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

*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 FOR AMICI CURIAE THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE BIOTECHNOLOGY INDUSTRY ORGANIZATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER


JAMES M. SPEARS
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, NW
Suite 300
Washington, DC 20004
(202) 835-3400

DOUGLAS HALLWARD-DRIEMEIER
*Counsel of Record*
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005
(202) 508-4600
*Douglas.Hallward-Driemeier@ropesgray.com*


[*additional counsel listed inside cover*]

TOM DILENGE
BIOTECHNOLOGY INDUSTRY ORGANIZATION
1201 Maryland Ave., SW
Washington, DC 20024
(202) 962-9200

RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

# In the Supreme Court of the United States

No. 13-1162

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

*v.*

UNITED STATES EX REL.
STEVEN MAY AND ANGELA RADCLIFFE

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

## MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the Pharmaceutical Research and Manufacturers of America (PhRMA), the Biotechnology Industry Organization (BIO), and the Chamber of Commerce of the United States of America (Chamber) move for leave to file the accompanying brief as amici curiae in support of petitioners. Counsel for petitioners has consented to the filing of this brief; counsel for respondents has not.

PhRMA is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. BIO is the world's largest trade association representing biotechnology companies, academic institutions, and state biotechnology centers. The Chamber is the world's largest business federation, representing 300,000 direct members

and indirectly representing the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

As potential targets of False Claims Act (FCA) litigation, amici's members have a direct, particular interest in the proper application of congressionally imposed limitations that bar untimely, duplicative litigation of previously disclosed allegations. The Fourth Circuit's decision below makes it an outlier among the courts of appeals, creating a perpetual forum for stale FCA claims that Congress intended to be precluded by one or all of the public disclosure bar, 31 U.S.C. 3730(e)(4)(A) (2006), the first-to-file bar, 31 U.S.C. 3730(b)(5), and the six-year statute of limitations on relators' claims, 31 U.S.C. 3731(b)(1). By dismantling these essential protections, the Fourth Circuit invites relators with only derivative knowledge of the allegations endlessly to file and refile meritless complaints, causing considerable uncertainty and imposing substantial litigation costs on businesses operating in the health-care, defense-contracting, and financial-services industries, all of which are frequent targets of relators under the FCA.

Amici's considerable interest in ensuring the proper application of the FCA gives them a strong interest in the resolution of this case. PhRMA and BIO filed a brief amici curiae in the court of appeals in support of a petition for rehearing en banc, and PhRMA and the Chamber filed a brief amici curiae on related topics in this Court in support of the pending petition in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter* (No. 12-1497).

For these reasons, amici respectfully move for leave to file the attached brief.

Respectfully submitted,

JAMES M. SPEARS
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

TOM DILENGE
BIOTECHNOLOGY INDUSTRY ORGANIZATION

DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP

RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued:



Statutes:

Statutes—Continued:



Miscellaneous:

# In the Supreme Court of the United States

NO. 13-1162

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

*v.*

UNITED STATES EX REL.
STEVEN MAY AND ANGELA RADCLIFFE

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

Amici curiae respectfully submit this brief in support of the petition for a writ of certiorari.[1]

## INTEREST OF AMICI

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discov-

[1] Counsel for each party was informed at least ten days prior to this brief's due date of amici curiae's intention to file this brief. Counsel for petitioner consented to the filing of this brief; counsel for respondents did not. Accordingly, amici are filing herewith a motion for leave to file this brief pursuant to Rule 37.2 of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

ering new medicines that enable patients to lead longer, healthier, and more productive lives, investing an estimated $51 billion in 2013 alone to develop pioneering new treatments. PhRMA's mission is to advance public policies that encourage innovative medical research on life-saving and life-enhancing medicines.

The Biotechnology Industry Organization (BIO) is the world's largest biotechnology organization, representing more than 1,100 members in all 50 U.S. states. BIO's members are involved in the most cutting-edge research and development of medical breakthroughs and other innovative health-care technologies, and range from entrepreneurial start-ups developing a first product to Fortune 100 multinationals, as well as academic research centers, state and regional biotechnology associations, and service providers to the industry.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to advocate the interests of its members before Congress, the Executive Branch, and courts.

