No. 12-1497

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

1. Whether the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, applies to a civil fraud claim brought by a private relator under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*

2. Whether the FCA's "first-to-file" provision, 31 U.S.C. 3730(b)(5), bars a relator from filing a new *qui tam* suit when a *qui tam* action raising similar allegations has been filed, but subsequently dismissed on non-merits grounds, before the new suit is commenced.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim" to the government "for payment or approval." 31 U.S.C. 3729(a)(1)(A). The Act authorizes both the government and private persons to sue for violations. See 31 U.S.C. 3730(a) and (b). Under the FCA's limitations provision, suit must

be brought within six years of the date of the violation, or within three years of the date the material facts were known or should have been known to the responsible government official (so long as the suit is brought within ten years of the violation). 31 U.S.C. 3731(b).

When a private person (known as a relator) brings a lawsuit (known as a *qui tam* action), the government may intervene and proceed with the action or may decline to intervene and allow the relator to proceed. See 31 U.S.C. 3730(b)(1)-(4) and (c). In either event, any recovery is divided between the relator and the government. See 31 U.S.C. 3730(d). The FCA provides that, when a relator brings a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). Section 3730(b)(5) is commonly known as the FCA's "first-to-file" provision.

b. The Wartime Suspension of Limitations Act (WSLA), originally enacted during World War II,[1] suspends the statute of limitations in certain circumstances while the United States is engaged in military operations. As amended most recently in 2008, the WSLA 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

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[1] See Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

> conspiracy or not, * * * 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. Congress enacted the WSLA to ensure "that the limitations statute will not operate, under stress of [wartime], for the protection of those who would defraud or attempt to defraud the United States." S. Rep. No. 1544, 77th Cong., 2d Sess. 2 (1942) (1942 Senate Report).

2. Petitioners provided logistical services to the United States military in connection with the armed conflict in Iraq. Pet. App. 3a. In 2005, respondent worked for petitioners on water-purification projects at two camps in Iraq. *Ibid.* Respondent alleges that petitioners instructed him to submit time sheets for time he did not work, and that it was "routine practice" for petitioners to overbill the United States government on these projects. *Id.* at 3a-4a.

In February 2006, respondent brought an FCA action against petitioners, alleging that they had fraudulently billed the government for work in Iraq. Pet. App. 4a, 48a-49a. The district court dismissed the complaint for failure to plead fraud with particularity, and respondent promptly re-filed the complaint. *Ibid.* One month before trial, the parties were alerted to the pendency of an arguably related suit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05-CV-08924 (C.D. Cal. filed Dec. 23, 2005), that had been filed before respondent's action. Pet. App. 4a-5a, 51a.

Petitioners moved to dismiss respondent's suit based on the FCA's first-to-file provision. Pet. App. 5a. The district court concluded that respondent's suit

was sufficiently "related" to *Thorpe* to trigger the first-to-file provision, and it dismissed respondent's complaint without prejudice. *Ibid.* Respondent appealed the dismissal of his complaint, and in the meantime, *Thorpe* was dismissed. *Ibid.*

Respondent then re-filed his FCA suit against petitioners. Pet. App. 5a. The district court again dismissed the complaint, based on the first-to-file bar, because respondent's first suit against petitioners was still pending on appeal when he filed the second suit. *Id.* at 5a-6a.

Respondent voluntarily dismissed his appeal in the first suit. In June 2011, he filed this action, again alleging that petitioners had fraudulently billed the government for services provided to the military in Iraq. Pet. App. 5a-6a, 48a. Petitioners moved to dismiss the complaint, arguing (1) that it is barred by the FCA's first-to-file provision because of the *Thorpe* action and a new case filed in Maryland (*United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 07-CV-01487 (D. Md. filed June 5, 2007)), and (2) that most of respondent's claims are untimely under the FCA's six-year statute of limitations. Pet. App. 52a, 57a.[2]

3. The district court granted petitioners' motion to dismiss. Pet. App. 47a-76a. The court held that respondent's suit was barred by the first-to-file provision because *Duprey* was sufficiently "related" to the instant lawsuit and had been filed before the instant suit was commenced. *Id.* at 58a-64a. The court acknowledged that *Duprey* had been dismissed on

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[2] Petitioners also argued that the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), bars this lawsuit. Pet. App. 57a. Neither the district court (*id.* at 57a n.3) nor the court of appeals (*id.* at 22a) addressed that argument.

procedural grounds after this lawsuit was filed. *Id.* at 63a. It nevertheless dismissed respondent's complaint with prejudice, explaining that the application of the first-to-file bar depends on "the facts as they existed when the action was brought," and that *Duprey* "was pending when [respondent] filed the instant suit." *Id.* at 63a-64a.

