No. 12-1497

In The
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR, INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT BENJAMIN CARTER IN OPPOSITION

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QUESTIONS PRESENTED

1. In a situation where there is no split in the circuits, should this Court grant interlocutory review of a carefully considered, detailed decision of the Fourth Circuit Court of Appeals that correctly applied the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, to claims of fraud against the United States Government pertaining to the failure to purify water for troops stationed in Iraq during an on-going war?

2. In a situation where there is no split on this narrow issue in the circuits, should this Court grant interlocutory review of a decision of the Fourth Circuit Court of Appeals that applied existing circuit precedents to the specific facts of this case and determined that a jurisdictional dismissal under the False Claims Act's first-to-file bar, 31 U.S.C. § 3730(b)(5), should be without prejudice, thereby preventing a defendant from claiming immunity from suit in perpetuity based on a potentially frivolous or jurisdictionally incompetent complaint?

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INTRODUCTION

Respondent Benjamin Carter respectfully submits that none of Petitioners' arguments merit further review. The decision below correctly followed well-established doctrines of this Court. Petitioners concede that no circuit split exists concerning neither the majority panel's application of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287,[1] nor the full panel's application of the first-to-file provision of the United States False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733.[2] Additionally, this case presents the unique facts for applying the WSLA to an FCA matter, because the fraud occurred during Operation Iraqi Freedom, the fraud was perpetrated in Iraq, and the fraud directly impacted the troops serving in Iraq. The decision below also correctly followed circuit court precedent in holding that a dismissal under the first-to-file jurisdictional bar has no preclusive effect and should have been a "without prejudice" dismissal, which is consistent with well-settled law that a dismissal for lack of jurisdiction is not an adjudication on the merits or a bar to further claims. Moreover, the petition for certiorari is not yet ripe for this Court's review because the Fourth Circuit remanded the matter to the district court for

[1] The WSLA extends the time for bringing an action relating to a fraud against the United States during a time of war.

[2] "The FCA prescribes penalties for claims submitted to the government that are known to be false" and encourages "citizens to act as whistleblowers. . . ." Pet. App. at 17a.

further proceedings, and a fully briefed motion to dismiss is currently pending.

STATEMENT OF CASE

Petitioners Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc. (collectively "Petitioners") perpetrated a massive fraud against the United States Government during a time of war by billing for services that should have been provided to United States troops in a war zone, but that were never performed, and by charging for hours that were never worked. Pet. App. at 2a-3a. As alleged in the complaint, Petitioners hired Respondent Benjamin Carter ("Respondent" or "Carter") and others to test and purify water for United States troops engaged in Operation Iraqi Freedom in Iraq. Pet. App. at 3a. However, Petitioners did not test or purify water, and fraudulently instructed their employees to submit erroneous time cards totaling at least twelve hours per day regardless of the amount of time each employee actually worked. Pet. App. at 3a-4a. Petitioners repeatedly lied to the United States Government about performing water testing and purification, and as a result the United States paid for this work under Petitioners' "LOGCAP III" government contract with the United States. Pet. App. at 3a.

Carter initiated this matter upon the filing of a *qui tam* lawsuit under the FCA on February 1, 2006. Pet. App. at 4a. The Government conducted an

investigation after which the complaint was unsealed in May 2008. Pet. App. at 4a. The parties engaged in extensive motion practice and discovery, which closed in March 2010. Pet. App. at 4a. However, one month before the scheduled trial date, the United States Department of Justice disclosed the existence of another FCA matter filed under seal in December 2005, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05-cv-8924 (C.D. Cal. filed Dec. 23, 2005) ("*Thorpe*"). Pet. App. at 4a-5a. On May 10, 2010, the district court granted Petitioners' motion to dismiss Carter's complaint without prejudice, finding that *Carter* and *Thorpe* were "related" actions within the meaning of the FCA, and therefore Carter's action was barred under the first-to-file provision of the FCA, 31 U.S.C. § 3730(b)(5). Pet. App. at 5a. Carter re-filed his complaint following the dismissal of *Thorpe*, which occurred on July 30, 2010. Pet. App. at 5a.

