No. 13-1162

In the Supreme Court of the United States

PURDUE PHARMA L.P., a limited partnership, and; PURDUE PHARMA, INCORPORATED,
Petitioners,

v.

UNITED STATES EX REL. STEVEN MAY AND ANGELA RADCLIFFE,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners Purdue Pharma, L.P., and Purdue Pharma, Inc. ("Petitioners" or "Purdue") seek to have this Court review the Fourth Circuit decision on three questions. The first is the construction of the pre-2010 version of the "public-disclosure" bar of the False Claims Act. The petition should be denied on this question because 1) the Fourth Circuit remanded the case to the district court, where proceedings are ongoing and the district court is charged with making factual findings as to the "public-disclosure" bar that could moot the question; 2) the question involves a twenty-year old construction of a statutory provision that was superceded four years ago, and is therefore primarily of historical interest only; and 3) the Fourth Circuit decided the question correctly.

Petitioners request that this Court should hold their petition pending the disposition of the "First-To-File" Bar and Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, questions raised in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, No. 12-1497 ("Carter"). The petition should be denied on those questions as well because 1) the Fourth Circuit's decision is interlocutory and not ripe for review by this Court; 2) there are material factual differences between this action and *Carter* such that this Court's rulings in *Carter* might have little or no dispositive effect on this action; and 3) the Fourth Circuit decided the questions correctly.

Statement

While the gist of the wrongdoing that Respondents Steven May and Angela Radcliffe allege in the complaint that they filed in 2010 that Petitioners committed is "nearly identical" to that

alleged by Mark Radcliffe in the complaint that he filed in 2005, Petitioners fail to point out that the period alleged by Respondents in which the wrongdoing occurred is from 1996 to 2009. (Am. Compl. ¶ 35 (Doc. 87)).

Another material factual point that the Petitioners fail to note is that Respondents have pled that the statute of limitations has been equitably tolled during the time that Mark Radcliffe's action was pending. (Id. at ¶ 36) Respondents pled equitable tolling in addition to pleading that the WSLA was triggered so as to suspend the running of the statute of limitations. Thus, equitable tolling serves as an alternative and additional basis for Respondents' contention that the statute of limitations does not bar some of the claims that accrued more than six years prior to the filing of their complaint.

Reasons Why The Petition Should Be Denied

I. The Fourth Circuit's Decision Remanding The Case To The District Court Is Interlocutory And Not Ripe For Review By This Court

Because the Fourth Circuit remanded the case to the district court for further proceedings, the Fourth Circuit's decision is not ripe for review by this Court. *See Brotherhood of Locomotive Firemen & Enginemen v. Banger & A.R. Co.*, 389 U.S. 327, 328 (1967)(per curiam)(denying petition for writ of certiorari based on fact that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *see also, e.g., Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012)(same, *citing Banger & A.R. Co.*). Accordingly,

this Court should deny the petition and wait for a final judgment before exercising its certiorari jurisdiction. *See VMI v. United States*, 113 S. Ct. 2431 (1993)(Scalia, J.)(denying petition for writ of certiorari)("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.")

A. The Public-Disclosure Bar Issue Is Not Ripe Because The District Court Has Yet To Do The Necessary Fact-Finding.

In remanding the case to the district court, the Fourth Circuit expressly directed the district court to make the necessary factual determination as to whether the relators actually derived the allegations from an applicable public disclosure. Pet. App. 20a ("Because the district court has not made the factual findings necessary to determine whether the public-disclosure bar precludes this action, we must remand this case to the district court for discovery and other proceedings as necessary to resolve the issues related to the applicability of the public-disclosure bar.") While any finding by the district court that any of the allegations were actually derived from a public disclosure would be erroneous, nonetheless, such a determination would thereby moot Purdue's appeal to this Court on that question. Consequently, the lack of the requisite factual findings by the district court renders the Fourth Circuit's decision on this question unripe for review by this Court. Therefore, the Court should deny certiorari on this question for this reason alone. *See VMI; Banger & A.R. Co.*

B. The WSLA Issue Is Not Ripe, And Could Be Mooted By Action By The District Court.

Respondents allege that Purdue violated the False Claims Act as a result of false claims that were submitted during the time period of 1996 to 2009. (Am. Compl. ¶ 35 (Doc. 87)) The action was filed on December 30, 2010. (Compl. (Doc. 1)) Thus, the alleged false claims submitted after December 30, 2004, would not be subject to the FCA's six-year statute even without any operation of the WSLA.

