No. 13-

IN THE

Supreme Court of the United States

PURDUE PHARMA L.P. AND PURDUE PHARMA INC.,
Petitioners,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the False Claims Act's pre-2010 "public-disclosure bar," 31 U.S.C. § 3730(e)(4) (2009), prohibits claims that are "substantially similar" to prior public disclosures, or instead bars a claim only if the plaintiff's knowledge "actually derives" from prior disclosures.

2. Whether the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), precludes a later-filed action that is based on the same facts as an earlier-filed action only so long as the earlier case is still pending.

3. Whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, suspends the limitations period for civil claims, such as a False Claims Act claim brought by a private party.

RULE 29.6 STATEMENT

Purdue Pharma Inc. has no parent company and no publicly held company owns 10 percent or more of its stock.

Purdue Pharma L.P.'s parent company is Purdue Holdings L.P. No publicly held company owns 10 percent or more of the partnership interests of Purdue Pharma L.P. (or Purdue Holdings L.P.).

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DOJ, *Fraud Statistics* (Dec. 23, 2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf 14

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Purdue Pharma L.P. and Purdue Pharma Inc. (together, Purdue) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-22a) is reported at 737 F.3d 908. The court's opinion denying rehearing (App. 23a-40a) is unreported, as is the opinion of the district court (App. 41a-42a).

JURISDICTION

The court of appeals entered judgment on December 12, 2013, and denied a timely petition for rehearing on February 7, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent portions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, are reproduced in the appendix.

STATEMENT

1. The False Claims Act "prohibits false or fraudulent claims for payment to the United States." *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 463, (2007). Under certain circumstances, private individuals, known as relators, may bring a so-called "*qui tam*" action to enforce the FCA on the government's behalf, in exchange for a share of any recovery. *See id.*; 31 U.S.C. § 3730(b)(1), (d)(1)-(2). This financial incentive is designed "to encourage private individuals who are aware of fraud against the government to bring such information forward at the earliest possible time." *United States ex rel. Barth* v. *Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995). But "[b]ecause *qui tam* plaintiffs … are entitled to a portion of the proceeds of successful suits," the statute also creates "the potential for parasitic lawsuits by those who … contributed nothing to the exposure of the fraud." *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992).

To address this, Congress included in the FCA two jurisdictional bars that help ensure that the government "pay[s] only for useful information." *United*

States ex rel. Minn. Ass'n of Nurse Anesthetists v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1047 (8th Cir. 2002). The first, known as the public-disclosure bar, provided until its amendment in 2010 that "[n]o court shall have jurisdiction over" an FCA action "based upon the public disclosure of allegations … unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2009). As this Court explained, the provision prohibits "*qui tam* suits when the relevant information has already entered the public domain through certain channels." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 285 (2010).[1]

The second jurisdictional provision, known as the first-to-file bar, provides that "[w]hen a person brings an action under [the FCA], 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 first-to-file bar is intended to "ensur[e] a race to the courthouse among eligible relators, which may spur the prompt reporting of fraud." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 377 (5th Cir. 2009) (internal quotation marks omitted).

The FCA also contains a six-year statute of limitations, *see* 31 U.S.C. § 3731(b)(1), along with a tolling provision that can extend the limitations period to "no

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[1] Congress amended the public-disclosure bar in 2010 to clarify that an action is barred "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (codified at 31 U.S.C. § 3730(e)(4)(A)). The bar is also now non-jurisdictional.

… more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

2. In 2005, Mark Radcliffe, a former Purdue sales manager and the husband of respondent Angela Radcliffe, filed a *qui tam* action against Purdue. He alleged that Purdue had fraudulently "market[ed] its pain-relief drug, OxyContin, as a cheaper alternative to the drug it replaced, MS Contin," by falsely telling medical professionals that OxyContin was "twice as potent" and therefore "cheaper per dose than MS Contin." *United States ex rel. Radcliffe* v. *Purdue Pharma L.P.*, 600 F.3d 319, 321 (4th Cir. 2010). After investigating these allegations, the United States declined to intervene. *Id.* at 323.

The district court dismissed Mark Radcliffe's complaint for failure to plead his fraud claims with the particularity required by Federal Rule of Civil Procedure 9(b). *See United States ex rel. Radcliffe* v. *Purdue Pharma L.P.*, 582 F. Supp. 2d 766, 783-784 (W.D. Va. 2008); *United States ex rel. Radcliffe* v. *Purdue Pharma L.P.*, 2009 WL 161003 (W.D. Va. Jan. 25, 2009). The Fourth Circuit affirmed on the alternative ground that Radcliffe had executed a release of claims against the company upon his departure. *See Radcliffe*, 600 F.3d at 321. The court concluded that the release was enforceable because the government "was aware, prior to the filing of the *qui tam* action, of the" allegedly fraudulent conduct. *Id.* at 333. This Court denied certiorari in October 2010. *See* 131 S. Ct. 477 (2010).

3a. Two months later, this action was filed by Mark Radcliffe's wife, Angela, and one of his former subordinates, Steven May (together, relators). Their allegations are "nearly identical to those advanced by Mark Radcliffe." App. 3a. Indeed "many of the[ir] allega-

tions … are verbatim copies of" his. App. 19a. (Relators have also been represented by the same counsel who represented Mark Radcliffe.) The United States again declined to intervene. App. 30a.

Purdue moved to dismiss on multiple grounds, including res judicata, the public-disclosure bar, and the statute of limitations. App. 31a. After the close of briefing on the motion to dismiss, relators asserted for the first time that the statute of limitations "ha[d] been suspended" under "the Wartime Suspension of Limitations Act." Appellants' Notice of New Authority, Dist. Ct. Dkt. No. 49, at 1-2 (Aug. 24, 2012). That act provides that the statute of limitations for certain fraud "offense[s]" is tolled during periods of war until five years after the president or Congress proclaims a "termination of hostilities." 18 U.S.C. § 3287.

Without addressing Purdue's other arguments, the district court dismissed the complaint with prejudice on res judicata grounds. App. 37a-39a.[2]

b. The court of appeals vacated and remanded. App. 1a-22a. It first held that res judicata did not apply because the release at issue in Mark Radcliffe's case encompassed only his own claims. App. 4a-9a. The court then rejected each of Purdue's alternative grounds for affirmance.

As to the public-disclosure bar, the court first concluded that the 2010 amendments to the bar, *see supra* n.1, do not apply to allegations (like relators') that involve pre-amendment conduct. App. 10a-17a. The court then noted that although "most circuits have interpreted the 'based upon' language [in the pre-2010

[2] The district court had subject matter jurisdiction under 31 U.S.C. § 3732 and 28 U.S.C. § 1331.

statute] to bar actions where the allegations of fraud were 'supported by' or 'substantially similar' to" the public disclosure, it had taken a different view in *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994). App. 18a. *Siller* "interpreted the clause as barring only those actions where the relator's knowledge … was *actually derived* from the public disclosure *itself*." *Id.* Applying that rule, the court here noted that relators had "submitted affidavits … asserting that their knowledge of Purdue's fraud was not derived from [Mark Radcliffe's] complaint … but from conversations with Mark Radcliffe and, in Steven May's case, from his own experiences." App. 20a. The court remanded for the district court to address these claims and otherwise determine whether the relators "actually derived" their allegations from the public disclosure in Mark Radcliffe's case. *Id.*

As for the first-to-file bar, the Fourth Circuit agreed that this action is "clearly based on the facts underlying" Mark Radcliffe's case. App. 22a. It noted, however, that it had "recently held," in *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), "that the first-to-file bar applies only if the first-filed action was still pending when the subsequent action was commenced." App. 22a. Because this Court had denied review in Mark Radcliffe's case by the time relators filed this action (and the time to seek rehearing of that denial had expired), the court of appeals held that the first-to-file bar did not apply here.

The court subsequently denied Purdue's petition for rehearing and rehearing en banc. App. 41a-42a. With one judge dissenting, it also denied Purdue's motion to stay the issuance of its mandate pending the filing and disposition of this petition. *See* Corrected Order, C.A. Dkt. No. 66, at 2 (Mar. 11, 2014).

REASONS FOR GRANTING THE PETITION

The court of appeals made three errors in deciding this case, each involving an important question of federal law. One question implicates an established (and severely lopsided) circuit conflict, while the other two are substantively identical to the questions presented in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, No. 12-1497, which is the subject of a pending invitation to the Solicitor General to file a brief expressing the views of the United States. This petition should therefore be held pending the disposition of the petition in *Carter* (and, if review is granted there, the Court's decision in the case). Following that, the Court should either grant the petition here, vacate the judgment below, and remand for further proceedings in light of *Carter*, or grant this petition on all three questions presented.

I. THE FOURTH CIRCUIT HAS MISINTERPRETED THE PUBLIC-DISCLOSURE BAR

A. The Decision Below Perpetuates A Deep Circuit Conflict

Prior to its amendment in 2010, the FCA's public-disclosure bar provided that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations" via specified channels. 31 U.S.C. § 3730(e)(4)(A) (2009). As this Court has observed, the courts of appeals have divided over the meaning in this provision of the phrase "based upon." *See Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1895 (2011). In particular, the Fourth Circuit has adopted a reading that has been rejected by all ten of the other circuits that have expressly addressed the issue.

In *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), the court of appeals held that "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 … action is based," *id.* at 1348 (emphasis added). The court believed that this reading was justified by "a straightforward textual exegesis": "[t]o 'base upon' means to 'use as a basis for,'" and therefore an action is "based upon" a public disclosure only if it is "actually derived from that disclosure." *Id.* (citing "definition no. 2 of [the] verb 'base'" in *Webster's Third New International Dictionary* 180 (1986)).

As the Fourth Circuit made clear here, under *Siller* "the question is not whether the allegations set out in the relator's complaint are similar to publicly disclosed allegations of fraud" but "whether the relator learned about the fraud from the public disclosure." App. 19a (emphasis omitted). A *qui tam* suit can therefore survive a public-disclosure challenge even if it "includes allegations … identical … to those already publicly disclosed," so long as the relator's knowledge stemmed from some other source. *Siller*, 21 F.3d at 1348. Here, for example, the relators' complaint contains nearly verbatim copies of allegations from Mark Radcliffe's complaint, yet the court of appeals held that this case could proceed if the relators derived their knowledge "from conversations with" him rather than from his lawsuit. App. 20a.

"[E]very other circuit to consider this question has adopted a different interpretation" of the public-disclosure bar, i.e., has rejected *Siller*'s reading. *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009) (acknowledging the conflict in citing and following cases from eight other circuits); *see also*

United States ex rel. Ondis v. *City of Woonsocket*, 587 F.3d 49, 57-58 (1st Cir. 2009) (acknowledging the conflict and adopting the majority approach); *United States ex rel. Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994) (implicitly embracing the majority rule).[3] Under the majority view, "the relator's claim is 'based upon' the public disclosure" "as long as the relator's allegations are substantially similar to information disclosed publicly." *Ondis*, 587 F.3d at 57. The result is that "[p]ublic disclosure of the allegations" is sufficient to "divest[] district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information." *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

This established circuit conflict is unlikely to resolve itself. Although "the tilt in favor of the majority view" has grown "more pronounced" over time, *Ondis*, 587 F.3d at 57, the Fourth Circuit has steadfastly refused—including in this case—to revisit *Siller*. This is so even though the court recognized at the time of *Siller* that "other circuits ha[d] not embraced" its position, *Siller*, 21 F.3d at 1348, and even though the court here acknowledged that "most circuits" disagree with its approach, App. 18a.