As detailed in the panel's opinion, following numerous procedural issues resulting in Carter re-filing his complaint on June 2, 2011, Petitioners moved to dismiss that complaint. Pet. App. at 5a-7a. On November 29, 2011, the district court granted Petitioners' motion to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, finding that another action, *United States ex rel. Duprey v. Halliburton, Inc.*, No. 8:07-cv-1487 (D. Md. filed June 5, 2007), was "related" and "pending" under the FCA's first-to-file bar at the time Carter filed his 2011 complaint. Pet. App. at 63a-64a. The district

court also found that Carter's complaint was time-barred because it had been filed beyond the FCA's six-year statute of limitations, and that the WSLA did not toll the statute of limitations for an action filed by a private relator.[3] Pet. App. at 74a-75a. Unlike the district court's dismissals of Carter's other complaints under the first-to-file bar, in this instance, the district court dismissed this complaint with prejudice. Pet. App. at 75a, 76a. Additionally, the district court did not consider whether the public disclosure provision of the FCA barred Carter's action. Pet. App. at 7a.

Carter filed a notice of appeal of the district court's dismissal of his complaint on December 28, 2011, and in a thorough and well-reasoned opinion, the majority panel of the Fourth Circuit reversed the district court on March 18, 2013. Pet. App. at 2a. The Fourth Circuit found that the WSLA applied to Carter's claims of fraud tolling the FCA's statute of limitations because the United States was "at war" during the pertinent time period. Pet. App. at 8a-16a. Additionally, the Fourth Circuit panel held that the district court erred in dismissing Carter's complaint with prejudice. Pet. App. at 20a-23a. The panel determined that related actions were pending when Carter filed his complaint on June 2, 2011, and found

[3] Carter filed his original complaint within the FCA's six-year statute of limitations period. However, due to the lengthy procedural history and the district court's numerous rulings on Petitioners' motions to dismiss Carter's complaints, the WSLA arose as an issue in this case.

that § 3730(b)(5) – which prevents a plaintiff from bringing "a related action based on the facts underlying the *pending* action" – barred his action. Pet. App. at 20a-21a (emphasis added). Nevertheless, the panel noted that this finding did not end its inquiry, and held that § 3730(b)(5) does not preclude subsequent actions once a related case was no longer pending. Pet. App. at 21a-22a. Thus, the panel held that the district court erroneously dismissed Carter's complaint with prejudice. Pet. App. at 22a. The panel expressly declined to address whether Carter's complaint should be dismissed on the basis of the FCA's public disclosure provision because that was not decided by the district court.[4] Pet. App. at 22a-23a.

Petitioners moved for a rehearing en banc before the Fourth Circuit, which the Fourth Circuit denied on April 23, 2013. Pet. App. at 77a. As noted in that order, no Fourth Circuit Judge requested a poll under Fed. R. App. P. 35. Pet. App. at 77a.

[4] Presently pending before the district court is Petitioners' motion to dismiss based upon the FCA's public disclosure provision, 31 U.S.C. § 3730(e)(4). The motion is scheduled to be heard by the district court on September 6, 2013.

REASONS FOR DENYING THE PETITION

I. The Court Should Deny The Petition As Interlocutory

Absent extraordinary circumstances, this Court generally awaits a final judgment before granting a petition for certiorari. *Va. Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Postponing the Court's intervention until a final judgment in the lower courts best serves judicial efficiency. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until the final decree.").

Here, the Fourth Circuit panel remanded the case to the district court for further proceedings, and a fully briefed motion to dismiss is currently pending in the district court. Pet. App. at 23a. This petition will be moot if the district court grants Petitioners' motion, and if the court denies that motion there will be a trial and additional briefing that will illuminate the facts for this Court's potential review. Thus, this matter is not ripe for the Court's review. *See Bd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring) ("Because no

final judgment has been rendered . . . I agree with the Court's decision to deny the petitions for certiorari.").

