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 IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*


JOHN M. FAUST
LAW OFFICE OF
JOHN M. FAUST, PLLC
*1325 G Street, NW*
*Suite 500*
*Washington, DC 20005*
*(202) 449-7707*

JOHN P. ELWOOD
*Counsel of Record*
CRAIG D. MARGOLIS
JEREMY C. MARWELL
TIRZAH S. LOLLAR
VINSON & ELKINS LLP
*2200 Pennsylvania Avenue, NW, Suite 500W*
*Washington, DC 20037*
*(202) 639-6500*
*jelwood@velaw.com*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases:** **Page(s)**

**Statutes:** **Page(s)**



**Other Authorities:**

## SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States has formally taken the position that, because of a *criminal code* tolling provision for fraud "offenses" enacted to accommodate law-enforcement officials distracted by wartime duties, no statute of limitations now restricts *civil actions* under the False Claims Act ("FCA"). Under this view, limitations have been tolled on *all* FCA actions, brought by the government or a private relator, war-related or not, since at least the 2001 Authorization for the Use of Military Force, if not the First Gulf War. And the limitations period will remain tolled indefinitely until Congress or the President takes the unprecedented (and politically unlikely) step of formally declaring *all* conflicts involving the United States to be over. Though the government concedes that the Wartime Suspension of Limitations Act ("WSLA") originally addressed only crimes, it claims that the deletion of two words, unremarked by Congress, expanded the statute's sweep to civil actions.

The government's current view reverses the criminal-only position it took before this Court at a time when it routinely litigated WSLA cases. The government does not even mention, much less attempt to reconcile, this Court's admonitions that the WSLA must 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); *United States* v. *McElvain*, 272 U.S. 633, 639 (1926) (predecessor provision "is to be construed strictly"), or the FCA's "absolute" 10-year statute of repose, see Pet. 15-16. See generally *CTS Corp.* v. *Waldburger*, No. 13-339 (June 9, 2014), slip op. 7

("Statutes of repose * * * generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.").

There's more. The government now says the FCA, which it previously told this Court bars suits "which the government is capable of pursuing itself" (as when it is "already on the trail of the alleged fraud"), Br. of U.S. as *Amicus Curiae* 10, *Graham Cnty. Soil & Water Conserv. Dist.* v. *U.S. ex rel. Wilson* (U.S. 2010) (No. 08-304) ("*Graham Cnty.* U.S.Br."), actually permits relators to bring sequential lawsuits alleging identical claims already well-known to the government, as long as they proceed one case at a time. That is contrary to the government's prior representation that under the first-to-file bar, "even a first-in-time *qui tam* complaint * * * which is subsequently dismissed prevents a second-in-time complaint from proceeding," U.S. Br. 26, *Chovanec* v. *United States*, 606 F.3d 361 (7th Cir. 2010) ("*Chovanec* U.S.Br."), http://goo.gl/uscYwn. The combined effect of the government's two reversals is that self-interested relators can hale government contractors into court to litigate identical claims dating to the last century again, and again, and again.

The government's current position represents a remarkable enough assertion of authority by the Executive Branch—endorsed by a court with among the nation's busiest FCA dockets and jurisdiction over most government contractors, see Chamber *Amicus* Br. 20-21; NDIA *Amicus* Br. 2-3—that it would warrant review under this Court's Rule 10(c) even absent

disagreement among the courts.[1] But there is disagreement: a "squar[e] conflict[]" among circuits on the first-to-file issue, Br. for U.S. Supporting Reh'g En Banc 3, *U.S. ex rel. Shea* v. *Cellco P'ship*, No. 12-7133 (D.C. Cir. May 15, 2014), and rampant disagreement among the lower courts on the WSLA issue, see pp. 7-8, *infra*. That the government has taken positions on *both* sides of *both* issues underscores the extent of confusion and the strong arguments that the Fourth Circuit erred. The many cases decided while this Court's invitation was pending confirm that both issues are important and arise frequently; the government's expansive reading will further promote litigation.

Both issues have been fully examined by a variety of courts and are ready for this Court's review. The government identifies no vehicle problems that would keep this Court from resolving both issues, and does not dispute that this case is an excellent vehicle for addressing the interaction between the two provisions. Prompt review is necessary to avoid "dire effects" on government contractors. Pet. App. 46a (Agee, J., concurring in part and dissenting in part); Pet. 23 (detailing "grave implications").

