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

PETITIONERS' SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

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STATUTES AND RULES

Petitioners (hereafter Purdue) submit this brief in response to the government's recently-filed invitation brief in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, No. 12-1497. Both questions presented in *Carter* are also presented here (along with a third question) and the Court appears to be holding Purdue's petition pending the disposition in *Carter*.

ARGUMENT

I. THE FIRST-TO-FILE QUESTION WARRANTS REVIEW

A. Purdue's second question presented is whether the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), precludes a later-filed action based on the same facts as an earlier-filed action only until the latter is finally resolved. The government's invitation brief acknowledges (at 20-22) that the circuits are divided over that question. The government argues, however, that review should be denied because the division may soon resolve itself, via a rehearing by the en banc D.C. Circuit in *United States ex rel. Shea* v. *Cellco Partnership*, No. 12-7133. But for that to occur, the court would have to both grant rehearing and depart from the panel's first-to-file ruling. That is too contingent a scenario for this Court to decline review—thereby forcing Purdue and many other defendants to continue litigating (or perhaps settle) costly FCA claims for months or years to come.

Even if the circuit conflict resolved itself, moreover, the situation would then essentially be the same as when this Court invited the government's brief. The Court thus evidently viewed the question as potentially warranting review despite the absence of a conflict, perhaps because of the question's importance and recurring nature—and the flaws in the Fourth Circuit's

analysis. *See* S. Ct. R. 10(c). That judgment was correct.[1]

B. 1. The government's arguments on the merits of the question are unavailing. The government first contends (Br. 18) that under the first-to-file bar's "plain terms, a *qui tam* suit is barred when a 'related action' is 'pending.'" That would be correct if the bar stated that a later action is foreclosed if the earlier action "is still pending" when the later action is commenced. But it does not say that. It 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). Hence, the bar attaches "[w]hen a person brings an action," and thereafter precludes any action related to the one that was pending *when the bar attached*. *See Shea*, 2014 WL 1394687, at *5 (D.C. Cir. Apr. 11, 2014).[2] Nothing in the definition of "pending" offered by the government (a definition that is not in dispute) is inconsistent with that interpretation—an interpretation the government never addresses.

The partial dissent in *Shea* relatedly asserted that under the majority's reading, the word "pending" is superfluous. *See* 2014 WL 1394687, at *8 (op. of Srinivasan, J.). That is incorrect. The first-to-file bar discusses two different actions, the earlier-filed one and the later-filed one. The word "pending" (which modifies "action" in the provision) specifies which of those two is

[1] The Court has not requested a response to Purdue's petition. The circuit conflict on Purdue's first question presented (*see* Pet. 7-9) is by itself sufficient reason to do so. That approach would also allow the Court to learn, before having to dispose of Purdue's petition, whether the D.C. Circuit will rehear *Shea*.

[2] *Shea* was decided after Purdue filed its petition.

being referenced. While the partial dissent's view was that even without the modifier, there would be "no great mystery" about what "action" was being referenced, *id.*, it was within Congress's purview to conclude that the added clarity was indeed necessary, or even just desirable.

2. The government also argues (Br. 19) that its reading "makes good sense." This argument, however, rests on the premise that the first-to-file bar serves only the two (carefully worded) purposes identified by the government. That premise is infirm.

a. According to the government (Br. 19), the bar's first purpose is preventing the dilution of the first-filing relator's recovery. But that is not an end in itself. Rather, it furthers the actual purpose of the first-to-file bar (and of the *qui tam* provisions generally): fostering government awareness of fraud while minimizing follow-on lawsuits, which hurt the public by diverting a portion of any recovery away from the Treasury. *See, e.g.*, *United States ex rel. Heineman-Guta* v. *Guidant Corp.*, 718 F.3d 28, 35 (1st Cir. 2013) (citing *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011)); *Makro Capital of Am., Inc.* v. *UBS AG*, 543 F.3d 1254, 1259 (11th Cir. 2008). The proper question, then, is not which reading of the statute better avoids dilution of the first relator's recovery. (Nor is that question helpful, as both readings do so equally well.) The question is which reading better fosters government awareness of fraud while minimizing follow-on lawsuits.

The answer is that Purdue's does: That reading, unlike the government's, ensures that *only* the first relator can enjoy any recovery. It thus provides a stronger incentive for relators to sue promptly, which

increases government awareness of fraud. *See, e.g.*, *United States ex rel. St. John LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) ("[S]ection 3730(b)(5) creates a race to the courthouse among eligible relators, [which] may … spur the prompt reporting of fraud." (omission and second alteration in original)). Purdue's reading of the first-to-file bar also does more to reduce follow-on actions.

The government denies that its reading will discourage races to the courthouse, asserting (Br. 20) that a *different* FCA provision—the public-disclosure bar, 31 U.S.C. § 3730(e)(4)(A)—will still spur such races. Even if that were true, it would not justify adopting the government's reading, because as noted (and the government does not dispute the point), that reading allows more follow-on lawsuits, which reduce the public's share of FCA recoveries.