II. WSLA

A. The Panel's Decision Is Sound and Well-Reasoned as the WSLA Applies to Civil Cases

The majority correctly decided that the WSLA applies to civil cases involving fraud on the United States.[5] The FCA is one of the government's primary means of rooting out fraud in the military. *See* U.S. Dep't of Justice Press Release, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html ("The False Claims Act is the government's primary civil remedy to redress false claims for federal money or property, such as . . . loans and payments under contracts for goods and services, including military contracts."). The FCA designates *qui tam* relators, through their counsel, as "private attorneys general," *United States ex rel. Jamison v. McKesson Corp.*, 649

[5] In 1944, Congress specifically broadened the language of the WSLA to include civil offenses by deleting the words "now indictable" from the statute. The plain language of the statute after 1944 applies "to *any offense* involving fraud or attempted fraud against the United States." 18 U.S.C. § 3287 (emphasis added). *See, e.g.*, *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1944); *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 551 (D.D.C. 1956) (finding that the WSLA would apply to an FCA action).

F.3d 322, 330 (4th Cir. 2011) (quotations omitted), to pursue civil fraud claims on behalf of the United States in order to "stop . . . massive frauds perpetrated by large [private] contractors during the Civil War." *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 781 (2000). The Fourth Circuit properly held that the WSLA applies to FCA actions. *See, e.g., McCans*, 146 F. Supp. at 551 ("in 1944 Congress in the Contract Settlement Act, 18 U.S.C. § 3287, 58 Stat. 649, 667, enacted July 1, 1944, amended the language of the [WSLA] by deleting the term 'now indictable.' This brought the False Claims Act within its purview."), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958). *See also* Pet. App. at 15a ("whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case."). Moreover, being that the clear intent of Congress in passing the WSLA was to override specific limitations periods for fraud against the United States during a period of war, to hold otherwise would render the WSLA superfluous.

The Fourth Circuit concluded:

> [h]ad Congress intended for "offense" to apply only to criminal offenses, it could have done so by not deleting the words "now indictable" or it could have replaced that phrase with similar wording. However, Congress did not include any limiting language and . . . in failing to do so it chose for the Act to apply to all

> offenses involving fraud against the United States.

Pet. App. at 14a; *see also id.* at 29a (Wynn, J., concurring) ("we are left to conclude that when Congress said 'any offense,' it meant *any* offense, including offenses raised by private False Claims Act relators."). The majority panel found support for this conclusion from numerous courts that considered the issue. Pet. App. at 13a-14a (citing *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954); *United States v. BNP Paribas*, 884 F. Supp. 2d 589 (S.D. Tex. 2012); *McCans*, 146 F. Supp. 546; *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955)). *See also United States v. Temple*, 147 F. Supp. 118, 120 (N.D. Ill. 1956); *United States v. Salvatore*, 140 F. Supp. 470 (E.D. Pa. 1956); *United States v. Covollo*, 136 F. Supp. 107 (E.D. Pa. 1955); *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955) ("If it had been the intent of Congress to make said Act applicable to criminal actions only, instead of using the word 'offense' it could have used such words as 'crime', 'criminal offense', etc."); *United States v. Murphy-Cook & Co., Inc.*, 123 F. Supp. 806 (E.D. Pa. 1954); *United States v. Strange Bros. Hide Co.*, 123 F. Supp. 177 (N.D. Iowa 1954).

Petitioners strain to find support elsewhere because no court has adopted Petitioners' interpretation. The petition relies on the inapposite decisions in *Bridges v. United States*, 346 U.S. 209 (1953) and *United States v. Smith*, 342 U.S. 225 (1952). *Bridges*

is distinguishable from the instant case because the underlying offense in *Bridges* lacked what the Court considered "an essential ingredient" – a fraud of a pecuniary nature. *Bridges*, 346 U.S. at 221. The Court held that the WSLA could not apply because "none of [the charges] involve[d] the defrauding of the United States in any *pecuniary manner* or in a manner concerning property." *Id*. (emphasis added).