B. The Fourth Circuit's Position Is Wrong

1. As noted, the Fourth Circuit in *Siller* relied on what it termed a "straightforward textual exegesis" of the statutory phrase "based upon." 21 F.3d at 1348. But even if "actually derived from" is a reasonable def-

[3] The Seventh Circuit in *Glaser* overruled its own prior decisions that had interpreted the public-disclosure bar as *Siller* did. *See Glaser*, 570 F.3d at 910 n.1, 920.

inition of the phrase "based upon," standing alone, "[c]ourts have a duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation marks omitted); *see also, e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001) ("We do not … construe the meaning of statutory terms in a vacuum."). Indeed, this Court has specifically instructed that "to determine the meaning of" words "in the public disclosure bar, we must consider the provision's entire text, read as an integrated whole." *Schindler Elevator*, 131 S. Ct. at 1891 (internal quotation marks omitted). The Fourth Circuit's interpretation of "based upon" disregards that fundamental admonition. *See United States ex rel. Findley* v. *FPC-Boron Emps.' Club*, 105 F.3d 675, 682 (D.C. Cir. 1997) (observing that although the Fourth Circuit "located an acceptable definition of the term to 'base upon' on which to reach its result, … the court performed its analysis without fully considering the context of the phrase's inclusion in the FCA" (internal quotation marks omitted)).

In particular, *Siller* "read[s] the 'original source' exception out of the statute." *Ondis*, 587 F.3d at 58. That exception permits a *qui tam* suit to proceed despite a prior disclosure if the relator "has direct and independent knowledge" of the information underlying the relator's allegations and has "voluntarily provided the information to the Government before filing." 31 U.S.C. § 3730(e)(4)(B) (2009); *see also id.* § 3730(e)(4)(A) (2009) ("No court shall have jurisdiction over an action … based upon the public disclosure of allegations or transactions … unless … the person bringing the action is an original source of the information."). If, as *Siller* holds, a relator's allegations must "actually derive" from the public disclosure in order to trigger the bar,

then the relator's knowledge could never be "independent" of that disclosure. *Ondis*, 587 F.3d at 57-58; *see also United States ex rel. Grayson* v. *Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000) ("A putative relator's knowledge … is 'independent' if the knowledge is not dependent on public disclosure."). Any relator that ran afoul of the public-disclosure bar as interpreted in *Siller* would therefore be unable to satisfy the original-source exception's "direct and independent knowledge" requirement. Conversely, under *Siller* no relator would ever need to rely on the original-source exception, because anyone who satisfied its requirements would also satisfy the broader "actually derived" test for the public-disclosure bar. *See Findley*, 105 F.3d at 683. As a result, relators would not have to meet the exception's more stringent requirements, including that the relator "voluntarily provide[] the information to the Government before filing." 31 U.S.C. § 3730(e)(4)(B); *see, e.g.*, *United States ex rel. Biddle* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 538 (9th Cir. 1998) (*Siller* "allow[s] the relator to avoid the voluntariness requirement").

In short, the Fourth Circuit's interpretation "swallows the original source exception whole." *Findley*, 105 F.3d at 683.[4] This violates "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions" and "no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (alteration in original) (internal quotation marks omit-

[4] Fourth Circuit case law bears this out: Purdue is aware of no case in which the court found that a lawsuit fell within the scope of the public-disclosure bar but that the original-source exception applied.

ted). It also undermines Congress's effort to "preserve[] the rights of the most deserving *qui tam* plaintiffs: those whistle-blowers who qualify as original sources." *Graham Cnty.*, 559 U.S. at 301. Under *Siller*, a relator with "direct and independent knowledge" (i.e., an original source) is identically situated to relators who lack such knowledge but who obtained their information from a source other than the public disclosure.

2. *Siller* is inconsistent not only with the text of the public-disclosure bar but also with its purpose. In enacting that bar, Congress sought "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty.*, 559 U.S. at 295. Specifically, it sought to "reward those who come forward with useful information," *Glaser*, 570 F.3d at 917, while discouraging lawsuits by those who "contributed nothing to the exposure of the fraud," *Doe*, 960 F.2d at 319.

This purpose is furthered by construing the bar to apply whenever "the relevant information has already entered the public domain." *Schindler Elevator*, 131 S. Ct. at 1895. In other words, "the fact of 'public disclosure' … is the touchstone" of the bar, *Graham Cnty.*, 559 U.S. at 292, because "[w]hen the material elements of a fraud are already in the public domain, the government has no need for a relator to bring the matter to its attention," *Ondis*, 587 F.3d at 58.

The Fourth Circuit's interpretation, by contrast, benefits relators who come forward after a public disclosure has occurred. This case is a perfect example: Respondent Angela Radcliffe claims to have learned of the allegations through "private conversations" with her husband Mark. Because Mark had previously disclosed those same allegations in his lawsuit, Angela

"contributed nothing to the exposure of the [alleged] fraud." *Doe*, 960 F.2d at 319. Yet under *Siller*, she is just as entitled to take part of the government's recovery as someone who actually uncovered the alleged fraud. *Siller* also creates the arbitrary result that she can proceed with her case if she learned of the allegations through "private conversations" with her husband, but not if she did so by reading the complaint he filed in court (or media coverage about his case); the latter would be "actually derived" from the public disclosure, while the former would not. Nothing justifies that anomalous outcome.

Furthermore, *Siller* reduces the incentive for those who know about a fraud to come forward promptly. Under the reading adopted by the other circuits, such would-be relators have a strong incentive to make the fraud known "'at the earliest possible time,'" before a public disclosure bars their suit. *United States ex rel. McKenzie* v. *BellSouth Telcomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997) (quoting *United States ex rel. Dick* v. *Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)). *Siller*, by contrast, would permit these relators to sit on their knowledge without fear that a public disclosure would preempt their lawsuit. That result would hinder the government's interest in promptly uncovering fraud: "Information brought forward by relators … is less useful … once revelations about fraudulent conduct are in the public domain because the government is already aware that it might have been defrauded and can take responsive action." *Glaser*, 570 F.3d 915.[5]

[5] This case is a good vehicle to address the proper interpretation of the public-disclosure bar, because as the Fourth Circuit acknowledged, the result would be different under the majority view. *See* App. 16a (relators' "claims are viable under the pre-

C. The Question Presented Is Important And Has Ongoing Significance

The proper interpretation of the public-disclosure bar is an important issue to the many entities who participate in FCA litigation—including, of course, the federal government. By adopting an unduly cramped reading of the statute, the Fourth Circuit has vastly expanded potential FCA defendants' liability, and thus made itself a magnet for *qui tam* litigation that would be jurisdictionally barred anywhere else in the country. The likelihood of such forum-shopping is magnified by the breadth of the FCA's venue provision, which permits venue in "any judicial district in which the defendant … can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred." 31 U.S.C. § 3732(a).[6]

The importance of the issue is underscored by the tremendous sums at stake in FCA cases. In 2012, the government obtained over $3 billion in judgments and settlements from *qui tam* litigation, with relators collecting another $430 million. *See* DOJ, *Fraud Statistics—Overview* 2 (Dec. 23, 2013).[7] Even assuming that *Siller* is relevant in only a fraction of Fourth Circuit *qui tam* cases, the Fourth Circuit's adherence here to its reading of the public-disclosure bar will have significant economic consequences.

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amendment version of the FCA, but not under the amended version, which focuses on the similarity of the allegations of fraud rather than the derivation of the knowledge of fraud").

[6] Because the Fourth Circuit contains the headquarters for numerous government agencies and contractors, it is likely to be an appropriate venue for a broad variety of cases.

[7] *Available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

The 2010 amendments to the public-disclosure bar, which rejected *Siller* and codified the majority position (*see supra* n.1), do not make the issue unsuitable for review. This Court has previously granted certiorari to address statutory or regulatory provisions that were no longer in effect. For example, in *Judulang* v. *Holder*, 132 S. Ct. 476 (2011), this Court reviewed the interpretation of a provision of the Immigration and Nationality Act, even though Congress had repealed that provision fifteen years earlier. The Court explained that the provision continued to have ongoing effects because relief thereunder remained available to certain aliens. *See id.* at 480-481. Similarly, in *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871 (2011), the Court took up the meaning of the Federal Reserve Board's Regulation Z notwithstanding the fact that by the time of the petition, the Board had amended the relevant parts of the regulation, *see id.* at 874 n.1 (noting that "the provisions discussed in this opinion are no longer in effect"). It did so after the Acting Solicitor General observed in his invitation brief that despite the changes to the regulation, "[i]f the decision below is allowed to stand, [defendants] will be exposed to needless litigation expenses and potential liability." U.S. Br. 19, *Chase Bank*, No. 09-329 (U.S. May 19, 2010). Precisely the same is true here.

In fact, two other FCA rulings that the Fourth Circuit has made ensure that its interpretation of the public-disclosure bar will mean significant "litigation expenses and potential liability" for years to come. First, the court here held that the pre-2010 version of the public-disclosure bar applies to conduct predating the amendments, even if the complaint is filed after the amendments took effect. App. 17a. Second, as discussed in Part III, the court has held that the FCA's

six-year statute of limitations is tolled by the 2002 Authorization for Use of Military Force and the Wartime Suspension of Limitations Act. As a result, the statute of limitations on FCA claims dating back to 2002 is tolled until several years after Congress or the president formally proclaims a termination of hostilities. This creates a potentially enormous universe of cases in which *Siller* (and the decision below) will still apply—with, as noted above, substantial sums of money at stake. These circumstances warrant this Court's review. *See Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 31-32 (1958) ("We granted certiorari because th[e] decision [below] conflicted with rulings in other Courts of Appeals on the same issue, and because the question as to the proper scope of § 275 (c), *although resolved for the future by § 6501 (e)(1)(A) of the Internal Revenue Code of 1954*, remains one of substantial importance in the administration of the income tax laws for earlier taxable years." (emphasis added) (footnote and citation omitted).[8]

II. THE FOURTH CIRCUIT HAS MISINTERPRETED THE FIRST-TO-FILE BAR

A. This Petition Should Be Held For *Carter*

Purdue argued below that relators' complaint should be dismissed under the FCA's first-to-file bar, which provides 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). The bar applies here, Purdue argued, be-

[8] Given the clarity of the Fourth Circuit's error in interpreting the public-disclosure bar, the Court may deem this part of the decision below suitable for summary reversal.

cause relators' allegations are nearly identical to those in Mark Radcliffe's case. Before the Fourth Circuit decided this case, however, another panel of the court (in *Carter*) "held that the first-to-file bar applies only if the first-filed action was still pending when the subsequent action was commenced." App. 22a (citing *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 182-183 (4th Cir. 2013)). Applying that holding, the court here—though agreeing that "this action is clearly based on the facts underlying" Mark Radcliffe's case, App. 22a—ruled that the first-to-file bar did not preclude relators' claims because Mark Radcliffe's lawsuit had been dismissed (and this Court had denied review) prior to the filing of this action. *Id.*

The defendants in *Carter* have filed a petition for certiorari (No. 12-1497) challenging the Fourth Circuit's interpretation of the first-to-file bar. And on October 7, 2013, this Court invited the Solicitor General to file a brief expressing the views of the United States on whether that petition should be granted. Because this petition presents the same first-to-file question presented in *Carter*, it should be held pending the disposition of that petition.