---

[1] Br. of U.S. as *Amicus Curiae* 17, *Air Wis. Airlines Corp.* v. *Hoeper* (U.S. 2013) (No. 12-315) (successfully urging review because of decision's "possible impact" although it "does not conflict" with "any decision of * * * any other appellate court"); Br. of U.S. as *Amicus Curiae* 17 n.1, *Republic of Iraq* v. *Beaty* (U.S. 2008) (No. 07-1090) (same, "[i]n view of the [issue's] importance" despite "no circuit conflict"); Br. of U.S. as *Amicus Curiae* 8, *Chamber of Commerce* v. *Candelaria* (U.S. 2010) (No. 09-115) (same).

### A. The WSLA Only Applies To Crimes

1. The government's principal contention is that Congress's 1944 deletion of two words—"now indictable"—from a tolling provision that "originally limited the WSLA's application to criminal fraud offenses" (U.S.Br.11)—extended its reach to civil provisions. The government neglects to note that this Court construed that language in the WSLA's predecessor just as petitioners have (Pet. 14; Reply 3), as making tolling "applicable to offenses * * * *not already barred*." *McElvain*, 272 U.S. at 637 (emphasis added). Congress deleted those words as redundant because another provision of the 1944 law specified that tolling "shall not apply to acts, offenses, or transactions which are already barred." Contract Settlement Act of 1944, 58 Stat. 649, 667.

We need not guess how Congress would write a tolling provision for both criminal and civil matters: It did so two months after enacting the WSLA, addressing tolling not for "offenses," but "*violations* of the antitrust laws * * * now indictable *or subject to civil proceedings*." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added).[2] The idea that Congress

---

[2] The government emphasizes that the 1944 amendments were within an enactment that "was largely civil in nature." U.S.Br.11. But that law simply added "criminal prosecutions for violations of the Surplus Property Act * * * to the list of prosecutions" covered by the WSLA. U.S.Br. 26-27, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362) ("*Koller* U.S.Br."); accord *United States* v. *Smith*, 342 U.S. 225, 227-228 (1952) (law extended to "offenses of the type likely to be committed during the post-hostilities period"). The criminal nature of the "offense[s]" is confirmed by the fact that the relevant section was captioned "PROSECUTION OF FRAUD," § 19(b), 58 Stat. 667.

would transform a tolling provision limited to *criminal prosecutions* to one also encompassing civil suits by the ambiguous step of deleting two words, without any reference in legislative history, runs counter to the rule that "Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Congress's failure to address the WLSA's interaction with the FCA's (civil) statute of repose is further indication it applies only in criminal cases. *CTS Corp.*, slip op. 11-15.

While the government argues that no post-1944 amendment "limit[ed] the WSLA's reach to crimes," U.S.Br.13, it ignores indications that its criminal-only scope was already well understood. Four years after the supposedly transformational 1944 amendment, when Congress comprehensively recodified the criminal law to "mak[e] it easy to find the criminal statutes," 94 Cong. Rec. 8906 (daily ed. June 18, 1948), it placed the WSLA in the new criminal code's chapter on "limitations." Cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, * * * instead of the criminal code."). That chapter divided "offenses" into two obviously criminal categories, "capital" and "not capital," and *every* use of "offense" referenced a crime, 62 Stat. 827-828. (That remains true. See 18 U.S.C. §§ 3281-3301.) Whatever modern dictionaries may say, U.S.Br.8-9, limiting "offense" to crimes accords with the word's ordinary meaning at the time of the WSLA's enactment: "A crime or misdemeanor; a breach of the criminal laws." *Black's Law Dictionary*

1232 (4th ed. 1951). Cf. *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 610-611 (1987) (looking to contemporaneous definitions to construe statute).

The government identifies no other provision of title 18 (U.S.Br.9) that uses "offense" to describe a civil violation; its sole example is 93 years old, see U.S.Br.9 (citing *United States* v. *Hutto*, 256 U.S. 524 (1921)), and it concedes in a footnote that even that statute has been amended to indicate that "offense" means only crimes, by referring to less serious "offense[s]" as "misdemeanors." U.S.Br.10 n.3. But the government fails to note that the 1948 statute codifying WSLA provided that "*any other* offense [besides a felony] is a misdemeanor," 62 Stat. 684 (codified at 18 U.S.C. § 1) (repealed 1984) (emphasis added), clearly limiting the term to crimes.