Smith did not, contrary to Petitioners' suggestion, analyze whether the WSLA applies to civil offenses. The *Smith* Court dealt with an entirely different concern: "[t]he question [of] whether the Act [applied] to offenses committed after [the] termination of hostilities." *Smith*, 342 U.S. at 227. Moreover, the mere fact that the Court identified the offenses in *Smith* as "crimes," gives no support for this petition. *See also United States v. Grainger*, 346 U.S. 235, 244 (1953) ("Congress sought by its phrase 'involving fraud . . . in any manner' to make the [WSLA] applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined"); *BNP Paribas SA*, 884 F. Supp. 2d at 605 ("Because defendants have failed to cite any persuasive authority in support of their contention that the WSLA applies only to criminal and not to civil actions, and because the court finds persuasive the analysis of the WSLA's legislative history, the analysis of the meaning of the word 'offense,' and the conclusion that the amendments to the WSLA made in 1944 extended the WSLA's application to civil actions made in *Dugan & McNamara*,

127 F. Supp. at 801, and in *Kolsky*, 137 F. Supp. at 359, the court concludes that defendants have failed to carry their burden of showing that the FCA claims asserted in this action should be dismissed as time barred. . . .").

Since the instant action concerns pecuniary fraud for Petitioners' repeated failure to purify water for United States troops stationed at two camps in Iraq, the majority panel properly applied the plain meaning of the WSLA to this FCA action alleging fraud on the United States during a time of war.

B. The WSLA Does Not Require a Formal Declaration of War and There Is No Circuit Split on This Issue

Applying a purely textual reading, the majority panel of the Fourth Circuit determined that the WSLA "does not require a formal declaration of war." Pet. App. at 11a. This straightforward conclusion is correct. Both the pre- and post-2008 versions of the WSLA begin with the phrase, "When the United States is at war. . . ." 18 U.S.C. § 3287. Neither version contains the word "declared," or any reference or phrase that would otherwise limit the WSLA to certain types of conflicts. "Where . . . [a] statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Statutory construction begins with the "language of the statute, and when a statute speaks with clarity to an issue

judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

Congress has, in fact, specifically required a formal declaration of war when its intent was to limit a statute's application. *See* 28 U.S.C. § 2416(d) ("in a state of war declared pursuant to article I, section 8, of the Constitution of the United States"); 50 U.S.C. § 1829 ("a declaration of war by the Congress"); 50 U.S.C. § 1811 ("a declaration of war by the Congress"); 50 U.S.C. § 98f(a)(2) ("in time of war declared by Congress"); 10 U.S.C. § 123(a) ("In time of war, or of national emergency declared by Congress. . . ."); 41 U.S.C. § 1710 ("during war or during a period of national emergency declared by the President or Congress"). Accordingly, Petitioners' suggestion that "When the United States is at war" should in essence be replaced with "When Congress declares war," overlooks a canon of statutory construction that if Congress so desired, it would have limited the WSLA to wars it formally declared as it has done with numerous other statutes. There is no division among the circuit courts on this issue, and, therefore, the Court should deny this petition.

Indeed, Petitioners' failure to cite any circuit split concedes that there is none. *See* Sup. Ct. R. 10. Rather than weigh in on the issue at this time, the Court should allow the issue to percolate in the lower courts – assuming this issue even recurs – before granting certiorari since no circuit court has

addressed the pertinent issues in any of the district court cases cited by Petitioners. *See Brown v. Texas*, 522 U.S. 940, 943 (1997) (noting that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'" (quoting *McCray v. New York*, 461 U.S. 961, 962-63 (1983))).

Petitioners posit that there is a conflict between the Fourth Circuit's decision and a handful of district court decisions. However, this Court does "not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court. . . ." Eugene Gressman et al., *Supreme Court Practice* 256 (9th ed. 2007). Moreover, the Fourth Circuit's decision is factually and procedurally distinct from the lower district court opinions relied on by Petitioners. The district court's discussion of the WSLA in *Shelton*, for instance, was *dicta* because it found that the conduct at issue was on-going and within the statute of limitations of the government's conspiracy charge. *United States v. Shelton*, 816 F. Supp. 1132, 1136 (W.D. Tex. 1993). The unpublished decisions relied upon by Petitioners, *United States v. Anghaie*[6] and *United States v. Western*

[6] At the time of the petition's filing, *United States v. Anghaie* was on appeal before the Eleventh Circuit. On June 7, 2013, the circuit court vacated and remanded the judgment for further findings on evidentiary issues. *See United States v.*

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Titanium, Inc.,[7] do not reach a level of conflict among the circuits that justifies certiorari, and thus the decision below does not create an intolerable conflict among the lower courts.