PhRMA, BIO, and the Chamber regularly participate as amici curiae in this Court.

The Fourth Circuit has stripped defendants, including amici's members, of essential defenses to stale and duplicative *qui tam* actions. By allowing relators to move forward on recycled FCA allegations, the Fourth Circuit's flawed rulings impose considerable additional burdens on the pharmaceutical, health care, and public

contracting sectors, which now face the Sisyphean prospect of relitigating the same claims over and over in serial litigation.

## SUMMARY OF THE ARGUMENT

The ruling below exemplifies the extent to which the Fourth Circuit has eviscerated the limits Congress imposed on private relators' ability to file suit under the False Claims Act. Amici fully support appropriate enforcement of the FCA and recognize the important role of relators with personal knowledge of previously undisclosed violations in bringing fraud and abuse to the government's attention. Amici's members devote significant resources to internal compliance programs that complement the government's efforts to prevent misconduct. But the Fourth Circuit's misconstruction of the FCA undermines the carefully balanced statutory scheme adopted by Congress to incentivize would-be whistleblowers to bring alleged fraud to the government's attention quickly.

Congress imposed increasingly stringent limitations on *qui tam* suits depending on the extent to which the alleged fraud had already been brought to federal prosecutors' attention. Once fraud allegations are publicly disclosed in a manner likely to put the government on notice (such as by the media), only an insider with direct and independent knowledge, *i.e.*, someone likely to contribute to the government's ability to obtain a recovery, can file a *qui tam* action. 31 U.S.C. 3730(e)(4). And once an actual *qui tam* action has been filed, which means prosecutors are definitely on notice, no other *qui tam* suit is permitted based on those allegations. 31 U.S.C. 3730(b)(5). Finally, Congress barred relator suits entirely after six years, whereas it gave the gov-

ernment a longer period (up to ten years) to file suit when prosecutors learned of the fraud late. 31 U.S.C. 3731(b)(1), (2).

The Fourth Circuit adheres to none of these limitations. Rather than rewarding whistleblowers who have brought new allegations of fraud to the government's attention, the Fourth Circuit permits a relator with no direct knowledge whatsoever to file a *qui tam* suit based on allegations of fraud that have already been brought to the government's attention and indeed that have already been asserted in a prior *qui tam* action. And, under that Circuit's construction of the Wartime Suspension of Limitations Act (WSLA), serial relators may do so in perpetuity based on conduct that falls far outside the six-year limitation on relator suits.

Two of the Fourth Circuit's three errors—concerning the scope of the first-to-file bar and the meaning of the WSLA—are already before the Court in *Kellogg Brown & Root Services* v. *United States ex rel. Carter* (No. 12-1497) (pet. for cert. filed June 24, 2013), in which the Court has requested the views of the Solicitor General. The present case, which also presents a question regarding the Fourth Circuit's interpretation of the public disclosure bar, further highlights the fundamental problem with that Circuit's approach to the FCA's relator provisions. Here, the court of appeals allowed the relators to bring these stale, recycled allegations based on their assertion (if credited) that, rather than learning of the fraud allegations from reading the first *qui tam* complaint, they learned of the allegations from the first *qui tam* relator orally, during conversations at work and over the dinner table. In combination, these three errors by the court of appeals

undermine critical limits Congress imposed on *qui tam* suits.

American businesses suffer the consequences of this judicial abdication of the FCA's threshold defenses. Even a meritless *qui tam* suit where the government has declined to intervene can be costly for a company to defend against. That is even more so when the alleged fraud happened long ago, and the cost of gathering stale evidence increases (along with the chance that it has disappeared altogether).

The Court should grant the petition in conjunction with the *Carter* petition to correct the Fourth Circuit's egregious misreading of the FCA and restore the statutory scheme adopted by Congress, or at a minimum should hold this petition pending the resolution of *Carter*.