The district court also held that most of respondent's claims are time-barred, rejecting respondent's argument that the WSLA applies to this action. Pet. App. 64a-75a. The court acknowledged that the term "offense" in the WSLA could apply to both criminal and civil violations of law, *id.* at 68a, and that many courts have interpreted the WSLA to apply to civil fraud violations, *id.* at 71a & n.17. The court held, however, that the WSLA should not apply in *qui tam* suits because the FCA's limitations provision distinguishes between *qui tam* suits and suits brought by the government, and because such application would undermine the FCA's purpose of "combat[ting] fraud quickly and efficiently" by "allow[ing] relators to sit on their claims." *Id.* at 73a-74a. Without deciding whether the WSLA applies to FCA suits brought by the government, the court concluded that it does not apply to "a civil FCA action brought by a relator, in which the United States has opted not to intervene." *Id.* at 74a.

4. The court of appeals reversed and remanded. Pet. App. 1a-23a.

a. The court of appeals held that the WSLA suspends the statute of limitations for respondent's claims. Pet. App. 8a-16a. The court observed that the statute's reference to "offense[s] * * * involving fraud" could include both criminal and civil violations,

and it concluded that Congress intended the WSLA to apply to both. *Id.* at 13a-14a. The court explained that, as first enacted in 1942, the WSLA had referred to offenses "now indictable," thus limiting the provision to criminal offenses, but that Congress had deleted that language in 1944, evidencing its intent to expand the WSLA to civil fraud offenses. *Id.* at 14a.

The court of appeals further explained that applying the WSLA to civil fraud offenses "furthers the WSLA's purpose," which is "to root out fraud against the United States during times of war." Pet. App. 16a. The court also observed that "all but one court to have considered the issue of whether the WSLA applies to civil claims have found that it applies." *Id.* at 14a (citation omitted). Finally, the court rejected petitioners' argument that the WSLA should be limited to FCA suits brought by the United States. The court explained that the suspension of limitations in the WSLA "depends upon whether the country is at war and not who brings the case." *Id.* at 15a; see *id.* at 15a-16a.

b. The court of appeals held that the FCA's first-to-file provision does not forever bar respondent's claims. Pet. App. 16a-22a. The court concluded that, because *Thorpe* and *Duprey* were pending when petitioner filed his June 2011 complaint, and those actions are sufficiently "related" to this lawsuit to trigger the first-to-file bar, respondent's complaint was properly dismissed. *Id.* at 19a-21a. The court further held, however, that the dismissal should have been without prejudice so that respondent could file a new lawsuit, since both *Thorpe* and *Duprey* had been dismissed. *Id.* at 21a. The court explained that the first-to-file bar applies only when a "related action" is "pending,"

and that "once a case is no longer pending," "the first-to-file bar does not stop a relator from filing a related case." *Id.* at 21a-22a.

c. Judge Wynn concurred, providing additional reasons why the WSLA applies to respondent's suit. Pet. App. 23a-31a. Judge Agee concurred in part and dissented in part, taking the view that the WSLA suspends the statute of limitations for civil claims only when the United States is a party. *Id.* at 31a-46a.

DISCUSSION

The court of appeals correctly held that the WSLA applies in a *qui tam* suit under the FCA because a civil FCA violation is an "offense * * * involving fraud * * * against the United States." 18 U.S.C. 3287(1). The term "offense" can refer to both criminal and civil violations of law, and the context, history, and purposes of the WSLA demonstrate that Congress intended to suspend the limitations period in times of war for all frauds against the United States. The court below also correctly recognized that the WSLA's applicability does not depend on whether a particular suit is brought by the government or by a private relator. There is no disagreement in the courts of appeals on the question whether the WSLA applies to *qui tam* suits or to civil FCA violations more generally. Accordingly, the first question presented does not warrant this Court's review.

