No. 13-1162

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: April 24, 2014

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents declined to consent. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to promoting limited and accountable government, supporting the free enterprise system and the rule of law, and opposing abusive enforcement actions and civil litigation by the government and private litigants.

To that end, WLF has appeared before this Court and other federal courts in numerous cases raising significant issues regarding the civil False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 128 U.S. 2123 (2008); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

WLF submits that, over the last three decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, and their shareholders as well as to the public at large.

The potential bounties available under the FCA's *qui tam* provisions make this mechanism susceptible to abuse by opportunistic bounty hunters masquerading as true whistleblowers. WLF believes that one of the most effective bars to such parasitic lawsuits has been the public-disclosure bar that Congress crafted in the 1986 amendments to the FCA. This public-disclosure bar is a core feature of *qui tam* enforcement of the FCA, and it requires dismissal of *qui tam* suits where the *qui tam* relator's case is based on publicly disclosed information and the relator is not an original source to the Government.

WLF is concerned that the decision below undermines the effectiveness of the public-disclosure bar in all cases filed in federal courts located in one of the five States comprising the Fourth Circuit. If allowed to stand, the decision below will facilitate the filing of parasitic lawsuits, especially in light of Fourth Circuit rulings that ensure application of the pre-2010 version of the public-disclosure bar—the version at issue here—to virtually all FCA actions for many years to come.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus curiae addresses only the first two 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 set of facts as an earlier-filed action only so long as the earlier case is still pending.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting limited and accountable government, supporting the free enterprise system and the rule of law, and opposing abusive enforcement actions and civil litigation by the government and private litigants.

To that end, WLF has appeared before this Court and other federal courts in numerous cases raising significant issues regarding the civil False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 128 U.S. 662 (2008); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

WLF submits that, over the last three decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, and

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of WLF's intent to file.

their shareholders as well as of the public at large.

The potential bounties available under the FCA's *qui tam* provisions make this mechanism susceptible to abuse by opportunistic bounty hunters masquerading as true whistleblowers. WLF believes that one of the most effective bars to such parasitic lawsuits has been the public-disclosure bar that Congress crafted in the 1986 amendments to the FCA. This public-disclosure bar is a core feature of *qui tam* enforcement of the FCA, and it requires dismissal of *qui tam* suits where the *qui tam* relator's case is based on publicly disclosed information and the relator is not an original source to the Government.

WLF is concerned that the decision below undermines the effectiveness of the public-disclosure bar in all cases filed in federal courts located in one of the five States comprising the Fourth Circuit. If allowed to stand, the decision below will facilitate the filing of parasitic lawsuits, especially in light of Fourth Circuit rulings that ensure application of the pre-2010 version of the public-disclosure bar—the version at issue here—to virtually all FCA actions for many years to come.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Petitioners Purdue Pharma L.P. and Purdue Pharma Inc. (collectively "Purdue") manufacture and

distribute the prescription drug OxyContin, a widely prescribed pain-relief medication. Respondents Steven May and Angela Radcliffe filed this FCA lawsuit against Purdue in 2010, two months after the Fourth Circuit affirmed dismissal of an FCA lawsuit raising virtually identical claims against Purdue and filed by Mark Radcliffe. Mark Radcliffe is a former Purdue sales manager and the husband of Angela Radcliffe.

Both lawsuits alleged that Purdue falsely told medical professionals that OxyContin was "twice as potent" (and therefore "cheaper per dose") than the drug it replaced, MS Contin. The lawsuits further alleged that as a result of these false statements, all reimbursement claims submitted by pharmacies to federal health care programs for OxyContin supplied to patients should be deemed "false claims" and that Purdue should be held liable under the FCA for causing those false claims to be submitted. The United States declined to intervene in either lawsuit.

Purdue sought dismissal of the second FCA lawsuit on several grounds, including that it was barred by both the public-disclosure bar and the first-to-file bar. *See* 31 U.S.C. § 3730(e)(4)(A) (2009) and § 3730(b)(5). The district court did not address those defenses but instead dismissed on *res judicata* grounds. Pet. App. 23a-40a.