B. If The Court Denies Certiorari On The First-To-File Question In *Carter*, Then It Should Grant Review Here

In the event the Court declines plenary review of the first-to-file question in *Carter*, it should take up that question here. The Fourth Circuit's interpretation of the first-to-file bar is wrong, the proper interpretation of the bar is an important question, and this case is a good vehicle for addressing it.

1. The Fourth Circuit's holding that the first-to-file bar applies only until the first-filed FCA action is

resolved is not faithful to the statutory text. The court read the bar to say that later-filed actions are barred "only if the first-filed action *was still pending* when the subsequent action was commenced." App. 22a (emphasis added). But that is not what the statute says. It states that the bar takes effect "[w]hen a person brings an action," 31 U.S.C. § 3730(b)(5), and it goes on to provide that no private person may thereafter bring an action related to the one that was "pending" *when the bar attached*, *id.* The word "pending" in the provision, in other words, simply describes the first-filed action, i.e., distinguishes between the two actions mentioned—the first-filed action (which necessarily is "pending" "[w]hen" it is filed) and any subsequent action (which is not). *See United States ex rel. Powell* v. *American InterContinental Univ., Inc.*, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012) ("'pending' is used as a shorthand for the first-filed action").

The structure of the first-to-file bar confirms this reading. "It is clear that [the phrase] 'based on the facts underlying the pending action' merely clarifies 'related action.'" *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). It is implausible that Congress imposed a significant limitation on the first-to-file bar—draining much of its ability to "prevent opportunistic successive plaintiffs" from filing "repetitive claims," *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001)—in such an obtuse way, i.e., by inserting a single adjective into a phrase that merely clarifies whether a subsequent "action" is "related" to the first-filed action. *See Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in …

ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

2. The Fourth Circuit's interpretation is also fundamentally at odds with the purpose of the first-to-file bar. Like the public-disclosure bar, the first-to-file bar serves Congress's "twin goals of … encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Hampton* v. *Colombia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003) (internal quotation marks omitted). It does this by offering a reward to those who alert the government to fraud, while denying a bounty to those who merely repeat allegations of which the government is already aware. *See Lujan*, 243 F.3d at 1187; *see also United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) ("duplicative claims do not help reduce fraud or return funds to the federal fisc"). This approach helps "ensur[e] a race to the courthouse among eligible relators, which may spur the prompt reporting of fraud." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 377 (5th Cir. 2009) (internal quotation marks omitted).

"Once the government is put on notice of its potential fraud claim," however—which happens as soon as the first action is filed—"the purpose behind allowing qui tam litigation is satisfied." *United States ex rel. Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *see also United States ex rel. Green* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995) ("A whistleblower sounds the alarm; he does not echo it." (internal quotation marks omitted)). And since the government obviously remains on notice even after the first-filed action is resolved, there is no reason for the bar's effect to dissipate when that resolution occurs.

In other words, "[d]ismissed or not," the first-filed action "promptly alert[s] the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *Lujan*, 243 F.3d at 1188.

The court below offered no explanation for how its reading can be reconciled with the provision's fundamental purpose, nor has any other court that adopted the same reading. That reading instead engenders haphazard results, precluding an imitative *qui tam* suit one day but permitting it the next. This reading also allows relators to bring case after related case as long as they are filed seriatim. There is no justification for such a rule.

3. Finally, to the extent the Court considers legislative history, the Fourth Circuit's interpretation cannot be reconciled with the history of the first-to-file bar, which makes no mention of the court's "only-while-still-pending" limitation.

The House report accompanying the 1986 amendments to the FCA (which added the first-to-file bar) describes the bar as follows: "When an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The report says nothing about the need for the initial action to still be pending—indeed, its discussion of § 3730(b)(5) does not include the word "pending." Nor does the Senate report. In describing the first-to-file bar, that report states that *qui tam* "enforcement … is *not* meant to produce … multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986) (emphasis added). Yet multiple separate suits is precisely what the Fourth Circuit's interpretation permits.

4. For much the same reasons discussed in Part I—e.g., the large sums at stake in FCA cases—the proper interpretation of the first-to-file bar is an important question. It is also one that arises frequently around the country. *See 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, 964 (10th Cir. 2009); *Powell*, 2012 WL 2885356, at *6. And this case is a good vehicle to address the question, because the issue was pressed below and because as the Fourth Circuit acknowledged (and the United States agreed), relators' claims would be barred under the reading that Purdue advances. *See* App. 22a, *quoted supra* p.17; United States Br., C.A. Dkt. No. 44, at 8 (Sept. 20, 2013) (relators' action is a "nearly identical," "parasitic follow-on lawsuit").

III. THE FOURTH CIRCUIT HAS MISINTERPRETED THE WARTIME SUSPENSION OF LIMITATIONS ACT

A. This Petition Should Be Held For *Carter*

Purdue argued below that the complaint should be dismissed because the alleged conduct occurred outside the FCA's six-year period of limitations (31 U.S.C. § 3731(b)).[9] In the district court, relators initially responded that the limitations period should be equitably tolled. After the close of briefing on Purdue's motion to dismiss, however, they filed a supplemental pleading arguing that the limitations period had been suspended

[9] More specifically, according to the complaint the alleged fraudulent activity occurred, at the latest, between October and December 2004. Because the complaint was filed on December 30, 2010, there were only two days—December 30 and 31, 2004—that conceivably fell within the limitations period. But, Purdue argued, relators failed to allege that any fraudulent activity or corresponding claims for reimbursement occurred on those two days.

by the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, which tolls certain statutes of limitations during periods of international conflict. *See* Appellants' Notice of New Authority, Dist. Ct. Dkt. No. 49, at 1-2 (Aug. 24, 2012). Because the district court dismissed the complaint based on res judicata, it did not reach Purdue's timeliness argument (or relators' defenses).

Purdue pressed the limitations issue on appeal in conjunction with its arguments under Federal Rule of Civil Procedure 9(b), explaining that the complaint could not survive scrutiny because it failed to identify any conduct that occurred within six years of its filing. *See* Appellees' Br., C.A. Dkt. No. 25, at 37-38 (Feb. 11, 2013). Relators countered by again invoking the WSLA: They argued that Purdue had "fail[ed] to address relators' contention that the statute of limitations was suspended by" that act, and they expressly "incorporate[d] herein" the WSLA arguments they made in the district court. Appellants' Reply Br., C.A. Dkt. No. 27, at 20 n.8 (Feb. 28, 2013). Moreover, after the Fourth Circuit decided *Carter*, relators submitted a letter arguing that "defendants' arguments … rely heavily on statute of limitations (SOL) arguments … that are now precluded by this Court's recognition in *Carter* that the Iraq War triggered the WSLA[]…, thereby eliminating the SOL as a viable defense in this case." Appellants' 28(j) Ltr., C.A. Dkt. No. 30, at 1 (Apr. 8, 2013).

The Fourth Circuit's ruling—express in *Carter* and implicit here—that the WSLA does toll the statute of limitations for civil claims was erroneous and warrants this Court's review. As noted, the defendants in *Carter* have filed their own petition challenging the Fourth Circuit's WSLA ruling. Because this petition presents

substantively the same question as in *Carter*, it should be held pending the disposition of that petition.

B. If The Court Denies Certiorari On The WSLA Question In *Carter*, Then It Should Grant Review Here

In the event the Court declines to address the WSLA question in *Carter*, it should take up that question here. The Fourth Circuit erred in holding that the WSLA applies to civil claims, especially ones brought by private relators. And as this case illustrates, that holding undermines fundamental principles of repose—and derogates the FCA's absolute ten-year limitations period—by creating a potentially indefinite extension of the FCA's statute of limitations.

1. The WSLA provides in relevant part that "[w]hen the United States is at war …, the … statute of limitations applicable to any *offense* … involving fraud or attempted fraud against the United States … shall be suspended" until specified conditions are met. 18 U.S.C. § 3287 (emphasis added). The Fourth Circuit's conclusion that this language applies to civil claims is manifestly erroneous.[10]

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[10] The WSLA was amended in 2008 to provide that it applies when "Congress has enacted a specific authorization for the use of the Armed Forces" (i.e., not just when the United States is "at war"), and to extend the suspension period from three years after the termination of hostilities to five years. *See* Wartime Enforcement of Fraud Act, Pub. L. No. 110-417, § 855(1), 122 Stat. 4356, 4545 (2008). While it is unclear which version of the statute applies in a case like this, where the complaint was filed post-amendment but the alleged conduct occurred pre-amendment, the Court need not address that question because the issues raised here apply equally to both versions.

The WSLA tolls limitations periods in cases involving an "offense." That word, standing alone, unambiguously refers only to criminal cases. *Black's Law Dictionary*, for example, defines "offense" as "[a] violation of the law; a crime, often a minor one." *Black's Law Dictionary* 1186 (9th ed. 2009); *accord, e.g.*, *The American Heritage Dictionary of the English Language* 1255 (1996) (defining "offense" as "[a] transgression of law; a crime"). This Court has likewise frequently used the term "offense" as synonymous with "crime." *See, e.g.*, *Nijhawan* v. *Holder*, 557 U.S. 29, 33 (2009) ("[I]n ordinary speech words such as 'crime,' … 'offense,' and the like sometimes refer to a generic crime."); *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013) ("[C]ourts … compare the elements of … the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood."); *see also Miranda* v. *Anchondo*, 684 F.3d 844, 849-850 (9th Cir. 2012) (op. on reh'g) (supplying additional examples from this Court and others). Nor is this a new usage. To the contrary, it long predates enactment of the WSLA. *See, e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 85 (1915) ("It … has been repeatedly declared … that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy."). Indeed, while this Court has occasionally used the phrase "civil offense," Purdue is aware of no case in which the Court has used the unadorned term "offense" to encompass civil infractions.

In interpreting the WSLA itself, moreover, this Court and others have plainly regarded the law as limited to criminal offenses, albeit without engaging the question expressly. In one case, for example, this Court "conclude[d] that the Suspension Act is inapplicable to *crimes* committed after the date of termination of hostilities," adding that "[t]he fear [that motivated

passage of the act] was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the *crimes* of fraud … would be forgotten until it was too late." *United States* v. *Smith*, 342 U.S. 225, 228-229 (1952) (emphases added). And the following year the Court stated that "the wartime suspension of limitations … is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense *charged*." *Bridges* v. *United States*, 346 U.S. 209, 221 (1953) (emphasis omitted); *see also United States* v. *Gottfried*, 165 F.2d 360, 367 (2d Cir. 1948) (L. Hand, J.) (WSLA "provided that in three classes of crimes the prosecution should not be barred, until three years after hostilities had ended.").

If any doubt remained, it would be dispelled by Congress's placement of the WSLA in title 18 of the U.S. Code—which is entitled "Crimes and Criminal Procedure." *See Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("The placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly's view that § 1146(a) covers preconfirmation transfers."). More specifically, the WSLA resides in the limitations chapter of title 18's "Part II—Criminal Procedure." Pub. L. No. 80-772, 62 Stat. 683, 813 (1948). And when Congress located the statute there in 1948, the first section of title 18 confirmed that "offense" was synonymous with "crime," stating that "[a]ny offense punishable by death or imprisonment for a term exceeding one year is a felony[, and] [a]ny other offense is a mis-

demeanor." 62 Stat. at 684 (then codified at 18 U.S.C. § 1 (repealed 1984)).[11]

Finally, giving "offense" its natural meaning is faithful to this Court's direction that the WSLA is "'to be narrowly construed'" because it "creates an exception to a long-standing congressional 'policy of repose' that is fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 216 (quoting *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1932)).[12] The Fourth Circuit's vast expansion of the WSLA's reach, by contrast, ignores that direction.