The court of appeals also correctly held that the FCA's first-to-file provision does not apply if a previously-filed related case is no longer pending when a *qui tam* suit is commenced. That interpretation is consistent with the statute's plain language, which bars the instant action only when a "related action" is "pending," 31 U.S.C. 3730(b)(5), and it reasonably

balances the need to encourage prompt filing of FCA suits with the need to permit the adjudication of FCA claims on their merits. The courts of appeals have disagreed on the question whether the first-to-file bar applies in these circumstances, but that disagreement is a narrow one that soon may be resolved without this Court's intervention. Accordingly, review of the second question presented is not warranted at this time.

A. The Question Whether The WSLA Applies To Civil Fraud Claims Does Not Warrant This Court's Review

1. The court of appeals correctly held that the WSLA applies to both civil and criminal fraud offenses.

a. The WSLA broadly provides that, when the United States is at war or Congress has authorized the use of military force, "the running of *any* statute of limitations applicable to *any* offense * * * involving fraud or attempted fraud against the United States or any agency thereof *in any manner*, whether by conspiracy or not, * * * shall be suspended until 5 years after" the termination of hostilities. 18 U.S.C. 3287 (emphases added); see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). The statute also encompasses additional categories of offenses involving government property and contracts. See 18 U.S.C. 3287(2) and (3). Congress thus defined the statute's coverage not by reference to the criminal or civil character of the underlying violation, but by reference to the substantive nature of the wrongdoing involved.

As both courts below recognized, the word "offense" can encompass both civil and criminal violations of law. See Pet. App. 13a-14a, 68a; see also, *e.g.*, *Black's Law Dictionary* 1186 (9th ed. 2009) (defining

"offense" as "[a] violation of the law; a crime, often a minor one" and providing examples of both criminal and civil "offenses"); *Webster's Third New International Dictionary* 1566 (1993) (defining "offense" as "an infraction of law" or "crime"). Numerous provisions of the United States Code use the word "offense" to refer to a civil violation. See, *e.g.*, 15 U.S.C. 45(*l*); 16 U.S.C. 1540(a)(1); 16 U.S.C. 3373(a)(4); 29 U.S.C. 2619(b); 33 U.S.C. 1321(b). This Court likewise has frequently used the term "offense" to describe civil violations of law. See, *e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (in an employment-discrimination case, referring to "Title VII offenses"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) (repeating the rule that "exemplary damages imposed on a defendant should reflect the enormity of his offense") (citation and internal quotation marks omitted); *Welsh* v. *Wisconsin*, 466 U.S. 740, 746, 751-754 (1984) (repeatedly referring to a civil traffic violation as a civil "offense").

In *United States* v. *Hutto*, 256 U.S. 524 (1921), the Court construed the federal criminal conspiracy statute, which then as now prohibited conspiracy "to commit any offense against the United States." *Id.* at 525 (quoting § 37, Criminal Code). The Court held that the statute applied to a conspiracy to violate a federal statute prohibiting federal Indian affairs employees from trading with Indians. See *id.* at 525, 528-529. The Court explained that the statute's reference to an "offense against the United States" "does not in terms require that the contemplated offense shall of itself be a criminal offense." *Id.* at 528. Rather, the Court concluded, the conspiracy statute proscribed

any "combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful." *Id.* at 529. That holding provides further evidence that the word "offense" is not limited to crimes, even when it appears within the Criminal Code.[3]

b. The WSLA's history confirms that Congress intended it to apply to both civil and criminal fraud offenses. Congress enacted the WSLA in 1942, in the midst of World War II.[4] As originally enacted, the WSLA provided that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United

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[3] In light of subsequent amendments to the federal conspiracy statute, it is doubtful that the statute in its current form (18 U.S.C. 371) encompasses conspiracies to commit civil violations. Section 371 establishes a five-year maximum term of imprisonment for conspiring to commit an "offense against the United States," then states that if the "offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment * * * shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. 371. Congress's use of the term "misdemeanor" to describe less serious "offense[s]" suggests that Congress used the term "offense" in current Section 371 to mean "crime." But see *United States* v. *Wiesner*, 216 F.2d 739, 741-742 (2d Cir. 1954). But that simply shows that the term "offense" sometimes encompasses civil violations and sometimes does not, and that the particular context in which the term appears may help to clarify its meaning. Here, various contextual clues demonstrate that the term as it appears in the WSLA is not limited to crimes.