The Fourth Circuit vacated and remanded. Pet. App. 1a-22a. In addition to reversing the district court's *res judicata* determination, it rejected Purdue's arguments that the public-disclosure bar and the first-to-file bar provided alternative grounds for affirming

the district court. *Id.* at 17a-20a, 22a.[2]

Applying well-established circuit precedent, the appeals court held that even when an FCA suit is based on allegations that are "substantially similar" to allegations that that were previously disclosed publicly, the public-disclosure bar is inapplicable unless the relator's knowledge of the allegations "was actually derived from that disclosure." *Id.* at 18a (quoting *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994)). Because May and Angela Radcliffe contended that their knowledge of the allegations was *not* derived from the initial FCA lawsuit (Radcliffe contends, for example, that she learned of the allegations by speaking with her husband, not by reading his lawsuit), the court held that Purdue was not entitled to dismissal on public disclosure grounds. *Id.* at 20a. The court acknowledged, however, that the Fourth Circuit's interpretation of the public-disclosure bar conflicted with the interpretation of most other federal appeals courts and that the interpretation of those other courts would have required dismissal of this lawsuit. *Id.* at 18a, 19a (stating that "the standard urged by Purdue

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[2] Congress amended the public-disclosure bar in March 2010 in connection with health care reform legislation. *See* Patient Protection & Affordable Care Act, Pub. L. 111-148, § 10104(j)(2). Although this case was filed in December 2010 (nine months after Congress amended the FCA), the Fourth Circuit determined that the pre-2010 version of the bar should apply in this case and in all other FCA cases involving alleged events occurring before March 2010. Pet. App. 9a-17a. There is no serious dispute that had the latest version of the public-disclosure bar been applied here, this case would have been subject to dismissal. Unless otherwise indicated, citations herein to 31 U.S.C. § 3730(e)(4)(A) refer to the pre-2010 version of the public-disclosure bar.

is the standard adopted by other circuits but *rejected* by *Siller*.") (emphasis in original).

The Fourth Circuit also rejected Purdue's argument that dismissal should be affirmed under the FCA's first-to-file bar. Pet. App. 22a. That provision states 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). Relying on its earlier decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 182-83 (4th Cir. 2013), *petition for cert. filed*, No. 12-1497 (June 24, 2013), the court held that "the first-to-file bar applies only if the first-filed action was still pending when the subsequent action was commenced." Pet. App. 22a. The court concluded that the bar was inapplicable here because the FCA suit filed by Mark Radcliffe had already been dismissed by the time his wife and Steven May filed this suit raising identical claims. *Id.*

SUMMARY OF ARGUMENT

This case raises issues of exceptional importance. The Fourth Circuit has adopted—and maintained its adherence to—an interpretation of the FCA's public-disclosure bar that conflicts sharply with the interpretation of all other federal appeals courts that have addressed the issue. As a result, the public-disclosure bar no longer serves as an effective check against parasitic FCA lawsuits filed within the five States comprising the Fourth Circuit. In light of the ever-increasing number of lawsuits filed by private citizens under the FCA's *qui tam* provisions and the huge sums often at issue in such suits, review by this

Court is warranted in order to resolve the conflict.

Review is also warranted because the Fourth Circuit's interpretation of the public-disclosure bar is clearly wrong. As applied to this case, the bar provides that federal courts lack jurisdiction over FCA *qui tam* claims "based upon" the "public disclosure of allegations or transactions" from a variety of sources, including disclosures made during a civil hearing. 31 U.S.C. § 3720(e)(4)(A) (2009).[3] The appeals court held that an FCA lawsuit is not "based upon" such public disclosures unless the relator actually derived his/her knowledge of the underlying allegations or transactions from that public disclosure. Thus, according to the appeals court, the suit can proceed—regardless of how much pre-suit publicity the allegations/transactions have received—if the relator obtained his information based on conversations with the person who filed the prior lawsuit, or with the author of the relevant government report, or with the newspaper reporter who wrote the relevant news media account.