2. The court of appeals' rationale for doing so does not withstand scrutiny. Its sole reason was that in 1944, Congress deleted certain language from the original version of the WSLA. In particular, the act originally applied to "offenses involving the defrauding or attempts to defraud the United States … in any manner, and now indictable under any existing statutes." Pub. L. No. 77-706, 56 Stat. 747, 747-748 (1942). In 1944, Congress—as part of a wholesale rephrasing of the act—deleted the language "now indictable under any existing statutes." *See* Contract Settlement Act, Pub. L. No. 78-395, § 19(b), 58 Stat. 649, 667 (1944). Ac-

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[11] To the extent the Court considers it, the legislative history of the 2008 amendment to the WSLA is also consistent with the conclusion that the act is limited to criminal cases. The Senate report observed that the amendment (described *supra* n.10) would "protect American taxpayers from *criminal* contractor fraud." S. Rep. No. 110-431, at 1-2 (2008) (emphasis added). And in expressing concerns about the amendment, two senators stated that it would provide "a very long—potentially indefinite—statute of limitations for a criminal offense." *Id.* at 8.

[12] The reference to "our criminal law" is yet another indication of the Court's implicit view that the WSLA reaches only criminal cases.

cording to the court of appeals, "[h]ad Congress intended for 'offense' to apply only to criminal offenses, it could have done so by not deleting the words 'now indictable' or it could have replaced that phrase with similar wording." *Carter*, 710 F.3d at 180.

That reasoning fails. To begin with, although the court stated that its reading was grounded partly in the 1944 amendment's legislative history, *see Carter*, 710 F.3d at 180 ("[B]ecause we find … the legislative history persuasive, we find that the WSLA applies to civil claims."), the court actually cited no relevant legislative history.[13] Nor, to Purdue's knowledge, does the legislative history speak to the import of the amendment (even assuming the Court would give such history any weight). More fundamentally, the Fourth Circuit's explanation for the deletion of "now indictable under any existing statutes" is certainly not the only possible one. Congress may instead have recognized that the deleted language could be construed to limit the WSLA to criminal laws already on the books in 1942 (as opposed to laws that would be the enacted subsequently). And in 1944 Congress may have wanted to eliminate any such limitation. Whether or not that was Congress's actual intention, it is far more plausible than the Fourth Circuit's explanation—which is contradicted both by Congress's retention of the word "offense" and by its placement of the WSLA in title 18 four years after the amendment.

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[13] The Court of Claims case that the Fourth Circuit relied on, *Dugan & McNamara, Inc.* v. *United States*, 127 F. Supp. 801 (Ct. Cl. 1955), likewise did not discuss any pertinent legislative history (the Fourth Circuit's contrary claim notwithstanding, *see Carter*, 710 F.3d at 179-180).

3. Finally, applying the WSLA in a case like this, in which the United States is neither a plaintiff nor an intervenor, is particularly unjustified. The WSLA, after all, was enacted "to give the Department [of Justice] more time to apprehend, investigate, and prosecute offenses occurring under the stress of present-day events of the war," *Smith*, 342 U.S. at 230 (Clark, J., concurring) (internal quotation marks omitted), when law enforcement officers are "busily engaged in [their] many duties, including the enforcement of the espionage, sabotage, and other laws," *Bridges*, 346 U.S. at 219 n.18. In a case like this, however, the government is not racing against any statute of limitations; the relators have brought the alleged fraud to the government's attention and obviated any limitations problem by filing their own action. Nor does the litigation require the government to divert substantial resources from the war effort (or any other purpose). Because the government has declined to intervene, its expenditure of resources in connection with the case is minimal. In these circumstances, there is no legitimate purpose to be furthered by tolling the limitations period—particularly given that the alleged conduct has no connection to war-related activities.

The harm from such tolling, by contrast, is substantial. Under the Fourth Circuit's interpretation of the WSLA, the statute of limitations for all FCA claims has been tolled since at least 2002. And the tolling continues until either three or five years after the statutory requirements for terminating the hostilities have been met (depending on which version of the statute applies). Government contractors and other businesses thus face the prospect of having to litigate claims stretching back decades. Simply preparing for that possibility (with massive document retention programs,

for example) places severe burdens on businesses. And those businesses that actually have to defend against such claims will likely face the burden of faded memories and the loss of other helpful evidence—in addition to the substantial litigation costs involved. Recognizing the unfairness of imposing such burdens, Congress expressly provided that the FCA's limitations period could not be extended to "more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). The Fourth Circuit's evisceration of that limitation—and its concomitant undermining of the fundamental principles of repose that underlie statutes of limitations in general—is yet another reason that its misreading of the WSLA warrants review.

CONCLUSION

This petition should be held pending this Court's disposition of the petition in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, No. 12-1497 (and, if review is granted, the decision in that case). The Court should then either grant this petition, vacate the judgment below, and remand for reconsideration in light of *Carter*, or else grant the petition for plenary review on all three questions presented.

Respectfully submitted.

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MARCH 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2287

UNITED STATES ex rel. STEVEN MAY
AND ANGELA RADCLIFFE,
Plaintiff-Appellant,
v.

PURDUE PHARMA L.P., a limited partnership, and;
PURDUE PHARMA, INCORPORATED,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT
BECKLEY. IRENE C. BERGER, DISTRICT JUDGE.
(5:10-CV-01423)

Argued: September 20, 2013
Decided: December 12, 2013

Before TRAXLER, Chief Judge, DIAZ, Circuit Judge,
and Gina M. GROH, United States District Judge
for the Northern District of West Virginia,
sitting by designation

Vacated and Remanded by published opinion.
Chief Judge Traxler wrote the opinion, in which
Judge Diaz and Judge Groh joined.

* * *

TRAXLER, Chief Judge:

Appellants Steven May and Angela Radcliffe brought this action under the False Claims Act, 31 U.S.C. §§ 3729-33 (the "FCA"), against Purdue Pharma L.P. and Purdue Pharma, Inc. (together, "Purdue"). Giving preclusive effect to this court's decision in *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010), the district court dismissed the action on res judicata grounds. Because we agree with the appellants that this action is not barred by res judicata, we vacate the decision of the district court and remand for further proceedings.

I.

Mark Radcliffe, the husband of appellant Angela Radcliffe, was a district sales manager for Purdue. Radcliffe was laid off as part of a reduction in force in June 2005, and he subsequently executed a general release (the "Release") of all claims against Purdue in order to receive an enhanced severance package. Radcliffe thereafter filed an FCA action against Purdue ("*Qui Tam I*")[1] in which he alleged that Purdue falsely marketed its narcotic pain medication OxyContin to physicians as being twice as potent as MS Contin (a cheaper, off-patent drug also manufactured by Purdue), thus making it appear that OxyContin was cheaper per dose than MS Contin. The government investigated Radcliffe's allegations and declined to intervene in his action.

[1] "A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator.'" *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009).

The district court eventually dismissed *Qui Tam I* with prejudice, concluding that Radcliffe's amended complaint did not satisfy the heightened pleading requirements of Rule 9. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. …"). On appeal, we affirmed the with-prejudice dismissal on alternate grounds, concluding that the Release barred Radcliffe's FCA claims. *See Radcliffe*, 600 F.3d at 333.

After we issued our opinion in *Radcliffe*, Steven May and Angela Radcliffe (the "Relators") commenced this FCA action against Purdue ("*Qui Tam II*") setting forth allegations nearly identical to those advanced by Mark Radcliffe in *Qui Tam I*. As noted, Angela Radcliffe is Mark Radcliffe's wife; Steven May was formerly a sales representative for Purdue under Mark Radcliffe's supervision.

Purdue moved to dismiss the Relators' complaint on res judicata grounds, arguing that our decision in *Radcliffe* barred the Relators from proceeding with *Qui Tam II*. *See, e.g.*, *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 650 (4th Cir. 2005) ("Res judicata … precludes the assertion of a claim after a judgment on the merits in a prior suit by the parties or their privies based on the same cause of action."). Purdue also argued that the FCA's public-disclosure bar, *see* 31 U.S.C. § 3730(e)(4), divested the district court of jurisdiction over the action and that the complaint did not allege fraud with the particularity required by Rule 9.

As to the res judicata question, Purdue contended that *Radcliffe* was a judgment on the merits because it affirmed a with-prejudice dismissal; that the claims as-

serted in *Qui Tam I* and *Qui Tam II* were identical; and that the parties were identical because *Qui Tam I* was "brought on behalf of the United States as the real party in interest," such that the government "and any other relators seeking to allege identical claims are bound by its judgment." J.A. 83. The Relators argued that *Radcliffe* was not a decision on the merits for res judicata purposes, but they did not directly dispute Purdue's contention that the parties were identical.

Citing *Adkins v. Allstate Insurance Co.*, 729 F.2d 974 (4th Cir. 1984), the district court held that *Radcliffe* was necessarily a decision on the merits because it affirmed the grant of a summary-judgment motion. *See Adkins*, 729 F.2d at 976 n.3 ("For purposes of *res judicata*, a summary judgment has always been considered a final disposition on the merits."). And because the Relators did not challenge the other res-judicata requirements, the district court held without further analysis that "the instant case is barred by the doctrine of res judicata." J.A. 225. The district court therefore dismissed the action without considering the other issues raised by Purdue. This appeal followed.

II.

The Relators argue on appeal that the district court erred by giving preclusive effect to *Radcliffe* and dismissing their action on res judicata grounds. The preclusive effect of a judgment issued by a federal court is a legal question governed by federal common law and subject to de novo review. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (federal common law determines preclusive effect of federal-court judgment); *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 210 (4th Cir. 2013) (district court's application of res judicata reviewed de novo).

Generally speaking, whether res judicata precludes a subsequent action "turns on the existence of three factors: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Clodfelter*, 720 F.3d at 210 (4th Cir. 2013) (internal quotation marks omitted).

A.

The Relators contend that *Radcliffe* was not a "judgment on the merits" because the decision was premised on a determination that Mark Radcliffe lacked standing to pursue the FCA claims. Because Article III standing requirements are jurisdictional, *see, e.g.*, *United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (2013), and jurisdictional dismissals are not "judgment[s] on the merits for purposes of res judicata," *Goldsmith v. Mayor of Balt.*, 987 F.2d 1064, 1069 (4th Cir. 1993),[2] the Relators argue that *Radcliffe* is not entitled to preclusive effect.

We disagree with the Relators' reading of our decision in *Radcliffe*. Standing principles require the plaintiff to have suffered an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). In the context of the FCA, however, it is the government, not the private-citizen relator, that has been injured by the defendant's fraud. FCA relators nonetheless have standing to bring an FCA action because the FCA "effect[s] a partial assignment of the Government's damages claim" and thus statutorily vests private citizens with standing. *Vt.*

[2] "However, a jurisdictional dismissal … still operates to bar relitigation of issues actually decided by that former judgment." *Goldsmith*, 987 F.2d at 1069.

Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000).