[4] Congress had enacted a similar provision following World War I, extending the statute of limitations for "offenses involving the defrauding or attempts to defraud the United States" from three years to six years. See Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220. Congress repealed that provision in 1927. See Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51.

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." Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

Two years later, Congress amended the WSLA as part of the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 649, 667. *Inter alia*, Congress changed the concluding clause of the statute, removing the language that had previously limited the WSLA to offenses "now indictable under any existing statutes." 56 Stat. 748. Under the amended version, the limitations period was suspended for qualifying offenses "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." § 19(b), 58 Stat. 667. As the court below explained, the "now indictable" language originally limited the WSLA's application to criminal fraud offenses, and the deletion of the "now indictable" language in 1944 made the WSLA "applicable to all actions involving fraud against the United States." Pet. App. 14a. If Congress had intended for the WSLA to continue to apply only to criminal offenses, it could have included some "limiting language" to make that point clear, *ibid.*, but Congress did not do so.

Congress's failure to include language limiting the WSLA to crimes is especially telling because the Contract Settlement Act was largely civil in nature. The Act's purpose was to ensure that government war contracts could be terminated, and creditors could be

paid, more quickly, in order to allow for a speedy transition from a wartime to peacetime economy. See § 1, 58 Stat. 649. Recognizing that such an expedited process would increase the opportunity for fraud, Congress included both criminal and civil provisions intended to better protect the government from fraud committed by wartime contractors. See § 19(c), 58 Stat. 667-668 (creating new criminal and civil offenses, including fine of $2000 per act and double damages, for presenting false claims for payment in connection with war contracts). Congress also established procedures for the Comptroller General to certify to the Department of Justice that a war contract settlement was induced by fraud, and it required each contracting agency to report to the Department of Justice "any settlement" with a war contractor that the agency believed "was induced by fraud," so that the Department could "take * * * action" to "recover payments made to such war contractor." §§ 16, 18(e), 58 Stat. 664-665, 666-667.

In the same 1944 enactment that removed the "now indictable" language, Congress also expanded the WSLA to reach any offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement" of any contract connected to the war effort. § 19(b), 58 Stat. 667. Later that year, Congress expanded the WSLA's reach again, to apply to any offenses "committed in connection with the care and handling and disposal of property under the Surplus Property Act." Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 765, 781. The overall context of the 1944 Acts reinforces the conclusion that Congress's removal of the "now

indictable" language was intended to expand the WSLA's reach to civil fraud, contracting, and procurement offenses.

Congress has not taken any action since 1944 to limit the WSLA's reach to crimes. Congress modified the statute in 1948, see Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 683, 828, "to make [the WSLA] permanent instead of temporary legislation," thereby "obviat[ing] the necessity of reenacting such legislation" for each future war, H.R. Rep. No. 304, 80th Cong., 1st Sess. A165 (1947). The 1948 amendments made no change, however, to the list of offenses that the WSLA covered. The WSLA remained unchanged from 1948 to 2008. In 2008, Congress amended the law to provide for suspension of limitations periods not only when the United States is "at war," but also when "Congress has enacted a specific authorization for the use of the Armed Forces," and to expand the suspension period from three years to five years after the termination of hostilities. Department of Defense Appropriations Act, 2009, Pub. L. No. 110-329, Div. C, § 8117, 122 Stat. 3574, 3647. Again, Congress did nothing to limit the offenses reached by the statute.

c. Applying the WSLA to civil FCA violations furthers the WSLA's purposes. The WSLA reflects Congress's recognition that frauds against the government committed during a time of war "may be difficult to discover" and "may not come to light for some time to come." 1942 Senate Report 2. Suspension of the limitations period ensures "that frauds may be discovered and punished even after the termination of the present conflict," and that the statute of limitations will not "protect[] * * * those who would

defraud or attempt to defraud the United States." *Ibid.* The Senate Report accompanying the Surplus Property Act of 1944 likewise explains that, due to "the intensive preoccupation of both participants and witnesses with the war effort," "the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war," and at that point, it will "require considerable time before they advance to the stage of litigation." S. Rep. No. 1057, 78th Cong., 2d Sess. 14 (1944) (1944 Senate Report).