C. The Panel's Decision Does Not Lead to Indefinite Tolling and the Opinion Is Limited to the Particular Facts of This Case

The Fourth Circuit's decision does not indefinitely extend the limitations period.[8] As the majority

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Anghaie, No. 12-10086, 2013 U.S. App. LEXIS 11582 (11th Cir. June 7, 2013). The district court issued an Order on Limited Remand on July 22, 2013. *Anghaie*, No. 09-cv-37 (N.D. Fla. July 22, 2013) (Doc. No. 268). The *Anghaie* docket does not yet indicate any further appeals.

[7] Since the decision in *United States v. Western Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224 (S.D. Cal. July 1, 2010), the government dismissed all of its charges with prejudice against two of the defendants, Daniel Schroder and John Cotner, that moved for dismissal in the district court. *Western Titanium*, No. 08-cr-4229 (S.D. Cal. Jan. 13, 2013) (Doc. No. 937).

[8] Petitioners misstate the Fourth Circuit panel's holding in claiming that the panel held that hostilities have not yet ended. Pet. Br. at 8. The panel did not address the issue of whether hostilities ended; rather, the panel only addressed whether Operation Iraqi Freedom was on-going at the time the claims at issue were presented. Pet. App. at 13a ("Neither Congress nor the President had met the formal requirements of the Act for terminating the period of suspension *when the claims at issue were presented for payment*. We therefore conclude that *the United States was at war during the relevant time period* for purposes of the WSLA.") (emphasis added). *Cf.* Proclamation No. 8785, 77 Fed. Reg. 16,905 (Mar. 22, 2012),

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panel held, and Judge Wynn aptly explained, the WSLA simply "tolls the limitations period for fraud actions for a bounded period of time: the time during which the country is at war or otherwise engaged in a military conflict." Pet. App. at 29a (Wynn, J., concurring); *accord* Pet. App. at 16a. Courts routinely interpret and apply statutes or contract provisions regarding appropriate time periods. *See, e.g.*, *Michael v. First Commer. Bank*, 69 Fed. Appx. 801 (7th Cir. 2003) (interpreting time periods in context of ERISA and insurance); *Crutcher v. Cockrell*, 301 F.3d 656 (5th Cir. 2002) (interpreting time periods related to a habeas petition); *Ponthie v. United States*, 98 Fed. Cl. 339, 346-48 (Fed. Cl. 2011) (interpreting terms and relevant time periods in a contract). This case is no different than any other matter interpreting such terms.

Moreover, Petitioners' reliance on *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013), is misplaced. *Gabelli* stands for the proposition that the discovery rule is not applicable to 28 U.S.C. § 2462 in an SEC civil penalty matter. However, the application of the discovery rule is not a question in this case, and here the United States is a victim and a party-in-interest to the recovery rather than merely seeking to enforce a civil penalty. The Court's concerns in *Gabelli* that a "judicially imposed discovery rule would lack" "an

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(President Barack Obama's Presidential Proclamation honoring troops who served in Iraq and stating that "on December 18, 2011, their mission came to an end").

absolute provision for repose" is not an issue in this case, *id.*, as both versions of the WSLA provide a precise time in which the limitations period is suspended after the termination of hostilities, *compare* 18 U.S.C. § 3287 (2006) *with* 18 U.S.C. § 3287 (2009 Supp.). *See also Gabelli*, 133 S. Ct. at 1224 ("the cases in which 'a statute of limitation may be suspended by causes *not mentioned in the statute itself* . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" (citation omitted) (emphasis added)). Moreover, in *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918), the Court applied the discovery rule where the Government was defrauded and sought recovery rather than merely attempting to enforce a civil penalty.

