No. 12-1497

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, EX REL. BENJAMIN CARTER

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

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

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

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INTEREST OF THE UNITED STATES

This case presents questions concerning the construction of the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, and the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. 3287. The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. The WSLA was enacted to improve the government's ability to recover for frauds against the United States during times of war. The United States therefore has a substantial interest in the proper interpretation of both statutes. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. The FCA, 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim" to the government "for payment or approval." 31 U.S.C. 3729(a)(1)(A). The FCA authorizes both the government and private persons to sue for violations. See 31 U.S.C. 3730(a) and (b). Suit must be brought within six years of the date of the violation, or within three years of the date the material facts were known or should have been known to the responsible government official (so long as the suit is brought within ten years of the violation). 31 U.S.C. 3731(b).

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

b. The WSLA, 18 U.S.C. 3287, suspends the statute of limitations in certain cases while the government is engaged in military operations. As amended most recently in 2008, the WSLA provides in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, * * * the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

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

2. Petitioners provided logistical services to the United States military in connection with the armed conflict in Iraq. Pet. App. 3a. From January to April 2005, respondent worked for petitioners on water-purification projects at two camps in Iraq. *Ibid.* Respondent alleges that petitioners instructed him to submit time sheets for time he did not work, and that it was "routine practice" for petitioners to overbill the United States government on these projects. *Id.* at 3a-4a, 48a-49a.

In February 2006, respondent brought an FCA suit against petitioners, alleging that they had fraudulently billed the government for work in Iraq. Pet. App. 4a. The district court dismissed the complaint for failure to plead fraud with particularity, and respondent filed an amended complaint. *Ibid.* In March 2010, the parties were alerted to the pendency of an argua-

bly related suit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05-CV-08924 (C.D. Cal. filed Dec. 23, 2005), that had been filed before respondent's action and remained pending at that time. Pet. App. 4a-5a.

Petitioners moved to dismiss respondent's suit based on the FCA's first-to-file provision. Pet. App. 5a; J.A. 41. The district court concluded that respondent's suit was "related" to the "pending" *Thorpe* case, and it dismissed respondent's complaint without prejudice. J.A. 41-51. Respondent appealed, and in the meantime, *Thorpe* was dismissed. Pet. App. 5a.

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

In June 2011, respondent filed this action, again based on petitioners' alleged fraudulent billing for services in Iraq. Pet. App. 5a-6a. Petitioners again moved to dismiss the complaint under the first-to-file provision. That motion was based on the dismissed *Thorpe* action; on a pending suit filed in Maryland (*United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 07-CV-01487 (D. Md. filed June 5, 2007)); and on a pending, under-seal case in Texas. Pet. App. 6a-7a, 52a. Petitioners also contended that most of respondent's claims are untimely under the FCA's six-year statute of limitations. *Id.* at 6a, 57a.

3. The district court dismissed the complaint with prejudice. Pet. App. 47a-76a. The court held that the first-to-file provision barred respondent's suit because *Duprey* was pending when respondent filed his June

2011 complaint. *Id.* at 58a-64a. While acknowledging that *Duprey* had subsequently been dismissed on procedural grounds, the court held that the first-to-file provision depends on "the facts as they existed when the action was brought." *Id.* at 63a-64a. The court did not consider whether *Thorpe* or the Texas case also would bar the suit. *Id.* at 58a & n.4; J.A. 571.

The district court also found most of respondent's claims time-barred, rejecting respondent's argument that the WSLA had suspended the running of the FCA's statute of limitations. Pet. App. 64a-75a. The court acknowledged that the term "offense" in the WSLA could refer to both criminal and civil violations of law, *id.* at 68a, 73a, and that many courts have interpreted the WSLA to apply to civil fraud violations, *id.* at 71a & n.17. The court concluded, however, that the WSLA does not apply to "a civil FCA action brought by a relator, in which the United States has opted not to intervene." *Id.* at 73a-74a.

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

a. The court of appeals held that the WSLA suspends the statute of limitations for respondent's claims. Pet. App. 8a-16a. The court explained that the statute's reference to "offense[s] * * * involving fraud" literally encompasses both criminal and civil violations, and it concluded that Congress intended the WSLA to apply to both. *Id.* at 13a-14a. The court explained that the WSLA had originally referred only to offenses "now indictable," thus limiting its reach to acts of fraud prosecuted as crimes, but that Congress had later deleted that language, evidencing its intent to apply the WSLA to civil fraud actions. *Id.* at 14a. The court also explained that

applying the WSLA to civil fraud offenses "furthers the WSLA's purpose" of "root[ing] out fraud against the United States during times of war." *Id.* at 16a. Finally, the court of appeals rejected petitioners' argument that the WSLA is limited to FCA suits in which the United States has chosen to participate as a party. The court explained that the WSLA's applicability "depends upon whether the country is at war," "not who brings the case." *Id.* at 15a; see *id.* at 15a-16a.

b. The court of appeals held that, because *Duprey* and the Texas action were both "pending" when respondent filed his June 2011 complaint, and those actions were sufficiently "related" to this lawsuit, respondent's complaint was properly dismissed under the first-to-file provision. Pet. App. 17a-20a. The court also held, however, that the dismissal on first-to-file grounds should have been without prejudice, since *Duprey* and the Texas action had each been dismissed during respondent's suit. *Id.* at 20a-22a. The court explained that, "once a case is no longer pending," "the first-to-file bar does not stop a relator from filing a related case," *id.* at 21a-22a, but that other doctrines, such as res judicata or the FCA's public-disclosure bar, could "prevent the filing of subsequent cases." *Id.* at 21a.