Additionally, a jury has not yet rendered a verdict for Respondents, and the district court has not upheld a verdict, that encompasses false claims that were submitted outside of the limitations period.

Furthermore, the Respondents have pled that the statute of limitations was equitably tolled for the period of time during which the Radcliffe Action was pending. (Am. Compl. ¶ 36 (Doc. 87)) Neither the district court, nor the court of appeals, has ruled on this issue. If either court were to find that equitable tolling applied as contended by Respondents, then that finding would provide a basis for ruling that the statute of limitations did not apply for some or all of the remaining claims.

Neither the district court, nor the court of appeals addressed or applied the WSLA in this case. And, as shown above, it is possible neither will ever need to do so.

All of these unresolved issues demonstrate that this case is not ripe for review by the Court on this question, and in fact, the question might be mooted

by rulings of either the district court or Fourth Circuit. Thus, the Court should deny certiorari on this question based on this reason alone. *See VMI; Banger & A.R. Co.*

II. Reiterating A Twenty-Year Old Construction Of A Statutory Provision That Was Superceded Over Four Years Ago, The Public-Disclosure Ruling Is Of Constantly Diminishing Relevance, And Therefore Does Not Warrant Review By This Court.

The statutory provision in question, the "public disclosure" bar, 31 U.S.C. § 3730(e), was significantly revised in 2010 by Congress. Pet. App. 15a ("the 2010 amendments significantly changed the scope of the public disclosure bar"). That revision included the elimination of the operative language that the Fourth Circuit construed below, *see* 31 U.S.C. § 3730(e)(4)(A)(2011), which language now applies only to conduct, including Petitioners' alleged wrongdoing, occurring prior to the 2010 amendment, *see id.* at 10a-17a (*citing Graham County. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010)). Consequently, the importance of the Fourth Circuit's construction of the superceded language is diminishing with each passing day, and will eventually be of only historical interest. Its importance is further limited by the fact, conceded by Petitioners, (Pet. Br. 8-9), that the Fourth Circuit stands alone among the circuits in applying the plain meaning of the provision on this point; thus, its holding has no relevance outside of the Fourth Circuit.

Petitioners attempt to hype the importance of the Fourth Circuit's holding by noting the obvious, that FCA actions sometimes involve large dollar amounts, and warning of the danger that relators might "forum shop" by filing FCA qui tam cases in the Fourth Circuit. (See Pet. Br. 14-16) However, Petitioners gloss over the implications flowing from the fact that the Fourth Circuit decision establishing its construction of the "public-disclosure" bar on this question was issued twenty years ago. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994). Consequently, there has been twenty years of experience under the *Siller* regime in the Fourth Circuit. Yet, Petitioners fail to point to anything from that experience to support their "sky is falling" argument that the Fourth Circuit's construction of the "public-disclosure" bar in *Siller* is of general interest sufficient to warrant review by this Court. It is not. Accordingly, the Court should deny the petition for review of this question.

III. The Facts On The First-To-File Issue in *Carter* And This Action Are Different In A Potentially Determinative Way.

In *Carter*, the deemed first-filed actions were dismissed voluntarily by the same relator that brought the second action, *see United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 182-83 (4th Cir. 2013), while the earlier Radcliffe action was dismissed based on a settlement agreement the scope of which clearly did not include the United States or subsequent potential relators, Pet. App. 6a-9a. The question posed in *Carter* on the first-to-file bar is whether the bar is permanent, or operates only while the first-filed action is pending. It does

not address what actions qualify as the first-filed action for purposes of the bar. Some courts of appeals have ruled that some actions, depending on the reason that they were dismissed, cannot serve as the first-filed action for purposes of the first-to-file bar. *See, e.g., Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005)("we hold that in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)," thus, an FCA action dismissed on public disclosure grounds cannot serve as the first-filed action so as to bar a subsequent action pursuant to the first-to-file bar). Because the Fourth Circuit construed the first-to-file bar as operating only while the first-filed action is pending, and the putative first-filed action, the Radcliffe action, was not pending when Respondents filed their action, the Fourth Circuit was able to determine that the bar did not apply without the need for determining whether the putative first-filed action qualified as a first-filed action for the purposes of the bar. *See* Pet. App. 22a. Consequently, the resolution of the first-to-file question in *Carter* by this Court would not necessarily be dispositive of the first-to-file question raised by Petitioners in their petition. Accordingly, the Court should deny Petitioners' petition on this question for this reason.