Additionally, the majority panel's decision is limited by the particular facts of the case and will not have far-reaching implications. This case specifically concerns a fraud that occurred during a war, in a war zone, and directly impacted United States troops fighting in that war. The panel applied the WSLA to a situation that Congress clearly intended under any interpretation of the statute – wartime fraud. Whether or not the Fourth Circuit or other circuit courts will apply the WSLA outside the limited facts of this case remains at best speculation since no other circuit court has addressed the issue. This Court does not grant certiorari based upon speculation about what courts may do in the future when no splits exist, *see McCray*, 461 U.S. at 963 (Stevens, J.) (denying

certiorari where the issue requires "further study" in the lower courts "before it is addressed by this Court"), and where the petition is interlocutory.

III. First-To-File

A. The Unanimous Fourth Circuit Panel Correctly Applied Existing Circuit Law to the Facts in This Case on First-to-File Grounds

The panel correctly decided that the district court's jurisdictional dismissal of the case should have been without prejudice. It is well settled that the first-to-file provision in 31 U.S.C. § 3730(b)(5) is jurisdictional and courts need not reach the merits of a case to consider such a challenge. *See United States ex rel. Branch Consultants v. Allstate Ins.*, 560 F.3d 371, 376 (5th Cir. 2009). The Fourth Circuit panel's unanimous decision therefore follows the law of other circuits and does not require review by this Court. *See United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362-65 (7th Cir. 2010) ("§ 3730(b)(5) applies only while the initial complaint is 'pending.'"); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-64 (10th Cir. 2009) (explaining that the first-to-file bar no longer applies when the prior claim is no longer pending).

Petitioners recognized in moving to dismiss the complaint for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, that their first-to-file motion was jurisdictional and

not addressed to the merits.[9] They also recognized that they would not be entitled to a dismissal with prejudice unless the district court granted their motion addressed to the WSLA. In a well-placed footnote, Petitioners argued to the district court that: "This Court's previous dismissals under the first-to-file bar have been without prejudice, but there would be no point to a without prejudice dismissal now because, if Carter elects again to refile, he would be exceeding the statute of limitations for all of his FCA claims, as discussed in Section III, *infra*." *United States ex rel. Carter v. Halliburton Co*., No. 11-cv-602 (E.D. Va. Oct. 21, 2011, redactions filed Dec. 7, 2011) (Doc. No. 47), at 13, n.5. Indeed, the district court took the hook and erroneously concluded: "Carter's suit is precluded by the first-to-file bar is, of course, dispositive. The Court addresses Defendants' statute-of-limitations argument because, in addition to

[9] It is well settled that a dismissal under Rule 12(b)(1) solely for lack of subject matter jurisdiction is not an adjudication on the merits and is not a bar to a subsequent suit. *See Costello v. United States*, 365 U.S. 265 (1961) ("dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim."); *Ex parte McCardle*, 74 U.S. 506 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *Hughes v. United States*, 71 U.S. 232, 237 (1866) ("If the first suit was dismissed for . . . the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."). Thus, to dismiss with prejudice under Rule 12(b)(1) is to disclaim jurisdiction and then exercise it.

providing an independent basis for dismissal of Carter's claims, it bears on whether or not dismissal should be with prejudice." Pet. App. at 64a n.8. After concluding that Carter's claims were time-barred, the district court dismissed the case *with* prejudice stating that the claims "would be untimely were Carter to again file a new action. And amendment of the complaint would provide no cure to the Court's lack of jurisdiction by virtue of the first-to-file bar." Pet. App. at 75a. Thus, its rationale for dismissing *with* prejudice was that the WSLA would preclude the filing of a new complaint.

The panel's decision, however, appropriately interpreted both the letter and intent of the first-to-file provision because the interpretation urged by Petitioners would result in permanent immunity from suit for any defendant based upon the filing of an inadequate, frivolous, or jurisdictionally defective complaint.[10] There is nothing in the panel's decision, or the case law Petitioners cite,[11] that supports

[10] For instance, to the extent a "pending" complaint has not yet been challenged by a motion to dismiss, even if inadequate or defective, under section 3730(b)(5) that complaint bars not only Carter's complaint but any complaint by any appropriate relator. However, Petitioners urge an interpretation that goes beyond the statute; essentially, if a first-filed complaint were dismissed (either voluntarily, under Rule 9(b), or on jurisdictional grounds) all other potential relators would be barred from filing any future *qui tam* action involving the same fraud, thereby immunizing a defendant's fraudulent conduct on merely procedural grounds.