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

SUMMARY OF ARGUMENT

I. The WSLA suspends the statute of limitations during wartime for a civil fraud claim under the FCA.

A. The WSLA suspends the statute of limitations during times of war for "any offense * * * involving fraud or attempted fraud against the United States." 18 U.S.C. 3287. A civil violation of the FCA is such an "offense." Petitioners construe the word as synonymous with "crime," but the term "offense" is often used, including in numerous United States Code provisions and many decisions of this Court, to refer to civil violations of law.

Although the WSLA is located in Title 18, nothing in the operative text limits its application to crimes. The FCA's own limitations provisions likewise do not preclude the WSLA from applying. Finally, nothing in the WSLA limits its use to suits in which the government is a party, and it is uncontested that the requisite authorization to use military force is in effect.

B. The history of the WSLA's development confirms that the statute applies to civil fraud offenses. As originally enacted, the WSLA referred to offenses "now indictable under any existing statutes," thus limiting the statute's application to crimes. In 1944, Congress removed the "now indictable" language, evidencing its intention to apply the WSLA to both civil and criminal fraud cases. Congress made that change at the same time it enacted new civil penalties and enforcement procedures to address wartime fraud, further showing that Congress's focus was not limited to criminal prosecutions. Since 1944, Congress has not taken any action to limit the WSLA's reach to crimes.

C. Application of the WSLA to civil FCA actions is necessary to fully effectuate the purposes of both statutes. Congress recognized that wartime conditions may impede the detection and prosecution of fraud, and it enacted the WSLA to alleviate those burdens. Fraud during wartime threatens the public fisc, whether it is ultimately prosecuted civilly or criminally. The FCA is the primary means for the government to recover the money obtained through fraud against federal programs, including military programs. Indeed, the FCA's original purpose was to redress fraud during the Civil War.

II. The FCA's first-to-file provision does not bar a relator from bringing suit when a related suit has been both filed and dismissed before the relator's suit is commenced.

A. The first-to-file provision states that, when a private person brings an FCA suit, "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) (emphasis added). Because the word "pending" refers to a lawsuit that is awaiting decision, it does not accurately describe a lawsuit that has been dismissed. After an initial *qui tam* suit has been dismissed, subsequent *qui tam* suits based on the same facts may sometimes be precluded by the FCA's public-disclosure provision or by res judicata principles. The FCA's first-to-file bar, however, does not apply in this circumstance.

B. Limiting the first-to-file bar to the situation where the first case remains "pending" makes sense. The provision ensures that the relator who brought the first suit does not have his recovery diluted by intervenors or follow-on suits, and that defendants do

not face two or more simultaneous suits based on the same allegations. Once the first suit has been dismissed, the first relator no longer has a potential recovery to protect, and any legitimate interest the defendant has in avoiding future litigation is addressed through res judicata principles.

When it amended the FCA in 1986, Congress took a variety of steps to encourage meritorious private actions while barring certain parasitic suits. The first-to-file bar primarily protects the relator's interest in recovery, while the public-disclosure provision stops parasitic suits based on public information. Petitioners' view disrupts the harmony between those two provisions, treating the first-to-file bar as a draconian version of the public-disclosure bar, forever barring an FCA suit based on the same facts (even one brought by an original source) once the first suit has been dismissed. Petitioners' interpretation would likewise subvert the established rule that non-merits dismissals do not have res judicata effect.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT APPLIES TO A CIVIL FRAUD CLAIM UNDER THE FALSE CLAIMS ACT

A. The Plain Text Of The WSLA Encompasses Civil FCA Violations

1. The WSLA provides that, when the United States is at war or Congress has authorized the use of military force, "the running of any statute of limitations applicable to any offense * * * involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until 5

years after" the termination of hostilities. 18 U.S.C. 3287(1). The WSLA also tolls the statutes of limitations for other specified "offenses" involving government property and contracts. 18 U.S.C. 3287(2) and (3).

By its plain terms, the WSLA applies here because petitioners' alleged FCA violation is an "offense" that "involve[s] fraud or attempted fraud against the United States." As both courts below correctly recognized, the word "offense" can encompass both civil and criminal violations. See Pet. App. 13a-14a, 68a. "Offense" might mean "a crime," or it might refer more broadly to "[a] violation of the law." *Black's Law Dictionary* 1186 (9th ed. 2009); see, *e.g.*, 1 John Austin, *Lectures on Jurisprudence: The Philosophy of Positive Law* 196 (Robert Campbell ed., student ed. 1875) ("[a]n offence" may be either a "Civil Injury" or a "Crime"); 10 *The Oxford English Dictionary* 724 (2d ed. 1989) ("offence" is "[a] breach of law, duty, propriety, or etiquette"); *Webster's Third New International Dictionary* 1566 (1993) ("offense" is "an infraction of law" or "crime"). The dictionary definitions petitioners cite are in accord; one notes that "offense" can mean "[a] transgression of law," *American Heritage Dictionary* 1255 (3d ed. 1992), and another states that an "offense" may include a violation of criminal law with a civil remedy, see *Black's Law Dictionary* 1232 (4th ed. 1951).

Numerous provisions of the United States Code use the term "offense" to refer to civil violations of law. See, *e.g.*, 7 U.S.C. 136*l* (pesticide-control law); 12 U.S.C. 1723i (mortgage laws); 15 U.S.C. 45(*l*) (Federal Trade Commission order); 16 U.S.C. 1540(a)(1) (Endangered Species Act); 29 U.S.C. 2619(b) (Family and

Medical Leave Act). This Court likewise has used the term "offense" to describe civil violations of law. See, *e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (referring to "Title VII offenses"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007) (addressing whether conduct in civil antitrust action established a "Sherman Act offense" (citation and internal quotation marks omitted)); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) ("exemplary damages imposed on a defendant should reflect the enormity of his offense" (citation omitted)); *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 93 (1992) (hazardous-waste licensing laws imposed "escalating fines for each offense").

