U.S.Br.27. The "referential" use of "pending" to identify which action bars the other," *U.S. ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014), accords with the legislative history of *the first-to-file bar*, which Carter and his *amici* shun in favor of statements about the FCA or the 1986 amendments generally.[14] That history omits this supposedly central

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The definite article strengthens the inference that the phrase is referential.

[13] *Carey* v. *Saffold*, 536 U.S. 214 (2002) (U.S.Br.26), involved the exclusion from the one-year federal habeas limitations period of "[t]he time during which a [state petition] * * * is pending." 28 U.S.C. §2244(d)(2). *Saffold* demonstrates the importance of context: Under *Saffold*, a state postconviction action is deemed "pending" even when "nothing had been under consideration or awaiting the result of an appeal." 536 U.S. at 228 (Kennedy, J., dissenting).

[14] Carter distorts (Resp.Br.56-57) Administration testimony on an early version of the 1986 amendments. *Hearing on S. 1562 Before the Subcomm. on Admin. Practice & Procedure of the S. Judiciary Comm.*, 99th Cong. (1985). The witness explicitly *opposed* the result Carter now seeks: i.e., "permit[ting] a relator to bring an action based on evidence available to the Government * * * where the Justice Department does not choose to enter a suit." See *id.* at 20-21 (statement of Jay Stephens).

limitation, explaining that "[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).

Neither Carter nor the government explain why Congress would have spoken so obliquely if its goal were to subject government contractors to on-again, off-again lawsuits. Nor do they explain why, when Congress created one-case-at-a-time rules elsewhere, Pet.Br.45-46, it consistently used "different language" and "substantially different structure than the FCA's first-to-file provision." Resp.Br.52 & n.16. Most damning of all, neither Carter nor the government has *any* response to the fact that when the FCA's drafters sought to create a one-case-at-a-time rule in the *very bill* containing the first-to-file bar, they said so plainly. Pet.Br.47-48 (citing H.R. Rep. No. 99-660, at 4 (1986)).[15]

2. Carter and the government make much of the bar's dual prohibition on bringing a related action or intervening, arguing the intervention bar would be "nonsensical" if applied to dismissed actions. Resp.Br.49; accord U.S.Br.28. But as Carter recognizes, see Resp.Br.49 n.14 (bar is "two sentences * * * prohibit[ing] two different actions"), the provision is disjunctive, and only one portion even *uses* the term

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The government quotes statements of purpose relating to the 1986 FCA amendments generally, not the first-to-file bar. See *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) (analyzing policy of "[t]he FCA"); S. Rep. No. 99-345, at 2 (1986) (U.S.Br.29).

[15] 31 U.S.C. §3733(j)(2)(A) (U.S.Br.28) does not use "pending" as a temporal limitation.

"pending"—i.e., it bars a private party from "bring[ing] a related action based on the facts underlying the pending action" *or* "interven[ing]." See generally *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) ("a limiting clause or phrase * * * modif[ies] only the * * * phrase that it immediately follows"). It therefore does not follow that "'pending' must have the same meaning in the context of 'intervention' and 'bringing an action,'" Resp.Br.49. The D.C. Circuit unanimously rejected the related argument that a second suit must be capable of falling under both prohibitions to be barred. See Verizon Br.11.

3. The claim of support from "nearly every" (Resp.Br.50) or "[a]ll but one" (U.S.Br.26) of the circuits to consider the question is silly: There are *two* other decisions, and the government concedes one offers only "dicta." U.S.Br.26 (citing *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956 (10th Cir. 2009)). The D.C. Circuit "reviewed those decisions" and found their discussions to be dicta, "unaccompanied by any reasoning," or both. *Shea*, 748 F.3d at 344. Carter is flatly wrong that the D.C. Circuit is "split on the definition of pending." Resp.Br.51. Judge Sentelle, who authored both *Shea* and *U.S. ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011), observed that the meaning of "pending" was "not reached in *Batiste*." *Shea*, 748 F.3d at 343.

That the government must dismiss as a "mistake" its prior considered view in *U.S. ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361 (7th Cir. 2010), U.S.Br.27-28 n.8, shows at a minimum that the statutory text does not *unambiguously compel* the panel's reading, as Carter and the government claim.

The government advanced *KBR*'s reading in *Chovanec*, with the same certainty it now advocates the opposite position.

B. The Panel's Interpretation Frustrates The Statutory Purpose

1. Although Carter and his *amici* argue extensively about statutory purpose, Resp.Br.53; U.S.Br.29-34. they begin from a flawed premise. The government claims that the first-to-file bar's *only* purpose is to "encourag[e] whistleblowers to come forward." U.S.Br.29 (quotation omitted). Not so. While other FCA provisions encourage whistleblowers by offering cash bounties, the first-to-file bar *limits* such suits, to balance "adequate incentives for whistle-blowing insiders" against "discouragement of opportunistic plaintiffs who have no significant information to contribute." *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010).

