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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent cannot dispute that the False Claims Act ("FCA") is a statute of exceptional importance whose interpretation this Court has revisited frequently. *E.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885 (2011); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280 (2010); *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009). Nor can he dispute that the issues presented—application of statutes of limitation[1] and the FCA's bars to actions[2]—are important. While respondent quibbles about the extent of confusion over these issues, Opp. 12-14, 22-25, as the Fourth Circuit itself recognized, "courts are in conflict," Pet. App. 10a. Respondent opposes review principally because of *timing*: Although "numerous courts [have] considered the issue[s]" *already*, respondent makes a shopworn plea for further "percolat[ion]." Opp. 9, 13, 12. And because respondent's oft-dismissed lawsuit may have still other infirmities, he argues this case "is not yet ripe." *Id.* at 1.

Those strained efforts cannot disguise the fact that a splintered panel of the U.S. Court of Appeals with jurisdiction over most government contractors, Pet. 23, has held, contrary to the decisions of other federal courts, that a *criminal code* provision suspending statutes of limitations for fraud "offenses"

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[1] See, *e.g. Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (noting "importance of time limits on penalty actions"); cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 354 (1991) (limitations period is "important issue").

[2] See *Schindler Elevator*, *supra* (public disclosure bar); *Graham Cnty., supra* (same).

when prosecutors are distracted by war also applies to civil FCA suits brought by private relators who face no such distractions. And the panel applied tolling so broadly as to suspend limitations for *every* case of alleged fraud against the government, war-related or not, since at least 2001 and into the foreseeable future—until the President or Congress formally terminates all hostilities worldwide. It would be difficult to invent a more sweeping, and troubling, holding, yet there is more: The Fourth Circuit also held that a statutory bar on "copycat actions that provide [the government] no additional material information," *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011), instead allows relators to file an infinite series of identical suits, so long as only one is pending at a time. With no straight-faced argument that these issues are insufficiently important to merit this Court's attention, respondent halfheartedly suggests they may not "even recu[r]," Opp. 12. But of course they do, frequently—including in numerous filings *just during the pendency of this case*.[3]

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[3] See, e.g., Pet. 21-22 & n.5 (WSLA cases); Second Amended Complaint ¶¶ 2-3, 41, *United States ex rel. O'Keefe* v. *Pfizer, Inc.*, No. 11-cv-10065 (D. Mass. June 6, 2013) (citing decision below for proposition that nation "is still at war" and invoking WSLA for $1 billion in Medicaid/Medicare claims dating to 1997); Complaint, *United States ex rel. Paradise* v. *Mass. Gen. Hosp.*, No. 1:13-cv-11070 (D. Mass. May 8, 2013) (citing WSLA in alleging FCA violations related to medical treatment dating to 1996); *United States ex rel. Shea* v. *Cellco P'ship*, No. 12-7133 (D.C. Cir.) (reviewing first-to-file dismissal with prejudice) (scheduled for argument Nov. 26, 2013).

Sooner or later, this Court will have to resolve the two critical questions presented; the only issue is how many hundreds of millions of dollars American businesses must first devote to the "tremendous expenditure of time and energy" necessary to defend stale, non-intervened *qui tam* claims, Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007), which as a class are overwhelmingly meritless, see Chamber Amicus Br. 13. At a minimum, the Court should seek the views of the Solicitor General because the issues here fundamentally affect the government's relationship with its contractors. Doing so would also provide beneficial public notice about the government's views on tolling of civil fraud claims.

A. The Fourth Circuit's Sweeping WSLA Ruling Is Wrong

Respondent contends that by deleting two words—"now indictable"—from a tolling provision originally limited to criminal prosecutions, a minor 1944 amendment "specifically broadened the language of the WSLA to include civil offenses." Opp. 7 n.5. But as the petition explained (Pet. 14), Congress included those words to avoid reviving *already lapsed* statutes of limitations, and deleted them as redundant given other language specifying that tolling "shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." Contract Settlement Act of 1944, 58 Stat. 649, 667. (The latter sentence was deleted in 1948, and the provision has since applied only to the narrower term "offense[s]." Act of June 25, 1948, 62 Stat. 828.) But Congress does not fundamentally "transform the scope" of a

criminal statute through such a minor, ambiguous change. *Wimberly* v. *Labor & Indus. Relations Comm'n*, 479 U.S. 511, 518-519 (1987).[4]