As other appeals courts have pointed out, that is not a plausible interpretation of § 3720(e)(4)(A) because it essentially writes the "original source" exception out of the statute. *See, e.g., United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 58 (1st Cir. 2009). If the Fourth Circuit were correct that the "based upon" language renders the public-disclosure bar inapplicable in all cases in which the relator derived his/her information without reading the actual public

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[3] The bar includes exceptions for suits filed by the U.S. Attorney General or by an individual who qualifies as an "original source of the information." *Id.*

disclosure, then a relator would never have cause to seek the benefit of the "original source" exception. That is so because the FCA's definition of an "original source" is limited to one "who has direct and independent knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B); and those who *did* derive their knowledge by reading the public disclosure (*i.e.*, those relators who fall within the Fourth Circuit's understanding of the limited group that is subject to the public-disclosure bar) could never qualify as "original sources."

The decision below is also in considerable tension with this Court's decisions in *Graham* and *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011). Both of those decisions addressed the scope of the pre-2010 public-disclosure bar. Although neither decision directly addressed the meaning of § 3730(e)(4)(A)'s "based on" language, both decisions proceeded on the assumption that the relevant inquiry—when determining whether the public-disclosure bar is applicable—is whether a public disclosure of the types enumerated in the statute has occurred, not whether the relator's knowledge is derived from that disclosure. The Court's assumption was that Congress adopted the public-disclosure bar to prevent opportunistic bounty hunters from filing *qui tam* actions when the allegations they were raising had been previously disclosed in a manner that would likely have brought those allegations to the attention of federal authorities. *See, e.g., Graham*, 559 U.S. at 291 (public-disclosure bar's reference to disclosures contained in an "administrative . . . report, hearing, audit, or investigation" should be understood to apply to state publications as well as to federal publications, in part

because such state publications are "just as likely to put the Federal Government on notice of a potential fraud" as other public disclosures indisputably encompassed by the bar); *Schindler Elevator*, 131 S. Ct. at 1895. Both decisions emphasized that the key focus of the public-disclosure bar is whether "the relevant information has already entered the public domain through certain channels," *id*., not whether the relator was actually paying attention to those channels.

Review is also warranted in light of the importance to the business community of the questions presented by the Petition. The number of FCA *qui tam* cases filed annually has increased significantly in recent years, and the large dollar value of FCA judgments entered each year provides strong evidence of the value placed by businesses on FCA defenses such as the public-disclosure bar.

The fact that Congress has amended the public-disclosure bar does not lessen the importance of the circuit conflict over the meaning of the old version of the bar. Indeed, the great majority of cases being filed in the Fourth Circuit today continue to be subject to the pre-2010 version of the public-disclosure bar. Moreover, because FCA *qui tam* actions are stayed and remain under seal during the period (often, several years) that the Government is reviewing the complaint and deciding whether to intervene, almost all *qui tam* cases decided within the Fourth Circuit in the foreseeable future will be subject to the pre-2010 version.

The Fourth Circuit's interpretation of the first-to-file bar also warrants review. The need for review of that interpretation increased dramatically two weeks

ago, when the D.C. Circuit issued a decision expressly disagreeing with the Fourth Circuit's interpretation of the first-to-file bar. The D.C. Circuit held that the bar applies even when (as here and in that case) the previously filed FCA action has been dismissed and thus is no longer "pending" in federal court. *United States ex rel. Shea v. Cellco Partnership*, ___ F.3d ___, 2014 WL 1394687 (D.C. Cir. 2014).

As the Petition notes, Question Two is also raised in a pending petition seeking review of the Fourth Circuit's *Carter* decision. *See* No. 12-1497 (petition filed June 24, 2013). The Court requested the views of the Solicitor General on that petition, and the United States is expected to file its brief within the next month. Accordingly, WLF concurs with Petitioners' request that the Court hold this Petition with respect to Question Two until it has an opportunity to act on the *Carter* petition.

WLF nonetheless notes that the D.C. Circuit's discussion of the first-to-file bar illustrates why it is important that the Court consider the public-disclosure bar and the first-to-file bar in tandem with one another. Of particular interest in this regard is Judge Srinivasan's opinion dissenting in part. He explicitly agreed with the Fourth Circuit's conclusion that the first-to-file bar is operative only for as long as the first *qui tam* action remains undecided. *Shea*, 2104 WL 1394687, at *8 (Srinivasan, J., dissenting in part). He reasoned that the public-disclosure bar, not the first-to-file bar, was the primary means employed by Congress to "weed out copycat actions" and to "eliminate opportunistic relators." *Id.* at *11. The first-to-file bar, he concluded, was intended primarily to "protect the