## REASONS FOR GRANTING THE PETITION

### I. THE FOURTH CIRCUIT HAS IMPROPERLY STRIPPED DEFENDANTS OF THEIR FCA FIRST-TO-FILE AND STATUTE-OF-LIMITATIONS DEFENSES

#### A. The FCA's Statute Of Limitations Protects Businesses Against The Uncertainty Of Litigating Stale Claims

The WSLA is a criminal procedure statute enacted during the Second World War that tolls the statute of limitations for certain offenses when "the United States is at war." 18 U.S.C. 3287. The WSLA applies to "any offense * * * involving fraud or attempted fraud against the United States." *Ibid.* The Fourth Circuit ruled expressly in *Carter*, and—by declining to reach Purdue's arguments—implicitly here, that the WSLA indefinite-

ly tolls the statute of limitations for *civil* FCA claims, even claims brought by private relators, irrespective of whether the allegations are war-related or whether the Government has intervened.

As amici have argued in *Carter*, this view of the WSLA is patently wrong. See Br. of Amici Curiae U.S. Chamber of Commerce, et al., in Support of Certiorari, *Kellogg Brown & Root Servs.* v. *United States ex rel. Carter* (No. 12-1497) (Chamber *Carter* Amicus Br.). Title 18 governs "Crimes and Criminal Procedure," not civil claims. The WSLA appears in Part II of Title 18, which governs "Criminal Procedure." The WSLA itself confirms that it is a criminal statute, tolling the statute of limitations only for "offenses," a term that connotes a criminal violation. See *Black's Law Dictionary* 1186 (Garner, et al. eds., 9th ed. 2009) ("The terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous and ordinarily used interchangeably.").

Alarmingly, the Fourth Circuit's ruling, if not corrected, raises a strong possibility that civil FCA claims will be tolled not just for years or decades but indefinitely. Once triggered, the WSLA applies "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." 18 U.S.C. 3287(3). The Fourth Circuit—in obvious tension with its view that the WSLA can be triggered without a formal declaration of war[2]—concluded that the WSLA

[2] In 2002, when Congress enacted the Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 107-243, 116 Stat. 1498, the WSLA provided for tolling only when "the United States is at war." In 2008, Congress amended the WSLA to allow for tolling also where "Congress has enacted a specific authorization for the use of the Armed Forces." See Consolidated Security,

continues to operate until the formalities ending a war have been met. *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 179 (2013). But in recent years, the United States has been involved in military engagements in Afghanistan, Iraq, Libya, and elsewhere, none of which was commenced through a formal declaration of war and none of which has concluded through a formal proclamation or resolution.

Indefinite tolling of this sort undermines the statutory limitations scheme in the FCA. In addition to circumventing the absolute ten-year statute of repose in the FCA, 31 U.S.C. 3731, indefinite tolling disregards the two distinct limitations provisions that govern the FCA claims brought by the Government and those brought by relators. Under the statutory scheme adopted by Congress, relators are absolutely bound by a six-year statute of limitations that is not subject to tolling. 31 U.S.C. 3731(b)(1). By contrast, the government may bring a claim up to ten years after the fraud, as long as it does so within three 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." 31 U.S.C. 3731(b)(2); see also *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 296 (4th Cir. 2008).[3] By treating relators differently from

---

Disaster Assistance, And Continuing Appropriations Act of 2009, Pub. L. No. 110-329, § 8117 (2008). The Fourth Circuit held in *Carter* that no formal declaration of war was required under either version of the WSLA and, on that basis, did not consider the possible constitutional difficulty of applying the 2008 amendment retroactively. See *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 178-179 (2013).

[3] A minority of courts have construed the FCA's equitable tolling provision to apply to relators under the theory that the relator

the government, Congress incentivizes relators to bring forward allegations of fraud quickly, as the public disclosure and first-to-file bars do.[4] Applying the WSLA equally to both government and relator lawsuits disregards the FCA's structure, improperly putting relators on an equal footing to the government.