In *Radcliffe*, we discussed FCA standing principles in the course of rejecting one of Radcliffe's arguments against enforcement of the Release. As we explained, "Radcliffe had a statutory [FCA] claim, *and the necessary legal standing* as partial assignee" once the government suffered an injury and Radcliffe became aware of the fraud. *Radcliffe*, 600 F.3d at 329 (emphasis added). We did not conclude that Radcliffe lost standing when he executed the Release, but instead simply held that his execution of the Release effected a waiver of his right to sue Purdue. *See id.* at 329 (explaining that Mark Radcliffe "had the *right*" to bring an FCA action before he signed the Release, "a right he waived under the terms of the Release").

B.

Although we reject the Relators' assertion that *Radcliffe* was a jurisdictional dismissal, we nonetheless agree with their bottom-line position that the district court erred by giving *Radcliffe* preclusive effect.

As the government notes in its *amicus* brief, the traditional res-judicata inquiry is modified in cases where the earlier action was dismissed in accordance with a release or other settlement agreement. *See Keith v. Aldridge*, 900 F.2d 736, 740-41 (4th Cir. 1990). A judgment entered "based upon the parties' stipulation, unlike a judgment imposed at the end of an adversarial proceeding, receives its legitimating force from the fact that the parties consented to it." *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir. 2004). Thus, where a dismissal is "based on a settlement agreement, … the principles of *res judicata* apply (in a somewhat modified form) to the matters

specified in the settlement agreement, rather than the original complaint." *Id.* That is, given the contractual nature of consent decrees and settlement agreements, the preclusive effect of a judgment based on such an agreement can be no greater than the preclusive effect of the agreement itself.[3] *See Keith*, 900 F.3d at 740 ("When a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties."); 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4427 ("Judgments that rest on stipulations, admissions in pleadings, or consent to the very judgment itself should be given effect according to the intention of the parties … ."); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211 (4th Cir. 2009) ("Settlement agreements operate on contract principles, and thus the preclusive effect of a settlement agreement should be measured by the intent of the parties." (internal quotation marks omitted)).[4]

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[3] Whether our decision in *Radcliffe* bars the current action is a legal issue that the Relators preserved by opposing the dismissal below and on appeal. That the Relators do not raise this particular argument does not preclude our consideration and application of it. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

[4] While this case involves a release executed before the commencement of any litigation, many of the cases addressing this issue involve consent decrees or other settlements reached after the commencement of litigation. *See, e.g.*, *Keith v. Aldridge*, 900 F.2d 736, 738 (4th Cir. 1990). As to the res-judicata question, there

The Release executed by Mark Radcliffe in *Qui Tam I* was personal to him and addressed only his rights and the claims that he might assert against Purdue. Neither the Relators nor the government were parties to or intended beneficiaries of the Release. *See Restatement (Second) of Contracts* § 302; *see also United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 451 (4th Cir. 2011) (explaining that the effect of an agreement settling FCA claims is a question of federal common law as to which the *Restatement (Second) of Contracts* provides guidance). The Release itself, therefore, could not serve as a defense to any claims that the Relators (or other non-signatories) might assert against Purdue. Indeed, we made this very point in *Radcliffe* when we noted that the Release "did not prohibit the government or another relator from pursuing similar claims against Purdue." *Radcliffe*, 600 F.3d at 329 n.8. Our decision in *Radcliffe* enforcing the Release did not (and could not) broaden the scope of the Release. Accordingly, because the Release does not bar non-signatories from proceeding against Purdue, the judgment enforcing the Release cannot bar such claims.

Purdue's arguments to the contrary are not persuasive. Our dismissal in *Radcliffe* may well have been a dismissal "on the merits" under Rule 41. *See* Fed. R. Civ. P. 41 ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits."); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1181

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is no meaningful difference between a post-filing settlement agreement and the pre-filing release at issue here.

(4th Cir. 1989) ("[F]or purposes of *res judicata*, a summary judgment has always been considered a final disposition on the merits." (internal quotation marks omitted)). As the Supreme Court has explained, however, "it is no longer true that a judgment 'on the merits' [for purposes of Rule 41] is *necessarily* a judgment entitled to claim-preclusive effect." *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (emphasis added). As discussed above, the preclusive effect of a judgment enforcing a settlement agreement is determined by the intent of the parties as reflected by the terms of that agreement, and the Release did not bar anyone other than Mark Radcliffe from bringing suit against Purdue. Regardless of the procedural vehicle through which our decision enforcing the Release was entered, our decision simply did not broaden the scope of the Release. *See Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004) ("[A] dismissal with prejudice contained in a consent decree is not a ruling on the merits that applies to others under the law of claim preclusion." (internal quotation marks and alterations omitted)). Accordingly, the district court erred by dismissing *Qui Tam II* as barred by principles of res judicata.

III.

We turn now to the contention urged by Purdue and the government that the district court's dismissal can be affirmed because the action is prohibited by 31 U.S.C. § 3730(e)(4), the FCA's "public disclosure" bar. Addressing that argument requires us to first determine which version of the statute applies to this case.

A.

The complaint focuses on conduct occurring between 1996 and 2005. At that time, the public-disclosure bar provided:

> No court shall have jurisdiction over an action under this section *based upon the public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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.

31 U.S.C. § 3730(e)(4)(A) (2005) (emphasis added).

Section 3730(e)(4), however, was amended on March 23, 2010—after the occurrence of the conduct alleged in the complaint, but before the commencement of this action. *See* Patient Protection & Affordable Care Act, Pub. L. 111–148, § 10104(j)(2), 124 Stat. 119, 901-02. The statute as amended provides that:

> 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—*
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> (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.

31 U.S.C. § 3730(e)(4)(A) (2010) (emphasis added). Purdue argues that the amended version of the statute applies, while the Relators argue that the prior version of the statute applies.

"[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (internal quotation marks omitted). Accordingly, a "presumption against retroactive legislation is deeply rooted in our jurisprudence," *id.*, and that "time-honored presumption" must apply "unless Congress has clearly manifested its intent to the contrary," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). The presumption against retroactivity, however, is limited to statutes "that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277. A statute has retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 269 (internal quotation marks omitted).

Applying these principles, the Supreme Court has twice held that the 2010 FCA amendments may not be applied to cases arising before the effective date of the amendments. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010) ("The legislation makes no mention of retroactivity, which would be necessary for its appli-

cation to pending cases given that it eliminates petitioners' claimed defense to a *qui tam* suit."); *see also Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011) (citing *Graham County* and stating that the 2010 amendments "are not applicable to pending cases"). The circuit courts considering the issue have likewise applied the pre-2010 version of the statute. *See United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 232 n.3 (3d Cir. 2013); *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 934 (7th Cir. 2012); *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 326 n.6 (5th Cir. 2011); *United States ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104, 107 n.2 (1st Cir. 2010); *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1188 n.3 (8th Cir. 2010).

Purdue suggests the analysis should be different in this case, however, because *Graham County* and *Schindler*, unlike this case, involved complaints that were filed before the statute was amended. We disagree. The retroactivity inquiry looks to when the underlying conduct occurred, not when the complaint was filed. *See Landgraf*, 511 U.S. at 265 ("[T]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place* … ." (emphasis added)). While changes in jurisdictional and procedural rules are often applied to pending cases, that is not because the date of filing controls, *see Hughes Aircraft*, 520 U.S. at 946 (refusing to apply 1986 FCA amendments to action that was commenced after the effective date of the amendments), but because application of those new rules often does not have an impermissible retroactive effect. *See Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually takes away no substantive right but simply changes the

tribunal that is to hear the case." (internal quotation marks omitted)); *id.* at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.").

The Supreme Court determined in *Graham County* and *Schindler* that application of the 2010 amendments would have retroactive effect if applied in those cases, and we conclude that the amendments likewise would have retroactive effect if applied in this case. *See Baldwin v. City of Greensboro*, 714 F.3d 828, 836 (4th Cir. 2013) (retroactivity inquiry looks to "whether the new statute would have retroactive effect as applied to the particular case" (internal quotation marks omitted)); *Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 459 (4th Cir. 2011) ("Th[e retroactivity] inquiry is narrow, for it asks *not* whether the statute may possibly have an impermissible retroactive effect in any case, but specifically whether applying the statute *to the person objecting* would have a retroactive consequence in the disfavored sense." (internal quotation marks and citation omitted)).

Under the prior version of the statute, § 3730(e)(4) operated as a jurisdictional limitation—the public-disclosure bar, if applicable, divested the district court of subject-matter jurisdiction over the action. *See* 31 U.S.C. § 3730(e)(4) (2005) ("*No court shall have jurisdiction* over an action under this section based upon the public disclosure of allegations … ." (emphasis added)); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468-69 (2007) (explaining that § 3730(e)(4) is a "jurisdiction-removing provision"). It is apparent, however, that the public-disclosure bar is no longer jurisdictional. The amended statute does not mention jurisdiction but in-

stead states that in cases where the bar is applicable, the court "shall dismiss" the action "unless opposed by the Government." 31 U.S.C. § 3730(e)(4) (2010). The 2010 amendments thus deleted the unambiguous jurisdiction-removing language previously contained in § 3730(e)(4) and replaced it with a generic, not-obviously-jurisdictional phrase ("shall dismiss"), while at the same time retaining jurisdiction-removing language in §§ 3730(e)(1) and (e)(2).[5] In our view, these changes make it clear that the public-disclosure bar is no longer a jurisdiction-removing provision. *See, e.g.*, *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."); *Pirie v. Chi. Title & Trust Co.*, 182 U.S. 438, 448 (1901) ("When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose."); *Chertkof v. United States*, 676 F.2d 984, 987 (4th Cir. 1982) ("[T]he deletion of language, having so distinct a meaning, almost compels the opposite result when words of such plain meaning are excised."). Indeed, it is difficult to understand how the amended public-disclosure bar could be jurisdictional when the government has the ability to veto a dismissal under that section. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (en banc) ("Subject-matter

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[5] *See* 31 U.S.C. § 3730(e)(1) (2010) (providing that "[n]o court shall have jurisdiction over" certain FCA actions brought by present or former members of the armed forces); *id.* § 3730(e)(2)(A) (providing that "[n]o court shall have jurisdiction over" certain FCA actions brought against members of Congress, senior executive branch officials, or members of the judiciary).

jurisdiction cannot be conferred by the parties, nor can a defect in subject-matter jurisdiction be waived by the parties."). And even if the changes somehow did not establish Congress' intent to convert the public-disclosure bar into a non-jurisdictional basis for dismissal, the omission of the jurisdictional language would nonetheless require us to treat the amended public-disclosure bar as such. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (Unless "Congress has clearly stated that the [statutory limitation] is jurisdictional … , courts should treat the restriction as nonjurisdictional in character." (internal quotation marks and alteration omitted)).

Moreover, the 2010 amendments significantly changed the scope of the public-disclosure bar. Under the prior version of the statute, disclosures in federal and state trials and hearings qualify as public disclosures, *see, e.g.*, *McElmurray v. Consol. Gov't of Augusta–Richmond Cnty.*, 501 F.3d 1244, 1252 (11th Cir. 2007), and disclosures in federal and state reports, audits, or investigations likewise constitute public disclosures, *see Graham Cnty.*, 559 U.S. at 301. After the amendments, however, only disclosures in *federal* trials and hearings and in *federal* reports and investigations qualify as public disclosures. *See* 31 U.S.C. §§ 3730(e)(4)(A)(i) & (ii) (2010). The 2010 amendments thus substantially narrowed the class of disclosures that can trigger the public-disclosure bar. By the same token, the amendments expand the number of private plaintiffs entitled to bring *qui tam* actions by including plaintiffs who learn of the underlying fraud through disclosures in state proceedings or reports.