first relator who files." *Id.* He feared that if the first-to-file bar is interpreted broadly (so as to cover situations in which the original *qui tam* action was no longer pending), it would upset the "balance" established by the public-disclosure bar—which was intended to protect suits filed by an "original source" even as it barred "parasitic" suits filed by relators whose allegations were already widely known. *Id.* Judge Srinivasan's concerns highlight the importance of granting review in this case as well as in *Carter*. Doing so will allow the Court to consider application of both the public disclosure bar and the first-to-file bar to *qui tam* cases whose allegations (as here) are highly similar to allegations raised in a previously filed (but no longer pending) lawsuit, and thereby ensure that the two provisions are interpreted harmoniously.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW SERIOUSLY UNDERMINES CONGRESS'S PURPOSES IN ADOPTING THE PUBLIC-DISCLOSURE BAR

"The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In 1986, after over 100 years of living with two very different extremes—one (before 1943) that allowed parasitic *qui tam* relators to cut and paste allegations from the Government's own pleadings and another (after 1943) that disallowed *qui tam* suits

where the Government had knowledge of the information even if the relator was the Government's source—Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the "public disclosure" bar codified in 31 U.S.C. § 3730(e)(4).

This provision states in full:

> 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 [sic] 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).[4]

To understand fully what this provision was designed to do, it is important to understand the history of the FCA's *qui tam* provisions and what led Congress

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[4] An "original source" for purpose of § 3730(e)(4) is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The "original source" analysis is wholly separate from the public-disclosure analysis and only comes into play if there indeed is a "public disclosure" within the meaning of § 3730(e)(4)(A).

to include the public-disclosure bar in the 1986 amendments.

As originally drafted, the FCA's *qui tam* provisions were very permissive, as well illustrated by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the FCA, and requested his statutory share (then half) of any subsequent civil judgment. *Id.* at 545. The relator ultimately prevailed in this Court. In response, Congress amended the FCA to bar *qui tam* actions "based on evidence or information the Government had when the action was brought." Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

Nearly 40 years later, the pendulum had swung the other way, as illustrated in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In that case, the court of appeals refused to allow the State of Wisconsin (an original source) to act as a *qui tam* relator in a Medicaid fraud action because, the court held, the FCA barred *qui tam* actions "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge." *Id.* at 1103. As this Court explained, "In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled." *Graham*, 559 U.S. at 294.

Whereas the *Marcus* case was responsible for the 1943 amendments to the FCA, the *Dean* case was a key

motivator for the 1986 amendments. Congress was keenly aware of both extremes—as exemplified by the *Marcus* and *Dean* cases—and used this history to shape what would become the public disclosure bar in the 1986 amendments to the FCA. With the 1986 amendments, Congress's "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991). The new public-disclosure bar was designed, as *Graham* explained, to obtain "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham*, 559 U.S. at 294 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

Under § 3730(e)(4)(A), the first step in the public disclosure inquiry is for a court to determine whether the *qui tam* relator's complaint is based on allegations or transactions that have been publicly disclosed. Several circuit courts have concluded that this initial analysis is meant to be a "quick trigger" test that, if necessary, will lead to the more nuanced "original source" analysis required under § 3730(e)(4)(B). *See, e.g., Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996).

A. The Public-Disclosure Bar Focuses on the Nature and Extensiveness of the Public Disclosure, Not on Whether the Relator Relied Directly on the Disclosure

Section 3730(e)(4)(A) makes clear that not just any public disclosure of alleged false claims triggers the public-disclosure bar. Rather, the bar is triggered only if the disclosure is of a type likely to be widely read and thus likely to come to the attention of federal law enforcement officials. That sort of limitation makes eminent sense; a relator contributes significantly to the exposure of fraud if previous public disclosures of the fraud were conveyed to only a handful of people. On the other hand, his suit can legitimately be termed "parasitic" if it is based on allegations that have been widely reported and thus are likely to be well known to federal officials.

Most of § 3730(e)(4)(A) is devoted to setting forth three categories of "public disclosures" that can trigger the public-disclosure bar:

Category 1: "a criminal, civil, or administrative hearing";

Category 2: "a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation"; or

Category 3: "the news media."