Businesses potentially subject to FCA litigation have a substantial interest in the "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," which are guaranteed by a statute of limitations. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000)). Statutes of limitations recognize that it is "unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Order of Railroad Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)). By eliminating any meaningful time limitation on relators,

---

is the "official of the United States" whose knowledge triggers the three-year limitations period. See, *e.g.*, *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1214-1218 (9th Cir. 1996). But the logic underlying that view is inconsistent with *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 931 (2009), and *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000), which clarified that relators are not acting as officers of the United States, but rather are partial assignees of government claims, and that the government is not a party to FCA litigation unless it has intervened.

[4] If relators got the benefit of tolling until government prosecutors learned of the fraud, relators would be able to let the six-year limitations period expire while watching damages mount, and then revive their time-barred claim by alerting unsuspecting federal officers of the fraud just before filing a *qui tam* action.

the Fourth Circuit subjects amici's members—health-care companies, government contractors, and other potential FCA targets—to "reviv[ed] claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers*, 321 U.S. at 348-349.

This case highlights the importance of reviewing the WSLA issue. The allegations in *Carter* arose from a military contract directly related to operations in Iraq. But as the Chamber and PhRMA warned in *Carter* (Br. at 6-7), the Fourth Circuit's ruling could result in the WSLA's application to civil claims with no nexus to military engagements. This prediction has proved prescient. The allegations here concern Purdue's marketing of the drug OxyContin, and there is no connection whatsoever to the hostilities in Iraq, Afghanistan, or elsewhere. Pet. App. 2a. Relators have identified nothing related to any ongoing hostilities that prevented them (or the government for that matter) from identifying the alleged fraud at issue here. Indeed, another relator (with direct knowledge of the allegations) *did* bring a *qui tam* based on the same allegations within the statutory limits.

The egregious facts of this case highlight the need for prompt review by this Court of the Fourth Circuit's misguided construction of the WSLA.

### B. The Fourth Circuit's Construction Of The First-to-File Bar Eviscerates The Provision's Important Protections For Both The Government and Defendants

The court of appeal's error in removing the FCA's statute of limitations is compounded by its interpretation of the first-to-file bar. The first-to-file bar pro-

vides: "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." 31 U.S.C. 3730(b)(5). The Fourth Circuit interprets the first-to-file bar to cease to operate once the first action is completed. Pet. App. 22a. That holding directly conflicts with the interpretation of the D.C. Circuit in an opinion issued since the petition in the present case was filed. See *United States ex rel. Shea* v. *Cellco P'ship*, No. 12-7133, slip op. 11 (April 11, 2014) (acknowledging circuit split with the Fourth Circuit). As the D.C. Circuit recognized, the word "pending" in the first-to-file bar is an adjective that "identif[ies] which action bars the other." *Id.* at 10. In other words, it connotes the priority given to the action that was pending *first*, not that the first action must remain pending for all time in order to have preclusive effect. The bar does not say that the filing of one suit bars another based on the facts underlying the first suit "*while the first remains pending*," as the Fourth Circuit would rewrite it. *Id.* at 9.

The Fourth Circuit's ruling also undercuts the intentional "race to the courthouse" the first-to-file bar creates in order to encourage relators to swiftly come forward with evidence of wrongdoing so the government "has enough information to discover related facts." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 377-378 (5th Cir. 2009). Instead, the Fourth Circuit's ruling creates a second race to the courthouse starting the moment the first action is dismissed, as well as additional races to the courthouse after each subsequent dismissal. But "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litiga-

tion is satisfied." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). These subsequent races to the courthouse "contribute nothing to the government's knowledge" of fraud, *Shea*, slip op. 10, and serve no plausible rationale of the first-to-file bar.

Congress did not intend that the United States share its recovery with such individuals, nor should defendants be put to the cost of defending multiple lawsuits based on allegations that the government does not wish to pursue. As amici previously explained in support of certiorari in *Carter*, *qui tam* suits in which the government has declined to intervene account for only a small fraction of FCA recoveries, yet they pose for defendants a very real threat (wholly independent of the merits) of costly litigation, thus forcing defendants into sizeable settlements. See Chamber *Carter* Amicus Br. 10-15.

