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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners submit this supplemental brief to address the relevance to the pending petition for a writ of certiorari of several intervening lower-court decisions.

A. Courts And Litigants Nationwide Continue To Invoke The Panel Decision To Toll Indefinitely Civil Fraud Claims Having Nothing To Do With War

As the petition explains, the panel decision is only the most prominent case in a growing series of judicial opinions allowing both self-interested private relators and the government to invoke the Wartime Suspension of Limitations Act ("WSLA")—a *criminal code* provision suspending statutes of limitations for fraud "offense[s]" when prosecutors are distracted by war—to revive time-barred *civil* fraud claims having nothing to do with war or defense contracting, and to toll such claims indefinitely. Pet. 3, 21-24. Although the petition identified a well-recognized lower-court conflict, new authority appeared even in the short interval between the petition and reply brief, including a decision rejecting the reasoning of the court below. Reply 2 & n.3; *id.* at 7 & n.8. Now, only two weeks later, further authority has joined the developed conflict.

1. Since petitioners' reply brief, another published decision has recognized the conflict of authority on the WSLA and invoked the panel opinion here to authorize indefinite tolling. There, the government seeks "hundreds of millions of dollars" in damages and penalties for the decidedly non-war-related conduct of "originating and underwriting government-

insured home mortgage loans." *United States* v. *Wells Fargo Bank, N.A.*, --- F. Supp. 2d ---, 2013 WL 5312564, at *1, *10 (S.D.N.Y. Sept. 24, 2013). While dismissing common-law claims as plainly time-barred, the court held that the WSLA had tolled False Claims Act ("FCA" or "Act") allegations dating back not only to the 2002 Authorization for Use of Military Force Against Iraq (which the panel here cited, Pet. App. 12a), but also the 2001 Authorization for Use of Military Force following the September 11 attacks. 2013 WL 5312564, at *11. The court also concluded that, as of September 24, 2013, "there has been neither a Presidential proclamation, with notice to Congress, nor a congressional resolution suspending hostilities" sufficient to terminate tolling. *Ibid.* The court expressly acknowledged one of the conflicts the petition squarely presents: "[c]ourts have disagreed about whether the conflicts in Afghanistan and Iraq put the United States 'at war' within the meaning of the [WSLA] given the absence of a congressional declaration of war." *Id.* at *11 n.10; accord Pet. I, 17-18.

Relying heavily on the Fourth Circuit's ruling and rationale, *Wells Fargo* rejected the possibility of a limiting interpretation—i.e., that the WSLA "applies only to *criminal* offenses"—and in the process acknowledged *another* division of authority the petition squarely presents. 2013 WL 5312564, at *13 (rejecting *United States* v. *Weaver*, 107 F. Supp. 963 (N.D. Ala. 1952), cited at Pet. 15); but 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, cited at Reply 7 n.8). Buoyed by the panel's

sweeping holding and rationale here, and, like the panel, invoking the (unspecified) general "purpose of the Act," *Wells Fargo* explicitly held that the WSLA extends to "matters * * * having nothing to do with wartime contracting." 2013 WL 5312564, at *13. The court saw no need for any nexus between the alleged fraud and the conflict authorizing tolling: "it makes no difference that the fraud in this case [was] * * * unrelated to the Iraqi or Afghani conflicts." *Id.* at *14. Thus, just one month after the brief in opposition was filed, two things it disputed can no longer seriously be contested: the issues the petition presents "recur" frequently, see Opp. 12; and it is not "speculation" that the WSLA will be applied outside the defense context, *id.* at 16.

2. *Qui tam* litigants, predictably, continue to exploit the favorable law in some jurisdictions. One pending case, *United States ex rel. Landis* v. *Tailwind Sports Corp.*, involves claims with no plausible link to war or defense contracting: allegations that Lance Armstrong and associated entities employed a doping scheme to win bicycle races and secure $40 million in sponsorship money from the U.S. Postal Service, based on alleged conduct dating to *1996*. The private relator has invoked the WSLA, in heavy reliance on the panel decision here. See Relator's Mem. in Opp'n to Def. Lance Armstrong's Mot. to Dismiss, *United States ex rel. Landis* v. *Tailwind Sports Corp.*, No. 1:10-cv-976 (D.D.C. Sept. 23, 2013) (Doc. 109) ("Landis Br.").

Arguing that the WSLA tolls claims for even "decidedly unmilitary" issues, the relator in *Landis* argues that the 2001 and 2002 Authorizations for Use

of Military Force put the United States "at war" for purposes of the WSLA—although he, too, acknowledges that "courts are divided as to whether [the pre-amendment WSLA] requires a formal declaration of war" to toll the statute of limitations. Landis Br. 4, 6. He quotes extensively from the panel decision here, among other things as justification to depart from cases giving the term "war" its ordinary meaning of a formally declared conflict. *Id.* at 6-8 & n.6. And the relator there invokes the panel for the proposition that intervening events did not provide formalities sufficient to terminate tolling. *Id.* at 9. Finally, the brief explicitly argues against giving effect to the FCA's 10-year "statute of repose," expressly endorsed in *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013). Landis Br. 12-13; cf. Pet. 2, 15-17 (noting inconsistency of *Gabelli* with indefinite tolling under WSLA); Reply 6-7 (same).

3. Despite its own aggressive and widespread recent invocation of WSLA tolling, see Reply 5; Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1 ("the government's use of the law has more than doubled" just since 2008, and the government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined), the government has been conspicuously silent about the WSLA in *Landis*. Perhaps perceiving risks from overreach given the pendency of this petition, the government's brief in this intervened *qui tam* uncharacteristically relies on an alternate ground for tolling, content to let the relator to carry the WSLA banner without comment one way or the other. See United States Opp'n to Def. Lance Armstrong's Mot. to Dismiss at 9-20,

United States ex rel. Landis v. *Tailwind Sports Corp.*, No. 1:10-cv-976 (D.D.C. Sept. 23, 2013) (Doc. 114). This shifting and strategic litigating position deprives private parties of notice about the government's view of potential indefinite tolling; calling for the views of the Solicitor General would provide beneficial public guidance on this critical and frequently recurring issue.

B. Respondent's Supposed Vehicle Problem Has Been Resolved

Respondent argued that this case is not ripe for review because, on remand from the Fourth Circuit's decision in this case, petitioners filed a motion to dismiss the complaint under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4). Opp. 5 n.4, 6. Respondent's concerns about possible "moot[ness]" were mistaken on their own terms, see Reply 11-12, but in any event have now vanished: On September 19, 2013, the district court adjudicated the motion, holding that the public disclosure bar does not require dismissal of Relator's claims. See Mem. Op., *United States ex rel. Carter* v. *Halliburton Co.*, No. 1:11-cv-602 (E.D. Va. Sept. 19, 2013) (Doc. 87).

Unless this Court grants review, respondent will be poised to file his *fourth* identical complaint invoking a statute Congress intended to prohibit "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), despite the fact that *two* other relators already brought those allegations to the government's attention, Pet. 6. Without a doubt, these are important questions that this Court will have to address eventually, but

the dramatic implications of the Fourth Circuit's opinion for *all* government contracting, in every industry, are apparent right now. This Court's review is urgently needed.

CONCLUSION

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

Respectfully submitted.

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