Respondent also ignores subsequent amendments. In 1948, when Congress permanently added the WSLA to the U.S. Code—in its *criminal title*—a neighboring provision defined "offense" to mean *only* "felon[ies]" and "misdemeanor[s]": i.e., *crimes*.[5] The suggestion (Opp. 8-9, 12) that Congress could have *even more* explicitly limited the WSLA to crimes ignores that the *ordinary meaning* of "offense" is a crime, Pet. 2, 13—indeed, the Criminal Code's *entire chapter* addressing limitations uniformly uses "offense" to describe only crimes. See 18 U.S.C. §§ 3281-3301.

Respondent downplays the decision's sweeping consequences by suggesting, without citation, that it is "limited by the particular facts of th[is] case." Opp. 16.[6] But the majority did not mention or rely on "lim-

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[4] Respondent's 1950s district court cases (Opp. 9) involved the United States as a party and did not contemplate the implications of tolling in an era of undeclared conflicts; some did not consider whether the WSLA applies in civil cases, *e.g.*, *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954).

[5] The statute provided that "[a]ny offense punishable by death or imprisonment for a term exceeding one year is a felony" and that "*[a]ny other* offense is a misdemeanor." Act of June 25, 1948, ch. 645, 62 Stat. 683, 684 (then codified at 18 U.S.C. § 1 (repealed 1984)) (emphasis added).

[6] While respondent breathlessly claims "massive fraud" "impact[ing] the troops" and involving a "failure to purify water" (Opp. 2, 1, i), he long ago abandoned "contaminated water" claims for his current timekeeping allegations (Pet. 6). The Justice Department met both claims with a collective yawn, repeat-

it[ing]" facts. Compare Pet. App. 8a-16a, with Opp. 16. Rather, it held sweepingly that "the WSLA applies to civil claims," Pet. App. 14a; that "relator-initiated claims" are not "excluded from the * * * WSLA," *id.* at 16a; and "the Act does not require a formal declaration of war," *id.* at 11a.

Assurances that the case is limited to "fraud that occurred * * * in a war zone" (Opp. 16) ring hollow. The statute contains no such limitation. It is hardly "speculation" (Opp. 16) that the WSLA will be applied outside the defense context: Respondent himself identifies such cases, *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 600-608 (S.D. Tex. 2012) (cited at Opp. 9, 10), and the government and private plaintiffs have frequently invoked it in suing industries as diverse as financial services and healthcare. See Chamber Amicus Br. 12; Pet. 22 & n.5; n.3, *supra*; Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1.

Respondent's tactical renunciation of indefinite tolling (Opp. 14) conflicts with his longstanding position. See Pet. App. 44a ("Before the district court, Carter argued that hostilities in Iraq have not formally ended, meaning that the limitations would still be tolled today"). Respondent lodged a brief that invoked the (even-longer-running) Afghanistan conflict, asserting that "[t]he WSLA by its terms does not demand that the nation be at war with the country where the violation of the FCA occurred." Relator's Mot. for Leave to File Sur-Reply, Ex. 1, at 13 n.5

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edly declining to intervene after a full investigation. See Pet. App. 52a.

(E.D. Va. Nov. 11, 2011, redactions filed Dec. 8, 2011) (Doc. 54). Respondent suggests that the proclamation of a "National Day of Honor" for Iraq veterans ended that conflict, 77 Fed. Reg. 16,903, 16,905 (Mar. 22, 2013), but does not explain how it observed the necessary formalities, Opp. 14-15. The government has successfully invoked the WSLA against a financial-services company for conduct having nothing to do with any war, asserting that the Iraq and Afghan conflicts continue. Gov't Opp. to Mot. to Dismiss 7, *United States* v. *BNP Paribas*, No. 4:11-cv-03718 (S.D. Tex. Mar. 20, 2012).