In *United States* v. *Hutto*, 256 U.S. 524 (1921), the Court held that the federal conspiracy statute, which prohibited conspiracy "to commit any offense against the United States," encompassed a conspiracy to violate a civil statute that prohibited federal Indian affairs employees from trading with Indians. *Id.* at 525, 528-529 (quoting § 37, Criminal Code). The Court explained that, by using the phrase "offense against the United States," the conspiracy statute "does not in terms require that the contemplated offense shall of itself be a criminal offense," but can include any conspiracy "to accomplish a purpose either criminal or otherwise unlawful." *Id.* at 528-529. That holding provides further evidence that the word "offense" is not limited to crimes but instead may be broader, depending on the context.[1]

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[1] The current federal conspiracy statute (18 U.S.C. 371) establishes a five-year maximum term of imprisonment for conspiring to commit an "offense against the United States" or to "defraud the

Congress defined the WSLA's coverage not by reference to the criminal or civil character of the underlying violation, but by reference to the substantive nature of the wrongdoing involved. The WSLA applies to a range of conduct—offenses involving fraud against the United States, government property, and government contracts—that threatens the public fisc during times of war. The statute broadly applies to "any" such offenses and to fraud perpetrated "in any manner." See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). Although Congress could have limited the WSLA to "crimes," it has not done so, instead using the term "offense" to reach a broader class of unlawful conduct directed at government funds, property, or contracts.[2]

2. Petitioners contend (Br. 20-21) that the WSLA must be limited to crimes because it is codified in Title 18 of the United States Code. But numerous provi-

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United States." Section 371 then states that, if the "offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment * * * shall not exceed the maximum punishment provided for such misdemeanor." *Ibid.* Congress's use of the term "misdemeanor" to describe less serious "offense[s]" suggests that the word "offense" in the first clause of Section 371 means "crime." But see *United States* v. *Wiesner*, 216 F.2d 739, 741-742 (2d Cir. 1954). Assuming that inference is correct, however, it simply shows that the term "offense" sometimes encompasses civil violations and sometimes does not, depending on the statutory context in which the word appears. The Court's decision in *Hutto* squarely refutes any suggestion that "offense" *always* means "crime," even with respect to statutes that appear in the Criminal Code.

[2] A wartime tolling provision also appears in the Uniform Code of Military Justice, but that provision is narrower than the WSLA because it applies to "any offense *under this chapter* * * * involving fraud." 10 U.S.C. 843(f) (emphasis added).

sions in Title 18 use the word "offense" to refer to conduct with both civil and criminal penalties.[3] And when Congress reorganized Title 18 in 1948, it did not change the relevant WSLA language, which refers to an "offense" involving fraud against the government. See pp. 20-21, *infra*. The Court therefore should be reluctant to "place too much significance on the location of a statute in the United States Code." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004).

Petitioners argue (Br. 35-36) that the WSLA should not apply to FCA claims because the FCA contains its own statute of limitations, which includes a tolling provision. The whole point of the WSLA, however, is to affect the manner in which existing (often offense-specific) limitations provisions operate. The WSLA applies, moreover, even in circumstances where other tolling provisions may be applicable. Assuming the requisite wartime conditions were present, the WSLA would clearly toll the five-year statute of limitations applicable to criminal false-claims offenses, see 18 U.S.C. 286, 287, 3282(a), even though in a particular case the limitations period could be tolled on another ground as well, see, *e.g.*, 18 U.S.C. 3290 (tolling for prosecution of fugitive from justice); 18 U.S.C. 3292 (tolling to obtain foreign evidence). Nothing in the WSLA suggests that it cannot similarly coexist with the limitations provisions in the FCA.

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[3] See, *e.g.*, 18 U.S.C. 38 (aircraft-parts fraud); 18 U.S.C. 216 (bribery and conflict-of-interest offenses); 18 U.S.C. 248 (interference with access to reproductive health services); 18 U.S.C. 670 (medical-product theft); 18 U.S.C. 1033(a) (insurance fraud); 18 U.S.C. 1964 (civil RICO); 18 U.S.C. 2292(a) (maritime offenses); 18 U.S.C. 2339B, 2339C (terrorism offenses).

3. Under 31 U.S.C. 3731(b), a civil FCA suit may not be commenced "more than 6 years after the" violation is committed, or "more than 3 years after the date when" the responsible federal official knew or should have known the relevant facts, "but in no event more than 10 years after the date on which the violation is committed, whichever occurs last." Petitioners contend that the court of appeals' "extension of WSLA tolling to *qui tam* claims is * * * irreconcilable with the FCA's express limitations provisions." Pet. Br. 35. That claim is misconceived.

Petitioners' claim of conflict between the WSLA and the FCA is premised on the FCA's *ten*-year limit, which petitioners view as a "statute of repose." Pet. Br. 35-36. Respondent filed his current suit less than ten years after the alleged violations, however, so the timeliness of that suit does not depend on whether the WSLA can suspend the ten-year limit.

In *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), this Court discussed the differences between "statutes of limitations" and "statutes of repose"; explained that the term "statute of limitations" sometimes encompasses statutes of repose and sometimes does not, depending on the context in which that term appears; and held that the phrase "applicable limitations period" in 42 U.S.C. 9658 does not include state statutes of repose. See 134 S. Ct. at 2182-2187. In a future case where the issue is presented, the Court could decide the distinct questions potentially implicated by use of the WSLA to suspend the FCA's ten-year limit. The Court's decision in *Waldburger* establishes the framework for addressing those questions. But the distinct legal status of "statutes of repose" provides no basis for questioning the WSLA's applicability to

the FCA's *six*-year limit, which is indisputably a (tollable) statute of limitations, much less for concluding that the WSLA is categorically inapplicable to civil cases.

