No. 12-1497

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, THE COALITION FOR GOVERNMENT PROCUREMENT, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Defense Industrial Association ("NDIA"), a non-profit, non-partisan organization, has a membership consisting of over 90,000 individuals and 1,780 companies, including some of the Nation's largest defense contractors. Promoting national security since 1919, NDIA encourages a vigorous and ethical forum of information exchange between the government and the defense industry. Due to the large number of civil False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, lawsuits targeting defense contractors, NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress's intentions.

The Coalition for Government Procurement ("CGP"), a national trade association, represents commercial contractors in the federal market. For more than 30 years, CGP has advocated for commonsense policies that improve the acquisition environment for the government, industry players, and, ultimately, the American public. As such, CGP has a strong interest in the correct application of the civil FCA.

The National Association of Manufacturers ("NAM"), the largest association of manufacturers in the Nation, represents small and large

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties filed blanket letters of consent to *amicus curiae* briefs with the Clerk of the Court.

manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the Nation.

Accordingly, the *amici* have a significant interest in the Fourth Circuit's decision below, which radically extends and potentially eradicates the FCA's statute of limitations. While *amici* have an interest in and support petitioners on the first-to-file question, *amici* herein particularly address the first question posed to this Court, concerning application of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, to the civil FCA.

SUMMARY OF ARGUMENT

This case presents the opportunity for this Court to prevent an unwarranted judicial expansion of the WSLA far beyond the text of the statute and contrary to Congressional intent. If allowed to stand, the Fourth Circuit's decision not only would sanction the WSLA's application to the post-1986 civil FCA – effectively eliminating the FCA's statute of limitations – but also would permit it to reach other civil statutes as well.

The Fourth Circuit's decision is at odds with this Court's recent reaffirmation of "the basic policies of

all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (internal quotation marks omitted), and prior emphasis that the WSLA be given a "conservative interpretation" in favor of repose, *Bridges v. United States*, 346 U.S. 209, 216 (1953). It also rests on a flawed interpretation of the text of both statutes and ignores important historical context and legislative history manifesting that Congress never intended the WSLA to apply in such an expansive manner.[2]

The WSLA is a 72-year-old criminal code provision, with even deeper criminal code roots, that suspends the statute of limitations for "any offense" involving fraud or attempted fraud against the government when the country is at war. Some courts mistakenly have concluded that the term "offense" now applies to civil violations as well.

According to the Fourth Circuit, this wholesale transformation – from a criminal-only provision to one that applies to both criminal and civil conduct – took place by omission. Acknowledging that the WSLA originally applied solely to criminal code

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[2] The Fourth Circuit's decision has been invoked in various jurisdictions, including in civil FCA cases having no relation to wartime contracting. *See, e.g.*, *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 610-11 & n.10 (S.D.N.Y. 2013); *United States ex rel. Paulos v. Stryker Corp.*, No. 11-0041, 2013 U.S. Dist. LEXIS 82294, at *50-51 (W.D. Mo. June 12, 2013), *aff'd*, 2014 U.S. App. LEXIS 15199 (8th Cir. Aug. 7, 2014) (affirming dismissal on original source grounds).

offenses, the Fourth Circuit's expansionist reasoning rests almost exclusively on Congress's removal of the words "now indictable" in the 1944 version of the statute. But ample legislative history offers a far more plausible explanation for the deletion of the phrase "now indictable under any existing statutes" – namely, that Congress made the WSLA applicable not only to offenses already committed for which indictment was still possible at the time of suspension, but also to crimes not yet committed. Notably, both before and after the 1944 amendments to the WSLA, the legal definition of "offense" consistently has meant a crime.

Similarly, while the Solicitor General reasons that "Congress's failure to include language limiting the WSLA to crimes" indicates Congress intended WSLA application in the civil context, *see* Brief for the United States as *Amicus Curiae* at 10-11 & n.3, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, No. 12-1497 (May 27, 2014), no such conclusion is warranted. To the contrary, the lack of direct language *including* civil claims within the ambit of the WSLA – a Title 18 provision with suspension periods that mirror the criminal statute of limitations – is evidence that Congress did not intend it to apply in the civil context. This is particularly apt given that Congress, in contemporaneous and analogous legislation, used both "violation" and "civil proceeding" to articulate a suspension statute's reach when it intended civil limitations periods to be included.