IV. The Decision Is Correct.

A. The Fourth Circuit's Position On The Public-Disclosure Bar Is Compelled By The Plain Meaning And Congressional Purposes Of The Statutory Provision.

Respondents invite the Court to direct its attention to the masterful dissent of Chief Judge Becker in *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), in which he sets forth a comprehensive analysis of the question, and demonstrates that the construction given to the "public-disclosure" bar by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson &* Co., 21 F.3d 1339 (4th Cir. 1994), is compelled by the plain language of the provision, furthers the Congressional purposes of the False Claims Act, and does not render redundant the "original source" provision of the statute. *See* 186 F.3d at 394-403 (Becker, C.J., dissenting).

The applicable version of the public-disclosure bar provides, in pertinent part, that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in [specific fora]." 31 U.S.C. § 3730(e)(4)(A)(2009). In reaching its construction, the Fourth Circuit in *Siller* gave the term "based upon" its plain meaning:

> We agree that Siller's reading of "based upon" as meaning "derived from" is the only fair construction of the statutory phrase. Section 3730(e)(4)(A)'s use of the phrase "based upon" is, we believe, susceptible of a straightforward textual exegesis. To "base upon" means to "use as a basis for." *Webster's Third New*

> *International Dictionary* 180 (1986) (definition no. 2 of verb "base"). Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based.

21 F.3d at 1348. The Fourth Circuit correctly rejected reading "based upon" as "supported by," or "similar to" because it would be contrary to common usage, or any usage of "based upon." *Id.* ("We are unfamiliar with any usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.'"); *see also* Robert Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUBLIC CONTRACT L.J. 478, 499-501 (1995).

Petitioners, in construing "based upon," as meaning "supported by" or "similar to," contrary to *Siller,* attempt to justify their departure from the plain language of the statutory provision by suggesting that applying the plain language of "based upon" as written would render redundant the "original source" provision. (Pet. Br. 9-12) However, this is not true. In *United States v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999), *overruled in Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009), the Seventh Circuit gave an example of a situation applying the construction of the "public-disclosure" bar given to it by *Siller* where "a plaintiff might be an original source even though her knowledge of every isolated element of the fraud is based upon public disclosures." *Id.* at 864; *see also Mistick*, 186 F.3d 326, 399 (3d Cir. 1999)(Becker, C.J.,

dissenting)(explaining how the plain meaning of the public-disclosure statutory provision does not render the original-source provision redundant); Vogel, *supra* at 504-06 (same).

The Fourth Circuit's construction of the public-disclosure bar furthers its purposes. It bars those who parasitically derive their allegations of fraud from an applicable public disclosure from bringing *qui tam* actions (unless they qualify as original sources), while still allowing those potentially valuable relators to bring *qui tam* actions who learn of fraud from family and co-workers who themselves might be unwilling or not in a position to serve as a relator. The fact that those relators might not have first-hand knowledge does not make their actions parasitical (or their recovery of monies by their *qui tam* actions any less valuable to the U.S. Treasury). *See* 21 F.3d at 1348 ("it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic").

B. The Fourth Circuit's First-To-File Holding Is Correct.

Respondents invite the Court to direct its attention to the dissent by Judge Srinivasan in *United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014). In contrast to the short discussion of the question in the majority opinion, Judge Srinivasan's dissent sets forth the most extensive analysis of any judicial decision on this question, and demonstrates that the text, purpose and history of the statutory provision compel the construction given to it by the Fourth Circuit and

every other circuit besides the D.C. Circuit that has considered the question. *Id.* at 346-51 (Srinivasan, J., dissenting).