And as we will discuss in more detail in the next section, the 2010 amendments also changed the required connection between the plaintiff's claims and the

qualifying public disclosure. Under the pre-amendment version of the statute, an action is barred if the action is "based upon" a qualifying public disclosure, *see* 31 U.S.C. § 3730(e)(4)(A) (2009), a standard we have interpreted to mean that the plaintiff must have "actually derived" his knowledge of the fraud from the public disclosure. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994). As amended, however, the public-disclosure bar no longer requires actual knowledge of the public disclosure, but instead applies "if substantially the same allegations or transactions were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (2010). Because the Relators allege that they did not derive their knowledge of Purdue's fraud from any public disclosure, their claims are viable under the pre-amendment version of the FCA, but not under the amended version, which focuses on the similarity of the allegations of fraud rather than the derivation of the knowledge of fraud.

We believe that these significant revisions to the statute "change[] the substance of the existing cause of action," *Hughes Aircraft*, 520 U.S. at 948, such that the amended statute would have retroactive effect if applied in this case. The 2010 amendments deprive Purdue of the previously available jurisdictional defense and replace it with a non-jurisdictional defense that is triggered by a substantially narrower range of public disclosures and is, even then, subject to veto by the government. *See id.* (1986 FCA amendment had retroactive effect because it "eliminate[d] a defense to a *qui tam* suit … and therefore change[d] the substance of the existing cause of action for *qui tam* defendants" (internal quotation marks and alteration omitted)); *id.* at 948-49 (1986 amendment "create[d] a new cause of action" by "exten[ding] … an FCA cause of action to pri-

vate parties in circumstances where the action was previously foreclosed" (internal quotation marks omitted)). The 2010 amendments similarly imperil the Relators' right to assert their claims against Purdue, a right they possessed and could have acted upon up until the moment that the amendments took effect. *See Landgraf*, 511 U.S. at 269 (statute has retroactive effect if it "takes away or impairs vested rights acquired under existing laws" (internal quotation marks omitted)); *cf. Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) ("When application of a new limitation period would *wholly eliminate* claims for substantive rights or remedial actions considered timely under the old law, the application is impermissibly retroactive. The legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action." (citations and internal quotation marks omitted)). Accordingly, because the 2010 amendments have retroactive effect and the legislation is silent as to retroactivity, the 2010 version of the public-disclosure bar cannot be applied in this case, notwithstanding the fact that the complaint was filed after the effective date of the amendments. *See Hughes Aircraft*, 520 U.S. at 946 (declining to apply 1986 FCA amendments to action alleging pre-amendment fraud that was commenced after the effective date of the amendments).

B.

Having concluded that the pre-2010 version of § 3730(e)(4) applies, we turn to the question of whether the public-disclosure bar requires dismissal of this action.

As previously noted, the pre-amendment version of the public-disclosure bar provides that:

> No court shall have jurisdiction over an action under this section *based upon the public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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.

31 U.S.C. § 3730(e)(4)(A) (2005) (emphasis added). Although most circuits have interpreted the "based upon" language to bar actions where the allegations of fraud were "supported by" or "substantially similar" to fraud that had been publicly disclosed, *see, e.g.*, *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 386 (3d Cir. 1999) (collecting cases), this circuit has interpreted the clause as barring only those actions where the relator's knowledge of the fraud alleged was *actually derived* from the public disclosure *itself*. *See Siller*, 21 F.3d at 1348 ("[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." (emphasis added)). The public-disclosure bar applies and requires dismissal if the action is "even partly" derived from prior public disclosures. *See United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 351 (4th Cir. 2009).

Whether a relator derived his knowledge of the fraud from a public disclosure is a jurisdictional fact to be resolved by the district court. *See id.* at 348, 350; *Siller*, 21 F.3d at 1349. Although the district court dis-

missed this action on res judicata grounds without addressing the public-disclosure bar,

Purdue contends that the record nonetheless establishes that the allegations in this action were at least partly derived from the publicly disclosed allegations contained in the *Qui Tam I* complaint. Purdue points out that the allegations of the complaints in *Qui Tam I* and *Qui Tam II* are nearly identical, and that many of the allegations in *Qui Tam II* are verbatim copies of *Qui Tam I* allegations. In Purdue's view, "[t]he verbatim overlap of the complaints forecloses any argument that the complaint in this action was not at least partly based on the … [c]omplaint in *Qui Tam I*." Br. of Resp't at 31. We disagree.

Under *Siller*, the question is not whether the allegations set out in the relator's complaint are similar to publicly disclosed allegations of fraud; the question is whether the relator's *knowledge* of the fraud was actually derived from the public disclosure—that is, whether the relator *learned about* the fraud from the public disclosure. *See Siller*, 21 F.3d at 1347, 1348 ("[T]he only fair construction" of § 3730(e)(4) is that "a qui tam action is only 'based upon' a public disclosure where the relator has *actually derived from that disclosure* ***the knowledge of the facts*** *underlying his action*." (emphasis added)); *see also id.* at 1348 (explaining that an FCA action could "include[] allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures"). Indeed, the standard urged by Purdue is the standard adopted by other circuits but *rejected* by *Siller*. *See id.* ("We are aware … that other circuits have not embraced this interpretation of the phrase, assuming instead that an action is based upon a public

disclosure of allegations if its allegations are identical or similar to those already publicly disclosed.").

The Relators both submitted affidavits to the district court asserting that their knowledge of Purdue's fraud was not derived from the *Qui Tam I* complaint or any other qualifying public disclosure, but from conversations with Mark Radcliffe and, in Steven May's case, from his own experiences as a Purdue sales representative. The similarity between the allegations in each complaint could provide a basis for disbelieving the Relators' assertions, *see Vuyyuru*, 555 F.3d at 350-51, but that is an issue for the district court as fact-finder, not this court. 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. *See United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 184 (4th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3010 (June 24, 2013) ("Because the district court should have the opportunity in the first instance to address the facts relevant to public disclosure, we remand this issue to the district court."); *Siller*, 21 F.3d at 1349 (remanding for district court to determine whether allegations were "actually derived" from prior suit). If the district court determines that the Relators' knowledge of the fraud alleged here was actually derived, even in part, from a qualifying public disclosure and that the Relators are not original sources of the information, then the district court must dismiss this action for lack of subject-matter jurisdiction. *See Vuyyuru*, 555 F.3d at 355.

IV.

Purdue makes two additional arguments for sustaining the district court's dismissal of this action that do not require extended discussion.

First, Purdue contends that dismissal was proper because the Relators' complaint fails to allege fraud with the specificity required by Rule 9 of the Rules of Civil Procedure. We disagree. Assuming without deciding that the complaint does not allege the fraudulent conduct with the specificity required by Rule 9, *see U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456-57 (4th Cir. 2013), *petition for cert. filed*, 81 U.S.L.W. 3650 (May 10, 2013),[6] the Relators have yet to amend their complaint, and they requested an opportunity to amend if the court believed the allegations deficient. Leave to amend a complaint should generally be freely granted, and there is at present no basis in the record for this court to conclude that any efforts to amend would be futile or otherwise improper. *See, e.g.*, *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012) ("[A] request to amend should only be denied if one of three facts is present: the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile." (internal quotation marks omitted)). Because the Relators have not had the opportunity to amend their complaint, we believe it would be improper to rely on any Rule 9 deficiencies to affirm the district court's dismissal of the action with prejudice. The district court on remand is free to consider Purdue's Rule 9 argument in the first instance.

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[6] On October 7, 2013, the Supreme Court invited the Solicitor General to express the views of the United States on the pending petition.

Second, Purdue argues that we can affirm the district court's order because dismissal is required by the FCA's "first to file" bar. *See* 31 U.S.C. 3730(b)(5). Section 3730(b)(5) provides 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." Although this action is clearly based on the facts underlying *Qui Tam I*, we recently held that the first-to-file bar applies only if the first-filed action was still pending when the subsequent action was commenced. *See Carter*, 710 F.3d at 182-83. By the time this action was commenced, *Qui Tam I* had been dismissed by the district court, the dismissal had been affirmed by this court in *Radcliffe*, and *certiorari* had been denied by the Supreme Court. *Qui Tam I*, therefore, was no longer pending at the time this action was commenced, thus making the first-to-file bar inapplicable. *See Carter*, 710 F.3d at 183 ("[O]nce a case is no longer pending the first-to-file bar does not stop a relator from filing a related case.").

V.

Accordingly, for the foregoing reasons, we vacate the district court's order dismissing this action on res judicata grounds and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

No. 12-2287
(5:10-cv-01423)

UNITED STATES ex rel. STEVEN MAY
AND ANGELA RADCLIFFE,
Plaintiffs,

v.

PURDUE PHARMA L.P., and PURDUE PHARMA, INC.,
Defendants.

CIVIL ACTION NO. 5:10-CV-01423
Filed: September 14, 2012

MEMORANDUM OPINION AND ORDER

The Court has reviewed *Defendants Purdue Pharma L.P. and Purdue Pharma Inc.'s Motion to Dismiss Relators' Complaint With Prejudice* (Document 23). Upon consideration of the motion, the opposition thereto (Document 31), the reply (Document 34), other submissions (Documents 35, 46, 47) and the entire record therein, the Court, for the reasons that follow, grants Defendants' motion.

I.

Relators Steven May and Angela Radcliffe initiated this *qui tam* case pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 and equivalent state stat-

utes, against Purdue Pharma L.P. and Purdue Pharma, Inc. (collectively referred herein as "Purdue") on behalf of the United States and the States of California, Georgia, Illinois, New York and Tennessee. Relators allege that Purdue, a business engaged in the development and production of prescription drugs and products, trained its sales force to make "false and misleading" representations to "physicians and other institutional decision makers" about the "equianalgesic cost"[1] of its "controlled-release pain relief tablet called OxyContin." (Compl. ¶¶ 4, 10-13.) Specifically, it is alleged that in 1996 Purdue began to represent that "one milligram of OxyContin would give the same pain relief as two milligrams of the benchmark, [Purdue's drug] MS Contin[]" and that "despite OxyContin's higher per milligram cost, OxyContin was cheaper than MS Contin when they were measured based on the pain relief that they provided[.]" (Compl. ¶ 12.) Relators allege that Purdue knew these representations were "false and misleading" because they "knew that there was no scientific basis for making those claims and that the scientific evidence that existed indicated that the equianalgesic ratio of OxyContin and MS Contin was no greater than 1.5 to 1—substantially and materially less than the 2 to 1 ratio." (Compl. ¶ 13.) According to the Relators, the "false 2:1 equianalgesic ratio and cost savings assertions" were marketed to hospitals, physicians, pharmacies and hospices to "encourage[] physicians to write prescriptions" for OxyContin which resulted in "Medicaid and other government programs" paying more

[1] Relators allege that "[t]he equianalgesic cost is the comparative cost of a pain medication when all factors are equalized to provide a typical patient with the same pain relief as competing pain medications." (Compl. ¶ 12.)

than necessary for a drug that was less potent. (Compl. ¶¶ 20, 28, 32). Relators allege that:

> Each OxyContin prescription paid for by Medicaid constituted a false or fraudulent claim to the Government when the pharmacy sought reimbursement from the Government because the Government was getting, on behalf of the Medicaid patient, materially less OxyContin, in terms of equianalgesic pain relief, than Purdue represented to the prescribing physician and others.

