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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

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Purdue's petition presents three questions. Two of those questions—one involving the interpretation of the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), and one involving the interpretation of the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287—are substantively identical to questions that the Court has taken up in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, No. 12-1497 (cert. granted July 1, 2014). The petition should therefore be held pending the decision in *Carter*, and then disposed of as appropriate. Relators' contrary arguments are meritless.

ARGUMENT

I. THE PETITION SHOULD BE HELD FOR *CARTER*

Relators assert that a hold for *Carter* is not warranted because factual differences between that case and this one supposedly mean that "the resolution of the first-to-file question in *Carter* w[ill] not *necessarily* be dispositive of the first-to-file question" here. Opp. 7 (emphasis added). That assertion is belied by the fact that the Fourth Circuit rejected Purdue's first-to-file argument entirely on strength of *Carter*, without any hint that factual differences between the two cases bore on its resolution of this issue. *See* Pet. App. 22a.

More fundamentally, the stringent standard for a hold that relators posit does not exist. The reason to hold Purdue's petition is that if the Court reverses on either question in *Carter*, then the proper course here will be to "GVR," i.e., grant the petition, vacate the judgment below, and remand for further consideration in light of *Carter*. And contrary to relators' suggestion, a GVR does not require that the decision in *Carter* "necessarily" compel a different result on remand. Opp. 7. All that is required is "a 'reasonable probabil-

ity' that the Court of Appeals would reject a legal premise on which it relied." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)); *see also Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (explaining that the Court had previously GVR'd because it viewed the intervening precedent as "sufficiently analogous and, perhaps, decisive to compel re-examination of the case"). Relators' own phrasing confirms that that standard is met here. *See* Opp. 7, *quoted supra* p.1; *see also* Opp. 6 (asserting that the facts here are different from those in *Carter* "in a *potentially* determinative way" (emphasis added) (capitalization altered)).

As to the WSLA question, relators do not similarly suggest that the impact of the Court's ruling in *Carter* could be affected by any factual differences between that case and this one.[1] Relators instead argue that a hold is unwarranted because the case has not reached final judgment and thus the WSLA question supposedly "is not ripe for review." Opp. 4. That is meritless. This Court frequently holds petitions (and then grants, vacates, and remands) in cases that have not reached final judgment. To take just one example, last Term this Court held several petitions pending its decision in *Fifth Third Bancorp* v. *Dudenhoefer*, 134 S. Ct. 2459 (2014). Those included the petition in *Amgen Inc.* v. *Harris*, No. 13-888 (U.S.), a case that was in an interlocutory posture because the court of appeals had—as here—reversed the district court's dismissal of the

[1] Relators imply otherwise at the outset, stating that "this Court's rulings [plural] in *Carter* might have little or no dispositive effect" here. Opp. 1. Relators' actual argument on this point, however, addresses only the first-to-file issue. *See* Opp. 6-7.

complaint. *See Harris* v. *Amgen, Inc.*, 738 F.3d 1026, 1030 (9th Cir. 2013) (subsequent history omitted). And after it decided *Fifth Third*, the Court granted, vacated, and remanded in *Amgen*. *See Amgen Inc.* v. *Harris*, 134 S. Ct. 2870 (2014). If the Court reverses in *Carter*, the same result will be warranted here.[2]

Relators argue more specifically, however (Opp. 4), that neither the district court nor the Fourth Circuit has yet addressed their equitable tolling argument, which is an alternative ground for avoiding the statute of limitations.[3] But given the Fourth Circuit's WSLA ruling, neither lower court will have occasion to address equitable tolling here *unless* that ruling is set aside. Equitable tolling thus provides no basis to deny either plenary review or a hold for *Carter*.[4]

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[2] The posture of this case is likewise not an impediment to plenary review, as relators suggest (Opp. 2-3). This Court often grants certiorari in cases that have not reached final judgment—including *Carter* itself. *See also, e.g.*, *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009); *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527 (2008); *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004). Review in such cases is appropriate if the petition presents an "important and clear-cut issue of law that is fundamental to the further conduct of the case … — particularly if the lower court's decision is patently incorrect." Shapiro et al., *Supreme Court Practice* 283 (10th ed. 2013) (collecting authorities). That is the situation here.

[3] Relators accuse Purdue of "fail[ing] to note" that they "have pled that the statute of limitations has been equitably tolled." Opp. 2. That is wrong. *See* Pet. 21 ("In the district court, relators initially responded that the limitations period should be equitably tolled.").