Those rationales for suspending the limitations period in wartime fraud cases apply equally in the criminal and civil contexts. Fraud against the United States may be "difficult to discover," take time to "be apprehended or investigated," and "require considerable time" to "advance to * * * litigation" (1942 Senate Report 2; 1944 Senate Report 14), regardless of whether that fraud is ultimately prosecuted criminally or civilly. That concern is best addressed by construing the WSLA to apply to all suits alleging fraud against the United States, including both criminal prosecutions and civil FCA suits.

d. The court of appeals correctly held that the WSLA applies in FCA suits brought by *qui tam* relators. By its terms, the WSLA's applicability turns on the nature of the "offense" alleged, not on the identity of the plaintiff. The dissenting judge below relied in part on legislative history that described the difficulties federal law-enforcement officials would face in detecting and prosecuting frauds during wartime. See Pet. App. 41a-42a (Agee, J., dissenting). Because the WSLA applies to offenses involving fraud against the United States, or involving government property or

contracts, Congress naturally focused on the practical exigencies confronting federal officers. Nothing in the WSLA's text, however, provides a basis for distinguishing between civil FCA suits brought by the United States and those brought by private relators.

2. a. Every court of appeals to consider the question has held that the WLSA applies in civil fraud cases. See Pet. App. 13a-14a; *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 310 (1960); *United States* v. *Witherspoon*, 211 F.2d 858, 860-863 (6th Cir. 1954). During the 1950s, numerous district courts addressed that issue, and they overwhelmingly reached the same conclusion.[5] The former Court of Claims also held that the WSLA applies to civil fraud claims. See *Dugan & McNamara* v. *United States*, 127 F. Supp. 801, 802-804 (Ct. Cl. 1955). Other than the district court in this case, which held that the WSLA does not apply to private *qui tam* suits, only one district court has found the statute inapplicable to civil cases. See *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), rev'd on other grounds, 207 F.2d 796 (5th Cir. 1953).

b. In 1959, the United States stated in a brief to this Court that the WSLA applies only to crimes. See U.S. Br. at 26-28, *Koller* v. *United States*, 359 U.S. 309

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[5] See *United States* v. *Temple*, 147 F. Supp. 118, 120-121 (N.D. Ill. 1956), rev'd on other grounds, 299 F.2d 30 (7th Cir. 1962); *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546, 550-551 (D.D.C. 1956); *United States* v. *Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa. 1956); *United States* v. *Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955); *United States* v. *Covollo*, 136 F. Supp. 107, 109 (E.D. Pa. 1955); *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806, 806 (E.D. Pa. 1954); *United States* v. *Strange Bros. Hide Co.*, 123 F. Supp. 177, 181-184 (N.D. Iowa 1954).

(1959) (No. 362). The WSLA was not at issue in that case, and the government's brief did not discuss either the sequence of enactments (including the deletion of the "now indictable" language) that had produced the WSLA in its then-current form, or the lower-court decisions (see note 5, *supra*) that had found the statute applicable to civil cases. The Court's summary disposition in *Koller* did not address the proper construction of the WSLA.

c. We are not aware of any published decision between 1959 and 2012 addressing the question whether the WSLA applies to civil fraud suits. The absence of such decisions is likely due at least in principal part to the fact that, until the WSLA was amended in 2008, there was substantial doubt whether the statute could apply absent a formal declaration of war. Since that amendment was enacted, the United States has successfully argued in two district courts that the WSLA applies in civil cases. See *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 612-614 (S.D.N.Y. 2013); *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 601-602 (S.D. Tex. 2012); see also *United States* v. *Movtady*, No. 13 Civ. 2227 (JMF), 2014 WL 1357330, at *5 n.4 (S.D.N.Y. Apr. 7, 2014) (district court reached same conclusion *sua sponte*); *United States ex rel. Carroll* v. *Planned Parenthood Gulf Coast, Inc.*, Civ. No. H-12-3505, 2014 WL 1933554, at *7 (S.D. Tex. May 14, 2014) (district court reached same conclusion in *qui tam* suit); *United States ex rel. Paulos* v. *Stryker Corp.*, Civil No. 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (same). The Court's invitation in this case prompted a further reexamination within the government of the question presented here. The government