The "first-to-file" provision provides, in pertinent part, that "[w]hen 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). In arguing that the provision establishes a permanent bar, Petitioners and the D.C. Circuit in *Shea* contend that the use of the word "pending" in the provision was merely referential, that its only purpose and meaning was to make clear that the "action" that follows "pending" refers to the first-filed action noted in the first clause of the provision. However, as Judge Srinivasan correctly points out, "removing 'pending' would make the majority's interpretation more—not less—acceptable. The provision would then say: 'When a person brings an action under this subsection, no person . . . may . . . bring a related action based on the facts underlying the [] action.'" 748 F.3d at 347 (Srinivasan, J., dissenting). Thus, the word "pending" "perform[s] no function under the majority's interpretation." *Id.* Petitioners' argument that Congress intended for "pending" to clarify that the "action" was referring to the first-filed action, even if unnecessarily, is fatally flawed because it improperly renders a word of the statute, "pending," if not superfluous, then at least insignificant. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that . . . , if it can be prevented, no . . . word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

Another notable shortcoming in the majority opinion in *Shea* is the paucity of its analysis of the purpose of the provision. In *Shea*, the court mentions only one purpose of the *qui tam* provisions of the False Claims Act – providing notice of fraud to the Government:

> our reading better suits the policy considerations undergirding the statute. . . . The resolution of a first-filed action does not somehow put the government off notice of its contents. On the other hand, reading the bar temporally would allow related qui tam suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions. Such duplicative suits would contribute nothing to the government's knowledge of fraud.

748 F.3d at 344. Petitioners go even further with the contention that "[o]nce the government is put on notice of its potential fraud claim," "the purpose behind allowing qui tam litigation is satisfied." (Pet. Br. 19 (internal citations and quotations omitted). This is simply wrong. A crucial purpose of the *qui tam* provisions of the FCA is to "supplement[] Government efforts to recoup monies lost due to fraud" by authorizing private citizens to prosecute FCA actions when the Government declines to intervene. *United States ex rel. Ritchie v. Lockheed Martin Corp*., 558 F.3d 1161, 1174 (10th Cir. 2009)(Briscoe, J., dissenting) As the Fourth Circuit has pointed out, " the plain language of the Act clearly anticipates that even after the Attorney General has 'diligently' investigated a violation under 31 U.S.C. § 3729, the Government will not necessarily pursue all meritorious claims; otherwise

there is little purpose to the qui tam provision permitting private attorneys general." *United States ex rel. Berge v. Bd. of Trustees*, 104 F.3d 1453, 1458 (4th Cir. 1997)(*citing, inter alia,* § 3730(c)(3)("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.")).

Petitioners' contention that making the Government aware of the fraud is the exclusive purpose of the *qui tam* provisions of the FCA is not only at odds with the text of the those *qui tam* provisions, but with their history as well. In 1943, Congress amended the FCA and the "amendment erected what came to be known as a Government knowledge bar." *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010).

Under the 1943 amendment, "[o]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). "In the years that followed the 1943 amendment, the volume and efficacy of qui tam litigation dwindled." 559 U.S. at 294. "Then, in 1986, Congress replaced the so-called Government knowledge bar with the narrower public disclosure bar." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1894 (2011). Consequently, construing the *qui tam* provisions to further only one purpose of the FCA *qui tam* provisions, that of making the Government aware of fraud, while ignoring their other purpose of recouping Government monies lost to fraud by authorizing a citizen to prosecute an FCA action alone when the Government declines to intervene, as

Petitioners urge, would have the effect of improperly reestablishing the government knowledge bar that Congress had removed with the 1986 Amendments to the FCA.

Petitioners erroneously suggest that there is nothing to support the notion that the Government "might not find the resources to pursue legitimate allegations of fraud — thereby foregoing the recovery that a successful FCA case would bring." (Pet. Supp. Br. 6-7 n. 6) Contrary to Petitioners' suggestion, as demonstrated below, the text, purpose and history of the 1986 Amendments make clear that the failure of the Government to pursue legitimate allegations of fraud was a primary impetus behind the enactment by Congress of the 1986 Amendments to the FCA.