The statute includes no suggestion that the bar is

inapplicable unless there exists some relationship between the relator and the public disclosure. Indeed, § 3730(e)(4)(A) includes no references whatsoever to the relator.

The Fourth Circuit focused its interpretation of the public-disclosure bar on the words "based upon," which appear in the opening clause of § 3730(e)(4)(A). It concluded from those words that Congress intended to limit the public disclosure bar to those situations in which not only was there a public disclosure falling into one of the three statutory categories but also that the relator "actually derived" his knowledge of the alleged fraud from that public disclosure. Pet. App. 18a.

B. The Fourth Circuit's Interpretation of the Public-Disclosure Bar Conflicts with Decisions from Numerous Other Federal Appeals Courts

The Petition explains in detail the extent of the conflict between the Fourth Circuit and other federal appeals courts regarding the meaning of the public-disclosure bar and, in particular, the meaning of the words "based upon." Pet. at 7-9 ("[T]he Fourth Circuit has adopted a reading that has been rejected by all ten of the other circuits that have expressly addressed the issue."). WLF will not repeat that explanation.

Suffice to say, review is warranted to resolve a circuit split that not only is sharp but also is unlikely (in light of the Fourth Circuit's long-standing commitment to its minority view) to resolve itself without this Court's intervention. Other circuits have concluded

that a public disclosure of the sort identified in § 3730(e)(4)(A) is sufficient to trigger the bar without regard to whether the relator learned about the fraud from the public disclosure. The Fourth Circuit disagrees, even while explicitly acknowledging that "most other circuits" have rejected its interpretation of the statute and instead "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." Pet. App. 18a.

Review is also warranted in light of the considerable tension between the decision below and this Court's decisions in *Graham* and *Schindler Elevator*. Both of those decisions addressed the scope of the pre-2010 public-disclosure bar. Although neither decision directly addressed the meaning of § 3730(e)(4)(A)'s "based on" language, both decisions proceeded on the assumption that the relevant inquiry—when determining whether the public-disclosure bar is applicable—is whether a public disclosure of the types enumerated in the statute had occurred, not whether the relator's knowledge had derived from that disclosure. The Court's assumption was that Congress adopted the public disclosure bar to prevent opportunistic bounty hunters from filing *qui tam* actions when the allegations they were raising had been previously disclosed in a manner that would likely have brought those allegations to the attention of federal authorities.

In determining whether an administrative report prepared by a *state* agency fit within § 3730(e)(4)(A)'s second category of public disclosures, *Graham* focused

repeatedly on whether such reports were generally distributed on a sufficiently wide basis to make it likely that they would come to the attention of federal authorities. *See, e.g.*, 559 U.S. at 291 (public-disclosure bar's reference to disclosures contained in an "administrative . . . report, hearing, audit, or investigation" should be understood to apply to state publications as well as to federal publications, in part because such state publications are "just as likely to put the Federal Government on notice of a potential fraud" as other public disclosures indisputably encompassed by the bar). Moreover, *Graham* repeatedly emphasized that once a court has determined that relevant information has entered the public domain through one of the enumerated channels, the § 3730(e)(4)(A) inquiry is over; the Court said nothing to suggest that the defendant must also demonstrate that allegations contained in the relator's complaint were derived directly from the public disclosure. *See, e.g., id.* at 285 (the bar "deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels"); *id.* at 292 ("It is the fact of 'public disclosure'—not Federal Government creation or receipt—that is the touchstone of § 3730(e)(4)(A)"); *id.* at 300 ("The statutory touchstone, once again, is whether the allegations of fraud have been 'public[ly] disclos[ed],' § 3730(e)(4)(A).").

Schindler Elevator, which considered whether responses to Freedom of Information Act requests should be deemed "administrative . . . reports" (thus falling within the second category of "public disclosures" enumerated in § 3730(e)(4)(A)) is to the

same effect. It directly quotes *Graham*'s admonition that the public-disclosure bar deprives courts of jurisdiction over *qui tam* suits once "the relevant information" has entered the public domain through one of the channels enumerated in the statute. 131 S. Ct. at 1895. Review is warranted in light of the considerable tension between the decision below and this Court's public-disclosure bar decisions.