In any event, the government's reliance on the public-disclosure bar simply underscores the need for review in this case. As explained in Purdue's petition (at 9-16), the Fourth Circuit, where many potential FCA defendants are located, continues to embrace an unduly narrow reading of the pre-2010 version of the public-disclosure bar, a version that will apply for years to come because of the court's expansive interpretation of the Wartime Suspension of Limitations Act (discussed below). That narrow reading all but eliminates the risk that the government says will spur prompt reporting under its reading of the first-to-file bar. The risk the government points to (Br. 20) is that a fraud will be publicly disclosed by the first lawsuit, thereby precluding later ones under the public-disclosure bar. But under the Fourth Circuit's reading of that bar, public disclosure is not enough to foreclose a later action. The later relator must have learned of the fraud *from* the

public disclosure (i.e., the earlier lawsuit). *See* Pet. 5-6. If instead she learned the relevant facts from any other source, such as conversations with the earlier relator—as respondents in this case assert—the public-disclosure bar does not apply. The government's claim that the public-disclosure bar ensures that its reading of the first-to-file bar will not discourage prompt reporting therefore fails, at least as long as the Fourth Circuit's reading of the public-disclosure bar is allowed to stand.[3]

The partial dissent in *Shea* ventured a different argument based on the public-disclosure bar, contending that the majority's reading of the first-to-file bar undermines Congress's retention of an "original-source" exception. *See* 2014 WL 1394687, at *11-12 (op. of Srinivasan, J.); *see also* 31 U.S.C. § 3730(e)(4)(A)-(B) (original-source exception). That is meritless. The original-source exception is an exception to the public-disclosure bar; it reflects Congress's judgment that individuals who possess information about fraud that is independent of the information already in the public domain should not be precluded from recovery *by that bar*. But that does not mean Congress also intended those people to be exempt from a separate bar—and the fact that Congress put the original-source exception only in the public-disclosure bar suggests the opposite.[4]

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[3] Whether that reading should stand is the first question presented here (a question on which there is an established circuit conflict). Because this case, unlike *Carter*, thus presents the full picture of how the Fourth Circuit has gone astray in interpreting the FCA, *see* PhRMA Br. 3-5, the Court should grant review here as well as in *Carter*.

[4] The partial dissent in *Shea* was therefore wrong in stating that *any* lawsuit by an original source is one "Congress specifically sought to allow." 2014 WL 1394687, at *12 (op. of Srinivasan,

Refusing to extend the exception to the first-to-file bar, moreover, is entirely sensible, because original sources should have the same incentive to file promptly (i.e., to disclose fraud) as other relators.[5]

b. The second purpose of the first-to-file bar identified by the government (Br. 19) is "protect[ing] the defendant from facing multiple, simultaneous *qui tam* actions regarding the same alleged misconduct." The government never explains, however, why such protection should be limited to simultaneous actions. As this case starkly illustrates, multiple *sequential* lawsuits are hardly less burdensome for defendants than simultaneous ones. (Indeed, they are generally more so, because sequential actions cannot be joined and litigated together.) Nor is there any reason to limit the protection to simultaneous actions: With the government alerted to the alleged fraud by the first action, no legitimate purpose is served by allowing subsequent lawsuits, even if the first action is fully resolved. *See United States ex rel. Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004), *quoted in* Pet. 19. If an allegation of fraud appears to have merit, after all, the government can file suit itself. As noted, that helps taxpayers by avoiding any need to share any recovery.[6]

J.). Again, Congress intended only that original sources' lawsuits not be foreclosed by the public-disclosure bar.

[5] Refusing to extend the exception to the first-to-file bar obviously does not render it a nullity: The exception allows a relator to sue whenever allegations of fraud have been publicly disclosed but no prior lawsuit based on those allegations has been filed.

[6] The partial dissent in *Shea* twice suggested that the government might decline to pursue meritorious allegations of fraud because of "a lack of resources." 2014 WL 1394687, at *11, 12 (op. of Srinivasan, J.). The government notably does not make this ar-

In short, both Purdue and the government offer plausible interpretations of the first-to-file bar's text, but only Purdue's is consistent with that provision's purposes. The Fourth Circuit erred in rejecting that interpretation.

II. THE WSLA QUESTION WARRANTS REVIEW

Purdue's third question presented (and the first question in *Carter*) is whether the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, applies to a civil FCA claim brought by a private relator where the United States has declined to intervene. The government recommends against review, primarily on the ground (Br. 8-15) that the Fourth Circuit properly answered that question. That is not correct.

The WSLA tolls the statute of limitations for any "offense" against the United States, a word that refers to crimes rather than civil violations. The government disagrees, arguing (Br. 10 n.3) that "the term 'offense' sometimes encompasses civil violations and sometimes does not, and … the particular context in which the term appears may help to clarify its meaning." Even if that is true, the government all but ignores the most important "contextual clue[]" (*id.*) regarding the WSLA's use of "offense": the statute's placement in title 18, which concerns crimes.[7] Under this Court's precedent, that placement leaves no doubt that Con-

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gument in its invitation brief, and the partial dissent offered no evidence to support the notion that the government might not find the resources to pursue legitimate allegations of fraud—thereby forgoing the recovery that a successful FCA case would bring.

