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,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT BENJAMIN CARTER

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QUESTIONS PRESENTED

1. Whether this Court should affirm the Fourth Circuit's holding below that the Wartime Suspension of Limitations Act tolls civil actions under the False Claims Act for offenses involving pecuniary war frauds, such as Respondent's action which alleges that Petitioner fraudulently billed the U.S. Army for purifying and testing contaminated water for troops at military bases in Iraq.

2. Whether this Court should accept Petitioner's novel reading of the False Claims Act's first-to-file provision, which would frustrate the statute's purpose to assist the Government to uncover and punish fraud, and would instead permit poorly pled, dismissed cases filed by uninformed relators to permanently immunize Petitioner and future fraud defendants from suits by informed relators with direct evidence of the fraud.

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STATEMENT OF THE CASE

1. Introduction

Respondent Benjamin Carter ("Carter") was stationed at Ar Ramadi and Al Assad military bases in Iraq, near Fallujah, when he personally observed his employer, Petitioner Halliburton,[1] fraudulently billing the United States Government ("Government") for purifying and testing contaminated water from the Euphrates River, when it was doing neither. Instead, Halliburton's fraud exposed American troops, who were showering and brushing their teeth in contaminated water, to serious health risks. A later internal report by Halliburton's Theatre Water Quality Manager in Iraq confirmed that Halliburton's failure to purify water could have resulted in "mass sickness or death." Halliburton then applied for and received a $55 million dollar "award" for, in part, its claimed "excellent" testing and water purification services. The district court never questioned the substantive merits of this case, and, indeed, had ordered it to trial, when the series of unusual procedural events occurred that led this case to this Court.

The issues before this Court are whether (1) the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, tolls Carter's civil False Claims Act ("FCA") action, 31 U.S.C. §§ 3729-3733, for Halliburton's war

[1] The Petitioners in this case are Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International (collectively "Halliburton").

fraud offenses, and (2) under the FCA's first-to-file provision, 31 U.S.C. § 3730(b)(5), an FCA case that was dismissed without deciding the merits can bar Carter's case and all future relator actions against Halliburton for its war fraud offenses during the war in Iraq. Halliburton's claim that Congress intended the WSLA to be limited to criminal offenses is without merit. The plain language and legislative history of the WSLA and the FCA demonstrate that Congress intended the WSLA to toll the statute on civil FCA claims involving war fraud offenses. Important policy considerations support this interpretation because Congress intends for the Government to have the alternative of seeking either civil or criminal remedies for war fraud offenses.

Since the Civil War, Congress has recognized problems with uncovering and remedying fraud offenses such as the offense alleged in this case. When it was enacted in 1863, the principal goal of the FCA was to incentivize knowledgeable citizens to come forward and help uncover and punish war profiteers. President Abraham Lincoln, in his support for the original FCA, stated: "'Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the South and bodies of their countrymen are moldering in the dust.'" *U.S. ex rel. Marcus v. Hess*, 127 F.2d 233, 235 n.12 (3d Cir. 1942) (quoting Report of the House Committee on Government Contracts, March 3, 1863). Contrary to Halliburton's position, Congress passed

the FCA to assist the Government in prosecuting fraud, not defendants in avoiding prosecution. Moreover, Congress understood that while the Government may elect not to pursue a fraud, it might be in the interest of this country and its taxpayers for relators to pursue that fraud on behalf of the Government. In the time since its passage, Congress has repeatedly amended the FCA, strengthening and further encouraging relators with knowledge and evidence of fraud to come forward and assist the Government to recover its damages.

In 1941, Congress faced a terrible war that was draining the Government's resources, and again recognized its longstanding policy to combat war fraud. Congress understood that wartime fraud is often difficult to detect, and that witnesses and evidence may be unavailable. Further, those responsible for investigating fraud are often focused on the war effort and war contractor fraud may go undetected until long after the war ends. To address this concern, Congress passed the WSLA, which tolled actions for offenses involving pecuniary war fraud during the war.

While the original WSLA could be read to toll solely criminal offenses, several years later in 1944, Congress made clear that thereafter the WSLA would apply to "any offenses" whether they were pursued through civil or criminal proceedings. While Halliburton seeks to persuade this Court otherwise, using isolated fragments of legislative history, it is clear that Congress passed the 1944 amendments to the WSLA intending that the Government could

pursue either civil or criminal offenses. In 1944, Congress amended the WSLA to apply to the language restricting "any offense," and added additional denominated offenses involving, among other things, war contract offenses, such as the offense at issue in this case, and war property offenses. By doing so, Congress recognized the Government may choose to pursue war offenses through criminal or civil proceedings and there was no reason to distinguish between them.

In 1986, to strengthen the FCA, Congress created the public disclosure and original source provisions, to weed out relators who bring no value, while ensuring that relators with first-hand, valuable information of fraud offenses are authorized and incentivized to pursue those offenses for the Government, even if that fraud has been publicly disclosed. Congress also passed the first-to-file provision to ensure that the Government maintained control over pending cases by precluding third parties from intervening or filing related actions in other courts. This careful balance of barring meritless cases while encouraging cases with merit was essential to Congress's goals. Halliburton now seeks to frustrate that intent by precluding original sources from pursuing fraud on behalf of the government if a meritless case has been filed and dismissed. The FCA was passed to punish fraud not to help those who commit fraud avoid punishment.

Halliburton now asks this Court to disregard Congress's intent and the views of the Solicitor General

in this case, and to significantly impair the ability of the Government to uncover and punish war fraud offenses. To accomplish this, it asks this Court to write into the WSLA words that Congress never wrote, and write out of the FCA words that Congress enacted. Neither interpretation is consistent with the plain meaning of the text of those laws or Congress's express intent, and both interpretations would deprive the Government of essential tools for pursuing war fraud offenses, such as the one in this case, which drain the federal treasury and put our troops at risk.

2. Background

In 2004, pursuant to its contract Logistics Civil Augmentation Program ("LOGCAP") III, Task Order 0059 with the United States Army, Halliburton hired Carter as a Reverse Osmosis Water Purification Unit ("ROWPU") operator. Between January and April of 2005, Carter oversaw the purification of water from the Euphrates River to be used at the Al Assad and Ar Ramadi war bases in the Sunni Triangle near Fallujah in Iraq. Joint Appendix ("JA") 104, 114; Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3a.

While at Al Assad, Carter observed Halliburton employees pretending to purify water because they had no training to operate ROWPU equipment, and fraudulently billing the Government for doing so. JA 116-117. At Ar Ramadi, Carter saw there was no testing or water purification equipment, yet numerous

Halliburton employees were fraudulently billing the Government for purifying and testing the contaminated water. JA 117-125. Instead, Halliburton employees were billing while they were playing softball and relaxing in their "hooches." JA 263-264.

Carter was concerned that troops were showering, washing, and brushing their teeth with highly contaminated water that posed health risks. JA 123-124. He began conducting his own investigation and testing. JA 122-125. During his investigation, he discovered an organism or larvae in what should have been purified water in one of the soldier's latrines, and he reported it to his superiors. JA 471-474. Halliburton did nothing to fix the situation. JA 127. Carter again complained to his superiors, but they told him to keep his mouth shut. JA 478-479. Eventually, Carter resigned. JA 127. Carter later learned that, in or about February 2005, Halliburton applied for and received a $55 million dollar "award" from the Army for, in part, its fraudulent claim that it had done an "excellent" job of purifying water at Al Assad and Ar Ramadi. E.D. Va., Civ. No. 1:10-cv-864 ("*Carter II*"), Mem. in Opp. to Motion to Dismiss, Docket Entry ("D.E.") 36, at 4.

After Carter resigned, Wil Granger, Halliburton's Theatre Water Quality Manager for Iraq and Kuwait, performed his own investigation, which corroborated Carter's allegations. JA 127-129, 509-510. Granger wrote an internal report concluding that the troops and other personnel at Ar Ramadi had for years been exposed to high levels of unpurified contaminated

water posing risks to their health. Wil Granger, *KBR Report Of Findings & Root Cause Water Mission B4 Ar Ramadi*, 3-4 (May 13, 2005), http://www.halliburtonwatch.org/reports/granger_report.pdf. Granger determined that Halliburton was using untrained personnel, had inadequate or non-existent record-keeping, and had not even assembled its purification equipment. *Id*. Granger concluded that the consequences of Halliburton's actions "*could have been very severe resulting in mass sickness or death.*" *Id*. at 4 (emphasis in original).[2]

After Carter returned home from Iraq in 2005, he reported this fraud to Congress and the Department of Justice, and then, in February 2006, he filed this FCA action.

3. Procedural History

Carter filed his complaint on February 1, 2006 as C.D. Cal., Civ. No. 06-cv-0616, which was transferred on November 3, 2008 to E.D. Va., Civ. No. 1:08-cv-1162 ("*Carter I*"). The complaint was unsealed on May 29, 2008 when the Government declined to intervene, authorizing Carter to pursue the action. Pet. App. 4a. Over the next two years, Carter's attorneys obtained extensive evidence corroborating Halliburton's fraud. Their fraud investigation was complicated by the fact that many witnesses were still stationed

[2] An unknown Halliburton employee gave this report to Congress, but Halliburton never publicly released it.

in war zones in Iraq and Afghanistan. One witness, Carter's supervisor at Ar Ramadi, Walter Meyers, was working in Kandahar in Southern Afghanistan, and had to be flown to Dubai for Carter's counsel to depose him. *See* Deposition of Walter Meyers, January 18, 2010, 8:23-25.