Again, the present case fully illustrates the behavior that the Fourth Circuit's ruling in *Carter* invites. Two new relators who happened to be the wife and coworker of the initial relator, stood ready to refile the first relator's complaint (using the same counsel) shortly after the first relator's suit was dismissed, though the new relators contributed nothing to the government's ability to seek recovery. This kind of gamesmanship, offering little benefit to the government but inflicting considerable cost on businesses, will become the norm if the Fourth Circuit's decision is not reversed.

## II. THE FOURTH CIRCUIT'S ERRONEOUS READING OF THE PUBLIC DISCLOSURE BAR EXACERBATES THE PROBLEMS ALREADY PRESENT IN *CARTER*

The present case demonstrates that the combined effect of *Carter*'s elimination of the first-to-file and statute-of-limitations defenses and the Fourth Circuit's previous gutting of FCA's public disclosure bar is to make the Fourth Circuit a perpetual forum for stale, duplicative, and derivative claims brought by relators who add nothing to the government's ability to recover fraud against it. Every other circuit has rejected the Fourth Circuit's atextual construction of the public disclosure bar. And, although this third error is now nearly twenty years old, its combination with the errors in *Carter* adds fresh urgency to the need for this Court's review.

The version of the public disclosure bar applicable to this case, and all others involving pre-2010 conduct,[5] divests federal courts of subject matter jurisdiction over FCA *qui tam* suits that are "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 relator is an "original source of the information." 31 U.S.C. 3730(e)(4) (2006). To be an original source, relator (1) must have "direct and inde-

[5] This case deals with the version of the public disclosure bar as it existed before the enactment of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 10104(j)(2). The Fourth Circuit in the case below ruled that the 2010 amendments did not apply retroactively to conduct occurring prior to their enactment, Pet. App. 10a-17a, and Purdue has not sought review of that ruling.

pendent knowledge of the information on which [relator's] allegations are based," and (2) must have "voluntarily provided the information to the Government before filing an action." 31 U.S.C. 3730(e)(4)(B) (2006). But the Fourth Circuit has read the public disclosure bar so narrowly as to render the "original source" exception superfluous. As a consequence, derivative *qui tam* suits that Congress intended to bar, and that would be barred in other circuits, can go forward in the Fourth Circuit (even, in light of *Carter*, when the alleged fraud occurred more than a decade ago and has already been the basis of another *qui tam*).

### A. The Fourth Circuit's Construction Collapses The Distinction Between The Public Disclosure Bar And The "Original Source" Exception

In past decisions, this Court has reprimanded the Fourth Circuit for its "failure to treat the public disclosure bar as an integrated whole." *Graham Cnty. Soil & Water Cons. Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 293 n.12 (2010). The Fourth Circuit makes precisely the same error here, adopting a construction that inverts the statutory structure by creating a threshold inquiry that renders the "original source" exception superfluous.

The Fourth Circuit's interpretation requires courts to determine whether a relator "actually derived" allegations from a public disclosure of related facts in order to trigger the public disclosure bar's threshold inquiry. See Pet. App. 17a-20a; see also *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994). But if a relator "actually derived" allegations from the public disclosure, then he would never

qualify as an original source because he would lack the requisite "direct and independent knowledge." 31 U.S.C. 3730(e)(4)(B) (2006). As a result, whenever the public disclosure bar applies in the Fourth Circuit, the "original source" exception becomes irrelevant.

The Fourth Circuit first adopted this construction of the public disclosure bar 20 years ago in *Siller*, relying entirely on a purported "plain meaning" of the words "based upon," 21 F.3d at 1349, but one that failed to accord with this Court's subsequent (and repeated) admonition that in order "to determine the meaning of one word in the public disclosure bar, [courts] must consider the provision's 'entire text,' read as an 'integrated whole,' " *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (quoting *Graham Cnty.*, 559 U.S. at 290, 293 n.12). *Siller*'s analysis consisted solely of reference to a dictionary entry defining "base[d] upon" as "use as a basis for" and the naked assertion that reading "based upon" to mean "actually derived from" was "fully consistent with" the statutory objective of preventing parasitic lawsuits. 21 F.3d at 1348 (quoting *Webster's Third New International Dictionary* 180 (1986)). The court gave no consideration to the interplay between the public disclosure bar's threshold inquiry and the original source exception.