has concluded that, in light of the current text of the WSLA, the development of the statute's language over time, and the case law construing the provision, the WSLA should be interpreted to apply to both criminal and civil fraud offenses. Because this is the uniform view of the courts of appeals, no further review of the issue is warranted.

3. The court below also concluded that, for purposes of the pre-2008 version of the WSLA, the United States had been "at war" in Iraq since October 11, 2002, when Congress enacted an Authorization for the Use of Military Force against Iraq (AUMF). Pet. App. 12a. Although the petition contains passing criticisms of that holding (Pet. 13, 16), the timeliness of respondent's suit does not depend on whether the prior version of the FCA required a formal declaration of war. Because respondent alleges FCA violations occurring in 2005, see Pet. App. 3a, the FCA's six-year limitations period had not expired when the WSLA was amended in 2008. And under the WSLA in its current form, the limitations period in covered cases is suspended "[w]hen the United States is at war *or Congress has enacted a specific authorization for the use of the Armed Force*s." 18 U.S.C. 3287 (emphasis added).

The 2008 WSLA amendment thus operated to suspend the FCA's limitations period in this case, whether or not that period had previously been running under the pre-amendment version of the WSLA. And because the 2008 amendments clarified going forward that the AUMF and similar congressional authorizations can trigger the WSLA, the proper interpretation of the phrase "at war" in the prior version of the statute is of no continuing importance.

B. The Question About The FCA's First-To-File Provision Does Not Warrant This Court's Review

1. The court of appeals correctly held that the FCA's first-to-file provision applies only when a related suit is "pending" at the time the relator files her action. See Pet. App. 20a-22a.

a. The first-to-file provision states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). By Section 3730(b)(5)'s plain terms, a *qui tam* suit is barred when a "related action" is "pending." Under usual understandings of the word, a matter is "pending" if it "remain[s] undecided," is "awaiting decision," or is "under consideration." *Black's Law Dictionary* 1248 (9th ed. 2009); see *Carey* v. *Saffold*, 536 U.S. 214, 219-220 (2002) (stating that the "ordinary meaning" of "pending" is "in continuance" or "not yet decided" (citation omitted)). And under that ordinary meaning, a civil action ceases to be "pending" when it is dismissed by the trial court. Once a related first-filed action is no longer "pending," the FCA's first-to-file bar is inapplicable by its terms.

Although the district court recognized that the first-to-file bar applies only when a related action is "pending," it dismissed respondent's complaint with prejudice because two related cases had been pending when respondent filed suit in June 2011. Pet. App. 63a-64a. As the court of appeals explained, however, both of those related actions have since been dismissed, and so neither is "pending" now. *Id.* at 21a-22a. Because no first-filed action is currently "pend-

ing," the court of appeals correctly held that petitioner is "entitled to file a new complaint." *Id.* at 63a-64a.

b. Limiting the first-to-file bar to situations where the first-filed action remains "pending" makes good sense. A key purpose of the first-to-file provision is to "encourag[e] whistleblowers to come forward by rewarding the first to do so." *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005). The first-to-file bar furthers that purpose by precluding a relator from filing a new action while a related action is pending, thereby protecting the first relator from either a race to judgment or dilution of any recovery his suit might produce. See, *e.g.*, *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (if "dozens of relators could expect to share a recovery for the same conduct" it would "decreas[e] the[] incentive to bring a *qui tam* action in the first place"). When a relator seeks to file a suit based on the same facts as a pending action, the first-to-file bar also protects the defendant from facing multiple, simultaneous *qui tam* actions regarding the same alleged misconduct.