Review is warranted to prevent the "dire effects," Pet. App. 46a (Agee, J., concurring in part and dissenting in part), of the statute of limitations having "not even begun to run on any * * * possible fraud claims" since September 2001 (Pet. 3-4, 115 Stat. 224 (Sept. 18, 2001)), which creates "unpredictable liability for aged claims" and imposes "ever-increasing [defense] costs" on U.S. industry. Chamber Amicus Br. 4, 6, 10.

B. The Panel Exacerbated A Recognized Conflict Of Authority

Respondent does not dispute that this Court's only decisions construing the WSLA require it be "narrowly construed" as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953). See Pet. 10-14. Reciting the facts of *Bridges* and *United States* v. *Smith*, 342 U.S. 225 (1952), see Opp. 9-10, does not displace their general interpretative principles. Pet. 10-13. The suggestion (Opp. 15-16) that *Gabelli* v.

SEC, 133 S. Ct. 1216 (2013), is relevant only to a "discovery rule" ignores its explicit statement that the FCA's 10-year statute of repose is "absolute," *id.* at 1224, and courts' widespread recognition that "*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation." *United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) (Easterbrook, J.).

The majority acknowledged that "courts are in conflict" about "whether the pre-amendment WSLA requires a formal declaration of war or whether the authorized use of military force shall suffice," Pet. App. 10a, which petitioner's own cases confirm. See *BNP Paribas*, 884 F. Supp. 2d at 601 ("[c]ourts are * * * in conflict" on this issue). The non-germane procedural history respondent recites (Opp. 13-14 & nn.6-7) does not resolve that conflict.[7] Respondent also ignores decisions limiting the WSLA to criminal cases.[8] This Court has repeatedly granted review to resolve similar conflicts. *E.g.*, *Murphy Bros.* v. *Mi-*

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[7] *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044 (N.D. Fla. Feb. 21, 2011), rejected application of the WSLA and dismissed counts as untimely. The Eleventh Circuit later remanded for fact-finding on an unrelated jury issue. *United States* v. *Anghaie*, No. 12-10086, 2013 WL 2451168 (11th Cir. June 7, 2013). The government in *United States* v. *Western Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224 (S.D. Cal. July 1, 2010), dismissed charges against individual defendants only after the district court rejected WSLA tolling and dismissed other counts as untimely.

[8] *E.g.*, *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952); cf. *United States ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-cv-245, 2013 WL 3893323, at *7 (W.D. Pa. July 26, 2013) (WSLA inapplicable to non-intervened civil FCA actions).

chetti Pipe Stringing, Inc., 526 U.S. 344, 349 & n.2 (1999) (conflict between courts of appeals and district courts); *Heffron* v. *Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981) (same).

C. Respondent's Shifting Rationales For A "One-Case-At-A-Time" Rule Are Meritless

Until now, respondent's principal argument was that because 31 U.S.C. § 3730(b)(5) provides that "an action under [the FCA]" bars any "related action based on the facts underlying the pending action," the bar ends when a prior claim is no longer "pending." Perhaps appreciating that the words "pending action" impose no explicit time limit, but by their terms simply identify *which facts* no longer remain for a private relator to pursue, see Pet. 28-30, respondent has abruptly downgraded this theory to a secondary role. Opp. 20-22.

Respondent's *new* principal argument—that a dismissal for lack of jurisdiction categorically cannot be "with prejudice," Opp. 17-18 & n.9—fares no better.[9] It simply *assumes* the matter in dispute—that Congress intended a first-to-file dismissal to be "[c]urable." See, *e.g.*, *United States ex rel. Poteet* v. *Bahler Med., Inc.*, 619 F.3d 104, 115 (1st Cir. 2010) (rejecting argument that jurisdictional dismissal under FCA's "public disclosure" bar must be without prejudice; collecting authorities). Courts routinely—and validly—dismiss matters with prejudice under

[9] Contrary to respondent's suggestion (Opp. 17-18), petitioners argued below that the bar operates even "after the first-filed suit is dismissed." Mem. in Support of Mot. to Dismiss 6 (E.D. Va. Oct. 21, 2011, redactions filed Dec. 7, 2011) (Doc. No. 47).