*Siller* was decided before most courts had the opportunity to consider the issue. Since then, every other circuit has rejected the Fourth Circuit's approach, ruling that a *qui tam* is barred where it is "substantially similar to" or "supported by" a qualifying public disclosure, preserving the two-step analysis that Congress created. See *United States ex rel. Mistick PBT* v. *Hous. Auth. of Pittsburgh*, 186 F.3d 376, 386 (3d Cir.

1999) (Alito, J.) (collecting cases). The other courts of appeals have assessed the public disclosure bar as "an integrated whole," *Graham Cnty.*, 559 U.S. at 293 n.12, and rejected the "actually derived" standard because it is "inconsistent with the basic structure of the FCA because it renders the 'original source' exception to the public disclosure bar largely superfluous." *United States ex rel. Findley* v. *FPC-Boron Emps.' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997). As those courts have explained, the Fourth Circuit's approach renders the original source exception meaningless because "an individual [who] could * * * prove that his information was not derived from a public disclosure by showing that he was an original source of the information" could proceed under the Fourth Circuit's interpretation, "even if there were no 'original source' exception as such." *Mistick*, 186 F.3d at 387 (Alito, J.). Only the Seventh Circuit has ever agreed with the Fourth Circuit, but even it recently reversed itself and embraced the majority rule as "more consistent with the overall design of the jurisdictional bar." See *Glaser* v. *Wound Care Consultants Inc.*, 570 F.3d 907, 915 (2009) (overruling *United States* v. *Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999)).

As a practical consequence of the Fourth Circuit's ruling, many relator suits that Congress intended to exclude from the courts' subject matter jurisdiction may proceed in the Fourth Circuit. The original source exception's requirement of pre-filing disclosure to the government is one victim of the Fourth Circuit's reading: a relator who did not "actually derive" allegations from the public disclosure "can successfully avoid the second requirement of the original source provision, namely, that he voluntarily provide the information to

the Government prior to bringing an action." *United States ex rel. Biddle* v. *Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 538 (9th Cir. 1998). Another victim is the requirement that relators have "direct and independent knowledge" of the allegations, which relators need not show so long as they claim in an affidavit not to have derived their information from the public disclosure. In this very case, relators who would not satisfy the original source exception may proceed (if their testimony is credited on remand) because the public disclosure bar is never deemed triggered, despite the fact that the prior complaint already "put the Federal Government on notice of a potential fraud." *Graham Cnty.*, 559 U.S. at 291. Were this case brought in any other circuit, relators' complaint would have been dismissed and the litigation concluded.

### B. The Court Of Appeals' Construction Is Inconsistent With Subsequent Decisions Of This Court And Congress's Own Clarification Of The Statute's Meaning

As noted, the Fourth Circuit's analysis in *Siller* relied almost entirely on what the panel believed was the "plain meaning" of the phrase "based upon," but this Court has made clear that the phrase can have another meaning, far more consonant with the statutory structure, and Congress has itself confirmed that alternative construction.

Subsequent to *Siller*, this Court has twice clarified, in connection with the same statute, that the phrase "based upon" can mean "similar in substance," rather than "actually derived from." The public disclosure bar's pre-1986 analogue, the government-knowledge bar, precluded *qui tam* actions "*based upon* evidence or

information" the government had when the action was brought. 31 U.S.C. 3730(b)(4) (1982) (emphasis added). The Court has explained that, under this pre-amendment language, "once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Graham Cnty.*, 559 U.S. at 294 (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)). "[D]isclosure of *information about the claim* to the Government constituted a full defense to a *qui tam* action," regardless of where the relator derived his knowledge. *Hughes Aircraft*, 520 U.S. at 951 (emphasis added). In *Hughes Aircraft*, for example, the information in question was in the government's possession as a result of a military audit, and there is no indication in the opinion that relator, who was a manager on the Hughes project for Northrop, actually derived his allegations from the information in the government's possession. See *id.* at 942-943. In other words, there was no requirement under the pre-1986 statute that, in order to be "based upon" the "evidence or information" in the government's possession, the relator's suit had to be "actually derived from" the evidence or information that was in the government's files.