2. The government can maintain that "[a]pplying the WSLA to civil FCA violations furthers the WSLA's purposes" (U.S.Br.13) only by editing the legislative history beyond recognition. As this Court explained, explicitly referencing the *criminal* statute of limitations (the WSLA's neighbor, 18 U.S.C. § 3282), Congress enacted the WSLA because while "'[d]uring normal times the present 3-year statute of limitations may afford * * * sufficient time to investigate, discover and gather evidence *to prosecute frauds* against the Government,'" during wartime, "'*[t]he law-enforcement branch* of the Government is * * * busily engaged in its many duties, including *enforcement of the espionage, sabotage, and other laws*,'" preventing it from "'discover[ing] and punish[ing]'" such crimes. *Smith*, 342 U.S. at 228-229 n.2 (quoting S. Rep. No. 1544, 77th Cong., 2d Sess., at 1-2 (emphases added));

*id.* at 228-229 ("the fear was that the law-enforcement officers would be [too] preoccupied"). Congress expressed no concern about distraction of *civil* enforcement officials, much less private relators, who suffer no war-related resource constraints; extending the WSLA to them "directly thwart[s]" congressional intent to "combat[] fraud quickly." Pet. App. 43a, 45a (Agee, J., concurring in part and dissenting in part).

3. The government argues that review is not warranted because "[e]very court of appeals to consider the question has held that the WSLA applies in civil fraud cases" and "only one district court" besides the one below has concluded otherwise. U.S.Br.15. But the government ignores decisions rejecting application of the WSLA to private *qui tam* fraud suits, including three decided during the pendency of this petition.[3] The number of recent decisions the government cites (U.S.Br.16) demonstrates that the issue recurs frequently. There doubtless would be still more, but the FCA's treble-damages provision spurs settlement. Cf. Jeffrey M. Perloff et al., *Antitrust Settlements & Trial Outcomes*, 78 Rev. Econ. & Stat. 401, 408 (1996).

The government does not dispute the panel's observation that "courts are in conflict" about "whether the pre-amendment WSLA requires a formal declara-

---

[3] See *Hericks* v. *Lincare Inc.*, No. 07-cv-387, 2014 WL 1225660, at *14 n.16 (E.D. Pa. Mar. 25, 2014); *U.S. ex rel. Bergman* v. *Abbot Labs.*, Civ. No. 09-4264, ___ F. Supp. 2d ___, 2014 WL 348583, at *16 (E.D. Pa. Jan. 30, 2014); *U.S. ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-cv-245, 2013 WL 3893323, at *7 (W.D. Pa. July 26, 2013).

tion of war," Pet. App. 10a. Indeed, it *concedes* "substantial doubt" about that issue. U.S.Br.16. The government contends that the issue "is of no continuing importance" because of the 2008 amendment. *Id.* at 17. That might be so if stale claims became barred; but the government contends that claims can still be brought dating to the late 1990s—a period of wide-ranging U.S. military action, growth in Medicare and Medicaid, and extensive federal reliance on private contractors. The number of affected cases remains vast.

4. At a time when the government had been litigating WSLA cases continuously since its enactment, it represented to this Court that the 1944 amendments suspended "limitations on *criminal* violations of the Surplus Property Act," but "[b]y contrast, Congress provided no suspension of limitations on *civil* [violations] under Section 26 [of the Act]," *Koller* U.S.Br.8 (emphasis added). With the benefit of hindsight—and billions in potential FCA revenues[4]—the government has revisited that view. While the government contends that "[t]he WSLA was not at issue in that case," U.S.Br.16, its *Koller* argument explicitly contrasted the Act's criminal and civil provisions to show civil provisions were compensatory and thus (at that time) subject to *no* statute of limitations. Indeed, the government suggested the same would be true under the "almost identical" language of the *False Claims Act*. *Koller* U.S.Br.8. And the brief *did* "discuss * * * the sequence of enactments" resulting

[4] See, *e.g.*, Dep't of Justice, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013).

in the WSLA's then-current wording, contra U.S.Br.16; it specifically discussed that history and how the 1944 amendments (on which the government now relies) changed the text, *Koller* U.S.Br.26-27. The *Koller* brief suggests that people familiar with the WSLA's enactment and early use would consider the government's current arguments insubstantial.

### B. Sharp Conflict Over The First-to-File Bar Warrants Review

1. The government concedes facts sufficient to warrant review: Circuits are split on a recurring and important question: "whether the first-to-file provision applies when no action involving the same underlying facts remains 'pending' when the relator files her suit." U.S.Br.20. The government has acknowledged the scope of an FCA bar is "an important legal issue." *Graham Cnty.* U.S.Br.7; see also Reply 1 & n.2. The government's support of rehearing *en banc* in *Shea*, and its repeated hedging that review is not warranted "at this time," U.S.Br. 8, 20, suggest that it too will support review when the split persists.