As discussed in Part II below, the Fourth Circuit compounded its improper application of the WSLA to

civil limitations periods by applying it to today's civil FCA. Specifically, the court failed to appreciate that the 1986 amendments to the civil FCA included a statutory definition of "knowing" that disqualifies WSLA application pursuant to this Court's "essential ingredient" test. *See United States v. Grainger*, 346 U.S. 235, 242-43 (1953); *Bridges*, 346 U.S. at 220-23; *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 10-00976, 2014 U.S. Dist. LEXIS 83313, at *67-72 (D.D.C. June 19, 2014).

Amici respectfully submit that the Fourth Circuit's statutory and legislative history analyses are flawed and incomplete. This Court should reverse the judgment below.

ARGUMENT

I. THE WSLA'S HISTORY SUPPORTS LIMITING ITS APPLICATION TO CRIMES

The WSLA's history – traceable in important part to the earliest laws of this Nation – demonstrates that the WSLA always was, and today remains, a statute that solely affects criminal statutes of limitations.

Indeed, the WSLA's roots are in statutes where the use of the term "offense" was limited to the distinction between capital and non-capital crimes. The legal definition of "offense" has not materially changed over time, and it is therefore no surprise that the WSLA, the application of which is limited to "offense[s]," is codified in Title 18.

While some courts – including the Fourth Circuit – have seized upon Congress's removal of the phrase "now indictable" from the WSLA in order to justify expanding its reach into the civil arena, the WSLA's legislative history supports no such reasoning and, instead, compels a far more plausible explanation for that language change. As described below, in 1921 and then again in 1942, Congress passed retrospective legislation to address the limitations period for certain offenses already committed or "now indictable under any existing statutes" at the time of enactment. In 1944, Congress removed the "now indictable under any existing statutes" language when it replaced the 1942 interim measure with a forward-looking provision that also would account for suspension of the limitations period for qualifying offenses not yet committed. No legislative history supports the notion that Congress intended or achieved a wholesale expansion of the WSLA to civil fraud statutes when it removed the "now indictable" language. To the contrary, contemporaneous antitrust legislation shows how Congress directly would have accomplished such an extension.

Moreover, the fact that Congress consistently has maintained symmetry between the WSLA's suspension period and the ordinary criminal statute of limitations further evidences the statute's exclusively criminal scope.

A. The WSLA's Earliest Origins Are "Criminal"

In 1790, Congress first enacted a general statute of limitations for federal crimes, imposing a two-year

limitations period for non-capital offenses. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. This limitations period remained the law for over 85 years and was codified in the initial edition of the Revised Statutes of the United States as follows: "No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section one thousand and forty-six [*i.e.*, revenue and slavery offenses], unless the indictment is found or the information is instituted within two years next after such offense is committed." Rev. Stat. § 1044 (1875).

Barely a year after codification, Congress lengthened the limitations period to three years. Act of Apr. 13, 1876, ch. 56, 19 Stat. 32. In so doing, Congress specifically excluded crimes already "barred by the provisions of existing laws" such that the existing limitations period had run. *Id.* As codified, the statute provided:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six [*i.e.*, revenue and slavery offenses], unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.

Rev. Stat. § 1044 (1878).

This remained the rule until 1921, when Congress enacted its first distinct limitations period – six years – for crimes of fraud against the government. Act of Nov. 17, 1921, ch. 124, 42 Stat. 220 (an act "relating to limitations in criminal cases"). Similar to the current WSLA,[3] that act addressed "offenses involving the defrauding or attempts to defraud the United States":

> *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Id.