The parties completed discovery and the district court had ordered the case to trial, when, in March 2010, the Government advised the parties and the court that another case, *United States ex rel. Thorpe v. Halliburton Co.*, Civ. No. 05-cv-08924 (C.D. Cal. Dec. 23, 2005), filed a few weeks before *Carter I*, might overlap allegations in Carter's case. JA 220. The district court ordered briefing and, after oral argument, on May 10, 2010, held that *Thorpe* jurisdictionally barred *Carter I* under the first-to-file provision of the FCA. JA 51. In so holding, the court rejected Carter's argument that his case was not based upon the allegations in *Thorpe* because Thorpe had never been to Al Assad or Ar Ramadi and his co-relator had never been to Iraq, and the *Thorpe* complaint contained no allegations about water purification, or any specific conduct at those bases. JA 45-46. The court also rejected Carter's argument that, at least as to the fraud alleged by Carter, *Thorpe* did not satisfy Federal Rule of Civil Procedure 9(b) and was otherwise without merit. JA 50-51. While conceding that case law supported Carter's argument, the court declined to analyze the merits of the *Thorpe* complaint because it was pending before another court. JA 50. The court dismissed *Carter I*

without prejudice, and left open the possibility that Carter could refile his case if *Thorpe* was dismissed. JA 547-548.

On July 13, 2010, Carter appealed the decision on the above and other grounds. Pet. App. 5a. In the interim, as Carter expected, the Government declined *Thorpe*, and the district court dismissed the case for lack of prosecution without reaching the merits. *Id*. On August 4, 2010, Carter then refiled the same complaint (*Carter II*), and attempted to dismiss his appeal. *Id*. While Halliburton delayed dismissal by opposing, the Fourth Circuit eventually dismissed Carter's appeal on February 14, 2011. Pet. App. 5a. Halliburton moved to dismiss *Carter II* on the grounds that it was barred by the appeal in *Carter I*, which was no longer pending. *Carter II* D.E. 31. On May 24, 2011, the court dismissed *Carter II* without prejudice because it found Carter's appeal of his own case was pending when *Carter II* was filed and therefore Carter's own case was first-to-file as to itself. Pet. App. 6a. Had this not occurred, this case would already have been tried, and arguably no statute of limitations issue would even exist.

On June 2, 2011, Carter refiled E.D. Va., Civil Action No. 1:11-cv-602 ("*Carter III*"), and this time the Government advised the parties that two new cases, which were filed in 2007 while both *Carter I* and *Thorpe* were pending, might overlap *Carter III*. JA 550. Halliburton moved to dismiss on this basis and on grounds that the statute of limitations had now run because of the court's prior procedural dismissals

and that Carter was not an original source and barred by the public disclosure bar. JA 563-564. Carter opposed, claiming that (1) the two new cases did not overlap his case, (2) the WSLA tolled the statute of limitations because his case alleged war fraud offenses, (3) the court should relate back or equitably toll the statute of limitations because *Carter I* was filed well within it, and (4) he was an original source. JA 569, 572-573, 581. On November 29, 2011, the district court rejected all of Carter's arguments on the statute of limitations, holding that *United States ex rel. Duprey v. Halliburton Co.*, No. 07-cv-1487 (D. Md. June 5, 2007), barred Carter and the WSLA did not apply to this non-intervened action to pursue a civil war fraud offense. JA 571, 581. The court refused to equitably toll or relate back Carter's identical complaint to the one he filed in February 2006 although all discovery had been completed on the claims and they were set for trial. JA 572 n.11. The court dismissed *Carter III* with prejudice, holding it was barred by the first-to-file provision and the FCA's six-year statute of limitations. JA 583. It did not decide the public disclosure issue. JA 563. Carter appealed. JA 197.

The Fourth Circuit reversed and held the WSLA applies to civil actions for war fraud, such as this case. Pet. App. 16a. The Fourth Circuit concluded the WSLA applies here because Halliburton's fraud was committed while the United States was "at war" in Iraq. Pet. App. 10a-13a. Additionally, the court reviewed the 1944 amendment to the WSLA in which

Congress removed the phrase "now indictable," and concluded Congress intended henceforth for the WSLA to apply to civil offenses involving pecuniary war fraud. Pet. App. 13a-14a. Finally, the court held the WSLA applies to non-intervened cases that are pursued by relators, observing that the "suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case," and that the district court appeared to be "critiquing the purpose of the WSLA itself and not providing a valid basis for excluding relator-initiated claims from the WSLA." Pet. App. 15a-16a. The Fourth Circuit also held that § 3730(b)(5) does not preclude subsequent actions once a related case is no longer pending. Pet. App. 21a-22a. Since both actions which barred Carter's case had been dismissed, the court held he had a right to refile his case, which was still within the applicable statute of limitations. Pet. App. 16a, 22a. The Fourth Circuit remanded the case with instructions to dismiss *Carter III* without prejudice so Carter could refile his case. Pet. App. 22a. Thereafter, the Fourth Circuit denied Halliburton's petition for a rehearing *en banc* and did not stay its mandate. Pet. App. 77a.

On remand, the parties agreed that the district court could address Halliburton's remaining claim that the public disclosure provision barred Carter's complaint. The court held Carter was unquestionably an original source of the allegations in his complaint because he directly and personally observed the fraud at Ar Ramadi and Al Assad. JA 235-242. The court

then dismissed the action without prejudice as directed by the Fourth Circuit. JA 242.

On September 23, 2013, Carter then refiled, E.D. Va., Civ. No. 1:13-cv-1188 ("*Carter IV*"). Upon motion by Halliburton, the court dismissed *Carter IV* without prejudice under the first-to-file provision because of Halliburton's pending petition to this Court, even though *Carter III* had been dismissed. *Carter IV* D.E. 30 at 17-18. This Court granted Certification on July 1, 2014. JA 245.

SUMMARY OF ARGUMENT

1. Congress passed both the WSLA and the FCA to assist the Government in uncovering and punishing fraud by war profiteers who were cheating the Government while it was engaged in warfare.

The WSLA's language that tolls statutes of limitations for pecuniary war frauds, such as the one in this case, by its terms applies to "any offense" whether criminal or civil that involves pecuniary war fraud. The primary meaning of the word "offense," as recognized by this Court, Congress, and relevant reference materials, is "a violation of law," which can be pursued through either civil or criminal proceedings. No other text anywhere in the WSLA supports an interpretation that limits the phrase "any offenses" only to criminal offenses. Halliburton essentially acknowledges this fact, and accordingly focuses its entire argument on statutory and legislative history in

an attempt to persuade this Court to write words into the WSLA that simply are not there.

This argument does not avail Halliburton because an examination of the WSLA's statutory and legislative history supports a finding that Congress intended to apply the WSLA to toll the civil FCA claims in this case. While the WSLA originally contained language which could be read to limit offenses to "now indictable," criminal offenses, Congress deleted that limiting language in 1944 as part of the Contract Settlement Act ("CSA"), Pub. L. No. 78-395, 58 Stat. 649, which also created new civil offenses relating to the negotiation, award, performance and termination of war contracts. Additionally, the same Congress denominated new offenses to be tolled by the WSLA, which included offenses relating to the disposition of surplus property under the Surplus Property Act of 1944 ("SPA"), Pub. L. No. 78-457, 58 Stat. 765. This supports the view that Congress had civil offenses in mind when it amended the WSLA to remove "now indictable." These fundamental changes to the statute and statutory scheme do not constitute ambiguous or collateral amendments. Rather, they demonstrate a clear policy that Congress intended that the WSLA henceforth apply whether offenses were pursued in criminal or civil proceedings. For those reasons, the Fourth Circuit correctly decided that the WSLA applies to Halliburton's "offense" in this case, which involves fraud on the troops in wartime.

Furthermore, as the Fourth Circuit recognized, Congress passed the WSLA to address fraud on the Government and made no distinction whether it was the Government attorney or a relator seeking a remedy for that fraud. The policy considerations underlying the WSLA tolling provisions apply equally to the Government and relators, such as Carter, who are stationed in war zones and are thereby inhibited and delayed from investigating and prosecuting the fraud.

This Court need not and should not consider Halliburton's argument that the WSLA somehow circumvents the 10-year statute of repose in the FCA since all of Carter's complaints were filed within the 10-year statute of limitations.

Similarly, the question before this Court is solely whether the Fourth Circuit was correct in determining that the WSLA applies to toll this civil action for a pecuniary war fraud, and the question of whether the WSLA applies more broadly to frauds unrelated to war is not before this Court. Nevertheless, the language of the WSLA supports an interpretation that tolling only applies to pecuniary offenses, "connected with or related to the prosecution of the war." Indeed, this Court in *United States v. Grainger*, 346 U.S. 235 (1953) has already observed that the language of the statute and the legislative history supports a conclusion that Congress was concerned with pecuniary war frauds.