C. Review Is Warranted Because the Decision Below Is Incorrect

Review is also warranted because the Fourth Circuit's interpretation of the public-disclosure bar is clearly wrong. As applied to this case, the bar provides that federal courts lack jurisdiction over FCA *qui tam* claims "based upon" the "public disclosure of allegations or transactions" from a variety of sources, including disclosures made during a civil hearing. 31 U.S.C. § 3720(e)(4)(A). The appeals court held that an FCA lawsuit is not "based upon" such public disclosures unless the relator actually derived his/her knowledge of the underlying allegations or transactions from that public disclosure. Thus, according to the appeals court, the suit can proceed—regardless of how much pre-suit publicity the allegations/transactions have received—if the relator obtained his information based on conversations with the person who filed the prior lawsuit, or with the author of the relevant government report, or with the newspaper reporter who wrote the relevant news media account.

As other appeals courts have pointed out, that is not a plausible interpretation of § 3720(e)(4)(A) because

it essentially writes the "original source" exception out of the statute. While the Fourth Circuit's interpretation of "based upon" is plausible when those words are examined in isolation, it violates *Graham*'s admonition that courts should seek to discern congressional intent by construing entire statutes, "not isolated provisions." 559 U.S. at 290. As the Seventh Circuit explained:

> If "based upon" means "actually derived from," . . . it is hard to understand the import of the "independent knowledge" component of the original-source exception; a relator who "actually derived" his allegations of fraud from (and therefore "based" his allegations "upon") information in the public domain could never avoid the jurisdictional bar by showing that he has "independent knowledge" of the fraud. Put another way, following [the] minority interpretation of "based upon," once a court concludes that a lawsuit is actually derived from publicly disclosed information, asking the original-source question never affects the jurisdictional result.

Glaser v. Wound-Care Consultants, Inc., 570 F.3d 907, 916 (7th Cir. 2009).

Moreover, the decision below is inconsistent with the "golden mean," *Graham*, 559 U.S. at 294, that Congress sought to forge in 1986—a balance between adequate incentives for whistleblowers and discouragement of parasitic lawsuits. The principal impetus for the 1986 legislation was a desire to overturn the Seventh Circuit's *Dean* decision, which had

dismissed claims by a relator because the allegations in the complaint were publicly disclosed before suit was filed. Many commentators criticized *Dean* because it failed to recognize any exception for an original source of information, which the relator in *Dean* had clearly been. But while all agree that a principal purpose of the 1986 amendments was to create an original-source exception, there is no indication in the legislative history that Congress intended to authorize a post-public disclosure *qui tam* suit by an individual who is not an original source but whose knowledge of the information in his complaint happens not to have been directly derived from the public disclosure. Indeed, authorization of such suits would have been inconsistent with Congress's intent to prevent opportunistic lawsuits by individuals who do not provide any new information to the federal government.

D. The Scope of the Public-Disclosure Bar Is an Important Issue

Review is also warranted in light of the importance to the business community of the questions presented by the Petition. The number of FCA *qui tam* cases filed annually has increased significantly in recent years, and the large dollar value of FCA judgments entered each year provides strong evidence of the value placed by businesses on FCA defenses such as the public-disclosure bar. According to the Justice Department, new FCA *qui tam* lawsuits have averaged nearly 700 per year over the past three fiscal years, more than double the average from a decade earlier. During that same period, funds collected in connection with judgments and settlements entered in *qui tam*

cases averaged more than $3 billion per year. *See* Civil Division, DOJ, *Fraud Statistics—Overview* (Oct. 1, 1987 - September 30, 2013).

The fact that Congress has amended the public-disclosure bar does not lessen the importance of the circuit conflict over the meaning of the old version of the bar. Indeed, the great majority of cases being filed in the Fourth Circuit today continue to be subject to the pre-2010 version of the public-disclosure bar. The court below ruled that the old version applies to any lawsuit whose allegations pre-date adoption of Congress's amendment of the public-disclosure bar in March 2010. That rule ensures that the many new *qui tam* complaints whose allegations stretch back several years will be subject to the pre-2010 version for many years to come.