[11] Petitioners' citation to cases discussing the policy behind notice to the government is inapposite to this case and the

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Petitioners' argument that the unanimous panel is encouraging relators to endlessly re-plead claims even if the claims were litigated in other cases and put the government on notice. As the panel stated, "[a]lthough the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not." Pet. App. at 21a. Moreover, there are other provisions in the FCA that address public disclosure. The panel's decision clearly tracks the plain language of the FCA, which 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) (emphasis added).

The petition for certiorari can be reduced to a request that this Court read the word "pending" out of § 3730(b)(5), something that the district court and

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panel's analysis of section 3730(b)(5). *See United States ex rel. Batiste v. SLM Corp*., 659 F.3d 1204, 1210 (D.C. Cir. 2011) (discussing whether first-filed complaints must meet Rule 9(b) to bar later complaints); *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 295 (4th Cir. 2008) (discussing the FCA's statute of limitations in section 3731(b)(2)); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) (discussing its rationale for rejecting the "identical facts" test over the "essential claim" or "same material elements" test); *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (discussing its rejection of the "identical facts" test); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 570 (10th Cir. 1995) (discussing the FCA's public disclosure bar in section 3730(e)(4)).

Fourth Circuit correctly refused to do. Petitioners' claim that Congress's use of the word "pending" was not to impose any time limitation and was merely a "drafting short-hand" to distinguish between the first-filed action and a subsequent action flies in the face of the law, including cases by this Court, that require courts to interpret statutes based upon their plain meaning. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 552-53 (1987) ("When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter.'" (citation omitted)). Accordingly, Petitioners' reliance on an unreported opinion from the Northern District of Georgia, concerning its interpretation of the word "pending" in § 3730(b)(5), to invoke this Court's jurisdiction is misplaced. Pet. Br. 29 (citing *United States ex rel. Powell v. Am. Intercontinental Univ. Inc.*, No. 1:08-cv-2277, 2012 U.S. Dist. LEXIS 97587, at *13-18 (N.D. Ga. July 12, 2012)). Notably, the district court in *Powell* incorrectly asserted that this was an issue of first impression and failed to consider the circuit law in *Chovanec* and *In re Natural Gas Royalties*. *Id*. at *17. In relying upon *Powell*, Petitioners' arguments go far beyond the Fourth Circuit panel's unanimous holding. Taking Petitioners' arguments to their logical conclusion would compel that all dismissals under the first-to-file jurisdictional bar would be with prejudice and would lead to the untenable result that all other relators would be precluded from filing a complaint

after a first-filed complaint was dismissed for any reason, including a voluntary dismissal.

Boiled down, Petitioners' arguments for a writ of certiorari amount to nothing more than policy arguments concerning their dissatisfaction with the panel's unanimous first-to-file decision and are more appropriately the province of congressional lobbying. According to this Court's Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, Petitioners present no compelling reason or important question to grant the petition for writ of certiorari.

B. The Panel's "First-to-File" Holding Follows the Decisions of the Circuits

Not only is there no circuit split, but every circuit that has considered this narrow first-to-file issue has come to the same conclusion as the Fourth Circuit panel's conclusion that the bar of 31 U.S.C. § 3730(b)(5) does not apply to an action filed *after* the prior action is no longer "pending." *See Chovanec*, 606 F.3d at 362-65; *In re Natural Gas Royalties*, 566 F.3d at 963-64; *see also United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("The statutory text imposes a bar on complaints related to earlier-filed, 'pending' actions. The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."). The

panel specifically held that "[a]lthough the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not." Pet. App. at 21a. Accordingly, once a first-filed "case is no longer pending the first-to-file bar does not stop a relator from filing a related case. . . . The first-to-file bar allows a plaintiff to bring a claim later; this is precisely what a dismissal without prejudice allows a plaintiff to do as well." Pet. App. at 22a. Petitioners do not identify a circuit split, indeed there is no circuit split, therefore there is nothing for this Court to review.