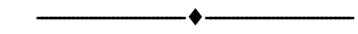
2. Just as Halliburton seeks to write words into the WSLA that Congress did not include, it seeks to

write the word "pending" out of the first-to-file provision that Congress enacted. As the plain text says, the purpose of the first-to-file provision is to ensure governmental control over FCA cases and to prevent any third parties from interfering with that control by intervening or filing separate parallel FCA actions while the first-filed action is "pending."

The first-to-file rule addresses many concerns. It prevents inconsistent judgments, diversion of government resources and dilution of the relator share, which incentivizes the relator to come forward in the first place. None of these concerns are present once the first-filed action is dismissed and no longer pending.

Halliburton's attempt to read the word "pending" out of the first-to-file rule would allow broadly worded frivolous complaints to bar cases by informed original sources with valuable evidence of fraud against the Government. Congress clearly did not intend such a result because it passed the FCA's original source provision, which incentivizes and authorizes relators with direct knowledge of fraud against the Government to pursue FCA cases even if the fraud is publicly disclosed and known to the Government. Halliburton's hypothetical series of infinite relators' cases will not occur because if cases that are decided on the merits are filed first, they will bar any later cases under both the public disclosure provision and principles of claim preclusion. The only cases that

will not be barred are those with merit brought by original sources as Congress intended.



ARGUMENT

I. The WSLA Applies To Toll The Statute Of Limitations For This Civil Pecuniary War Fraud Offense

A. The Text Of The WSLA Makes No Distinction Between Civil And Criminal Offenses

Halliburton asks this Court to write the words "criminal offense" into the WSLA, and thereby hold it immune from suit for its war fraud offenses against American troops in Iraq on the grounds that the WSLA applies to toll criminal actions for war fraud offenses, but not civil actions for those same offenses. Halliburton is mistaken.

The WSLA, 18 U.S.C. § 3287, provides in pertinent part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), 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 conspiracy or not, or (2) committed in connection

> with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, 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.

The plain language of the WSLA makes clear that it applies to the running of "any statute of limitations" applicable to "any offense" described in subsections (1), (2), or (3), whether pursued by way of criminal or civil proceedings.

When interpreting a statute, courts must "start, as always, with the language of the statute." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008) (internal quotation and citation omitted); *see also Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their

place in the overall statutory scheme." (internal quotations and citations omitted)).

Halliburton is incorrect when it contends that the word "offense" can only refer to a crime. It has long been recognized that the word "offense" can refer to offenses such as the FCA offense in this case, which can be subject to either criminal or civil remedies. *See Moore v. Illinois*, 55 U.S. 13, 19-20 (1852) ("An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence."). In other words, the word "offense" refers to a violation of law; the remedy for the violation is a separate matter, and may be criminal or civil or both. That is why the term "criminal offense" is not redundant and why "civil offense" is not a contradiction in terms.

In addition, this Court, appropriate reference texts, and Congress, use the word "offense" to refer to underlying conduct, which can be pursued as either criminal or civil offenses. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.19 (1978) (stating that "Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the [Sherman] Act"). The ordinary, primary meaning of "offense," as defined in legal and non-legal dictionaries, is "a violation of law,"

"a transgression of law," or "a breach of law." *See Oxford English Dictionary* 724 (2d ed. 1991) ("A breach of law, duty, propriety, or etiquette"); *Random House Dictionary* 1344 (2d ed. 1987) ("a transgression of the law"); *American Heritage Dictionary* 1255 (3d ed. 1992) ("[a] transgression of law").[3] Halliburton ignores all of these references and relies on one definition in *Black's Law Dictionary*. Halliburton fails to note another definition of offense that applies to civil offenses that states: "Civil law. An intentional unlawful act that causes injury or loss to another and that gives rise to a claim for damages." *Black's Law Dictionary* 1188 (9th ed. 2009). *Black's Law Dictionary* further explains that offense in the civil sense can refer to torts (such as fraud). *Id*. ("This sense of *offense* is essentially the same as the common-law intentional tort.").[4]

Congress has expressly recognized that the same "offense" may give rise to civil or criminal proceedings or both, including specifically in the context of the

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[3] Halliburton erroneously interprets dictionary definitions by selecting one sense of the term "offense" (*e.g.*, "a crime"), instead of the first-listed, primary sense of the term (*e.g.*, "a transgression of the law"). Brief for Petitioner ("Pet. Br.") 20 (citing *American Heritage Dictionary* 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime")). Halliburton cites no support for reading later entries to narrow the primary meaning of the first-listed entry.

[4] *Black's Law Dictionary* recognizes that legal words can be used in many senses and therefore lists the alternative senses as separate definitions rather than combining them in one definition.

FCA. *See* 31 U.S.C. § 3731(e) (collaterally estopping a defendant from denying the elements of an offense in a civil FCA action, brought by the Government or a relator, when the offense involves the same transaction as a criminal proceeding resulting in a judgment rendered in favor of the United States). The same is true in Title 18 of the U.S. Code, including, for example, 18 U.S.C. § 38, which provides a list of covered "offenses" in subsection (a), criminal penalties for those offenses in subsection (b), and civil remedies for those offenses in subsection (c).

Notably, this Court has referred alternatively to both civil offenses[5] and criminal offenses,[6] acknowledging that the word "offense" is not limited to crimes. Moreover, Congress routinely refers to "criminal offenses" to restrict a statute to criminal violations. *See, e.g.*, 18 U.S.C. § 402 (" . . . if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt"); 18 U.S.C. § 983 ("In this section, the term

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[5] *See, e.g.*, *Welsh v. Wis.*, 466 U.S. 740, 754 (1984) (describing "a noncriminal, civil forfeiture offense for which no imprisonment is possible"); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 432 (1914) (Lamar, J., dissenting) (describing the once prohibited charging of interest on a loan as a "civil offense").

[6] *See, e.g.*, *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) ("federal courts must look to state law for the substantive elements of the criminal offense") (internal citations and quotations omitted).

'civil forfeiture statute' – (1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense. . . ."). There would have been no need for this Court or Congress to add the modifier "criminal" if "offense" could only mean a crime. Halliburton's interpretation of the WSLA that would render the words of other criminal statutes in Title 18 superfluous should be rejected. *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[Petitioners'] view thus runs afoul of the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." (internal citations and quotations omitted)).

Also, the WSLA's surrounding text reveals no language that supports Halliburton's interpretation that "any offense" means "criminal offense" exclusively. Indeed, the law's remaining subsections refer to offenses that are more civil in nature than criminal. Subsection (2) refers to violations pertaining to real and personal property offenses, and subsection (3) refers to offenses involving "negotiation, procurement, award performance, payment for, interim financing, cancellation and termination of contracts, subcontracts or purchase. . . ." 18 U.S.C. § 3287. The WSLA's enumeration of these offenses supports the Fourth Circuit's reading that "any offense" includes offenses underlying both civil and criminal remedies in the FCA and other statutes. Because neither the text nor context of "any offense" provides any basis to narrow that phrase, this Court should

reject Halliburton's narrow interpretation that conflicts with the term's broader, "primary meaning." *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891-92 (2011) (finding no textual basis for adopting a narrow meaning of "report"); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287-88 (2010) (rejecting holding that the term "administrative" reaches only federal sources, and concluding that "there is no immediately apparent textual basis for excluding the activities of state and local agencies (or their contractors) from its ambit").

If Congress wanted to narrow the WSLA solely to offenses of a criminal nature, it could have easily done so by inserting the word "criminal" before the word "offense" as it has in numerous statutes. Congress was presumably aware that in the decade plus following the WSLA's 1944 amendments nearly every court to consider the WSLA's application to civil offenses held that "any offense" includes offenses pursued under civil laws, including the FCA.[7] By not

[7] *See*, *e.g.*, Pet. App. 13a-14a (Fourth Circuit's decision below collecting cases); *see also U.S. v. Strange Bros. Hide Co.*, 123 F. Supp. 177, 184 (N.D. Iowa 1954) (holding that the term "offense" in the WSLA applies to FCA violations involving either civil liability or criminal prosecutions); *U.S. v. Hougham*, 270 F.2d 290, 293 n.3 (9th Cir. 1959) (applying WSLA to civil action under the SPA), *rev'd on other grounds*, 364 U.S. 310 (1960); *U.S. v. Temple*, 147 F. Supp. 118 (N.D. Ill. 1956) (applying WSLA to civil actions under the FCA and 41 U.S.C. § 119 for presentation of a false document for payment); *U.S. v. Salvatore*, 140 F. Supp. 470 (E.D. Pa. 1956) (applying WSLA to a civil action

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responding to this judicial interpretation for over 50 years, Congress is presumed to have consciously decided not to narrow the language of "offense" in the WSLA's subsequent amendments. *See Monessen S. R. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("we have recognized that Congress's failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation]." (internal citations and quotations omitted)).