Other circuits considering the meaning of "based upon" in the post-1986 public disclosure bar have appropriately noted that, before 1986, those words did not carry the meaning that the court in *Siller* ascribed to them as the only reasonable meaning. See *Mistick*, 186 F.3d at 382 (Alito, J.) ("Prior to 1986, such suits were barred if the information on which they were based was already in the Government's possession." (quoting *Hughes Aircraft*, 520 U.S. at 941)); *Biddle*, 161 F.3d at 538 ("[T]here is no evidence that Congress intended to

change the meaning of 'based upon' in the 1986 amendment."); *Findley*, 105 F.3d at 684-685 (noting "a long line" of pre-1986 cases that "implicitly reject" an "actually derived" interpretation of "based upon" because relators' claims were barred whenever the government previously possessed evidence "sufficient to enable it to adequately investigate the case and to make a decision whether to prosecute").

Not only have the other circuits rejected the Fourth Circuit's interpretation, so too has Congress. In the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 10104(j)(2), (4)(A) (codified at 31 U.S.C. § 3730(e)(4) (2014)), Congress revised the statutory language to specify that courts must dismiss actions "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. 3730(e)(4)(A) (2014). By making the threshold test turn upon public disclosure of "substantially the same" allegations, Congress made clear that the public disclosure bar's threshold inquiry does not turn on a factual determination of whether the relator actually relied upon the earlier public disclosure. This change confirms what every other court had recognized was Congress's original intent in 1986: that "[o]nce the public disclosure of the information occurs * * *, then only a person who qualifies as an 'original source' may bring the action." 132 Cong. Rec. H9382 (1986) (statement of Rep. Berman).

Although the combination of Congress's clarification and the passage of time should have made the error in *Siller* of diminishing (and ultimately vanishing) significance, the Fourth Circuit's construction of the WSLA means that *Siller* will have continuing effects

into the future, because there is no time limit on bringing claims based on pre-2010 conduct.

## III. The Court Should Grant The Petitions For Certiorari In *Carter* And The Present Case To Prevent The Significant Harm To American Businesses That Will Result From The Fourth Circuit's Several Errors

Although there is no public benefit from allowing relators to recycle stale claims that the government has already declined to pursue, there are significant costs—defending against these meritless suits drains critical resources from productive uses, like researching new life-saving drugs, innovative medical devices, information and data processing technologies that detect and prevent terrorist attacks, or defense technologies that protect American troops in combat.

FCA *qui tam* litigation has ballooned since the 1986 FCA amendments, but experience demonstrates that there is very little benefit to the government from the large majority of *qui tam* suits in which the Department of Justice declines to intervene. The number of *qui tam* filings has grown from 30 in 1987, to 350 in 2007, and reached an astonishing 753 suits in 2013. See U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2013* 1-2 (2013), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Yet the vast majority of these relator claims result in no recovery whatsoever, especially when the government declines to intervene in the case. The government intervenes in only approximately 20% of *qui tam* suits. Christina O. Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 971 (2007). Fully 92% of cases where

the government does not intervene are eventually dismissed. *Id.* at 975. Indeed, although non-intervened *qui tam* actions are by far the most common procedural posture of FCA suits, they account for only 2.5% of total FCA monetary settlements and judgments. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2013* 2 (2013).

Yet, even meritless FCA suits inflict considerable costs on businesses in the form of time and money invested in litigating the case, as well as the reputational harm resulting from unfounded allegations. The health-care industry and defense contractors bear the bulk of this burden. See U.S. Dep't of Justice, *Fraud Statistics—Health And Human Services: Oct. 1, 1987–Sept. 30, 2013* 2 (2013); U.S. Dep't of Justice, *Fraud Statistics—Department of Defense, Oct. 1, 1987– September 30, 2013* 2 (2013). Unintervened *qui tam* suits against health-care industry defendants are reaching epidemic proportions, and constitute a significant drag on the industry. Indeed, in 2013, nearly 500 of the total 846 FCA suits filed, or 60%, were filed by relators against health-care industry defendants. Compare U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987– Sept. 30, 2013* 2 (2013), with U.S. Dep't of Justice, *Fraud Statistics—Health And Human Services: Oct. 1, 1987– Sept. 30, 2013* 2 (2013).