(Compl. ¶32.) Consequently, Relators assert that "Purdue is liable, pursuant to 31 U.S.C. § 3729, for each of those false or fraudulent claims." (Compl. ¶ 33.) Relators admit that they "are unable to identify at this time all of the false or fraudulent claims which were caused by Purdue's conduct." (Compl. ¶ 34.) However, in explanation, Relators offer that:

> Purdue's misrepresentations, systematically made nationwide over a period of several years, generated a huge number of false and fraudulent claims spanning the years 1996 to 2009. Additionally, the false claims—primarily prescriptions that were fraudulently induced by Purdue, were usually submitted to pharmacies with whom Relators had no dealings. Additionally, these records are usually protected by medical record confidentiality statutes and relators would generally have no access to them. Thus, the listing of the individual false claims in this complaint is neither feasible, nor practical, and is not required.

(*Id.*) Relators also allege that Purdue violated the False Claims Acts in the various states included in Counts Two through Five of their Complaint.[2]

This is the second such FCA suit litigated against these Defendants regarding their alleged "false 2:1 equianalgesic ratio and cost savings assertions" about the drug OxyContin. The first civil action, initiated in 2005, was asserted by Mark Radcliffe, Relator Angela Radcliffe's husband. Mark Radcliffe was a former Purdue drug representative and district manager managing numerous sales representatives, including Relator Steven May. Both Relator May and Mark Radcliffe allegedly marketed OxyContin and informed physicians and others of the 2:1 equianalgesic ratio and cost savings as trained by Purdue. Mark Radcliffe's *qui tam* action (hereinafter referenced to as the "2005 Qui Tam") was ultimately dismissed by the United States District Court for the Western District of Virginia for failing to satisfy the particularity requirement for fraud pleadings set forth by Rule 9(b) of the Federal Rules of Civil Procedure. On appeal, the Fourth Circuit Court of Appeals affirmed the judgment dismissing Radcliffe's suit with prejudice, but disagreeing with the District Court's ruling not to enforce Mark Radcliffe's pre-filing Release Agreement with Purdue (Radcliffe executed the agreement as part of his severance from the company). The Circuit Court determined that the Release Agreement barred Mark Radcliffe from prosecuting the qui tam matter against these Defendants. (*See United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 582 F.Supp. 2d 766 (W.D. Va. 2008); 2009 WL

[2] Relators' Complaint has denoted two separate state law FCA claims as Count IV. (Complaint, ¶¶ 41-44) (Allegations of violations of Georgia and Illinois State False Medicaid Claims Act).

161003 (W.D. Va. Jan. 25, 2009); *aff'd* 600 F.3d 319 (4th Cir. 2010), *cert denied*, 131 S.Ct. 477 (2010.)

Defendants now move to dismiss the instant Complaint pursuant to Rules 8, 9(b), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

II.

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). "[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated in Rule 8 [of the Federal Rules of Civil Procedure] (providing general rules of pleading) … and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted.)" *Id.* Federal Rule of Civil Procedure 8(a)(2) requires that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). This pleading standard requires that a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). In matters alleging a party's fraud, Rule 9 of the Federal Rules of Civil Procedure requires a heightened pleading standard. Rule 9 commands a party to "state with particularity the circumstances constituting fraud or mistake." However, the party is permitted to allege generally any "[m]alice, intent, knowledge, and other conditions of a person's mind." Fed.R.Civ.P. 9(b).

In *Ashcroft v. Iqbal*, the United States Supreme Court stated that to survive a 12(b)(6) motion to dis-

miss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when [a party] pleads factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged." *Id.* The plausibility standard "asks for more than a sheer possibility that a [party] has acted unlawfully." *Id.* Rather, "[i]t requires [a party] to articulate facts, when accepted as true, that 'show' that [the party] has stated a claim entitling [them] to relief[.]" *Francis*, 588 F.3d at 193 (quoting *Twombly*, 550 U.S. at 557). Such "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not show[n]"—"that the pleader is entitled to relief." *Id.* (quoting Fed.R.Civ.P. 8(a)(2)).

With respect to a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Fourth Circuit, in *Adams v. Bain*, 697 F.2d 1213 (4th Cir.1982), described two distinct ways in which a defendant may challenge subject matter jurisdiction:

> First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are as-

> sumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. Second, it may be contended that the jurisdictional allegations of the complaint were not true. A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.

Adams, 697 F.2d at 1219 (footnote omitted); *see also Campbell v. United States*, Civil Action No. 2:05-cv-956, 2009 WL 914568, *2 (S.D.W. Va. Apr. 2, 2009). "A trial court may consider evidence by affidavit, deposition, or live testimony without converting the proceeding to one for summary judgment." *CSX Transp. v. Gilkison*, Civil Action No. 5:05CV202, 2009 WL 426265, *2 (N.D. W. Va. Feb. 19, 2009) (citing *Adams*, 697 F.2d at 1219; *Mims v. Kemp*, 516 F.2d 21 (4th Cir. 1975)).

III.

The FCA, 31 U.S.C. §§ 3729 *et seq.*, forbids any person or entity from knowingly presenting or causing to be presented false or fraudulent claims to the federal government for payment or approval. 31 U.S.C. §3729(a)(1)(A); *U.S. ex. rel. Oberg v. Kentucky Higher Educ. Student Loan Corp.*, 681 F.3d 575, 578 (4th Cir. 2012). The FCA provides for both the Attorney General and a private person, identified as a relator, to uncover and prosecute frauds against the government. A relator's civil action is known as a *qui tam* suit on the government's behalf. "Qui tam" is an abbreviation for the Latin phrase "*[q]ui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vermont Agency of Natural Resources v.*

United States ex rel. Stevens, 529 U.S. 765, 769 n.1 (2000). Once a relator files a civil action, the United States investigates the claim and chooses whether to intervene in the civil action or allow the relator to prosecute the matter on its own. 31 U.S.C. § 3730(b)(1) and (b)(4). "The government's decision not to intervene in an FCA action does not mean that the government believes the claims are without merit and the government's decision not to intervene therefore is not relevant in an FCA action brought by a private party." *United States ex rel. Ubi v. IIF Data Solutions*, 650 F.3d 445, 457 (4th Cir. 2011) (internal citations omitted). A successful relator receives a percentage of the civil action's proceeds. 31 U.S.C. § 3730(d).

As it did in the first *qui tam* case, the United States has declined to intervene in this matter. (United States' Notice of Election to Decline Intervention (Document 7) ("[T]he United States notifies the Court of its decision not to intervene in this action. … Through the States of California and Tennessee, the United States has been advised that the States of California, Georgia, Illinois, New York and Tennessee (the "States") have also decided not to intervene in this action.") Consequently, Relators are maintaining this action in the name of the United States pursuant to 31 U.S.C. § 3730(b)(1).[3]

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[3] Section 3730(b)(1) provides that:

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

31 U.S.C. § 3730(b)(1).

IV.

Purdue moves to dismiss Relators' Complaint on the basis that: (1) this FCA action "is a re-litigation" of the 2005 Qui Tam civil action and the principles of res judicata "preclude re-litigation of the same claims" where the first *qui tam* resulted in a "judgment on the merits"; (2) the Public Disclosure Bar requires dismissal of this case, pursuant to 31 U.S.C. § 3730(e)(4); (3) the Complaint fails to satisfy the heightened pleading standard of Rule 9(b) or the basic pleading requirement of Rule 8 of the Federal Rules of Civil Procedure; (4) The FCA's six-year statute of limitations bars Relator's recovery for all claims on or before December 30, 2004, and the Relators fail to "identify any claims submitted after that day nor assert any direct knowledge of Purdue after that day[;]" and (5) the State Law claims suffer the same defects as the federal claims and this Court should either dismiss the claims or refuse to exercise supplemental jurisdiction over the claims. (Defendants Purdue Pharma L.P. and Purdue Pharma Inc.'s Motion to Dismiss Relators' Complaint with Prejudice ("Defs.' Mot.") (Document 23) at 1-2.)

Assuming, without deciding, for the purposes of the instant motion that the Relators' FCA claim is not barred by the FCA's public disclosure bar, Section 3730(e)(4), that this Court's jurisdiction is not divested, and that the Relators' have sufficiently pled an FCA claim with the appropriate level of particularity to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, this Court finds dismissal of the instant civil action is warranted given the principles of res judicata.

V.

Defendants contend that this case should be dismissed on the basis of the doctrine of *res judicata*. Under this doctrine, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Andrews v. Daw*, 201 F.3d 521, 524 -525 (4th Cir. 2000) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The "principal purpose of the general rule of *res judicata* is to protect the defendant from the burden of relitigating the same claim in different suits[.]" *Pueschel v. United States*, 369 F.3d 345, 356 (4th Cir. 2004) (citations omitted). Defendants assert, pursuant to *Pueschel v. United States*, that the doctrine of res judicata is applicable where there is: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits. *Pueschel v. United States*, 369 F.3d 345, 345-355 (4th Cir. 2004) (citing *Nash County Bd. of Educ. v. Biltmore Co*., 640 F.2d 484, 486 (4th Cir. 1991). The Fourth Circuit has instructed that "[t]he determination of whether two suits arise out of the same cause of action … does not turn on whether the claims asserted are identical" but instead "on whether the suits and the claims asserted therein 'arise out of the same transaction or series of transactions or the same core of operative facts.'" (*Id.* at 355) (quoting *In re Varat Enters., Inc.*, 81 F.3d 1310, 1316 (4th Cir. 1996).

Defendants assert that all three elements are satisfied in this case. Specifically, Defendants contend: that the dismissal of the 2005 Qui Tam was with prejudice and that a "[d]ismissal for failure to state a claim under Rule 12(b)(6) constitutes a 'judgment on the merits for res judicata purposes"; that the causes of action in both *qui tam* actions are identical; and that both the United

States, as the real party in interest to the 2005 Qui Tam suit, and the relators seeking to allege identical claims are bound by the judgment. (Defendants Purdue Pharma L.P. and Purdue Pharma Inc.'s Memorandum in Support of Motion to Dismiss ("Defs.' Mem.") (Document 24) at 6.)

Relators do not challenge Defendants' latter two arguments. (*See* Relators' Opposition to Defendants' Motion to Dismiss ("Rels.' Opp'n") (Document 31) at 3-6.) Therefore, the only issue the parties dispute in this case is the first prong of the test—whether there has been a judgment on the merits in a prior suit. In that view, Relators assert that it is the Fourth Circuit's ruling that Mark Radcliffe's pre-filing agreement barred his *qui tam* claim, not the district court's ruling that Mark Radcliffe's pleading failed to satisfy Rule 9(b), that controls this Court's analysis. (Relators' Opposition to Defendants' Motion to Dismiss ("Rels.' Opp'n") (Document 31) at 4.) Relators also assert that because the appellate ruling "was ultimately based on a lack of standing" rather than on the merits of the claim, *res judicata* does not operate to bar this suit. (*Id.*) Relators also contend that the Fourth Circuit's affirmation of a dismissal with prejudice does not trigger the operation of res judicata. (*Id.* at 5.)