B. In 1944, Congress Clearly Set Forth Its Intent That The WSLA Apply To Litigation Involving Civil Pecuniary War Fraud Offenses

Since Halliburton recognizes there is no text in the WSLA that supports its position that "offense" means "criminal offense," it spends much of its brief arguing about legislative history. This Court need not and should not refer to statutory history or legislative history because the law is clear on its face, and the law's common sense meaning applies to pecuniary

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under the FCA); *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955) (applying FCA to civil actions under the SPA, and noting "[i]f it had been the intent of Congress to make the [WSLA] applicable to criminal actions only, instead of using the word 'offense' it could have used such words as 'crime,' 'criminal offense,' etc."); *United States v. Covollo*, 136 F. Supp. 107, 109 (E.D. Pa. 1955) (applying WSLA to civil action under the SPA); *United States v. Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954) (applying WSLA to civil action under the FCA).

war fraud offenses prosecuted under the FCA's civil provisions. Nevertheless, the relevant statutory and legislative history show that Congress intended to extend the WSLA to such civil offenses when it amended the WSLA in 1944.

Congress enacted the WSLA in 1942 in response to widespread concern about war profiteering during World War II, providing that:

> The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United 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. . . .

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

Two years later, on July 1, 1944, Congress enacted the CSA, to address rising concerns with the civil liabilities of contractors following completion of World War II. *See* Sen. James E. Murray, Contract Settlement Act of 1944, 10 Law & Contemporary Probs. 683, 685 (1944) (describing twin purposes of (1) settling the termination claims of war contracts with the greatest possible speed, and (2) protecting the Government against waste and fraud in that process). Consistent with that purpose, Congress simultaneously amended the WSLA, making clear that it applied to civil offenses relating to the war, such as false statements in connection with the termination of war contracts.

The textual changes expanded the WSLA's scope. First, under the 1942 WSLA, the statute was limited to "offenses involving the defrauding or attempts to defraud the United States or any agency thereof . . . now indictable," and the 1944 Congress deleted the phrase "now indictable." *Compare* 56 Stat. 747-48 *with* 58 Stat. 667. Second, Congress placed the war-frauds clause under a newly established subsection (1), and expanded the WSLA further by creating a new subsection (2) for any offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order. . . ." 58 Stat. 667. As with the amended subsection (1), subsection (2) was not in any way limited to criminal offenses.

It is also evident from the CSA and its legislative history that Congress was particularly concerned with efficiently winding down war contracts and establishing protections against fraud in connection with that process, whether those protections are civil or criminal in nature. *See, e.g.*, 58 Stat. 649 (listing the objectives including "to prevent improper payments and to detect and prosecute fraud"); H.R. Rep. No. 78-1355, at 31-32 (1944); H.R. Rep. No. 78-1590, at 1, 27-28 (1944). In the subsection immediately following the WSLA amendment, the CSA contained civil penalties for making false or fraudulent statements "in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract

with the United States. . . ." 58 Stat. 667-68. Thus, Congress amended the WSLA to extend its suspension of limitations to war contract offenses at the same time and in the same section of the law in which it provided civil penalties for fraud in connection with CSA war contract violations.

Just three months later, on October 3, 1944, Congress enacted the SPA, addressing the problem of disposing of surplus war materials at the close of World War II. As with the CSA, Congress was concerned with the potential for fraud or waste in connection with this vast governmental process, and it established civil remedies to address those issues. *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) ("In § 26 of the Surplus Property Act, Congress has provided three alternative remedies. . . . All three were recognized as civil remedies by Congress before the bill was passed. . . ."). "[T]he Senate Committee on Military Affairs described [these provisions] as providing for 'the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States. . . .'" *Id*. at 152 n.3 (quoting S. Rep. No. 78-1057, at 13-14 (1944)).

Significantly, at the same time it provided these civil remedies in connection with the sale of surplus property, Congress amended the WSLA, again expanding the offenses covered by the provision. Specifically, Congress added a new subsection (3) for "offenses" against the laws of the United States "committed in connection with the care and handling and disposal of

property under the Surplus Property Act of 1944. . . ." 58 Stat. 781. Courts thus recognized that the WSLA would apply to toll any statute of limitations applicable to civil provisions under the SPA. *Kolsky,* 137 F. Supp. 359 (holding that the WSLA tolled the five-year statute of limitations, in 28 U.S.C. § 2462, applicable to civil provisions of the SPA); *but see Koller v. United States*, 359 U.S. 309 (1959) (*per curiam*) (later holding that the five-year statute of limitations, in 28 U.S.C. § 2462, does not apply to SPA § 26(b)(1)).

Notably, in connection with its report on the SPA, the Senate Committee on Military Affairs described how the amendment to the WSLA, passed three months earlier, extended the time to proceed with "litigation" of war-fraud "offenses":

> As was provided in the Contract Settlement Act of 1944, the statute of limitations . . . was suspended until 3 years after the termination of hostilities in the present war. . . . *It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation*.

S. Rep. No. 78-1057, at 14 (1944) (emphasis added). The term "litigation" used with the term "offenses" is telling because the SPA undeniably created civil actions for offenses relating to the disposal of war property, and the term "litigation" is commonly used to refer to court proceedings involving civil or criminal

claims. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013); *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012). Thus, if Congress were referring exclusively to criminal prosecutions, the use of "litigation" in the Senate Report would be an unusual word choice. Furthermore, almost all of the offenses in the SPA were civil offenses, so it is unlikely that "bulk of offenses" refers solely to "criminal offenses."

In contrast to this compelling statutory and legislative history, Halliburton's speculation that Congress may have removed the "now indictable" language because it was "redundant," Pet. Br. 30, is unsupported by any legislative history or statement by even a single member of Congress. Halliburton relies on isolated statements in the WSLA's legislative history that say it applies to criminal offenses, but points to no legislative history containing statements by Congress, or anyone else in 1944 or later, that states that the WSLA applies only to criminal offenses, or that it does not apply to civil offenses. This Court has long dismissed similarly flawed logic.[8] *See Wall v. Kholi*,

[8] Moreover, contrary to Halliburton's contention, Congress's inclusion of the WSLA in a section of the CSA entitled "Prosecution of Fraud" does not evidence Congress's intent that the WSLA apply to civil and criminal proceedings. Indeed, the FCA, in 1940, 1946, and currently, uses "prosecution" to refer to the prosecution of civil FCA actions. *See, e.g.*, 31 U.S.C. § 3730(c)(4) ("the Government's investigation or prosecution of a criminal or civil matter"); 31 U.S.C. § 3730(d)(1) (providing that the relator share depends "upon the extent to which the person substantially contributed to the prosecution of the action"); 31 U.S.C. § 232(C)

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131 S. Ct. 1278, 1287 (2011) (finding that the Court's prior use of the term "collateral review" to refer to a review of the lawfulness of a prior judgment did not preclude the use of the term to describe other proceedings). In any event, isolated statements by members of Congress cannot contravene the statute's plain language and meaning. *See Garcia v. United States*, 469 U.S. 70, 77-78 (1984). Accordingly, the most reasonable interpretation of Congress's 1944 amendments is that Congress intended for the WSLA to apply to civil actions seeking remedies such as this FCA civil action for war fraud offenses.

C. Subsequent Amendments By Other Congresses To Other Sections Of The WSLA Do Not Provide Guidance On The Meaning Of "Offense"

Halliburton's reliance upon legislative history of subsequent amendments to the WSLA that do not speak to the meaning of "offense" is misplaced. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("the views of a legislator concerning a statute already enacted are entitled to no

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(1946) (providing under the notice provision of the FCA that the relator must provide "all evidence and information in his possession material to the effective prosecution of such suit"); *id.* at § 232(E)(2) (stating in a non-intervened case that a "court may award to the person who brought such suit and prosecuted it to final judgment. . . ."); 31 U.S.C. § 234 (1940) ("The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half" the forfeiture and damages recovered).

more weight than the views of a judge concerning a statute not yet passed"); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 204 (1963) (Stewart, J., dissenting) ("In construing these statutes, I think nothing is to be gained from the legislative history of a quite different law enacted by a quite different Congress in 1865, nor from the reports of still another Congress which amended that law in 1912."). For example, Halliburton places significant emphasis on the 1948 Congress's inclusion of the WSLA in Title 18. Halliburton cannot, however, plausibly argue that the 1948 Congress, which did not pass the amendment that removed restrictions on the words "any offense," intended to change the meaning of "offense" merely by adjusting the WSLA's location in the Federal Code. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364-65 n.6 (1984) (explaining that a statute's location and labels do not by themselves transform a civil remedy into a criminal one).

In any event, the 1948 Congress's placement gives meager support for Halliburton's claim. Title 18 contains numerous provisions that clearly apply to civil proceedings, thus eviscerating Halliburton's indispensable premise that Title 18 only applies to criminal laws. *See, e.g.*, 18 U.S.C. § 1964 (Civil RICO); 18 U.S.C. §§ 4243, 4248 (Civil Commitment); 18 U.S.C. § 3626 (Civil actions based on conditions of federal prisons); 18 U.S.C. § 2520 (Civil remedies for illegal wiretapping); 18 U.S.C. § 1595 (Civil remedies for human trafficking).

The legislative history of the FCA's 2008 amendments, which also did not affect the meaning of "any offense," supports the conclusion that the 2008 Congress understood that the WSLA applies to toll civil and criminal actions. *See* S. Rep. No. 110-431, at 6 (2008) (stating that WEFA would allow for "recover[y]" of "money lost in no-bid and cost-plus contracts awarded to companies *that have delivered defective products, overbilled the government, or committed criminal fraud*") (emphasis added); *see also id*. at 5 ("The change is necessary so that the date ending the authorization of military force is clear, *so courts, prosecutors, and litigants* can be sure when the statute of limitations starts to run. This change will avoid any confusion or unnecessary litigation in enforcing fraud cases in the future.") (emphasis added).