The Fourth Circuit's ruling below amplifies the already high cost of dealing with relator claims, by removing the essential protections that Congress provided in the FCA. Relators may dust off decades-old allegations, requiring businesses to investigate facts where key witnesses are no longer available and important documents are lost. No matter how many times previous relators have tried and failed with iden-

tical allegations, or how definitively the government has decided against pursuing the claims, new relators may continue to recycle the allegations, even where they have no direct knowledge of the underlying facts.

This case amply demonstrates the absurd results of the Fourth Circuit's disregard of each of the three statutory defenses Congress established to protect defendants against recycled *qui tam* allegations. Relators' allegations were previously disclosed—in many instances word for word—to the public and government in a *qui tam* suit filed by Mark Radcliffe, who is, respectively, the current relators' former supervisor and husband. The government, which was already conducting a thorough independent investigation of Purdue, declined to intervene or otherwise pursue Radcliffe's allegations. *United States ex rel. Radcliffe* v. *Purdue Pharma L.P.*, 600 F.3d 319, 322-323 (2010). The original complaint was ultimately dismissed with prejudice by the Fourth Circuit because Radcliffe had executed a general release of claims against Purdue in order to obtain an enhanced severance package. See *id.* at 321.

After dismissal, the complaint was copied and refiled by the same law firm, substituting the original relator's wife and co-worker. Pet. App. 3a. With *Siller* in mind, the new relators filed affidavits claiming that they did not derive their allegations from reading the previous complaint (which constituted the public disclosure of those allegations), but instead through oral conversations with the original relator. Pet. App. 20a.

The new relators would not qualify as "original sources," because they do not claim to have provided the government with any information from their own knowledge, yet, under the panel's ruling, relators may

proceed as long as they can persuade a judge that their knowledge was not "actually derived" from the earlier publicly filed complaint. Pet. App. 18a. And, although the allegations of the two complaints are virtually identical, the first-to-file bar does not apply in the Fourth Circuit's view, because the first action was dismissed before the second was filed. Moreover, as Purdue has explained (Pet. 21-22), relators have not identified any conduct by Purdue occurring within the FCA's six-year statute of limitations for relator suits, but have instead invoked the WSLA to allow them to refile a *qui tam* on claims that became time-barred while the first-filed suit was pending. The result is that the case has been remanded to the district court for a factual determination whether the second set of relators derived their information from the earlier publicly disclosed complaint or from private conversations with the initial relator. But even if Purdue should win that factual dispute, the Fourth Circuit's decision shows the way for a new set of relators' friends or relations to file yet a third *qui tam* complaint making the same allegations, as long as those relators are careful to rely only on private briefings from Mark Radcliffe and not to read any of the public disclosures relating to the previous lawsuits.

The combined effect of the Fourth Circuit's three errors is to make a mockery of the statutory scheme carefully designed by Congress to provide a reward and incentive only for those relators who act promptly when they discover fraud against the government to bring that fraud to the government's attention. And it imposes severe costs and uncertainty on businesses forced to litigate against meritless lawsuits. As described above, the Fourth Circuit's decision provides a roadmap for never-ending *qui tam* lawsuits based on

decades-old, recycled allegations that the government has already investigated and declined to prosecute.

The egregious facts of the present case make it all the more critical that the Court grant the pending petition for certiorari in *Carter*, and hold the present case pending the resolution of *Carter*. Alternatively, the Court could grant the present petition in addition to *Carter*, in order to consider together all of the three interrelated ways in which the Fourth Circuit has undermined the crucial limits to *qui tam* litigation under the FCA.

## CONCLUSION

The petition for a writ of certiorari should be granted or held pending the resolution of the petition in *Carter*.

Respectfully submitted,

JAMES M. SPEARS
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

TOM DILENGE
BIOTECHNOLOGY INDUSTRY ORGANIZATION

DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP

RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.

*Counsel for Amici Curiae*

APRIL 2014