The first-to-file bar serves "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *U.S. ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *Shea*, 748 F.3d at 342-343. The question is not whether narrowly construing the first-to-file bar would increase the number of *qui tam* suits as a "supplement to government actions" (U.S.Br.30), but rather "the precise scope of" the balance Congress struck in §3730(b)(5). *Graham Cnty.*, 559 U.S. at 298.

2. Even accepting the responsive briefs' account of the law's purpose, the panel's reading thwarts it.

KBR's interpretation "reward[s] the first" "whistleblower[] to come forward," *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) (U.S.Br.29); Carter's reading rewards infinite successors. This case, with its recurrent re-filing of a single complaint, and *Shea*'s repeated suits against a defendant for the same alleged conduct, Verizon Br.13-15, are not outliers.[16] Permitting repetitive suits implicates concerns about "wast[ing]" judicial and investigatory resources (Resp.Br.57); indeed, the government does not disavow (cf. U.S.Br.27 n.8) its observation in *Chovanec* that serial complaints "waste Government resources." Pet.Br.55.

Serial suits undermine the first relator's recovery no less than "simultaneous" ones. Cf. Resp.Br.51; U.S.Br.30. Carter and the government offer *no response* to well-documented pressures that demands from later relators and reduced settlement offers place on first-filing relators' recoveries. Pet.Br.55-56. Thus, the threat of repetitive litigation may indeed "fragment[]" the first relator's recovery—the very concern the government *concedes* the first-to-file bar seeks to avoid. U.S.Br.29. Conversely, where a late-arriving relator offers truly useful information, some courts allow the first-filer to join a second plaintiff by amending a complaint. See Taxpayers Against Education Fraud Br.28-29; see also *U.S. ex rel. Boise* v.

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[16] See also *U.S. ex rel. Powell* v. *Am. InterContinental Univ., Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *2, *6, *9 (N.D. Ga. July 12, 2012) (*four* previously dismissed actions against same defendant); *U.S. ex rel. Sandager* v. *Dell Marketing, LP*, 872 F. Supp. 2d 801, 805-806, 807-811 (D. Minn. 2012) (*three* earlier-filed lawsuits by two relators).

Cephalon, Inc., No. 08-cv-287, 2014 WL 5089671, at *5 (E.D. Pa. Oct. 9, 2014) (permitting joinder where "plaintiffs have consented to join together and share any proceeds of their suit due to the real or perceived advantage the additional relators bring").

3. While Carter and his *amici suggest* that claim preclusion and estoppel protect against repetitive litigation, they are studiously vague about whether they *actually* do so. See U.S.Br.30 ("may prevent * * * subsequent cases"); *id.* at 33 ("can have preclusive effects"); Resp.Br.60. None dispute that preclusion is an uncertain shield, requiring litigation of complex preclusion issues, including whether a nonparty is bound by the resolution of the first suit and whether settlement of a first-filed *qui tam* binds other relators. Pet.Br.56-57. Any preclusive effect against the government (U.S.Br.33) may not cover *non-intervened* cases, which represent the vast majority of FCA suits.[17]

The government is mistaken that after an initial suit is dismissed, res judicata is a defendant's "*only* potential source of protection against sequential *qui tam* suits," U.S.Br.33, and that applying the first-to-file bar by its terms would "subvert the established rule that non-merits dismissals do not have res judicata effect," *id.* at 9; accord *id.* at 30, 32. The responsive briefs identify no textual basis for distinguishing between "merits" and "non-merits" dismissals. Indeed, it is not *dismissal* that has preclusive effect, but

[17] Carter suggests that "relators have [not] waited to file" in the Fourth, Seventh or Tenth Circuits. Resp.Br.59 n.21. But those cases were decided far too recently to discern whether relators have delayed filing cases.

the first relator's "bring[ing] an action," and thus disclosing "substantially all material evidence and information the person possesses," §3730(b)(5), (b)(2). There is nothing unusual, much less "subver[sive]," about such conduct barring later opportunities to assert claims on behalf of the United States: The *entire purpose* of the FCA's limitations provisions is to "expand the circumstances in which future litigants can be precluded." U.S.Br.34.

The general effect of non-merits dismissals is not before the Court. At least one circuit has held that "the first-to-file bar [does not apply] * * * when the first action is jurisdictionally defective because the relator was not an original source of publically disclosed information." *Campbell*, 421 F.3d at 818; contra U.S.Br.32. Other courts have divided about whether the first-to-file bar applies when an earlier complaint was not adequately pleaded under Federal Rule of Civil Procedure 9(b). Compare *Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 972-973 (6th Cir. 2005) (no), with *Batiste*, 659 F.3d at 1210 (yes). The government has taken the former view, even as it assumes the opposite position here. Compare *Batiste*, 659 F.3d at 1210, with U.S.Br.33.