D. In The Years Following The 1944 Amendments, The Government Attorneys Responsible For Enforcing The WSLA And The Courts Interpreted The WSLA To Apply To Civil FCA Cases

The Solicitor General in this case agrees that the WSLA tolls Carter's civil FCA action. Moreover, contrary to Halliburton's claim, Congress, the Government attorneys responsible for applying the WSLA, and the courts have all historically treated the WSLA as applying to civil offenses, including specifically the

FCA.[9] Between 1946 and 1959, nearly every court to consider this question agreed with the Government's position that the term "offense" in the WSLA applies to violations of law involving either civil or criminal liability. *See supra* n.7 (collecting cases). Since then, no courts held otherwise until the district court below held that the WSLA does not apply to non-intervened FCA actions brought by relators, and the Fourth Circuit promptly reversed that decision.

Halliburton relies on this Court's holding in *Bridges v. United States*, 346 U.S. 209 (1953), to support its claim that the WSLA does not toll Carter's FCA civil action, but it does not. Halliburton does not acknowledge that at the same time this Court decided *Bridges*, it decided *United States v. Grainger*, 346 U.S. 235 (1953). When read together, this Court's holdings in *Bridges* and *Grainger* are fully consistent with the Fourth Circuit's and Carter's interpretation of the WSLA in this case.

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[9] While the Solicitor General's brief filed in *Koller v. United States*, 359 U.S. 309 (1959) (*per curiam*), can be read to argue that the WSLA does not toll civil offenses, at oral argument the Solicitor General's Office seemingly clarified that the brief was only referring to the specific SPA civil provision at issue in that case. Oral Argument (Part II) at 27:42, *Koller v. United States of America*, 359 U.S. 309 (1959) (No. 362), *available at* http://www.oyez.org/cases/1950-1959/1958/1958_362. Justice Potter Stewart raised a separate issue about whether the WSLA tolled civil FCA cases. The Solicitor General did not respond in the negative. Rather, he confirmed that the Government had taken that position in a number of cases, and district courts had agreed. *Id.*

In *Bridges*, this Court decided that the WSLA applies to pecuniary war fraud offenses. *Bridges*, 346 U.S. at 215, 221. At the same time, this Court decided in *Grainger* that offenses under the WSLA include offenses covered by the criminal false claims provision of the FCA. *Grainger*, 346 U.S. at 237. *Grainger* involved false statements to the Commodity Credit Corp. about wool prices for war contracts. *Id.* at 237-38. Because they were pecuniary offenses, this Court only considered whether the offenses involved defrauding the United States. *Id*. at 241-43. This Court held that the WSLA applied to "offenses" underlying FCA actions:

> which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined. . . . In the false claims clause of the False Claims Act, Congress met the requirements by identifying the offense as that of making 'any claim upon . . . the United States . . . knowing such claim to be false, fictitious or fraudulent. . . .' The combination of either falsity, fiction or fraud with the claim is enough.

Id. at 244. *Grainger* does not distinguish between civil and criminal proceedings. Thus, *Grainger* is consistent with the Fourth Circuit's holding that the WSLA applies to Carter's civil FCA action for false, fictitious, and fraudulent statements.

E. Interpreting The WSLA To Apply To A Relator's FCA Claims For Civil Fraud Offenses In Wartime Is Particularly Appropriate Given Congress's Intent That The FCA Protect The Government From War Profiteers

1. The FCA is Designed to Provide the Government with a Full Range of Civil and Criminal Provisions for Protecting Against Fraud

Congress enacted the FCA, including its *qui tam* provisions,[10] specifically to address profiteering and fraud by contractors during wartime. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. at 698; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) ("As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" (citation omitted)). "[S]ince the significant 1986 amendments to the FCA, the federal government has recovered over $38 billion using the Act." *Oversight of the False Claims Act, Hearing Before the H. Comm. on the Judiciary,*

[10] *Qui tam* originates in English law, and means in the name of the king. In the context of the FCA, the relator is suing in the name of the United States. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 463 (2007) ("*Qui tam* is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which means 'who pursues this action on our Lord the King's behalf as well as his own.'").

Subcomm. on the Constitution and Civil Justice 113th Cong. 1 (2014) (statement of Chairman Trent Franks). It would not be an overstatement to say that today the FCA is the most effective and powerful tool the Government has to pursue those who commit pecuniary fraud offenses in wartime. *See* Press Release, U.S. Dept. of Justice, Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012), *available at* http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986.

Congress has amended and revitalized the FCA throughout the statute's history, with the overall purpose of assisting the Government and relators to ferret out and punish fraud and recover monies lost for the Government. *See Graham County*, 130 S. Ct. at 1409. The FCA's text itself makes clear that Congress intends for the Government or relators to pursue civil FCA actions parallel to the Government's pursuit of criminal FCA prosecutions. While the FCA's civil and criminal provisions are now codified in different sections of the United States Code, the underlying offenses are essentially the same and frequently pursued in tandem. Indeed, the FCA's civil provisions specifically provide that final judgments rendered in any criminal FCA proceeding, will have preclusive effect in civil FCA proceedings for the same underlying offense. 31 U.S.C. § 3731(e).

Given that the FCA provides that the liability elements of the offense underlying a parallel civil action are deemed proven, Congress would reasonably

expect the WSLA to toll both civil and criminal actions for FCA offenses. Otherwise, the provision for estoppel would be irrelevant in war fraud cases tolled by the WSLA. *See United States v. Karron*, 750 F. Supp. 2d 480, 491 n.10 (S.D.N.Y. 2011) (collecting cases in which FCA liability is established based on the preclusive effect of a criminal conviction for the same offense). In Title 18, Congress adopted this same procedural approach to estoppel for offenses underlying civil remedies such as 18 U.S.C. § 38(c)(3).

Halliburton's attempt to rebut Congress's plain words in the WSLA, by relying on this Court's holding in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), is misplaced. In *Gabelli*, the SEC sought to create a judicial discovery rule without a period of repose, and this Court, in *dicta*, for illustrative purposes observed that a particular FCA provision, which was not at issue, established a discovery rule with an alternative limit of ten years from the date of offense. *Gabelli,* 133 S. Ct. at 1224 (citing 31 U.S.C. § 3731(b)). This merely shows that Congress often couples a discovery rule with a period of repose to ensure that a discovery rule cannot extend a statute of limitations indefinitely, and this Court was reluctant to sanction a judicial discovery rule without a period of repose. The WSLA, however, is not a judicial rule.

Congress passed the WSLA to address the unique circumstances involved in pursuing wartime fraud offenses. Congress recognized that the distractions of war make it difficult to investigate and pursue fraud offenses during war, and, therefore, Congress tolled

actions while war is ongoing without providing an absolute period of repose. It is Halliburton that is asking this Court to create a judicial rule providing an absolute, ten-year period of repose based on the FCA's discovery rule. Not only is that improper, but this Court need not reach the issue since a ten-year period of repose would not bar Carter's case. Carter filed his action well within Halliburton's proposed ten-year period of repose.

2. The FCA is Designed for Relators to Perform a Vital Function in Uncovering and Prosecuting Fraud

Congress's concern that the protections it provided for wartime fraud offenses would be impacted by the chaos of war applies equally to actions brought by relators or the Government. When a relator is involved in a war zone, as Carter was, he is unable to pursue an FCA fraud action on behalf of the Government until he returns from war. Moreover, the evidence and witnesses involved in that fraud would likely be unavailable to the Government until the hostilities ceased. For example, in this case, a key witness was located in a war zone in Afghanistan, the two bases in Iraq where Halliburton perpetrated the fraud offenses were located in war zones, and the troops who were witnesses to Halliburton's failure to purify water were engaged in combat. Additionally, the Government has an obligation to investigate an FCA action while the case remains under seal, *see* 31 U.S.C. § 3730(b)(2)-(4), and it may be difficult for

the Government to timely investigate its own war contractors (who may be actively assisting the Government in war zones) during war hostilities.

Halliburton's contention that a relator in a non-intervened case is unworthy of the WSLA's protection is unsupported by the law, and contradicted by the FCA's statutory scheme and purpose. The keystone of the FCA is Congress's recognition that the Government needs assistance from private citizens in uncovering and proving war fraud. *Graham County*, 130 S. Ct. at 1409 ("Congress passed the 1986 amendments to the FCA 'to strengthen the Government's hand in fighting false claims,' and 'to encourage more private enforcement suits.'" (internal citations omitted)). Congress understood that the best evidence of fraud comes from those who are close to the fraud itself, and it passed the FCA to incentivize those persons to come forward and assist the Government in prosecuting fraud. In 1986, Congress further empowered and incentivized private citizens such as Carter to assist the Government in prosecuting fraud by authorizing them to prosecute fraud on the Government's behalf even if the Government elects not to intervene. 31 U.S.C. § 3730(c)(3). Congress clearly recognized that there would be cases such as this one where the Government might choose not to intervene, but nevertheless permit and encourage private citizens such as Carter to prosecute the fraud on its behalf. *Id*. Congress also gave the Government the right to move to dismiss non-intervened cases in situations where it believes relators are not acting in the Government's best interest, and in this case

the Government has not done so, *see* 31 U.S.C. § 3730(c)(2)(A). Instead, it fully supports Carter's position before this Court that his case should go forward.