the FCA's jurisdictional "public disclosure" bar. See, *e.g.*, *ibid.*; *United States ex rel. Zizic* v. *Q2Administrators, LLC*, No. 12-2215, 2013 WL 4504765 (3d Cir. Aug. 26, 2013). Other examples abound.[10]

Respondent also now suggests that precluding "copycat [relator] actions that do not provide [the government] additional material information" about fraud, *Batiste*, 659 F.3d at 1210, creates "immunity" from suit. Opp. 19. But that is flatly wrong: Because the bar prohibits *only* an action by a "person other than the Government," the United States remains free to pursue FCA claims. 31 U.S.C. § 3730(b)(5).

Respondent strains to reconcile this decision with those of other circuits, Opp. 24-25, but there is little question this case would have been decided differently in those courts. Respondent would limit *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), to its facts, Opp. 23-24, but as a leading treatise recognizes, "the rationale for the court's decision applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b] (4th ed. CCH 2012). *Hughes* recogniz-

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[10] See, *e.g.*, *Calcano-Martinez* v. *INS*, 533 U.S. 348, 352 (2001) (Scalia, J., dissenting) ("I would vacate the judgment of the court below and remand with instructions to dismiss for want of jurisdiction, with prejudice * * *."); *Styskal* v. *Weld Cnty. Bd. of Cnty. Comm'rs*, 365 F.3d 855, 857 (10th Cir. 2004) (upholding dismissal of state-law claims "with prejudice," where court lacked supplemental jurisdiction).

es that the first-to-file bar is "exception-free" and "prevent[s] * * * related actions" after the "first-filed claim provides the government notice of the essential facts of an alleged fraud." 243 F.3d at 1187.

Respondent's disjointed account of *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009), Opp. 24-25, cannot obscure the essential sequence of events: The plaintiff filed an amended complaint that first alleged *qui tam* claims. The First Circuit affirmed the dismissal of those claims under the first-to-file bar because another plaintiff had alleged similar claims in another case, *which had been dismissed before the amended complaint was filed*. *Id.* at 32-34. A relator cannot avoid that rule merely by filing a new, rather than amended, complaint.[11] Finally, respondent invokes inapposite facts of *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371 (2009), Opp. 24, but has no response to the Fifth Circuit's express disapproval of "an infinite number of copycat *qui tam* actions" or conclusion that "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *Id.* at 378.

[11] While respondent seeks to distinguish *Makro Capital of Am., Inc.* v. *UBS AG*, 543 F.3d 1254 (11th Cir. 2008), as involving an amended complaint rather than re-filing the same complaint, Opp. 23 n.12, respondent cannot sidestep that court's refusal to "defeat the purpose of [the first-to-file bar] by allowing multiple private suits." 543 F.3d at 1260.

D. Immediate Review Is Appropriate

An interlocutory posture does not bar review of an "important and clear-cut issue of law that is fundamental to the further conduct of the case," including where "the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (collecting authorities); accord *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 160 (2004) (vacating denial of a motion to dismiss). This Court recently exercised certiorari jurisdiction where it had "significant disagreement with the [court of appeals]," *Morgan Stanley Capital Grp. Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 552 (2008), even where the Solicitor General recommended denial given "the interlocutory nature of th[e] issues," *id.* at 555 (Ginsburg, J., concurring in part and concurring in the judgment). Respondent identifies no factual issue that further delay would "illuminate" (Opp. 6) for later appellate review.

District court action will not moot this case during this Court's review. Contra Opp. 6. Any dismissal on alternate grounds would not affect jurisdiction until it is upheld on appeal and this Court denies certiorari or affirms. See *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). There is no realistic prospect that some future appeal would be complete before the Court decided this matter; the current appeal has already taken 20 months. And the possibility that petitioner could ultimately prevail on another ground is no obstacle to resolution of the questions presented here. See Pet. 31 n.8.

This case's torturous procedural history underscores the need for prompt review. Respondent began this litigation in early 2006, alleging conduct dating to 2005, and has repeatedly re-filed the same complaint after numerous dismissals. Absent this Court's intervention, respondent may continue to do so for years—or decades—to come.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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