Petitioners do not cite any circuit cases that expressly conflict with the Fourth Circuit panel's decision on this issue. Instead, many of their citations are not relevant to whether the first-to-file bar precludes a later-filed action when the prior action is no longer "pending."[12] For instance, Petitioners

[12] Petitioners' attempt to distract the Court with the rules regarding amendments to complaints and the relation back doctrine, which are irrelevant to the facts of this case and the § 3730(b)(5) analysis. *See Makro Capital of Am., Inc. v. UBS AG*, 543 F.3d 1254, 1259-60 (11th Cir. 2008) (holding that Rule 15's relation back doctrine did not permit a new *qui tam* claim in an amended complaint to relate back to the original complaint that contained no *qui tam* allegations and sought personal recovery for a fraud); *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14-15 (D.D.C. 2003) (holding that a relator's entirely new kickback allegations did not relate back to the original complaint's filing date because they were distinctly different claims, and, therefore, placed her new kickback allegations after those of a complaint filed later than the original complaint, but containing the same kickback allegations and filed before her amendment). As these cases and

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incorrectly claim that *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001), is illustrative. It is not illustrative of anything other than the Ninth Circuit's holding that § 3730(b)(5)'s plain language barred the relator's action while the prior-filed action was pending. *Id*. In *Lujan*, notwithstanding the dismissal of the first-filed case, the first-filed case was still pending when the relator initiated her action. *Id*.

Petitioners' reliance on *Branch Consultants*, 560 F.3d at 378, is similarly misplaced. That case involved the question of how to interpret first-to-file doctrine and whether a pending case was first-filed. There, the court was focused on whether the essential or material elements of a fraud claim were described in the same way in two complaints, *id*. at 378, and was not presented with a factual situation involving a dismissal with prejudice or whether a case could be filed after a first-filed pending case was dismissed. In fact, the Fifth Circuit recognized that this issue was not before it and declined to reach the issue. *Id*. at 379.

Petitioner is also incorrect in asserting that *United States ex rel. Duxbury v. Ortho Biotech Prods.,*

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the procedural history of this case demonstrate, there are other legal obstacles, such as the relation back doctrine and the statute of limitations, that impact whether a relator can proceed with a claim. However, those are not at issue here.

L.P., 579 F.3d 13, 32-34 (1st Cir. 2009), supports their position. *Duxbury* did not involve a dismissal of a prior suit before the date of a subsequent complaint. *See id*. at 32. It involved a complaint that was amended, after a second-filed action was voluntarily dismissed and unsealed, to add an additional relator and additional allegations similar to those publicly disclosed in the dismissed second-filed action. *Id*. at 17-20, 28, 32-34. There the court held that the first-to-file bar precluded claims asserted for the first time in an amended complaint that was filed after another relator had filed a complaint alleging similar off-label promotion claims. *See id*. at 32-34; *see also United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 551 F. Supp. 2d 100, 110-14 (D. Mass. 2008).

The relevant inquiry for the Court is whether there are any discrepancies among the circuit courts to justify granting a writ of certiorari. The panel's decision was correct – it followed the decisions of the Seventh and Tenth Circuit Courts of Appeals. Petitioners' argument that the word "pending" should be read out of 31 U.S.C. § 3730(b)(5) is an argument more appropriately made to Congress and is not worthy of review by this Court. *See Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1106-07 (2006) (Stevens, J., respecting denial of certiorari). Under this set of facts and the holding of the Fourth Circuit panel, we respectfully submit that this matter is unworthy of review by this Court.

CONCLUSION

This interlocutory petition raises no new significant or important issues. The Fourth Circuit panel's well-considered opinion on these issues, involving a fraud against troops in a war zone, is fully consistent with existing precedent for which there is no circuit split. For the foregoing reasons, review by this Court is both unnecessary and unwarranted. Respectfully, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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