There is no reason in the text of the WSLA or the FCA to conclude that Congress intended for Government actions to toll, while allowing relator actions, which are also designed to protect the Government, to expire. Indeed, the FCA's text shows that, as a procedural matter, Congress intended for relators to stand in the shoes of the United States. *See* 31 U.S.C. § 3730(b) ("The action shall be brought in the name of the Government."); 31 U.S.C. § 3731(e) (estopping defendants from challenging liability in civil FCA actions brought by the United States, 31 U.S.C. § 3730(a), or relators, 31 U.S.C. § 3730(b), based on a final judgment rendered in the United States' favor in a criminal proceeding for the same underlying false claims). Moreover, the FCA anticipates that the Government will have an ongoing role in a relator's FCA case even after a non-intervention decision. 31 U.S.C. § 3730(c)(3) (providing that the Government may monitor the relator's case and intervene at a later date). If it later decides to intervene, and file its own complaint, that complaint relates back to the relator's complaint for statute of limitations purposes. 31 U.S.C. § 3731(c).

F. Under The Interpretation Urged By Carter, The Dire Consequences Halliburton And *Amici* Posit Will Not Occur Because Their Arguments Are Based On False Premises

Halliburton's and *Amici*'s speculated "dire consequences" will not occur, and this Court need not resolve them to decide this case. *See Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

1. The Fourth Circuit's Application of the WSLA to Carter Will Not Open the Floodgates to Revive Stale Claims

Halliburton and *Amici* posit that the floodgates will open if this Court affirms the Fourth Circuit's decision as to Carter. This argument is without merit.

As a preliminary matter, the WSLA is rarely invoked to toll civil actions for war fraud, which is demonstrated by the infrequency with which it has been invoked since the Government began to apply it to civil cases in 1947. Halliburton's argument should, therefore, be rejected as pure speculation. *See Schindler*, 131 S. Ct. at 1895.

In most cases, relators, because of first-to-file concerns, will always file at their earliest opportunity to do so. *See infra* at Part II.D. Moreover, since the statute of limitations for the FCA is six years, their actions will almost always be timely. It is only in the rare case in which a relator is stationed overseas, or witnesses or evidence is otherwise involved in the

war that a relator is likely to use the WSLA's extension, which is precisely why Congress passed it.

2. The WSLA's Application to Fraud Offenses Unrelated to War is Not Before this Court

Halliburton and various *Amici* argue that the WSLA should not be extended to offenses that are unrelated to a war (as a few Courts have recently held). This Court need not, and should not, reach this issue because this case undisputedly concerns an offense involving fraud on troops in wartime in connection with a war contract which is covered under WSLA subsections (1) and (3).

Moreover, the WSLA's text and structure support an interpretation that it is limited to pecuniary offenses "connected with or relating to the prosecution of the war." 18 U.S.C. § 3287. That phrase appears at the end of the statute and could be read to limit the application of "any offense," by applying to all three subsections that precede it.[11] In the context of the

[11] In other words, the "related to the war" phrase would be read to modify "any offense," rather than subsection (3), thus providing that "the running of any statute of limitations applicable to any offense [identified in the WSLA] which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities. . . ." 18 U.S.C. § 3287.

overall statute, which applies when the United States is "at war," it would be appropriate to construe the WSLA's language as limiting its application to "any offense" that is "connected with or related to the war."

This interpretation is supported by the fact that after the SPA's enactment, the limiting language, "connected with or related to the war," was left at the end of subsection (2). 58 Stat. 781. Congress moved to rectify this situation when it amended the statute in 1948 to reverse the order of subsections (2) and (3), and thereby indicated that the limitation to offenses "connected or related to the war" could refer to all subsections just as the language pertaining to the suspension of limitations applied to all subsections. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 683, 828.[12]

Furthermore, this Court has already observed in *Bridges* and *Grainger* that WSLA subsection (1) is restricted to "war frauds" of a pecuniary nature. *Bridges*, 346 U.S. at 216 ("The legislative history of this exception . . . indicates a purpose to suspend the general statute of limitations only as to *war frauds*

[12] Congress also adopted a more expansive definition of war-related property offenses, extending protections from offenses under the SPA to offenses "committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States." 62 Stat. 828. That subsection itself contains no limitation. Without such a limitation, subsection (2) could be interpreted to apply to any offense involving U.S. Government property. That does not appear to be a reasonable interpretation.

of a pecuniary nature or of a nature concerning property." (emphasis added)). Nothing in the WSLA's text or history suggests that Congress intended the WSLA to extend beyond offenses related to the war. Indeed, all of the offenses specifically delimited in the WSLA are or can be offenses directly related to the war. *See* 18 U.S.C. § 3287(1), (2), and (3); *Graham County*, 559 U.S. at 289-90 (other later statutory text may be taken into consideration in determining the meaning of earlier terms).

3. The Triggering Events for Applying the WSLA are not Before this Court

Halliburton also argues that this Court needs to address Congress's choice of triggers for beginning and ending a war under the WSLA. The Court does not need to address these issues.

The Court need not address whether the United States was "at war" in Iraq because the 2008 version of the WSLA makes clear that the Iraq war triggered the WSLA's tolling provision.[13] Moreover, Halliburton's

[13] It is undisputed that Carter filed *Carter III* after the 2008 amendment to the WSLA, and, therefore, that is the applicable statute in determining the procedural issue. *See Republic of Aus. v. Altmann*, 541 U.S. 677, 693 (2004) (courts "apply changes in procedural rules 'in suits arising before [the rules'] enactment without raising concerns about retroactivity.'") (internal citations and quotations omitted); *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 665 (8th Cir. 1995) ("[T]he ADEA statute of limitations is 'a procedural rather than a substantive requirement' and . . . 'courts apply the procedure in effect when the case is

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claims that the WSLA's triggers for when a war begins and ends would lead to indefinite tolling are challenges to the manner in which Congress drafted the statute that go to the WSLA's very substance as enacted by Congress. The validity of this statute is not before this Court, nor should it be. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2645 (2013) (Ginsburg, J., dissenting).

G. Carter Timely Filed His Original Case, And His Refiled Complaints Should Relate Back To His Initial Filing, Or The Statute Should Be Equitably Tolled Under The Circumstances

There is no dispute that, upon returning from Iraq, Carter timely filed his initial FCA complaint,

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before them.' ") (internal citations and quotations omitted). Furthermore, Halliburton seemingly conceded in its petition for certification that the question of whether the 2008 or pre-2008 WSLA applies is not before the Court, stating: "[t]he questions presented in this petition – whether the WSLA tolls civil claims brought by private plaintiffs, and whether the panel was correct in determining the statutory suspension period had been triggered – apply to both versions of the statute, and thus this Court similarly need not address the applicability of the 2008 amendment." Petition for Writ of Certiorari ("Cert. Br.") 17-18 n.4. Thus, because Congress authorized the war in Iraq, *see* Authorization for the Use of Military Force against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), there is no question that the WSLA's suspension period was triggered in this case. *See* 18 U.S.C. § 3287 ("[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces.").

and at all times diligently pursued his judicial remedies in successive complaints. Thus, Carter's case should be allowed to proceed to trial in any event because his refiled complaints should relate back to his initial filing, or alternatively equitable tolling is appropriate. The Fourth Circuit heard, but did not address, these issues because it held that Carter timely filed his complaint under the WSLA. Pet. App. 16a. Accordingly, if this Court finds that the WSLA does not toll Carter's action, this Court should remand this case to the Fourth Circuit to address Carter's equitable arguments, along with his claims otherwise not barred by the FCA's statute of limitations.

This Court has explained the purpose of applying a statute of limitations as "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (internal citation and quotation omitted). Here, Carter filed his claims in early 2006, well within the FCA's statute of limitations, the parties completed all discovery, and the district court ordered Carter's case to trial. There is no concern in these circumstances about lack of notice to defendant, witnesses forgetting events, or lost documents that underlie typical statute of limitations concerns. Thus, there is no reason to apply the FCA's statute of limitations. *See Tiller v. Atlantic C. L. R. Co.*, 323 U.S. 574, 581 (1945) ("There is no reason to apply a statute of limitations when, as here, the

respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.").

Alternatively, "[t]his Court has permitted equitable tolling in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," and acknowledged that "tolling might be appropriate in other cases." *Young v. United States*, 535 U.S. 43, 50 (2002) (internal quotations omitted). Carter filed a timely FCA case, and Halliburton received notice of his case. *Burnett v. New York C. R. Co.*, 380 U.S. 424, 434-35 (1965) (tolling a FELA action when the plaintiff served the defendant with process and plaintiff's case was dismissed for improper venue). Additionally, tolling is appropriate here under the unusual procedural circumstances of this case because Carter's delay in filing his present complaint is peculiar to the FCA, and involves such factors as the time his initial case spent under seal, the complications of proceeding with an FCA case against a war contractor while the war in Iraq was ongoing, and the district court's novel applications of the FCA's first-to-file provision.