4. Petitioners state (Br. 37, 38) that it would be "particularly inconsistent with Congress's scheme" to apply the WSLA in *qui tam* suits because private relators do not "experience the same resource constraints during wartime as government prosecutors and investigators." But private relators, like government officials, may find it difficult during times of war to gain access to necessary evidence. More fundamentally, nothing in the WSLA's text distinguishes between FCA suits filed (or intervened in) by the government and those commenced and prosecuted by *qui tam* relators. By its terms, the WSLA's applicability turns on the nature of the "offense" alleged, not on the identity of the plaintiff. See Pet. App. 15a-16a. The "offense" alleged in this case clearly is one "involving fraud or attempted fraud against the United States or any agency thereof." 18 U.S.C. 3287(1).

5. Petitioners contend (Br. 38-41) that the phrase "at war" in the pre-2008 version of the WSLA required a formally declared war. This case provides no occasion to address that question, because the timeliness of respondent's suit does not depend on whether the prior version of the WSLA required a formal declaration of war. Because respondent alleges FCA violations occurring in 2005, see Pet. App. 3a, the FCA's six-year limitations period had not expired when the WSLA was amended in 2008. At least from 2008 forward, the amended version of the statute (which applies "[w]hen the United States is at war or Congress has enacted a specific authorization for the

use of the Armed Forces," 18 U.S.C. 3287) prevented that limitations period from continuing to run. Respondent's suit is therefore timely, whether or not the prior version of the WSLA required a formal declaration of war. See Pet. 17-18 n.4 (petitioners' statement that "this Court * * * need not address the applicability of the 2008 amendment").

B. The History Of The WSLA's Development Confirms That The Statute Applies To Civil Frauds

1. As originally enacted in 1942, the WSLA provided 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, or until such earlier time as the Congress by concurrent resolution, or the President, may designate." Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.[4] Two years later, Congress amended the WSLA as part of the Contract Settlement Act of 1944, Pub. L. No. 78-395, § 19, 58 Stat. 649, 667. *Inter alia*, Congress broadened the "offense[s]" to which the WSLA applied by removing the limiting phrase "now indictable under any existing statutes." ch. 555, 56 Stat. 748.

The amended version of the WSLA suspended the statute of limitations for "any offense against the laws of the United States * * * involving defrauding or attempts to defraud the United States or any agency

[4] Congress enacted a similar provision following World War I, see Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220, and repealed that provision in 1927, see Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51.

thereof whether by conspiracy or not, and in any manner." § 19(b), 58 Stat. 667.[5] The "now indictable" language in the original 1942 enactment had limited the WSLA's application to criminal fraud offenses (because only criminal offenses are "indictable"), and the subsequent deletion of that language made the statute "applicable to all actions involving fraud against the United States." Pet. App. 14a; accord, *e.g.*, *Dugan & McNamara, Inc.* v. *United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955) (reviewing that history and reaching the same conclusion). If Congress had intended for the WSLA to continue to apply only to crimes, it could have included some "limiting language" to make that point clear. Pet. App. 14a.

Congress's removal of the "now indictable" requirement is especially telling because the Contract Settlement Act was largely civil in nature. The Act's purpose was to ensure that government war contracts could be terminated, and creditors could be paid, more quickly, in order to allow for a speedy transition to a peacetime economy. See § 1, 58 Stat. 649. Recognizing that such an expedited process would increase the opportunity for fraud, Congress stated its intent to make available "all practicable methods * * * to prevent improper payments and to detect and prosecute fraud." § 1(f), 58 Stat. 649. Those new methods included both criminal and civil provisions. See § 19(c), 58 Stat. 667-668 (creating new criminal and civil offenses, including fine of $2000 per act and

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[5] Under the amended version, the limitations period was suspended for qualifying offenses "until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." § 19(b), 58 Stat. 667.

double damages, for presenting false claims for payment in connection with war contracts). The Contract Settlement Act also established mechanisms to alert the Justice Department to war-contract settlements believed to be induced by fraud so that the Department could "take such action as it deems appropriate" to "recover payments made to such war contractor." §§ 16, 18(e), 58 Stat. 664-665, 666-667. The extension of the WSLA to civil offenses fits comfortably among those civil enforcement measures.

Congress's expansion of the WSLA to cover offenses related to wartime contracts and government property reinforces the inference that Congress intended the statute's tolling rule to reach civil fraud, contracting, and procurement offenses. In the same statute that removed the "now indictable" language, Congress added language to reach "any" offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement" of any contract connected to the war effort. Contract Settlement Act § 19(b), 58 Stat. 667. Later in 1944, Congress again expanded the WSLA's reach to encompass "any" offense "committed in connection with the care and handling and disposal of property under the Surplus Property Act." Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 765, 781. Those additions were consistent with Congress's goal of using "all practicable methods" (Contract Settlement Act, § 1(f), 58 Stat. 649) to stop those who attempt to defraud the government during wartime.

2. Petitioners contend (Br. 29-31) that the purpose of the original "now indictable" language was to "ensure[] that the WSLA would not revive criminal

charges whose statutes of limitations had lapsed," and that Congress removed those words in 1944 because other language in the WSLA served that purpose. But the language petitioners identify—which provides that the WSLA "shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law," § 19(b), 58 Stat. 667—was present in the 1942 WSLA. See ch. 555, 56 Stat. 748. Petitioners' view therefore fails to give practical significance to the deletion of the "now indictable" language.