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[3] In the aftermath of World War I, Congress was concerned with providing the government adequate time to determine "whether prosecutions are justified or not" and "to begin the necessary prosecutions" for criminal offenses "which are claimed to have occurred during the war with Germany and since its conclusion." H.R. REP. NO. 67-365, at 1-2 (1921). Congress stated that "[m]any of these alleged offenses grew out of the contractural [sic] relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies" and that, given the passage of time, "many of these alleged crimes are already barred." *Id.*

Contemporaneous legal provisions made clear that Congress intended the term "offenses" to mean crimes. As Congress considered the 1921 act, the very section of the Revised Statutes that the act would amend, Rev. Stat. § 1044 (1878), and an immediately adjacent section, Rev. Stat. § 1043 (1878), divided offenses into those "capital" and "not capital," a manifestly criminal dichotomy that continued into the United States Code, *see* 18 U.S.C. §§ 581-82 (1925-26). Similarly, a 1909 act that served to "codify, revise, and amend the penal laws of the United States," classified certain offenses as "[f]elonies" and provided that "[a]ll other offenses shall be deemed misdemeanors." Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1088, 1152 (later codified at 18 U.S.C. § 541 (1925-26)).[4] The ordinary legal meaning of the word "offense" at that time was in accord: "[a] crime or misdemeanor; a breach of the criminal laws." *Black's Law Dictionary* 847-48 (2d ed. 1910).

Congress knew what "offense" meant. In fact, prior to passage of the 1921 amendment, it debated whether to expand the statute of limitations in the civil arena as well. During debate, Senator Walsh observed that "[t]his bill affects only criminal liability" and expressed the opinion that "I think we ought to safeguard the interests of the Government so far as the civil liability * * *, as well as the criminal responsibility." 61 CONG. REC. 7640 (1921).

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[4] Although the law was a re-codification of the entire criminal code in most respects, it left preexisting statutes of limitation, such as Rev. Stat. § 1044, in place. *See* Act of Mar. 4, 1909, ch. 321, § 344, 35 Stat. 1088, 1159.

Senator La Follette agreed and inquired about amending the bill to apply to civil claims. *Id.* Senator New replied that "[w]hile what [Senator Walsh] says is true, that we ought also to provide for the recovery of damages in civil suits, I think it is best to provide for that in a separate bill and not to delay the passage of this one through any attempt to amend it in any way." *Id.*

This Court also recognized that the 1921 act addressed only crimes, as it "relate[d] to all crimes, excepting only capital offenses," served "to carve out a special class of cases" from among those crimes, and should "be construed strictly." *United States v. McElvain*, 272 U.S. 633, 639 (1926); *cf. United States v. Scharton*, 285 U.S. 518, 522 (1932) ("[A]s [an analogous revenue provision] has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses.").

B. Congress Used The "Now Indictable" Language To Reflect Retroactivity – A Concern Having No Relation To Civil Liability

When the United States Code was first promulgated, the 1921 act was codified in Title 18 ("Criminal Code and Criminal Procedure") with minor alterations. However, the "now indictable" and not "already barred" language was maintained:

> *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency

> thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses, or transactions which on that date were already barred by the provisions of existing laws.

18 U.S.C. § 582 (1925-26).

Since the war had ended, Congress employed retroactive language to extend the limitations period for crimes already committed. Mindful of the due process concerns attendant to such retroactivity, the House Judiciary Committee sought advice from the Solicitor General, whose response is quoted at length in and substantially comprises the committee's report. H.R. REP. NO. 67-365, at 2 (1921). The Solicitor General assured Congress that as long as a defendant is "still liable to prosecution" at the time of the extension (*i.e.*, as long as "the statute of limitations has not fully run" for past conduct), retroactive extension is permissible. *Id.* The Solicitor General further advised that "[i]n drafting statutes on the above subject, care should be taken that the amendatory statute should be clearly made to apply to offenses already committed, for, in the absence of such clear intendment, there is a tendency on the part of the courts to hold that the amendatory statutes are prospective and that it was not the legislative intent to make them apply to

crimes already committed." *Id.* The committee adopted this advice in its report. *Id.*

The 1921 act also conforms to this advice. The "now indictable" language reflects clear application "to offenses already committed." *Compare* H.R. REP. NO. 67-365, at 1-2 (1921) *with* Act of Nov. 17, 1921, ch. 124, 42 Stat. 220; *cf. McElvain*, 272 U.S. at 637 ("[T]he [1921] proviso was made applicable to offenses theretofore committed and not already barred.").