II. The First-to-File Provision Does Not Bar Carter's Complaint

A. When Congress Said "Pending" It Meant "Pending." The FCA's Plain Language Restricts The First-To-File Provision To Pending Cases

Halliburton asks this Court to hold that it is forever immune from suit for its war fraud offenses because it interprets the term "pending" in the FCA's first-to-file provision, 31 U.S.C. § 3730(b)(5), in a manner that bars Carter's complaint and all other complaints accusing Halliburton of fraudulent billing in connection with services performed in Iraq and other countries. Halliburton's argument is without merit.

Initially, since Halliburton asks this Court to dismiss Carter's complaint below with prejudice, and there are currently no related cases pending, the only issue before this Court is whether a non-pending, dismissed case, which was never decided on the merits, forever bars an original source of information, such as Carter, from pursuing a war contractor such as Halliburton for a related fraud offense. Whether or not such a case bars Carter while it is pending is not before this Court. Halliburton's position that a dismissed case should bar all future actions for fraud related to the allegations in that complaint, whether or not those allegations had merit, is contrary to the first-to-file provision's text, Congress's express intent, and common sense.

The first-to-file provision's plain language makes clear that it applies only when a first-filed FCA action is "pending":

> 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). This provision unmistakably applies to bar an action in two limited circumstances: (1) intervening in a pending FCA action, or (2) bringing an FCA action related to a pending FCA action. There is nothing in the first-to-file provision's plain language that bars actions that are related to a previously filed, but no longer pending action.

Halliburton improperly asks this Court to write the word "pending" out of the first-to-file provision to bar any FCA actions that are in any way related to an earlier-filed, but no longer pending action, regardless of the earlier-filed action's merits. Such an interpretation would make the term "pending" superfluous, and has no support in the first-to-file provision's text. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Contrary to Halliburton's position, the first-to-file provision's text supports the Fourth Circuit's reading that the first-to-file provision applies only when there is a "pending" FCA case (*i.e.*, not dismissed or withdrawn).

The first-to-file provision is written from the standpoint of the first-filed case, and states that a

person may not "intervene" or "bring a related action" based on the facts underlying a "pending action." 31 U.S.C. § 3730(b)(5). Significantly, the prohibitions against intervening in an action or bringing a related action, are both modified by requiring that the first-filed action be "pending."[14] Halliburton contends that the word "pending" is merely shorthand for "first-filed." Pet. Br. 44. Under that interpretation, the first-filed case may be withdrawn or dismissed (*i.e.*, no longer pending) and still be "pending." That definition is nonsensical. Additionally, that definition ignores the fact that a party cannot intervene in a case that is dismissed or withdrawn.

Thus, Halliburton's suggestion that the first-to-file provision applies absent a pending action is inconsistent with the sentence structure of the first-to-file provision. The word "pending" must have the same meaning in the context of "intervention" and "bringing a related action." "By linking the prohibition against intervention with the prohibition against bringing a related action, Congress enacted a provision generally addressed to the effect of a pending action," (*i.e.*, not withdrawn or dismissed). *See United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338, 348

[14] The word "or" is used as a coordinating conjunction to join phrases of equal grammatical rank to one another. *The Chicago Manual of Style* ¶ 5.194 (16th ed. 2010). It is really two sentences, which prohibit two different actions premised on the same causal event (*i.e.*, a "pending action"), that are combined with a coordinating conjunction.

(D.C. Cir. 2014) (Srinivasan, J., concurring in part and dissenting in part).

If Congress intended to modify the meaning of "pending," it could have separated these two prohibitions, or used a word other than pending to refer to the first-filed action (such as "first-filed," "other," or "previous"), but it elected not to do so. Moreover, if Congress intended to bar all cases filed thereafter it had many ways to make that clear; for example, by inserting the word "ever" before the word "bring" (*i.e.*, "no person can. . . . [ever] bring a related action based on the facts underlying the pending action"). Thus, Halliburton's proposed interpretation of "pending" as "short-hand" to refer to a first-filed case (whether pending or not pending) is untenable.

The Fourth Circuit's interpretation of "pending" is consistent with the word's ordinary, common sense meaning. The word "pending," as used at the time the FCA was amended in 1986, commonly meant "[b]egun, but not yet completed." *Black's Law Dictionary* 1021 (5th ed. 1979). Thus, under an ordinary interpretation of the first-to-file provision, when a *qui tam* action is "filed, but not yet completed," no person other than the Government may intervene or file an action related to that *qui tam* action. Halliburton conveniently omits that nearly every Circuit court that has weighed in on the meaning of "pending" has adopted the Fourth Circuit's definition. *See United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362-65 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956,

963-64 (10th Cir. 2009). The only exception is the D.C. Circuit, which is apparently split on the definition of pending. *Cf. U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."); *Shea*, 748 F.3d at 333-34. The court in *Shea* was itself split. *Shea*, 748 F.3d at 349-50 (Srinivasan, J., dissenting).[15]

B. The Fourth Circuit's Reading Of The First-To-File Provision Is Consistent With The FCA's Statutory Scheme And The Express Intent Of Congress And Halliburton's Reading is Contrary To That Intent

Halliburton's interpretation of the first-to-file provision also conflicts with the FCA's overall statutory scheme. As is clear from the provision's plain language (and its statutory history), it serves the purpose of avoiding a multiplicity of simultaneous relator actions for the same fraud, which is only an issue when there is a "pending" first-filed action. Congress separately addressed the circumstance where the Government is potentially alerted to a particular fraud by a public disclosure such as an earlier-filed,

[15] Significantly, although Congress has amended the FCA several times since 1986, and is presumably aware that courts have consistently held that the first-to-file provision applies only to pending cases, Congress has never revised this provision to adopt Halliburton's proposed interpretation.

no longer pending action, in the FCA's public disclosure and original source provisions. *See* 31 U.S.C. § 3730(e)(4). These provisions were carefully designed to balance Congress's twin goals of encouraging relators to bring the Government valuable information, while ferreting out parasitic complaints that provide the Government with no new information. *Schindler Elevator Corp.*, 131 S. Ct. at 1894 ("the public disclosure bar was 'an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.' ").

Recognizing that the statute's plain language and the overall statutory scheme do not support its interpretation, Halliburton improperly refers this Court to language in several other statutory provisions that limit their application to pending actions by using different language than the first-to-file provision.[16] *See Amoco Prod. Co. v. Vill. of Gabell*, 480 U.S. 531, 552-53 (1987) ("Going behind the plain language of a statute in search of a possible contrary Congressional intent is a step to be taken cautiously even under

[16] *See* 28 U.S.C. § 1500 (using the language "has pending" in a provision with a substantially different structure than the FCA's first-to-file provision); 42 U.S.C. § 300aa-11(a)(5)(A)-(B) (same). As should be clear, Congress's choice of the language "has pending" (as opposed to "pending") in provisions substantially different in structure from the FCA's first-to-file provision is not meaningful, particularly since the "has pending" language does not fit in the context of the FCA's first-to-file provision (*i.e.*, the phrase "based on the facts underlying the 'has pending' action" makes no sense).

the best of circumstances." (Quotations omitted)). These examples, which contain very different sentence structures, show merely that depending on the context, there are a number of different ways to limit a procedural bar to the circumstance of a "pending" action, but plainly Congress's use of the language "pending" is a direct and accepted way to do so.

The legislative history of the FCA supports the Fourth Circuit's interpretation. As this Court has recognized, Congress passed the FCA's 1986 amendments to strengthen the FCA and to incentivize and empower relators with knowledge of fraud to file actions and report that fraud to the Government. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003).

Congress passed the public disclosure bar with the expectation that relators would file cases based on publicly disclosed allegations. In some instances those actions would be barred; however, Congress also recognized that the allegations might be publicly disclosed and even known by the Government and the subject of investigation, but the Government would still benefit from relators who had direct and independent knowledge of the fraud offense. The original source provision authorized such relators to file cases and to pursue them even if the Government declined to intervene, thus showing Congress's intent to allow relators who have valuable knowledge and evidence to bring later-filed actions to pursue defendants who defraud the government.

Under Halliburton's expansive interpretation of the first-to-file provision, if a relator files a frivolous complaint that brings the Government no value, and it is then dismissed or withdrawn without reaching the merits, an original source with direct and personal knowledge of the fraud could never file an action, and war profiteers would be immunized forever by poorly pled cases. Congress would not have passed the original source provision to incentivize such relators and authorize them to pursue non-intervened cases if it intended that result.

This concern is not speculative or hypothetical. In this case, the district court held that *Thorpe*, a poorly pled complaint, alleging widespread unspecified billing fraud throughout the world, filed by relators who had never been to the bases where Carter was stationed, barred a well-pled complaint filed by Carter, an original source with personal knowledge that Halliburton had been falsely billing for purifying and testing contaminated water when it was in fact not doing so. Now, as expected, *Thorpe* has been dismissed without a ruling on the merits, and under the Fourth Circuit's ruling, Carter has the right to pursue his case. If this Court rules for Halliburton, it will never face a jury for any of the fraud offenses related to the *Thorpe* complaint's overbroad allegations. More importantly, under similar reasoning, the *Thorpe* case, which is no longer pending, could bar any lawsuit by any future relator, no matter how knowledgeable and what evidence they have, against Halliburton for fraudulent billing in the countries

where the LOGCAP III contract applies, namely Iraq, Kuwait, Afghanistan, Djibouti, Republic of Georgia, and Uzbekistan. JA 529-530.[17] Contrary to Halliburton's claim, the FCA was passed to help the Government punish fraud, not to help those who defraud the government to avoid punishment. Congress cannot have intended this result.[18]

The first-to-file provision's drafting history also supports the Fourth Circuit's reading of the statute. It shows that Congress was concerned with the Government's ability to intervene in and control litigation when necessary, and prevent other persons from filing multiple and parallel litigations in other courts, and thereby interfering with that "pending" litigation.