Congress' enactment of *qui tam* provisions authorizing a citizen to prosecute a *qui tam* action alone (when the Government declines to intervene) makes sense only if Congress had concluded, which it did as shown below, that the Government was not pursuing all meritorious allegations of fraud. Further, the importance that Congress attached to that purpose is shown by the increased statutory incentives provided by Congress to entice a citizen to proceed with prosecuting the FCA action when the Government declines — the range of potential relator shares is increased from 15-25% to 25-30%. *Compare* 31 U.S.C. §§ 3730(d)(1) *with* (d)(2); *see also United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995)("Congress wished to create the greatest incentives for those relators best able to pursue claims that the government could not.").

The legislative history of the 1986 amendments demonstrate that the *qui tam* provisions were enacted in large part because Congress had concluded that Government prosecution of fraud was inadequate and needed to be supplemented with the assistance of private attorney generals, who could bring and prosecute FCA actions, alone if necessary:

> Perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. . . . Federal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resource factors. Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.

S. Report No. 345, 99th Cong., 2nd Sess., at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. Congress further noted that "fraud is perhaps so persuasive and, therefore, costly to the Government due to a lack of deterrence. [The Government Accounting Office] concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors." *Id.* at 3. Congress was particularly critical of the enforcement job done by the Department of Justice, noting that "Department of Justice records show that most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected." *See id.* at 4. Congressman Glickman noted that "frankly, whether as a result of a lack of resources or worse, the Department of Justice has not done an acceptable

job of prosecuting defense contractor fraud." 132 Cong. Rec. H6482 (September 9, 1986), *quoted in Erickson ex rel. United States v. American Inst. of Biological Sciences,* 716 F. Supp. 908, 917 n.21 (E.D. Va. 1989). As one of the sponsors of the 1986 Amendments pointed out:

> The public will be served by having more legal resources brought to bear against those who defraud the Government. . . . This is precisely what the law is intended to do: deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.

132 Cong. Rec. H9388 (October 7, 1986) (statement of Representative Berman).

By including the first-to-file bar in the False Claims Act, Congress was encouraging prompt reporting of fraud by creating a "race to the courthouse," in which only the first-to-file could maintain his suit, *see, e.g., Campbell v. Redding Med. Center*, 421 F.3d 817, 821 (9th Cir. 2005)("the first-to-file bar [] encourages prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud"). To accomplish this purpose, it was not necessary for Congress to make the bar so broad as to give defrauding corporations blanket immunity from a second suit by a qualified relator who is an original source even in the case where an unqualified parasitic or otherwise infirm relator wins the race to the courthouse and has his action dismissed before the merits of the underlying claims are even reached. And Congress did not do so.

To construe the first-to-file bar, as Petitioners would construe it, as conferring blanket immunity on the defrauder in this way is clearly an absurd result that frustrates the Congressional purpose of the FCA *qui tam* provisions of authorizing citizens to bring and prosecute FCA actions when the Government is unwilling or unable to do so. Petitioners' only answer to this conundrum created by its statutory construction is to suggest that the Government could always step in and prosecute. However, as noted above, this solution is refuted by the Congressional findings that prompted the 1996 Amendments to the FCA — the Government does not, and often cannot, pursue all of the meritorious allegations of fraud of which it becomes aware.

Accordingly, the Fourth Circuit's construction of the first-to-file bar as operating only so long as the first-filed action is "pending" is correct. It is consistent with the plain meaning of the provision, and furthers the purposes of the FCA.

V. The Decision in *Carter* Correctly Held That The WSLA Applies To Civil Offenses.

Respondents invite the Court to direct its attention to pages 8 through 17 of the Brief For The United States As Amicus Curiae filed in this Court in *Carter*. Therein, the Solicitor General explains why both the text and legislative history of the WSLA compel the conclusion that, contrary to Petitioners' contention, the Fourth Circuit was correct in holding that the WSLA applies to offenses both civil and criminal.

As the Solicitor General points out, Congress enacted the WSLA in 1942. *Carter*, Brief For The United States As Amicus Curiae 10. The WSLA

provided, in pertinent part, that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States . . . in any manner, and now indictable under any existing statutes, shall be suspended." Act of Aug. 24, 1942, Pub. L. No. 77-706. The modifier "now indictable" of offenses made it clear that the "offenses" were limited to criminal offenses.