[4] Relators state (Opp. 4) that the alleged misconduct here ran from 1996 to 2009. The one assertion in the operative complaint

Relators also suggest (Opp. 4) that the petition should not be held for *Carter* because "[n]either the district court[] nor the court of appeals addressed or applied the WSLA in this case." That is incorrect as to the Fourth Circuit (the district court indeed did not reach the WSLA issue, because it dismissed the complaint on other grounds), but even if it were correct it would not support relators' request for immediate denial of the petition. What matters for these purposes is whether an issue was "pressed or passed upon" below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive." *Id.* Hence it is sufficient that the WSLA issue was properly raised below. Relators do not dispute Purdue's showing (Pet. 21-22) that it was.

Relators' only other arguments regarding the WSLA and first-to-file issues (i.e., regarding a hold) are that the Fourth Circuit's ruling on each issue was correct. Those arguments are unavailing, but regardless they do not provide any basis for declining to hold the petition for *Carter*. It is of course unknown what the Court will decide in *Carter*, and simply assuming what the outcome will be is unwarranted. (Otherwise the Court could just as easily grant, vacate, and remand now, based on the possibility of a reversal.) Once this Court has resolved in *Carter* whether the Fourth Circuit's first-to-file and WSLA rulings were correct, it

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that the alleged misconduct postdated 2004 (*see* Am. Compl. ¶ 35) is manifestly inadequate as a matter of law, and thus as Purdue stated (*see* Pet. 21 & n.9), a reversal on the WSLA question would essentially eviscerate their case. Even if relators' view regarding the scope of their claims were correct, however, a reversal on the WSLA question would still drastically curtail those claims. Relators' argument is therefore not a valid reason to deny review (or a hold).

can dispose of this petition appropriately. But that requires holding the petition until the case is decided. That is the proper course.

II. RELATORS' REMAINING ARGUMENTS LACK MERIT

A. Public Disclosure

Relators advance three arguments regarding Purdue's challenge to the Fourth Circuit's interpretation of the public-disclosure bar, 31 U.S.C. § 3730(e)(4)(A) (2009): (1) that the issue is "unripe for review" because the Fourth Circuit remanded to the district court for further fact-finding, Opp. 3; (2) that Congress's 2010 amendment of the public-disclosure bar renders the issue unimportant, Opp. 5-6; and (3) that the Fourth Circuit's interpretation is correct, Opp. 8-10. Each argument fails.

1. The possibility that the district court will make findings that bring relators' claims within the scope of the public-disclosure bar does not preclude a grant of certiorari here. If this Court were to grant review and reverse the Fourth Circuit's interpretation of the bar, then there would be no need for further proceedings on remand. Purdue (and the lower courts) should not be forced to engage in (or oversee) burdensome discovery and other litigation based on an erroneous construction of the statute. More generally, as explained the interlocutory posture is not a bar to review of the ruling below. *See supra* n.2 (citing *Carter*, among other cases).

2. Relators fare no better in arguing that review should be denied because of Congress's 2010 revision of the public-disclosure bar. In fact, relators do not answer any of the points Purdue made (Pet. 15-16) regarding why the revision does not diminish the need for this Court's review. In particular, they ignore the criti-

cal point that the Fourth Circuit's public-disclosure ruling will continue to have great import for years to come because of the court's other rulings, including its WSLA interpretation, which tolls the statute of limitations on FCA claims at least as far back as 2001, and possibly earlier. The need for review here is thus significantly stronger than in other cases—also ignored by relators—in which the Court has "granted certiorari to address statutory or regulatory provisions that were no longer in effect." Pet. 15 (citing *Judulang* v. *Holder*, 132 S. Ct. 476 (2011), and *Chase Bank U.S.A., N.A.* v. *McCoy*, 562 U.S. 195 (2011)).

Relators do say (Opp. 6) that "there has been twenty years of experience under the *Siller* regime in the Fourth Circuit," yet the "sky is [not] falling." But relators ignore the extended discussion in the amicus brief of PhRMA et al. (at 19-23) about the harm caused by the explosion in recent years of meritless *qui tam* litigation, and of the ways in which the Fourth Circuit's interpretation of the public-disclosure bar contributes to that harm. Moreover, it was only last year that the Fourth Circuit construed the WSLA in *Carter* to greatly (if not indefinitely) extend the statute of limitations for FCA claims. Relators' attempt to portray this as a 20-year-old problem is therefore untenable.[5]

3. Relators' contention that the Fourth Circuit interpreted the public-disclosure bar properly would not be a reason to deny certiorari even if it were correct,

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[5] Relators dismiss (Opp. 6) Purdue's discussion of the enormous sums of money involved in FCA litigation. But as common sense suggests, and as the amicus brief of PhRMA et al. confirms, the billions of dollars at issue cannot simply be waved away as "hype." *Id.*

given the deep circuit conflict and the importance of the issue. But it is not correct.