To meet the Relators' assertion that the Fourth Circuit's ruling in the 2005 Qui Tam case was one based on standing, Defendants contend that the Circuit Court "did not make a finding about whether Mark Radcliffe had standing to file his case, but instead found against [him] on the basis of release[.]" (Defendants Purdue Pharma L.P., and Purdue Pharma Inc.'s Reply in Support of Motion to Dismiss ("Defs.' Reply") (Document 34) at 2.) Defendants argue that the Relators "misapprehend the Fourth Circuit's decision … and the role of

a relator[]" because the appellate decision turned on the affirmative defense of release, not a jurisdictional bar of lack of standing. (*Id.* at 1-2.) Defendants also argue that a release is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, and a dismissal on the basis of the release is a decision on the merits under the Federal Rules of Civil Procedure. (*Id.*) (citing Fed.R.Civ.P. 41(b)). Finally, Defendants assert that a finding in its favor here would vindicate the principles of res judicata because the Relators asserting the same allegations of a previous *qui tam* action are in privity with the government, and are bound by the prior judgment, just as is the government. (*Id.* at 3.)

This Court finds that the Relators are correct in that it is the appellate court's determination of the 2005 Qui Tam litigation that is proper for the Court to consider whether the instant claim should be barred by *res judicata*. The Fourth Circuit Court of Appeals affirmed the dismissal of Mark Radcliffe's 2005 Qui Tam claim without consideration of the district court's ruling that his Complaint was fatally flawed pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 322 n.2 (4th Cir. 2010) ("Because the Release is a complete bar to Radcliffe's claims, there is no need to address Radcliffe's arguments on the Rule 9(b) dismissal nor the district Court's denial of leave to amend.") However, this Court disagrees with the Relators' assertion that the 2005 Qui Tam case was dismissed on the grounds of Article III standing. However, the Fourth Circuit never made any finding that the dismissal of the 2005 Qui Tam case was due to the want of Article III standing, either explicitly or implicitly. This is likely so because it appears from both the district and appellate court opinions that neither party

questioned Mark Radcliffe's Article III standing as it related to the ultimate enforcement of the Release Agreement.

However, there is some support for the Defendants' assertion that its contentions concerning the pre-filing release constituted an affirmative defense in the 2005 Qui Tam suit. A fair reading of the district court's opinion reveals that the court considered Purdue's argument to enforce the pre-filing release as a "Release Defense" and referred to it as such on more than one occasion. (*See United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 582 F.Supp. 2d 766, 774 (W.D Va. 2008) (District Court identifying section three by the heading of "The Release Defense" and later stating: "The facts surrounding this *defense* have been developed in the summary judgment record.") (emphasis added); *Id.* at 768 ("As to the *defense* that Radcliffe had released Purdue from the claims … ") (emphasis added).

Further, the Fourth Circuit had no occasion to consider whether a relator has Article III standing to pursue a qui tam action after bargaining away its right to recover under the FCA. Instead, the Circuit Court considered generally that a relator has Article III standing to bring an FCA claim "because the [FCA] effect[s] a partial assignment of the Government's damages claim and that assignment of the United States' injury in fact suffices to confer standing on [the relator]." (*Id.* at 328.) (citations and internal quotations omitted.) In making this finding, the appellate court considered Mark Radcliffe's assertion that the language of his pre-filing Release did not encompass an FCA claim because on the date the Release was executed he had not asserted the FCA claim and no assignment of the Government's damages claim had occurred. The Fourth Circuit disagreed and concluded that Mark

Radcliffe had a statutory claim and the necessary legal standing as a partial assignee, once the government suffered an injury and he became aware of the fraud causing the injury. (*Id.* at 329.) The Circuit Court concluded that he had an interest in the lawsuit regardless of when he opted to vindicate it. (*Id.*) The Court found that Mark Radcliffe's decision not to file his *qui tam* action until after he signed the Release "d[id] not negate the fact that he had the *right* to file suit beforehand—a right he waived under the terms of the Release." (*Id.*). Thereafter, the Court considered whether "overriding public policy considerations" prevented enforcement of the Release and found that they did not. Therefore, the Fourth Circuit did not find that he lacked Article III standing, as that term is used upon consideration of subject matter jurisdiction, after signing the Release.

Finally, this Court finds that the Fourth Circuit's decision in the 2005 Qui Tam case was one made pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Circuit Court stated:

> In this case the parties provided evidence and thoroughly briefed the Release issue to the district court, which clearly relied on the declarations and other exhibits presented when determining the Release did not bar Radcliffe's *qui tam* suit. The parties have also relied on evidence relevant to the Release issue in their briefs submitted to this Court. The facts in the record appear to be generally undisputed and we therefore find it proper to convert Purdue's 'Rule 12(b)(6) motion to one under Rule 56' and thus consider the district court's ruling on that basis.

Radcliffe, 600 F.3d at 326. In light of the posture of the Circuit Court's review, it appears that its determina-

tion was a summary judgment determination on the enforcement of a pre-filing release. The Fourth Circuit has recognized that, "[f]or purposes of res judicata, a summary judgment has always been considered a final disposition on the merits." *Dresser v. Backus*, 229 F.3d 1142, 2000 WL 1086852 (4th Cir. Aug. 4, 2000) (table decision) (quoting *Adkins v. Allstate Ins. Co.*, 729 F.2d 974, 976 n. 3 (4th Cir. 1984)). The Court observes that neither party addressed this aspect of the appellate ruling.

Upon consideration of the foregoing, this Court finds that the Fourth Circuit ruling in the 2005 Qui Tam suit is a judgment on the merits of that case.[4] Thus, without any further challenge of the balance of the *res judicata* factors, the Court finds that the instant case is barred by the doctrine of res judicata.[5]

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[4] Relators also unpersuasively contend that the doctrine of res judicata should not apply in this case because both the United States and Defendants argued before the Fourth Circuit Court of Appeals that the government and other private individuals remain free to prosecute released claims. (Rels'. at 6.) The Court finds that this argument is misplaced. A review of the Fourth Circuit's opinion in the 2005 Qui Tam action reveals that Purdue and the Government made that assertion in support of their assertion that "prefiling releases are presumptively enforceable" and that the enforcement of such an agreement in that litigation would "uphold a number of important public policies." *Radcliffe*, 600 F.3d at 326.

[5] In support of their assertion that the 2005 Qui Tam civil action was dismissed with prejudice based on the standing argument, the Relators cite *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F.Supp.2d 310, 328 (D. Mass. 2001) for that proposition. However, the parties in that dispute squarely put before the court the issue of standing. *Medtronic*, 806 F.Supp.2d at 327 ("Finally, Medtronic argues that Dodd lacks standing to bring an FCA claim against Medtronic in this matter because he signed a termination agreement that contained an expansive release of claims.") This is

Given the disposition of this matter, the Court need not consider the parties' dispute as to whether the FCA's statute of limitation bars Relators' claim.

Finally, in Counts Two through Five, Relators assert that "Purdue, through its national sales force, marketed and sold OxyContin in all fifty states with its 2:1 lies" and that those "false and/or fraudulent claims were submitted to and/or paid" by the states of California, New York, Georgia, Illinois, and Tennessee. (*See* Compl. ¶¶ 35-46.)[6] 28 U.S.C. § 1367(a) and 31 U.S.C. § 3732(b) provide that this Court may exercise jurisdiction over the Relators' state claims. However, Section 1367(c)(3) provides that a "district court[] may decline to exercise supplemental jurisdiction over a claim under subsection (a) if … the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3). Given the disposition of the Relators' FCA claim and the procedural posture of this litigation, where the parties have not engaged in any discovery and a trial date has not been established, the Court does hereby exercise its discretion to decline supplemental jurisdiction over the Relators' state claims. The Court will, therefore, dismiss these claims without prejudice to the Relators' seeking prosecution of the claims in the respective state courts.

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a contention that was not made by the parties in the 2005 Qui Tam matter. Additionally, the Fourth Circuit in *Radcliffe* approvingly considered the Tenth Circuit's *Ritchie* decision in its analysis of the pre-filing Release enforcement issue. *Radcliffe*, 600 F.3d at 331 (citing *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009). The Court observes that the *Ritchie* court did not make any statement that its disposition of the Release in that case was based on Article III standing.

[6] *See supra*, n.1.

CONCLUSION

Therefore, upon consideration of the foregoing, the Court does hereby **ORDER** that *Defendants Purdue Pharma L.P. and Purdue Pharma Inc.'s Motion to Dismiss Relators' Complaint With Prejudice* (Document 23) be **GRANTED.**[7] Specifically, the Court **ORDERS** that the Relators' FCA claim be **DISMISSED WITH PREJUDICE** and that the Relators' state claims be **DISMISSED WITHOUT PREJUDICE** consistent with the ruling herein.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: September 14, 2012

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[7] While the Court is aware that 31 U.S.C. § 3730(b)(1) provides that an "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting," the cause authority in this Circuit as well as others have construed this provision to mean that such "written consent" is only applicable in matters voluntarily dismissed. *See United States ex rel. O'Malley v. Xerox Corp.*, 846 F.2d 75 (4th Cir. 1988) (Table per curiam decision) ("Section 3730(b)(1) is intended to reach voluntary dismissals and not dismissals based on substantive grounds.); *see also Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 798 n.5 (7th Cir. 2009) ("Salmeron also claims that the district court violated 31 U.S.C. 3730(b)(1) by failing to obtain the Attorney General's written consent before dismissing the action. Such consent is not required, however, for suits like Salmeron's that are involuntarily dismissed.") *United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89, 91 (2d Cir. 2008) ("[W]e have previously construed the provision [Section 3730(b)(1) to apply 'only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal.'") Given this Court's findings herein, such "written consent" is not required.

/s/ Irene C. Berger

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2287
(5:10-cv-01423)

UNITED STATES ex rel. STEVEN MAY
AND ANGELA RADCLIFFE
Plaintiff-Appellant

v.

PURDUE PHARMA L.P., a limited partnership, and;
PURDUE PHARMA, INCORPORATED
Defendants-Appellees

UNITED STATES OF AMERICA
Amicus Curiae

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; BIOTECHNOLOGY INDUSTRY ORGANIZATION
Amici Supporting Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BECKLEY. IRENE C. BERGER, DISTRICT JUDGE.
(5:10-CV-01423)

FILED: February 7, 2014

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Diaz and Judge Groh.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

STATUTORY PROVISIONS

31 U.S.C. § 3730. Civil actions for false claims [Effective May 20, 2009 to March 22, 2010]

* * *

(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) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or 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 has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the

[2] So in original. Probably should be "General".

information to the Government before filing an action under this section which is based on the information.

* * *

31 U.S.C. § 3731. False claims procedure

* * *

(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.

* * *

18 U.S.C. § 3287. 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 1031 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)).

Pub. L. No. 77-706, 56 Stat. 747 (1942)

AN ACT

To suspend temporarily the running of statutes of limitations applicable to certain offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. 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. 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.

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, August 24, 1942.

Pub. L. No. 78-395, 58 Stat. 649 (1944)

AN ACT

To provide for the settlement of claims arising from terminated war contracts, and for other purposes.

* * *

PRESERVATION OF RECORDS; PROSECUTION OF FRAUD

SEC. 19.

* * *

(b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows:

"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."

* * *

Pub. L. No. 80-772, 62 Stat. 683 (1948)

AN ACT

To revise, codify, and enact into positive law, Title 18 of the United States Code, entitled "Crimes and Criminal Procedure".

* * *

§ 3287. WARTIME SUSPENSION OF LIMITATIONS

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.