In 1944, Congress amended the WSLA, which amendment included the removal of modifier "now indictable under any existing statutes," and the addition of the modifier "any" to "offenses," such that the WSLA read, in pertinent part, that, if a triggering event occurs, "[t]he running of any existing statute of limitations applicable to any offense against the law of the United States . . . involving defrauding or attempts to defraud the United States . . . in any manner . . . shall be suspended." Contract Settlement Act of 1944, Pub. L. No. 78-395. This operative language remains a part of the current WSLA. *See* 18 U.S.C. § 3287.

The United States Code uses the word "offense" numerous times to refer to civil violations. *See, e.g.,* 15 U.S.C. 45(l); 16 U.S.C. 1540(a)(1). By removing the modifier "now indictable," and adding expansive language such that the operative phrase reads "any offense against the law of the United States . . . involving defrauding or attempts to defraud the United States . . . in any manner," Congress made the WSLA "applicable to all actions [including civil actions] involving fraud against the United States." *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 180 (4th Cir. 2010).

Petitioners' primary argument against construing "any offenses" as encompassing civil offenses is that the codification of the provision in title 18, which concerns crimes, provides a decisive "contextual clue" that Congress intended that "any offenses" be limited to criminal offenses. (Pet. Supp. Br. 7) However, this "clue" does not bear the weight of Petitioners' argument because placing the statutory provision in title 18 is also consistent with the Fourth Circuit's construction of "any offenses" as encompassing both criminal and civil offenses. The statutory provision had to be codified in a single title, and if it applies to criminal as well as civil offenses, as the Fourth Circuit holds that it does, then title 18 is equally appropriate as a home for the provision as a title containing civil offenses would be, perhaps more so given the Constitutional requirement of giving the citizenry fair notice of the criminal laws, including corresponding statutes of limitations.

In any case, a more salient contextual clue as to the construction of 'any offenses" is provided by Congress' placement of its amendment to the WSLA in and within the Contract Settlement Act of 1944. As the Solicitor General pointed out, the Act "was largely civil in nature." *Carter,* Brief For The United States As Amicus Curiae 11; *see generally* Edmund Burke, *War Contract Termination: The Contract Settlement Act of 1944*, 23 CHICAGO-KENT LAW REV. 107 (Mar. 1945). Additionally, that Act amended the WSLA not only by modifying "offenses" to "any offenses," and deleting the "now indictable" modifier, but also by expanding the offenses encompassed by the operation of the WSLA to

include offenses against the laws of the United States

> committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation [sic] 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 . . . .

Compare Pub. L. No. 78-395, sec. 19(b) (1944) *with* Pub. L. No. 77-706 (1942). These new covered offenses are all related to contracting and procuring. These newly-added covered offenses track much of the language in the immediately following paragraph 19(c), which sets forth fraud offenses related to federal contracting and procuring. For instance, paragraph 19(c) sets forth offenses committed "in connection with the termination, cancelation [sic], settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States." Pub. L. No. 78-395, sec. 19(c). The fraud offenses related to contracting and procuring set forth in section 19(c) of the 1944 Act include civil offenses. *See id.*; *United States v. Dinerstein*, 362 F.2d 852, 853 (2d Cir. 1966)("The action was brought by the United States pursuant to § 19(c) of the Contract Settlement Act of 1944, 58 Stat. 667, 41 U.S.C. § 119, for recovery of civil penalties for fraudulent claims in securing payment for terminated government war contracts.")

Congress' placement of the amendment to the WSLA in the Contract Settlement Act of 1944, and

within a section of the Act that also contained new civil offenses relating to contracts and procurement, in conjunction with the amendment's expansion of the scope of the WSLA to cover offenses relating to contracts and procurement, provide a compelling contextual clue that Congress, in also removing the "now indictable" language, thereby "intended to expand the WSLA's reach to civil fraud, contracting, and procurement offenses." *See Carter*, Brief For The United States As Amicus Curiae 12-13.

This construction furthers the purpose of the statute because, as the Solicitor General explained, the "rationales for suspending the limitations period in wartime fraud cases apply equally in the criminal and civil contexts." *Id.* at 13-14.

Accordingly, the Fourth Circuit's construction of the scope of the WSLA as including civil, as well as criminal offenses, is correct. It is compelled by the plain language of the statute, as well as its history and purpose.

Conclusion

The Court should deny the petition.

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