As explained in the petition (at 10-12), the Fourth Circuit's reading renders superfluous the "original-source" exception to the public-disclosure bar. In arguing otherwise, relators rely on: a Third Circuit dissent, a since-overruled Seventh Circuit decision, and a law review article. *See* Opp. 8-10. While those authorities speculate about ways the original-source exception might have meaning under the Fourth Circuit's reading, none of them cites any real example to support that speculation, i.e., any case in which a court held that the relator's allegations fell within the scope of the public-disclosure bar yet the relator satisfied the original-source exception. *See* Pet. 11 n.4 (noting that the Fourth Circuit has apparently never so held). In fact, in the Seventh Circuit case that relators cite, the court stated that the argument relators make here was "[f]air enough—in theory." *United States* v. *Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999), *overruled by Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009). Mere theorizing is insufficient to overcome the concrete problem with the Fourth Circuit's interpretation that virtually every circuit in the country has recognized. *See* Pet. 7-9.

It is far from clear, moreover, that relators' argument is sustainable even as a theoretical matter. The view of the Third Circuit dissent that relators cite was that the original-source exception might not be superfluous if the public-disclosure bar were interpreted to cover a relator whose allegation of fraud was based even in part on publicly disclosed information. *See United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376, 399 (3d Cir. 1999) (Becker, C.J., dissenting). But as then-Judge Alito explained for

the court in response, "the dissent ma[de] no effort to explain how this interpretation [of the public-disclosure bar] can be made to fit the language of" the statute. *Id.* at 387 (majority opinion). And the only case that the dissent cited as having adopted that interpretation has since been overruled. *See id.* at 399 (Becker, C.J., dissenting) (citing *Bank of Farmington*, 166 F.3d at 863). In short, relators' effort to overcome a fatal flaw in the Fourth Circuit's public-disclosure analysis falls short.

Equally infirm is relators' assertion (Opp. 10) that "[t]he Fourth Circuit's construction of the public-disclosure bar furthers its purposes." According to relators, it does this by allowing individuals "who learn of fraud from family and co-workers who themselves might be unwilling or not in a position to serve as a relator" to file suit. *Id.* But there is no sound reason to permit such lawsuits, because in these situations the alleged fraud is (by assumption) already known to the government. Relators suggest, again relying principally on a dissenting opinion, that such lawsuits are "valuable" even though they do not alert the government to alleged fraud, because the government will still be entitled to a share of any recovery. Opp. 12. But that ignores the fact that the overwhelming majority of FCA actions that the government declines to join—which would surely include cases making allegations of fraud that the government was previously aware of—result in no recovery whatsoever. *See* Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 974-975 & tbl. 2 (2007) (of nearly 2,600 FCA actions that were filed between late 1987 and late 2004 and that the government declined to join, 92 percent were dismissed and only 6 percent resulted in recovery, via a settlement or judgment). *All* of these lawsuits, however, impose costs on

defendants and the courts. That the Fourth Circuit's interpretation of the public-disclosure bar makes it easier to bring such meritless yet burdensome lawsuits is still further evidence that the interpretation is wrong and not consistent with Congress's purposes.

B. First-To-File And WSLA

Relators spend the majority of their brief (Opp. 10-21) arguing that the Fourth Circuit's WSLA and first-to-file rulings are correct. Because this Court has granted review of both rulings in *Carter*, those arguments are of no immediate consequence. The Court will soon receive comprehensive briefing on both issues, not only from the parties in *Carter* but also from the United States and other amici, and it will presumably resolve the propriety of the Fourth Circuit's rulings based on that briefing. Purdue thus will not burden the Court with a point-by-point refutation. Purdue simply notes the extent to which relators' arguments rely on dissenting opinions, *see* Opp. 10, 11, 12; Senate reports (erroneously described more than once as embodying the views of "Congress," Opp. 15); and statements by individual members of Congress, *see* Opp. 15, 16; *compare, e.g.*, *United States* v. *Trans-Mo. Freight Ass'n*, 166 U.S. 290, 318 (1897) (noting "a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body"); *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 457 n.15 (2002) (similar). Most of relators' arguments are also addressed in the supplemental brief that Purdue filed in this case in response to the government's invitation brief in *Carter*.

CONCLUSION

The petition should be held pending this Court's decision in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, No. 12-1497. The Court should then either grant the petition, vacate the judgment below, and remand for reconsideration in light of *Carter*, or else grant the petition for plenary review.

Respectfully submitted.

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