Six years and one month after enactment, the House Judiciary Committee issued a report concerning repeal of the extension. H.R. REP. NO. 70-16 (1927). The report reiterated that the 1921 act had been passed at the behest of the Attorney General, who had "represented that he was desirous of having further time to investigate alleged war frauds" lest the statute of limitations "run before it would be possible to obtain indictments." *Id.* at 1. Given that "the whole period of six years has now run against all offenses" indictable at the time of enactment, the committee concluded that "[t]he reasons for the [extension] have ceased to exist." *Id.* The report reflects that the Attorney General agreed, *id.* at 2, and Congress eliminated the extension, Act of Dec. 27, 1927, ch. 6, 45 Stat. 51.

This repeal had the effect of "restor[ing] the statute of limitations as it was prior to 1921," H.R. REP. NO. 70-16, at 1 (1927), including removal of the "now indictable" language, Act of Dec. 27, 1927, ch. 6, 45 Stat. 51. The use of the "now indictable" language for the first time in 1921 – applying the

1921 extension to crimes already committed at the time of enactment – was the first (and only) time this term had appeared in the general statute of limitations for non-capital crimes. *See* Rev. Stat. § 1044 (1878); *see also* 18 U.S.C. § 3282 (2012).[5]

C. The 1942 Version Of The WSLA Applied Only To Crimes That Already Had Occurred

In 1941, a House subcommittee held hearings on H.R. 4916, 77th Cong. (1st Sess. 1941), captioned as a bill to suspend "during time of war or national emergency the running of any statute of limitations on prosecutions for Federal offenses." *Suspending Statutes of Limitations During War or Emergency: Hearing on H.R. 4916 Before Subcomm. of the H. Comm. on the Judiciary*, 77th Cong. 1 (1941). This bill would have applied to any "offense punishable under the laws of the United States" and served as permanent policy rather than a one-time

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[5] The brief appearance of "now indictable under any existing statutes" from 1921 to 1927 was a one-time, retroactive extension of the limitations period for qualifying crimes committed prior to enactment. When Congress extended the general three-year limitations period for non-capital crimes to five years in 1954, the extension was effective both prospectively and retrospectively. Act of Sept. 1, 1954, ch. 1214, § 10(b), 68 Stat. 1142, 1145. That extension's retrospective language ("offenses * * * committed prior to [enactment], if on such date prosecution therefor is not barred by provisions of law in effect prior to such date," *id.)* parallels the language of the 1921 extension ("offenses * * * now indictable under any existing statutes," Act of Nov. 17, 1921, ch. 124, 42 Stat 220). This reinforces the view that "now indictable" in 1921 merely served to specify that the act was retrospective.

exception. *Id.* It contained no language limiting it to offenses "now indictable," and it was formulated to apply to future wars or emergencies as well. *Id.* Indeed, the United States was not yet at war: The subcommittee held its hearing on November 26, 1941. *Id.*

During the hearing, a Justice Department official testified that there was no "valid ground" for suspending "statutes of limitation on all crimes" and recommended that suspension be limited to "one type of crime," namely "frauds against the Government." *Id.* at 6 (statement of Special Assist. to the Att'y Gen.). He also recommended that a suspension be structured with "some time limit" (*i.e.*, for "some period of time") to avoid suspending the limitations period "indefinitely." *Id.* He added that "it would be very desirable if a bill such as was passed in 1921 were enacted at this time." *Id.* Likewise, in a letter included in the hearing report, the Attorney General stated that the Justice Department was "unable to recommend the enactment of the bill in its present form" since there was no apparent basis for "extension of the statute of limitations in criminal cases other than those involving frauds against the United States." *Id.* at 8.