Prior to 1986, the FCA had no "provision for the Government to take over the [relator's] action."

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[17] The *Thorpe* action alleged that "defendants defrauded the DOD by systematically inflating, and causing to be inflated, labor costs incurred on the LOGCAP III contract in Iraq, Afghanistan and other countries supported under LOGCAP III." JA 530.

[18] Carter's action was first blocked by the *Thorpe* action that was filed almost a month earlier, on December 23, 2005, it was then blocked by itself, it was then blocked by two actions filed subsequent to *Carter I* (which should themselves have been blocked by *Thorpe* and *Carter*), and it was then again blocked by Halliburton's Supreme Court *certiorari* petition. Along the way, the *Thorpe* action was dismissed, and the subsequent actions were voluntarily dismissed. As a result, Halliburton has avoided accountability for nearly nine years since Carter initiated his first action, and now seeks to immunize itself completely.

Congress added the first-to-file provision in the FCA's 1986 amendments to make clear that no other person could intervene in or divert the case by filing separate cases in different courts. S. Rep. No. 99-345, at 25 (July 28, 1986) (clarifying "that only the Government may intervene in a qui tam action. . . . [and] that private enforcement under the civil FCA is not meant to produce class actions or multiple, separate suits based on identical facts and circumstances.").[19]

At the hearing on the 1986 Amendments, the Hon. Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice, testified:

> one of the concerns we have is the portion of the bill which provides, that even after the Department of Justice has stepped in to litigate a qui tam action on the part of the United States . . . it creates some concern as to how do you manage that kind of litigation. *Second, it creates a concern as to whether or not potentially there could be any collusive action if suits are brought by an associate of*

[19] The statutory history that Halliburton relies on pertains not to the first-to-file provision but to the FCA generally, or the public disclosure and original source provisions specifically. All of the legislative history that discusses parasitic cases is focused on the government knowledge bar and the public disclosure bar. For instance, in discussing the need for amendments after the Court's ruling in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the legislative discussion explains that the previous government knowledge bar and a reduced relator's share are deterrents to unwarranted parasitic suits. H.R. Rep. No. 99-660, at 22-23 (1986).

> *the defendant who brings a qui tam action, he may remain in the action to try to frustrate the litigation itself.*

False Claims Reform Act, Hearing Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 20 (1985) (statement of Jay B. Stephens, Deputy Assoc. Att'y Gen. of the United States) (emphasis added). Thus, the provision's legislative history itself focused on possible interference with pending cases, including by the defendant, not barring later cases brought by relators.

C. The First-To-File Provision's Practical Real World Goals Are Accomplished Under The Fourth Circuit's Interpretation

There are good policy reasons for the Fourth Circuit's common sense interpretation that a case must be pending to bar a later-filed case. Restricting filings of parallel actions ensures that courts will not enter inconsistent judgments, Government resources will not be diverted while they are still investigating the first-filed case, the Government will not be obligated to pay more than one relator, and judicial resources will not be wasted. Similar considerations underlie the principles that apply when a federal court stays a case in favor of a first-filed, pending parallel action. *See Emplrs. Ins. v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 275 (2d Cir. 2008) (The first-to-file rule "'embodies considerations of judicial administration and conservation of resources' by avoiding

duplicative litigation and honoring the plaintiff's choice of forum." (citation omitted)); *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (noting if "dozens of relators could expect to share a recovery for the same conduct" it would decrease their incentive to file a *qui tam*). Finally, Halliburton benefits from the rule by avoiding having to face simultaneous actions on the same or similar conduct.[20] Under the Fourth Circuit's interpretation, the first-to-file provision is narrowly tailored to address these specific considerations that concern only "pending" FCA actions, and Halliburton's broad interpretation, which merely serves to forever immunize defendants from suit, does nothing to further those goals.

D. The Fourth Circuit's Decision Will Not Result In Either An Endless Stream Of Meritless Cases Or A Delay In Filing Cases. Rather It Will Encourage The Early Filing Of Well-Pled Cases By Knowledgeable Relators

Contrary to Halliburton's claims, the Fourth Circuit's interpretation would not open the door to an

[20] Halliburton's reliance upon the Ninth Circuit's holding in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001), is misplaced. In *Lujan*, the relator's case was filed while an earlier case was pending, and before it was dismissed. *Id.* The court merely held that Lujan's action was barred because the first-filed case was still pending when the relator initiated her action. *Id.*

endless stream of parasitic lawsuits, and it would not encourage relators to sit by and allow their claims to increase, thereby "maximiz[ing] the value of the alleged fraud" before they file. Pet. Br. at 55. These claims demonstrate a misunderstanding of both the FCA law and practice.

Under the Fourth Circuit's interpretation, relators are highly incentivized to file timely, well-pled complaints. Relators are certainly aware that under the first-to-file provision, a first-filed complaint will bar any related actions so long as it is "pending." That is significant, particularly given that FCA cases must be filed under seal, and often remain under seal for many years, 31 U.S.C. § 3730(b)(2). Thus, a relator who waits for damages to accumulate would have no way to know if his claim had already been staked by a pending, first-filed case that was under seal.[21]

Congress specifically addressed Halliburton's concern about endless, parasitic suits in the FCA's public disclosure and original source provisions. Those provisions adopt a legislative balance between encouraging relators to step forward with direct and independent information about fraud on the Government, and

[21] It is significant that in the Circuits (*e.g.*, Fourth, Seventh and Tenth) where Carter's "pending" interpretation has been applied, there is no evidence that, as a result, relators have waited to file. *See Schindler Elevator*, 131 S. Ct. at 1895 (rejecting relator's hypothetical argument and noting that there is no suggestion that defendants have made FOIA requests to insulate themselves).

discouraging parasitic lawsuits. *See* 31 U.S.C. § 3730(e)(4). Under Halliburton's interpretation of the FCA's first-to-file provision, this legislative balance would be eviscerated. The first-to-file provision would overlap the public disclosure bar with respect to FCA complaints[22] thereby barring "original sources." The application of the "original source" provision would therefore be dependent on whether a relator with a meritless complaint happened to file first. In such a case, all future relator cases would be barred.

Halliburton also fails to recognize that the principles of *collateral estoppel*, claim preclusion and/or *res judicata* would likely apply to any later-filed related case if the first-filed case were decided on the merits, thereby precluding the speculative series of endless relator cases Halliburton posits. *See Chovanec*, 606 F.3d at 362 ("[A] related action based on the facts underlying the pending action must be dismissed rather than stayed. And if the action is related to and based on the facts of an earlier suit, then it often cannot be refiled – for, once the initial suit is resolved and a judgment entered (on the merits or by settlement), the doctrine of claim preclusion may block any later litigation."); *Shea*, 748 F.3d

[22] Once an FCA case has been filed, the statute requires the Government to investigate it. 31 U.S.C. § 3730(a). Under the public disclosure bar, Government "investigations" constitute public disclosures. 31 U.S.C. § 3730(e)(4)(A). Therefore, both the unsealing of the first complaint and the Government's investigation into the complaint would arguably be public disclosures.

at 349-50 (Srinivasan, J., dissenting). Thus, the only apparent application of Halliburton's novel interpretation of the first-to-file provision is to provide for first-filed complaints, which are dismissed without a decision on the merits, to bar actions by relators with valuable "original source" information and thereby disincentivize those relators from coming forward with evidence of fraud.[23]

In conclusion, Halliburton's appeal here is an attempt to write words into the WSLA and out of the first-to-file provision to avoid a trial on the merits on, and to obtain permanent immunity for, its war fraud offenses. This war fraud involves putting the health of the men and women in the United States armed forces at risk while fraudulently billing the United States Government for years for purifying and testing contaminated water for our troops in Iraq, which never happened. Halliburton's arguments are contradicted by the plain language of the statutes involved, the intent of Congress, and this Court's decisions. Congress passed the FCA to punish these offenses and the WSLA to toll the time to bring them while our country is distracted by war.

[23] Also, as a practical matter, while the first-to-file provision does not apply to the government it is doubtful the government would pursue its own action if it did not intervene in the first-filed action. Relators bring valuable knowledge and evidence to the government, and, absent such evidence and corroborating witnesses, it is unlikely the government will prosecute.

CONCLUSION

The Judgment of the Fourth Circuit below should be affirmed.

Respectfully submitted,

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18 U.S.C. § 3287 (2009) provides:

Wartime suspension of limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), 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 conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, 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.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the

use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

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31 U.S.C. § 3730 (2012) provides in relevant part:

Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it

receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) 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.

* * *