Petitioners alternatively suggest (Br. 31 n.12) that "now indictable" was included to clarify that the WSLA applies to offenses already committed, and that this language became unnecessary by 1944 because of the "established practice of applying the WSLA to already-committed crimes." But both before and after the 1944 amendments, the statute contained language applying it to already-committed crimes. Compare ch. 555, 56 Stat. 748 (WSLA "shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run"), with § 19(b), 58 Stat. 667 (same). Petitioners thus identify no sound alternative explanation for Congress's initial inclusion, and subsequent deletion, of the phrase "now indictable under any existing statutes."

During the 15 years after the Contract Settlement Act was enacted, both courts of appeals that addressed the issue construed the WSLA to extend to civil cases. See *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 310 (1960); *United States* v. *Witherspoon*, 211 F.2d 858, 860-863 (6th Cir. 1954). The former Court of Claims reached the same conclusion, see *Dugan & McNamara*, 127 F. Supp. at 802-804, as did numerous

district courts, see Resp. Br. 22-23 n.7, with only one court adopting a contrary view, see *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), rev'd on other grounds, 207 F.2d 796 (5th Cir. 1953). In 1959, the United States stated in a brief to this Court that the WSLA applies only to crimes. See U.S. Br. at 26-28, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362).[6] The WSLA was not at issue in *Koller*, however, and the government's brief did not discuss either the sequence of enactments (including the deletion of the "now indictable" language) that had produced the WSLA in its then-current form or the lower-court decisions finding the statute applicable to civil cases. The Court's summary disposition in *Koller* did not address the proper construction of the WSLA.

3. Congress has not taken any action since 1944 to limit the WSLA's reach to crimes. In 1948, Congress modified the statute "to make it permanent instead of temporary legislation," thereby "obviat[ing] the necessity of reenacting such legislation" for each future war. H.R. Rep. No. 304, 80th Cong., 1st Sess. A165 (1947). Congress accomplished that objective by deleting language that suspended the statute of limitations "until three years after the termination of hostilities in the *present* war," § 19(b), 58 Stat. 667 (emphasis added), and providing instead that, "[w]hen the United States is at war," the statute of limitations for the specified offenses "shall be suspended until three years after the termination of hostilities," Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 683, 828. Congress also recodified the WSLA in 1948, when it

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[6] Although government counsel's discussion of that point at oral argument was more equivocal (see Resp. Br. 32 n.9), counsel did not withdraw the statement made in the government's brief.

revised Title 18 and enacted it into positive law. See 62 Stat. 683. The 1948 amendments made no material change, however, to the list of offenses that the WSLA covered. Before and after 1948, the WSLA applied to "offense[s]" "involving fraud or attempted fraud against the United States." Compare § 19(b), 58 Stat. 667, with § 3287, 62 Stat. 828.

The WSLA remained unchanged until 2008. Congress then amended the law to provide for suspension of limitations periods not only when the United States is "at war," but also when "Congress has enacted a specific authorization for the use of the Armed Forces," and to expand the suspension period from three years to five years after the termination of hostilities. Department of Defense Appropriations Act, 2009, Pub. L. No. 110-329, Div. C, Tit. VIII, § 8117, 122 Stat. 3574, 3647. Again, however, Congress did nothing to limit the offenses reached by the statute to crimes.

Petitioners contend (Br. 27) that the legislative history of the 2008 amendment evidences a clear intention that the WSLA applies only to crimes. But statements in the 2008 legislative history point in both directions, some supporting the view that the WSLA applies only to criminal prosecutions, and others the view that it encompasses civil enforcement suits. For example, the Senate Report refers to "prosecutors * * * pursu[ing] contracting fraud" through criminal cases, S. Rep. No. 431, 110th Cong., 2d Sess. 2 (2008) (2008 Senate Report), and notes the consistency of the suspension period with the "general statute for limitations of criminal offenses," *id.* at 4. The same report also refers, however, to Congress's broader goal of "promot[ing] the prosecution *and* enforce-

ment" of wartime fraud, *id.* at 1 (emphasis added), and ensuring that "investigators and auditors" have adequate time to bring "those who have defrauded the American taxpayers to justice" through "litigation," see *id.* at 4, 5. See also, *e.g.*, *id.* at 5 ("courts, prosecutors, and litigants" need to "be sure when the statute of limitations starts to run"); *id.* at 6 (WSLA enables the government to "recover taxpayers' money" from companies that "delivered defective products, overbilled the government, or committed criminal fraud"). In any event, the history of the 2008 legislation, which amended the WSLA in other respects but did not alter the class of "offense[s]" to which the statute applies, would be a "hazardous" basis for discerning the intent of the 1944 Congress on the question presented here. *United States* v. *Price*, 361 U.S. 304, 313 (1960).

C. Applying The WSLA To Civil FCA Violations Furthers The Statute's Purposes

1. The WSLA reflects Congress's recognition that during wartime, there are numerous "opportunities * * * for unscrupulous persons to defraud the Government," and those frauds "may be difficult to discover" and "may not come to light for some time to come." 1942 Senate Report 2. Even when wartime fraud and related contract and property offenses have been identified, government enforcement efforts will "require considerable time before they advance to the stage of litigation." S. Rep. No. 1057, 78th Cong., 2d Sess. 14 (1944) (1944 Senate Report). Suspension of the limitations period ensures "that frauds may be discovered and punished even after the termination of the present conflict," and that the statute of limitations will not "protect[] * * * those who would defraud or attempt to defraud the United States."