To test just how frequently such stretch-back cases arise, WLF undertook a survey of randomly selected *qui tam* complaints filed within the Fourth Circuit in 2011 and 2012.[5] Among the 27 complaints

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[5] The cases examined were those listed on the *False Claims Act Tracker*, a database maintained by the research firm Navigant. The database (available at http://www.navigant.com/insights/library/disputes_and_investigations/2013/false-claims-act-case-tracker-sept-2013) lists FCA lawsuits filed throughout the nation between 2007 and 2012. The database listed 27 *qui tam* suits filed within the Fourth Circuit in 2011 and 2012. Those 27 lawsuits represent only a small (but nonetheless randomly selected) percentage of the overall filings, because: (1) the database does not capture cases that are still under seal because the U.S. has not yet decided whether to intervene; and (2) it also does not capture cases until the parties file a dispositive motion that is reported on the Lexis-Nexis database.

examined, the allegations stretched back an average of 4.3 years. Assuming that that average has remained constant, the typical *qui tam* complaint being filed within the Fourth Circuit today (less than 4.3 years after § 3720(e)(4)(A) was amended in March 2010) is still subject to the pre-2010 version of the public-disclosure bar. One then must factor in the lengthy delays experienced in all FCA *qui tam* lawsuits. For example, *qui tam* cases are automatically stayed after being filed (typically, for several years), during which time the U.S. examines the allegations and decides whether to intervene. Those delays, when added to the time it takes for a civil case to proceed through the district court and on to the Fourth Circuit, mean that one can safely conclude that many of the FCA *qui tam* appeals being heard by the Fourth Circuit as late as the 2020s will still be subject to the version of the public-disclosure bar at issue in this Petition.

II. REVIEW OF THE FIRST-TO-FILE ISSUE IS ALSO WARRANTED IN LIGHT OF A RECENTLY CREATED CIRCUIT SPLIT

The Fourth Circuit's interpretation of the first-to-file bar also warrants review. The need for review of that interpretation increased dramatically two weeks ago, when the D.C. Circuit issued a decision expressly disagreeing with the Fourth Circuit's interpretation of the first-to-file bar. The D.C. Circuit held that the bar applies even when (as here and in that case) the previously filed FCA action has been dismissed and thus is no longer "pending" in federal court. *United States ex rel. Shea v. Cellco Partnership*, ___ F.3d ___, 2014 WL 1394687 (D.C. Cir. 2014).

As the Petition notes, Question Two is also raised in a pending petition seeking review of the Fourth Circuit's *Carter* decision. *See* No. 12-1497 (petition filed June 24, 2013). The Court requested the views of the Solicitor General on that petition, and the United States is expected to file its brief within the next month. Accordingly, WLF concurs with Petitioners' request that the Court hold this Petition with respect to Question Two until it has an opportunity to act on the *Carter* petition.

WLF nonetheless notes that the D.C. Circuit's discussion of the first-to-file bar illustrates why it is important that the Court consider the public-disclosure bar and the first-to-file bar in tandem with one another. Of particular interest in this regard is Judge Srinivasan's opinion dissenting in part. He explicitly agreed with the Fourth Circuit's conclusion that the first-to-file bar is operative only for as long as the first *qui tam* action remains undecided. *Shea*, 2104 WL 1394687, at *8 (Srinivasan, J., dissenting in part). He reasoned that the public-disclosure bar, not the first-to-file bar, was the primary means employed by Congress to "weed out copycat actions" and to "eliminate opportunistic relators." *Id.* at *11. The first-to-file bar, he concluded, was intended primarily to "protect the first relator who files." *Id.* He feared that if the first-to-file bar is interpreted broadly (so as to cover situations in which the original *qui tam* action was no longer pending), it would upset the "balance" established by the public-disclosure bar—which was intended to protect suits filed by an "original source" even as it barred "parasitic" suits filed by relators whose allegations were already widely known. *Id.*

Judge Srinivasan's concerns highlight the importance of granting review in this case as well as in *Carter*. Doing so will allow the Court to consider application of both the public-disclosure bar and the first-to-file bar to *qui tam* cases whose allegations (as here) are highly similar to allegations raised in a previously filed (but no longer pending) lawsuit, and thereby to ensure that the two provisions are interpreted harmoniously.

CONCLUSION

WLF respectfully requests that the Court grant the Petition.

Respectfully submitted,

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