In Congress's next session, the House Judiciary Committee addressed a new bill, H.R. 6484, 77th Cong. (2d Sess. 1942), intended to suspend the limitations period for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof," H.R. REP. NO. 77-2051, at 1 (1942). The committee's report observed that the United States once again was "engaged in a gigantic

war program" like the one that had necessitated an extension of the "criminal statute of limitations" in 1921. *Id.* The committee quoted favorably from its own 1921 report, which reasoned that, in the aftermath of World War I, the government had needed more time to determine "whether prosecutions are justified or not." *Id.* at 2 (quoting H.R. REP NO. 67-365, at 1-2 (1921)) (internal quotation marks omitted). The committee's 1942 report concluded that enactment would allow the busy government "sufficient time to investigate, discover, and gather evidence to prosecute frauds." H.R. REP. NO. 77-2051, at 2 (1942). The report also asserted that this bill had been "cleared with the Legislative Committee of the Department of Justice." *Id.*

During House floor debate, Rep. Rankin was the only Member to speak. 88 CONG. REC. 4759 (1942). She spoke favorably of the general principles behind suspension, emphasizing that the ordinary "3-year period * * * to investigate, discover, and gather evidence to prosecute Federal offenses" was not "adequate" given the scope of the war program and that "[t]he law-enforcing agencies of the Government" were occupied beyond their "normal functions of law enforcement." *Id.* She concluded that "evidence sufficient to indict may not be unearthed until considerably later." *Id.* She supported the bill, but emphasized that she favored H.R. 4916, which would have "stop[ped] the running of the statute of limitations on crimes already committed" for *all* federal crimes and urged Congress to support that approach. *Id.* at 4759-60.

Despite Rep. Rankin's preference for the more expansive H.R. 4916, the House passed the less-inclusive version (specific to fraud crimes, as embodied in H.R. 6484) immediately after debate. *Id.* at 4760. As passed, the House bill provided that "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended for the period of the present war and for 6 months thereafter." *Id.* at 4759. The bill then moved to the Senate, where the Senate Committee on the Judiciary recommended the bill with amendments. S. REP. NO. 77-1544 (1942).

The Senate committee's report was identical in most respects to that of the House committee, explaining that the government needed more time to investigate and "prosecute frauds," *id.* at 2, and recounting the 1921 extension of the "criminal statute of limitations" to prevent offenses from being "barred from prosecution," *id.* at 1-2. The committee's amendments were telling. The House bill only partially addressed the Justice Department's 1941 concerns – the bill was limited to frauds against the government, but it was still without a time limit other than the end of war. The House bill also was somewhat inconsistent in that it provided for an open-ended, forward-looking extension while retaining the retrospective language from the 1921 act that limited the bill to offenses "now indictable," making it temporary in some respects and permanent in others.

The Senate committee's amendments made the bill internally consistent, in part by replacing the "present war and for six months thereafter" standard with a fixed date, "June 30, 1945." S. REP. NO. 77-1544, at 1 (1942). The bill was then formally re-titled as a bill to "suspend temporarily the running of statutes of limitations applicable to certain offenses." 88 CONG. REC. 6161 (1942); 88 CONG. REC. 6874 (1942). By contrast, the bill had been introduced and had first passed the House not as a "temporar[]y" bill with a fixed end-date but rather as an open-ended bill tied to the unknown length of "the present war." 88 CONG. REC. 821 (1942); 88 CONG. REC. 4759 (1942).

The amended bill passed the Senate, 88 CONG. REC. 6161 (1942), and the House adopted it by unanimous consent, 88 CONG. REC. 6874 (1942). As codified the next year in a new section of Title 18, the 1942 act provided:

> The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or

> transactions which are already barred by the provisions of existing laws.

18 U.S.C. § 590a (Supp. III 1943) (codifying Act of Aug. 24, 1942, ch. 555, 56 Stat. 747).

The 1942 suspension borrowed its operative language from the 1921 extension. Indeed, this Court has recognized that the 1942 act was "substantially the same" as the 1921 act:

> [The 1942 act] was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I. * * * In 1942, the reports and proceedings demonstrate a like purpose, coupled with a design to readopt the World War I policy.

Bridges, 346 U.S. at 217-18 (footnotes omitted) (citation omitted); *see also id.* at 221 (noting the "substantial reenactment, in 1942," of the earlier act). Like the 1921 extension, and for the same reasons, the 1942 suspension was retrospective and thus only applicable to offenses that were "now indictable under any existing statutes."[6]

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[6] Unlike the 1921 extension, the 1942 suspension was enacted as a stand-alone provision rather than as an exception embedded in the ordinary statute of limitations, which continued in the United States Code as it had since its 1940 codification. 18 U.S.C. § 582 (1946).