1942 Senate Report 2; see H.R. Rep. No. 2051, 77th Cong., 2d Sess. 2 (1942) (same). Those rationales for suspending the limitations period in wartime fraud cases apply equally in the criminal and civil contexts. Congress's focus in enacting and amending the WSLA was to stop wartime misconduct that threatened the public fisc, see, *e.g.*, *Bridges* v. *United States*, 346 U.S. 209, 218 (1953), and suspending the limitations period for both civil and criminal fraud suits serves that important goal.

2. The government suffers substantial losses due to fraud, including "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation." *United States* v. *Halper*, 490 U.S. 435, 445 (1989). The FCA's civil enforcement mechanisms, which provide for treble damages as well as civil penalties, are "the Government's primary litigative tool for combatting fraud." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (1986 Senate Report); see *United States ex rel. Marcy* v. *Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008). Indeed, the FCA's original purpose was to root out wartime fraud, and the statute as first enacted "provided for both civil and criminal penalties" to further that goal. 1986 Senate Report 8; see *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (explaining that the FCA was enacted during the Civil War to "protect the funds and property of the Government from fraudulent claims").

Criminal and civil enforcement proceedings are both essential tools to address wartime frauds. As of 2008, investigations and audits "ha[d] uncovered how billions in taxpayers' money ha[d] been lost to contract fraud, waste, and abuse" in the "wars in Iraq and Afghanistan." 2008 Senate Report 2. "[H]undreds of

investigations" into alleged wartime fraud "remain[ed] pending," and "new investigations" were "started every month." *Ibid.* Applying the WSLA to both criminal and civil fraud offenses ensures that the government has the necessary time to investigate and bring suit to remedy those frauds, and that private *qui tam* relators may assist the government in that effort.

3. Petitioners do not dispute that application of the WSLA to civil fraud offenses would further the government's interest in addressing wartime fraud. Instead, they argue (Br. 35-38, 42-43) that application of the WSLA to civil FCA actions would result in "indefinite" tolling of the statute of limitations for those offenses. But all agree that Congress intended the WSLA to suspend the limitations period for criminal fraud cases. Further, tolling under the statute has an endpoint—"5 years after the termination of hostilities." 18 U.S.C. 3287.[7] To the extent that petitioners view that suspension period as unduly protracted, their quarrel is with Congress's balancing of interests in the specific context of wartime fraud. Cf. Pet. App. 29a (Wynn, J., concurring). And, as we explain above, this case does not present the question whether the WSLA suspends the operation of the FCA's ten-year limit on the commencement of suit. See pp. 14-15, *supra*.

Even apart from the statute of limitations, moreover, both the government and relators have ample incentives to investigate and sue to address wartime frauds as promptly as possible. The government has an interest in promptly restoring fraudulently-

[7] No issue about the interpretation of that phrase is before the Court.

obtained funds to the Treasury, and in ensuring that those who swindled the government are brought to justice. As time passes, "memories may dim, witnesses depart, and evidence disappear." *Hardin* v. *Straub*, 490 U.S. 536, 543 n.12 (1989). Private relators share those evidentiary incentives to bring suit promptly, and they also face FCA-specific hurdles if they delay in bringing suit. As discussed below, the first-to-file provision bars a suit based on the same facts as a "pending" suit, 31 U.S.C. 3730(b)(5), and the public-disclosure provision generally precludes suit once the factual circumstances of fraud become publicly known, see 31 U.S.C. 3730(e)(4). A potential relator who delays in filing suit thus runs a serious risk that another private party (or the government) will be the first to file, or that the public disclosure of pertinent information will bar his action. See Pet. App. 30a (Wynn, J., concurring) (explaining that relators "have an incentive to bring actions as early as possible"). Construing the WSLA in accordance with its text and history therefore creates no significant risk of gratuitous delay in the commencement of civil FCA suits.

II. THE FCA'S FIRST-TO-FILE PROVISION BARS A *QUI TAM* ACTION ONLY WHEN A RELATED SUIT REMAINS UNDECIDED

A. A Suit That Has Been Finally Dismissed Is No Longer "Pending"

1. The FCA's first-to-file provision states: "When a person brings an action under this subsection [*i.e.*, the subsection authorizing *qui tam* suits], 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). The question in this

case is whether Section 3730(b)(5) precludes a *qui tam* suit when a "related" *qui tam* suit was previously filed but has been dismissed by the time the second action is commenced. The court of appeals correctly held that, in this situation, Section 3730(b)(5) does not apply because the first suit is no longer "pending."

As used in the context of litigation, the word "pending" has a well-established meaning. A case is "pending" if it "[r]emain[s] undecided," is "awaiting decision," or is "under consideration." *Black's Law Dictionary* 1248 (9th ed. 2009); see, *e.g.*, *Webster's Third New International Dictionary* 1669 (1993) (defining "pending" as "not yet decided," "in continuance," or "in suspense"); Bryan A. Garner, *Garner's Modern American Usage* 596 (2003) (a case is "pending" when it "is awaiting an outcome"). This Court has used that "ordinary meaning," explaining that "pending" means "in continuance" or "not yet decided." *Carey* v. *Saffold*, 536 U.S. 214, 219-220 (2002) (relying on *Webster's*). A civil action therefore ceases to be "pending" when it has been dismissed and there is no issue left for the court to decide.

Accordingly, if a relator files a *qui tam* suit, and there is a "pending" lawsuit with sufficiently related claims, then the second suit is barred by operation of the first-to-file provision. But if the relator files a *qui tam* suit after a related first-filed suit has been dismissed, the first-to-file provision is inapplicable because the first suit is no longer "pending." All but one of the courts of appeals that have considered the issue have construed Section 3730(b)(5) in that manner. See Pet. App. 22a; *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*,

566 F.3d 956, 963-964 (10th Cir. 2009) (dicta); but see *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014), petition for cert. pending, No. 14-238 (filed Aug. 26, 2014).