[7] By contrast, the government's examples of "provisions of the United States Code [that] use the word 'offense' to refer to a civil violation" (Br. 9) are all outside title 18.

gress intended to limit the WSLA to crimes. *See* Pet. 25; *Smith* v. *Doe*, 538 U.S. 84, 91 (2003) (giving weight to state statute's placement in particular code); *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) (same). Indeed, the government's brief confirms this. The government explains that the current federal conspiracy statute likely does not encompass conspiracies to commit civil violations because it "use[s] … the term 'misdemeanor' to describe less serious 'offense[s].'" U.S. *Carter* Br. 10 n.3 (second alteration in original) (quoting 18 U.S.C. § 371). As discussed in Purdue's petition (at 25-26), the same was true of title 18 when the WSLA was put there: At that time, the first section of title 18 likewise used "misdemeanor" to describe less serious "offenses," 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 misdemeanor." Pub. L. No. 80-772, 62 Stat. 683, 684 (1948) (then codified at 18 U.S.C. § 1 (repealed 1984)). By placing the WSLA in a title that defined "offense" in this way, Congress made clear its intent to limit the statute's reach to crimes.

The government's only response on this central point (Br. 10) is that the holding of *United States* v. *Hutto*, 256 U.S. 524 (1921), shows "that the word 'offense' is not limited to crimes, even when it appears within the Criminal Code." That is untenable. The law at issue in *Hutto* was the federal conspiracy statute, and thus the statute was in the criminal code for a reason independent of how Congress wanted "offense against the United States" to be construed—namely that conspiracy itself is a crime. By contrast, there was no reason for Congress to put the WSLA in title 18 *other than* to limit that law to crimes. That is dispositive.

The government next asserts (Br. 13) that "Congress has not taken any action since 1944 to limit the

WSLA's reach to crimes." That would be irrelevant even if true, because the question here is whether the WSLA has always been limited to crimes. If the statute was so limited when originally enacted in 1942, there would have been no need for Congress to adopt such a limitation later. But in any event the government is mistaken. As discussed, in 1948 Congress took the significant step of locating the WSLA in title 18, which codifies the federal criminal laws.[8]

The government also contends (Br. 13, 14) that "[a]pplying the WSLA to civil FCA violations furthers the WSLA's purpose[]" because that purpose—ensuring that the government is not hindered by the strains of war from uncovering fraud—"appl[ies] equally in the criminal and civil contexts." That argument, however, does not justify applying the WSLA in cases, like this one, that were brought by a private party and that the government has declined to join. *See* Pet. 28-29. In addressing this point, the government quickly shifts away from purpose, arguing instead (Br. 15) that "[n]othing in the WSLA's text … provides a basis for distinguishing between civil FCA suits brought by the United States and those brought by private relators." That is simply wrong. As explained in the amicus brief filed here by PhRMA and others (at 3-4, 7-8 & n.3), claims by relators are subject to an absolute six-year limitations period, *see* 31 U.S.C. § 3731(b)(1). FCA claims brought by the government, however, are subject to a tolling provision that can extend the limita-

[8] The government echoes (Br. 10-13) the Fourth Circuit's reasoning that the 1944 removal of "now indictable" from the WSLA evinces Congress's intent not to limit the law to crimes. That argument is addressed in the petitions here (at 27) and in *Carter* (at 13-15), as well as in the amicus brief filed in *Carter* by the National Defense Industrial Association (at 10-13).

tions period, up to a total of ten years. *See id.* § 3731(b)(2). Congress thus concluded that there are reasons to extend the limitations period in government-filed cases that do not apply to private actions (certainly actions in which the government declines to intervene). Refusing to extend the WSLA to private actions honors that congressional judgment. It also honors Congress's command that the limitations period in FCA cases be "in no event more than 10 years." *Id.* The Fourth Circuit's decision, in contrast, by effectively allowing indefinite tolling, derogates that judgment and command—as well as the more general "long-standing congressional 'policy of repose' that is fundamental to our society," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953), *quoted in* Pet. 26. The government's invitation brief notably ignores that "fundamental" countervailing policy.

Finally, the government argues (Br. 17) that review should be denied because it is "the uniform view of the courts of appeals" that the WSLA applies in cases like this. But the Fourth Circuit is the sole circuit to have addressed this issue in more than half a century. *See id.* at 15-16. And only two other circuit cases have *ever* addressed the question—one of which is not good law because it was reversed on other grounds (and in any event the WSLA ruling in that case was dicta). *See id.* at 15. In neither of the two older cases, moreover, did the court address the argument presented here, i.e., that the WSLA does not encompass civil violations. Nor did either case discuss this Court's statements supporting that argument. *See* Pet. 25 (citing *United States* v. *Smith*, 342 U.S. 225, 228-229 (1952); *Bridges*, 346 U.S. at 221). The government's invitation brief also ignores these statements. Given all this, what the government generously calls "the uniform view of the

courts of appeals" (Br. 17) is not a sound reason to deny certiorari. In light of the importance of the issue and the flaws in the Fourth Circuit's analysis, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted on all three questions presented.

Respectfully submitted.

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