The government argues the disagreement is "narrow" and "may resolve itself" (U.S.Br.21)—i.e., *if* the D.C. Circuit were to decide to rehear *Shea* en banc, and *if* it ultimately reverses the panel. Even so, the panel decision would still reflect pervasive confusion and disagreement about an important issue, and show the strength of arguments that the Fourth Circuit erred. The Solicitor General has previously (and successfully) urged review despite a pending en banc proceeding (recommending that, at a minimum, the Court hold the case pending resolution of rehearing). See U.S. Br. 7-8, *Henderson* v. *United States*, 133

S. Ct. 1121 (2013) (No. 11-9307). And the chances of resolution are slight, given the tiny number of cases (a fraction of one percent) the D.C. Circuit rehears en banc. See Fed. Bar Council, *En Banc Practices in the Second Circuit* 6 (2014); accord Admin Ofc. of U.S. Courts, *Judicial Bus. of the U.S. Courts* (2013), Table S-1, http://goo.gl/hSfFoV.

In any event, the government understates the level of disagreement. As both the *government itself* and the leading FCA treatise have explained, the Ninth Circuit's rationale in *United States ex rel. Lujan* v. *Hughes Aircraft Co.,* 243 F.3d 1181, 1188 (2001), "appl[ies] with equal force to [require dismissal of] 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); accord *Chovanec* U.S.Br.26.

2. As the government told the Seventh Circuit, "a first-in-time *qui tam* complaint * * * which is subsequently dismissed prevents a second-in-time complaint from proceeding." *Chovanec* U.S.Br.26; accord *id.* at 20. That is so, the government explained, because allowing successive complaints "will only encourage other potential whistleblowers to wait until someone else comes forward first," and "will provide no benefit to the Government" because the first complaint ensures "the Government knows the essential facts of a fraudulent scheme, [and] has enough information to discover and pursue related frauds." *Id.* at 18-19. Allowing serial complaints would, in the government's prior view, "waste Government resources" by requiring investigation of repetitive claims and

"dilute the Government's recoveries without providing any benefit." *Id.* at 19. In short, the government's previous longstanding position is indistinguishable from petitioners'. Compare Pet. 28-30, with *Chovanec* U.S.Br. 18-20, 26.

The government ignores compelling textual, doctrinal, and practical reasons why the Fourth Circuit erred. As *Shea* explained, the most natural reading of the phrase "pending action" is "the referential one; it serves to identify which action bars the other," as "shorthand for 'first-filed action'"—because Congress did not (as the government and Fourth Circuit would have it) say the bar applies "while the first action remains pending" or if another relator "has pending" another case. *U.S. ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 2014 WL 1394687, at *5 (D.C. Cir. 2014). And the Solicitor General offers no response to the concern that "reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions." *Ibid.*; Pet. 24-25 ("infinite number of copycat *qui tam* actions"). That concern is hardly theoretical: Relator has now filed a *fourth* identical copy of his original complaint, initiating a new district court case and requiring yet *another* round of briefing and argument on grounds for dismissal and the first-to-file bar.

The government's newly minted position gives relators a direct financial incentive to delay filing to allow claims to accrue, thereby delaying disclosure of fraud allegations to the government. The risk of a first-filed suit triggering the public disclosure bar, U.S.Br.20 (citing 31 U.S.C. § 3730(e)(4)(A)), will not

affect "an original source of the information." *Ibid.* As the lengthy litigation of "original source" status in this case shows, see Supp. Br. 5, the public-disclosure bar is a sufficiently fact-intensive, time-consuming inquiry that it poses no significant deterrent to delaying a filing in pursuit of a bigger recovery. The government is studiedly vague about whether a merits judgment "*may* prevent the filing of subsequent cases." U.S.Br.19 (emphasis added). And the government's own statistics make it easy to "predict how or when an earlier-filed suit will be resolved" (U.S.Br.20) in most cases: As here, the vast majority of non-intervened, first-filed suits are dismissed, but not before inflicting enormous litigation costs. Chamber *Amicus* Br. 13.

## CONCLUSION

The petition should be granted. Alternatively, the petition should be held pending the D.C. Circuit's resolution of any *en banc* proceedings in *Shea*.

Respectfully submitted.

JOHN M. FAUST
LAW OFFICE OF
JOHN M. FAUST, PLLC
*1325 G Street, NW*
*Suite 500*
*Washington, DC 20005*
*(202) 449-7707*

JOHN P. ELWOOD
*Counsel of Record*
CRAIG D. MARGOLIS
JEREMY C. MARWELL
TIRZAH S. LOLLAR
VINSON & ELKINS LLP
*2200 Pennsylvania Avenue, NW, Suite 500W*
*Washington, DC 20037*
*(202) 639-6500*
*jelwood@velaw.com*

JUNE 2014