2. Petitioners assert (Pet. Br. 44-45) that the word "pending" is merely "referential," in that it identifies the first-filed action. But if Congress had intended the initial *qui tam* suit to bar all subsequent *qui tam* actions based on the same facts, regardless of when or on what ground the first suit was disposed of, it could easily have accomplished that objective. Congress could have provided, for example, that when a *qui tam* suit has been filed, "no person other than the Government may * * * bring a related action based on the facts underlying" the "first" action or the "original" action.

Indeed, even if the word "pending" were simply omitted, so that Section 3730(b)(5) barred any relator from "bring[ing] a related action based on the facts underlying the action," there would be "no great mystery about which action bars the other." *Shea*, 748 F.3d at 347 (Srinivasan, J., concurring in part and dissenting in part (internal quotation marks omitted)). Congress chose instead to refer to "the pending action," a term that accurately describes the initial *qui tam* suit only for so long as that suit remains active. Petitioners' interpretation of Section 3730(b)(5), under which a new *qui tam* suit can be barred by a prior action that was dismissed before the new suit was filed, would render the word "pending" superfluous.[8]

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[8] The government made the same mistake in its brief in *Chovanec*, which stated without explicit qualification that "a first-in-time *qui tam* complaint in which the Government declines intervention and which is subsequently dismissed prevents a second-in-

3. Other contextual evidence reinforces the conclusion that the word "pending" in Section 3730(b)(5) should be given its usual meaning. Once a *qui tam* suit has been filed, Section 3730(b)(5) bars any relator not only from "bring[ing] a related action based on the facts underlying the pending action," but also from "interven[ing]." 31 U.S.C. 3730(b)(5). The prohibition on (non-government) intervention makes sense only if and for so long as the original *qui tam* suit remains active; a person cannot intervene in a case that has been dismissed. See *Shea*, 748 F.3d at 348 (Srinivasan, J., concurring in part and dissenting in part). The accompanying prohibition on "bring[ing] a related action" should likewise be construed, in accordance with the usual meaning of the term "pending," to reflect the same premise.

A different FCA provision states that a petition challenging certain discovery demands may be filed in the district where "the proceeding in which such discovery was obtained is *or was last* pending." See 31 U.S.C. 3733(j)(2)(A) and (3)(A) (emphasis added). Congress's use of the italicized language reflects its evident awareness that a terminated judicial proceeding is no longer "pending." Congress should be presumed to have acted with the same awareness when it drafted Section 3730(b)(5).

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time complaint from proceeding." U.S. Br. at 26-27, *Chovanec*, *supra* (No. 06-1619), 2006 WL 3223990 (Sept. 11, 2006). The earlier complaints in *Chovanec*, however, had not yet been dismissed (and therefore were still "pending") when Chovanec filed her own complaint. See *id.* at 20 n.5.

B. Limiting The First-To-File Bar To "Pending" Actions Furthers The Statute's Purposes Of Redressing Misconduct While Discouraging Parasitic Claims

1. The key purpose of the first-to-file provision is to "encourag[e] whistleblowers to come forward by rewarding the first to do so." *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005); see 1986 Senate Report 2 (Congress amended FCA to "encourage any individual knowing of Government fraud to bring that information forward"). The first-to-file bar furthers that purpose by protecting the first relator from either a race to judgment or dilution of any recovery his suit might produce. See, *e.g.*, *Natural Gas Royalties*, 566 F.3d at 963 ("[The] true value [of the first-to-file bar] lies in protecting the recovery of the first relator who files."). If multiple suits were permitted and the entire recovery went to the relator who first obtained a favorable judgment, the disbursement of that recovery would depend on the vagaries of litigation timing, and the relator who filed suit initially might receive no reward for his efforts. Alternatively, if "dozens of relators could expect to share a recovery for the same conduct," the prospect of a fragmented award would "decreas[e] the[] incentive to bring a *qui tam* action in the first place." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). The first-to-file bar also protects an FCA defendant from facing simultaneous *qui tam* actions regarding the same alleged misconduct. See Pet. App. 18a (noting agreement among the circuits on the standards used to determine whether two *qui tam* suits are "related" within the meaning of Section 3730(b)(5)).

Neither of those rationales applies, however, after the first-filed action has been dismissed. Once the initial suit has been dismissed, the first relator has no continuing interest in avoiding dilution of his (now hypothetical) recovery. See *Shea*, 748 F.3d at 348-349 (internal quotation marks and citation omitted). The defendant likewise no longer faces the prospect of simultaneous suits. If the first-filed action has been decided *on the merits*, "the doctrine of claim preclusion may prevent the filing of subsequent cases." Pet. App. 21a; see, *e.g.*, *Chovanec*, 606 F.3d at 362; cf. *United States ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 936 (2009) (noting that "the United States is bound by the judgment in all FCA actions regardless of its participation in the case"). But if the first-filed action was dismissed on *non-merits* grounds, the defendant cannot expect to avoid litigating the merits of an FCA claim brought by a relator who otherwise satisfies the statute's requirements.

2. Application of the first-to-file bar only when there is a "pending" suit furthers the overall purposes of the 1986 FCA amendments. Congress enacted the first-to-file bar as part of a comprehensive effort to modernize the FCA. See 1986 Senate Report 1-2. That effort was premised on a recognition that *qui tam* suits are an essential supplement to government actions. See *id.* at 2, 4, 7, 8. Because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity," Congress provided financial incentives and protection against retaliation for private persons who bring FCA suits. *Id.* at 4. The first-to-file bar protects the financial incentives for relators by "clarif[ying] that only the

Government may intervene in a *qui tam* action" and preventing "class actions or multiple separate suits." *Id.* at 25.