Neither of those rationales for precluding follow-on *qui tam* suits applies, however, after the first-filed action has been dismissed. Once the initial suit has been dismissed, the first relator has no continuing interest in avoiding dilution of his (now hypothetical) recovery, and the defendant no longer faces the prospect of multiple pending suits. If the first-filed action has been decided *on the merits*, "the doctrine of claim preclusion may prevent the filing of subsequent cases." Pet. App. 21a. But there is no sound reason that a *non-merits* dismissal should preclude a subse-

quent *qui tam* suit brought by a relator who otherwise satisfies the FCA's requirements.

Petitioners assert (Pet. 29) that the court of appeals' interpretation of the first-to-file bar "undermines the statutory purpose of helping the government promptly to pursue fraud" because relators will have "no incentive * * * to file promptly" under the court of appeals' reading of Section 3730(b)(5). That argument is misconceived. If the first relator's allegations are publicly disclosed in the course of the suit, the second relator's complaint may be subject to dismissal under the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), even if the first suit is dismissed on non-merits grounds. See *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010). A potential relator also cannot predict how or when an earlier-filed suit will be resolved or whether that resolution will have preclusive effect in a later-filed suit. A potential relator thus has ample incentives to make every effort to be the first to file, even if Section 3730(b)(5) is construed (according to its terms) to require a "pending" suit.

2. The courts of appeals have disagreed on the question whether the first-to-file provision applies when no action involving the same underlying facts remains "pending" when the relator files her suit. The court below held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." Pet. App. 22a; see *United States ex rel. May* v. *Purdue Pharma L.P.*, 737 F.3d 908, 920 (4th Cir. 2013), petition for cert. pending, No. 13-1162 (filed Mar. 25, 2014). The Seventh Circuit has agreed that the first-to-file provision "applies only while the initial complaint is 'pending,'" *Chovanec*, 606

F.3d at 365, and the Tenth Circuit has stated the same view in dicta, see *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-964 (10th Cir. 2009) ("[I]f that prior claim is no longer pending, the first-to-file bar no longer applies.").[6] In *United States ex rel. Shea* v. *Cellco Partnership*, No. 12-7133, 2014 WL 1394687 (D.C. Cir. Apr. 11, 2014), however, the D.C. Circuit recently took the opposite view, holding that "the first-to-file bar applies even if the initial action is no longer pending." *Id.* at *4-*6.[7]

The disagreement in the circuits is a narrow one that may resolve itself without this Court's intervention. The D.C. Circuit's decision in *Shea* was issued by a divided panel. Judge Srinivasan dissented in

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[6] The Ninth Circuit has held that the first-to-file bar is inapplicable when the first-filed suit was dismissed under the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), but the second relator qualifies as an "original source" and therefore is not subject to the public-disclosure bar. See *Campbell*, 421 F.3d at 821-822. In a prior case, the Ninth Circuit applied the first-to-file bar when the related action was pending at the time the new complaint was filed but subsequently was dismissed, without addressing whether the relator may re-file her claim. See *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir.), cert. denied, 543 U.S. 1040 (2001).

[7] The other cases cited by petitioners (Pet. 24-26) are inapposite. For example, *United States ex rel. Branch Consultants* v. *Allstate Insurance Co.*, 560 F.3d 371 (5th Cir. 2009), addressed whether a previously-filed suit was "related" to the present suit, not whether the first-to-file bar applies when a related case is no longer pending. *Id.* at 378. Although *United States ex rel. Duxbury* v. *Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009), involved a previously-filed suit that had been dismissed by the time the court of appeals issued its opinion applying the first-to-file bar, the court in *Duxbury* did not address whether the first-to-file bar applies when the related case is no longer pending. *Id.* at 33-34.

part, taking the view that, when "the first action is no longer 'pending,' the first-to-file bar should pose no continuing obstacle to the filing of a subsequent action." 2014 WL 1394687, at *6. The relator in *Shea* has filed a petition for rehearing en banc, and the United States has submitted an amicus brief supporting that petition. See 12-7133 Docket entries (D.C. Cir. May 9, 2014, and May 15, 2014).

If the D.C. Circuit grants en banc review in *Shea* and ultimately agrees with the government as to the proper construction of Section 3730(b)(5), there will no longer be any circuit conflict on the second question presented here. Because the disagreement in the circuits is a narrow one that soon may resolve itself without this Court's intervention, review of the second question presented is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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