A truly frivolous complaint may not be "related" to a later suit that provides broader allegations and information. Cf. *Natural Gas Royalties*, 566 F.3d at 964 (claims against entities not named as defendants in earlier *qui tam* suit not "related"). Moreover, enforcing the plain terms of the first-to-file bar would "encourage the parties to present their best arguments * * * in the first instance and thereby save judicial time," *Spilman* v. *Harley*, 656 F.2d 224, 228

(6th Cir. 1981) (discussing estoppel), rather than treating subsequent complaints as "Mulligans."

4. Carter intones that frivolous first-filed suits will render KBR "forever immune." Resp.Br.47; see also *id.* at i, 16, 54 ("never face a jury"), 55 n.18, 58, 61. But he eventually concedes that a defendant is *not* "immun[e]," because the *government* remains free to sue. See 31 U.S.C. §3730(b)(5); Resp.Br.61 n.23. And for all the paeans to the value of "whistleblower" lawsuits, and concerns about "the government's limited resources," U.S.Br.32, no one disputes that *virtually all* FCA recoveries come from suits *the government* litigates. Non-intervened cases account for just 3.6% of recovered funds since 1986, and "more than 90% [of them are] dismissed as frivolous or otherwise without merit." Chamber.Br.16; cf. Nat'l Whistleblower Ctr.Br.8-9 (discussing recoveries from intervened *qui tam* actions). Claims of foregone relator tips are likewise overstated. Because subsequent relators may file without knowledge of an earlier still-sealed case, the government will often have the benefit of disclosures from both first- and later-filed cases. Cf. U.S.Br.32 (suggesting government's "lack of inside knowledge" would prevent it from bringing suit after first complaint is dismissed).[18]

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[18] Although Carter denigrates it as "poorly pled" (Resp.Br.54), the *Thorpe* complaint (J.A.525-538)—drafted by experienced *qui tam* attorneys—made the same material allegations as his. The *Thorpe* relators, like Carter, were former employees of KBR (or subsidiaries) who worked at bases in Iraq and Afghanistan. They alleged firsthand knowledge of time-card fraud (one had been "in charge of processing time-sheets"—better positioned than Carter, a water-purification operator). Compare First Am. Compl. 6, *U.S. ex rel. Thorpe* v. *Halliburton Co.*, No. 05-cv-8924

That the government repeatedly reviewed Carter's allegations (and those in many other related cases) and declined to intervene counsels skepticism about his breathless account of harm to troops. Moreover, for all Carter's current emphasis on improper water purification, those claims were dismissed in 2009, Pet.App.50a; his current claim is *time-card* fraud.

5. Nothing in KBR's reading "disrupt[s] th[e] balance" (U.S.Br.31) between the first-to-file and public disclosure bars. As KBR explained without contradiction, the two bars apply in different procedural postures and to different sets of claims. Pet.Br.49-52. Applying the first-to-file bar to "disallow" an action "allow[ed] under the original-source exception" (U.S.Br.32; accord Resp.Br.53), simply reflects the different operation of the various FCA bars. All agree a subsequent lawsuit by an "original source" is barred before a first-filed suit has been dismissed or reduced to judgment. And *after* a first-filed lawsuit has been dismissed, the first-to-file bar's triggering event (filing a *qui tam* suit) involves a substantial disclosure of information to an official statutorily obligated to "diligently" investigate it, 31 U.S.C. §3730(a), as compared to public disclosure in a press report or

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(C.D. Cal. June 19, 2008) (Doc. 21) ("KBR routinely instructed the LOGCAP III employees to charge no less than 12 hours of work per day, 7 days per week, on their timesheets even though most of those hours were never worked"), with J.A.165 (Carter alleging KBR policy of entering at least "twelve hours of work per shift, notwithstanding the number of hours actually worked"). *Thorpe* was dismissed not for any pleading deficiency, but because relator's counsel withdrew.

other source about which government officials may not even be aware. Pet.Br.54-55.

Nor is this reading tantamount to reinstating the repealed "government knowledge" bar. The first-to-file bar is triggered only after the first relator makes an extensive disclosure to the Attorney General. 31 U.S.C. §3730(b)(2). The government knowledge bar, by contrast, applied *however* the government learned of information. The disclosure accompanying a *qui tam* suit places the government in a far better position to pursue fraud than did the former knowledge bar. See, *e.g.*, *Safir* v. *Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978) (Friendly, J.) (finding it "rather curious" that under government-knowledge bar, "an informer who makes only a partial or merely conclusory disclosure to the United States before filing suit should be free to carry on a [q]ui tam action").

Concerns about supposedly "draconian" (U.S.Br.31) applications are overstated; the first-to-file provision simply governs third parties' ability to "seek remuneration although they contributed nothing to the exposure of fraud," *Graham Cnty.*, 559 U.S. at 296 n.16, by providing *previously disclosed* information. Congress sensibly concluded that the small possibility of additional recovery, after a first relator disclosed "all material evidence and information" and the government (by hypothesis) declined to intervene, does not justify successive "opportunistic" lawsuits imposing systemic costs on courts, investigators, and government contractors. See pp. 18-20, *supra*.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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