The first-to-file provision works in tandem with the public-disclosure bar, which also was enacted in 1986. The public-disclosure bar prevents parasitic lawsuits by requiring that an FCA claim be dismissed if the allegations or transactions underlying the claim have been publicly disclosed in various fora, unless the person bringing suit qualifies as an "original source." 31 U.S.C. 3730(e)(4). The bar applies not only if information is disclosed through litigation, but also if it comes to light through federal hearings, reports, or investigations, or through the news media. *Ibid.* By preventing suits based on public information while allowing an original source to bring suit, Congress sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1184 (10th Cir. 2008) (citation omitted).

Acceptance of petitioners' expansive view of the first-to-file bar would disrupt that balance. The public-disclosure bar does not categorically preclude *qui tam* suits that are premised on publicly available information. Rather, it allows such suits to be filed by an "original source," thereby alleviating a possible disincentive to the provision of fraud-related information to the government. See *Shea*, 748 F.3d at 350 (Srinivasan, J., concurring in part and dissenting in part). Petitioners' reading of Section 3730(b)(5) would transform that provision into a "more draconian public

disclosure bar," *Natural Gas Royalties*, 566 F.3d at 964, where "an action that Congress specifically sought to allow under the original-source exception would nonetheless be disallowed under the first-to-file bar," *Shea*, 748 F.3d at 350 (Srinivasan, J., concurring in part and dissenting in part).

Under petitioners' interpretation, the initial *qui tam* suit would bar all further *qui tam* actions based on the same facts, even if the first suit has been dismissed as procedurally defective or on other grounds wholly unrelated to the merits. *Inter alia*, petitioners' rule would apply if the first suit is dismissed on public-disclosure grounds even if the second relator qualifies as an "original source." Such a rule is contrary to Congress's stated goal of "encourag[ing] private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) (1986 House Report). That the government could bring suit itself after a first *qui tam* suit was dismissed (Pet. Br. 51-52) is no answer, because the government's limited resources, combined with its lack of inside knowledge, make *qui tam* suits both necessary and important. See 1986 Senate Report 2 ("[O]nly a coordinated effort of both the Government and the citizenry" will be effective in addressing fraud against the government.).

3. The first-to-file provision works together with res judicata principles to form a seamless whole. While a first action is "pending," the first-to-file bar prevents the defendant from being forced to litigate the merits in two courts simultaneously. Once the first suit has gone to judgment, the defendant's legitimate interests in avoiding relitigation of previously

decided issues are protected by the same res judicata principles that protect those interests in other legal contexts. Application of those principles generally turns on whether the initial judgment reflects a decision on the merits. See 1 Restatement (Second) of Judgments § 19 & cmt. a, at 161-162 (1982); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4435, at 132-149 (2d ed. 2002); see also, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-327 & n.5 (1979).

Like other lawsuits, a *qui tam* action may be dismissed at the threshold for any number of reasons, such as improper service, improper venue, lack of personal jurisdiction, or failure to plead fraud with particularity. A *qui tam* relator might also choose, for a variety of reasons, to voluntarily dismiss his complaint. Suits dismissed on such threshold grounds will not have been evaluated on the merits. Yet if the filing of the first action permanently barred any future private action, the defendant would be insulated from further *qui tam* suits even in cases where it had acted unlawfully. Petitioners' interpretation would thus give Section 3730(b)(5) the practical effect of a "more draconian" res judicata rule, cf. *Natural Gas Royalties*, 566 F.3d at 964, since (in petitioners' view) even a non-merits judgment in the initial *qui tam* suit would preclude subsequent suits based on the same facts.

If Section 3730(b)(5) were a defendant's *only* potential source of protection against sequential *qui tam* suits based on the same allegations, petitioners' policy arguments would have some force. But merits judgments in *qui tam* suits can have preclusive effects on non-parties, including the government, see, *e.g.*, p. 30,

supra; *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (setting out settled issue- and claim-preclusion rules), and merits determinations in alternative proceedings brought by the government also have preclusive effect, see 31 U.S.C. 3730(c)(5) (giving preclusive effect to "[a]ny finding of fact or conclusion of law made in such other proceeding"); see also 1986 House Report 24. The rule that non-merits judgments lack res judicata effect is not an obstacle to be overcome, but is instead central to the balance between competing interests that preclusion rules have traditionally struck. Nothing in the text or history of Section 3730(b)(5) suggests that Congress sought to expand the circumstances in which future litigants can be precluded.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. As originally enacted in 1942, the Wartime Suspension of Limitations Act, Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747-748, provided:

> [T]he 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, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

2. As amended by the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 667, the Wartime Suspension of Limitations Act provided:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) 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 present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

3. As amended by the Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 781, the Wartime Suspension of Limitations Act provided:

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) 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 present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transac-

tions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

4. As amended in 1948, see Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 828, the Wartime Suspension of Limitations Act provided:

When the United States is at war 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 with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

5. 18 U.S.C. 3287 now 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[1] 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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[1] See References in Text note below.

6. 31 U.S.C. 3730 provides, in pertinent part:

Civil actions for false claims

* * * * *

(b) ACTIONS BY PRIVATE PERSONS.—

* * * * *

(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.

* * * * *

(e) CERTAIN ACTIONS BARRED.—

* * * * *

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

7. 31 U.S.C. 3731 provides, in pertinent part:

False claims procedure

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(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

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