D. The Legislative History Of The 1944 WSLA Amendments Also Supports A Criminal-Only Application

As World War II continued, Congress passed two amendments in 1944 that made the temporary 1942 act more permanent by inserting a "present war" standard, this time at the Justice Department's suggestion. The amendments also brought more crimes within the ambit of the suspension.

The first 1944 amendment – never codified due to its short life – expanded the limitations suspension to include certain crimes associated with war-related government contracting, whether or not amounting to fraud (second clause below), and resulted in the following provision:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after

> the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

Contract Settlement Act of 1944, ch. 358, § 19(b), 58 Stat. 649, 667.

Although this amendment modified the suspension language, it was not the central focus of the Contract Settlement Act, which served primarily to establish an efficient system for compensating contractors when the government terminated war contracts. *Id.* § 1. The legislative record reflects that section 19, which included the revised suspension, was "prepared by the Department of Justice." 90 CONG. REC. 3907 (1944). A substantive criminal provision regarding destruction or failure to maintain war contract records was the centerpiece of section 19. *See* 90 CONG. REC. 1582-83 (1944) (setting forth the proposed section 19); S. REP. NO. 78-836, at 5 (1944) (explaining that these provisions "assure the expeditious prosecution of willful frauds on the part of war contractors in connection with contract settlements" by "mak[ing] it unlawful for war contractors to destroy records"). One of the act's stated purposes was to "prevent improper payments and to detect and prosecute fraud." Contract Settlement Act § 1. This referred, in part at least, to hotly-debated provisions for administrative review of

negotiated settlement agreements for fraud in the inducement, *id.* § 16, and appears likely to also have referred to substantive prohibitions on making false statements during war contract settlement negotiations with the government, *id.* § 19(c)-(d).

Given that the suspension would expire the next year, Congress took the opportunity of this amendment to extend the suspension in a forward-looking manner linked to the end of "the present war." In so doing, Congress dropped the retrospective "now indictable under any existing statutes" language. While the legislative record itself sheds little light on Congress's purpose for the particular wording changes to the suspension provision, it nonetheless makes clear that legislators continued to regard the suspension provision as exclusively criminal in spite of the removal of the "now indictable" language. For example, during House debate, Rep. Sumners discussed a "special department [in the Justice Department] to prosecute war frauds" that had been established at his suggestion and noted that the WSLA would serve to "extend[] the statute of limitation as to these war frauds so that those guilty of such fraud would not escape because of the confusion incident to the war." 90 CONG. REC. 6110-11 (1944).[7]

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[7] The placement of the revised limitations suspension also is telling. Section 19 is captioned "Preservation of Records; Prosecution of Fraud." Contract Settlement Act § 19. The limitations provision itself appeared as section 19(b). Section 19(a), the newly-created *criminal* provision regarding war contract records, thus immediately preceded the wartime suspension of limitations provision.

The second 1944 amendment expanded the limitations suspension to include crimes related to the handling of surplus property. Surplus Property Act of 1944, ch. 479, § 28, 58 Stat. 765, 781. As with the Contract Settlement Act, amending the suspension was not the primary purpose of the Surplus Property Act, which served primarily to establish a comprehensive system for disposition of surplus property. *See* Surplus Property Act § 2. A committee report explained that, "[a]s was provided in the Contract Settlement Act," the Surplus Property Act expanded the suspension of limitations to include "offense[s] against the laws of the United States arising in connection with activities" under the new act "until 3 years after termination of hostilities in the present war." S. REP. NO. 78-1057, at 14 (1944). The same report repeated familiar reasons for suspension, namely the "magnitude of the operations" and the "intensive preoccupation of both participants and witnesses with the war effort" with the result that offenses would "not be apprehended or investigated until the end of the war." *Id.*

E. If Congress Had Intended To Expand The WSLA To Civil Liability, It Would Have Done So Directly, As It Did In Contemporaneous Legislation

As a result of these two 1944 amendments, the words "now indictable under any existing statutes" no longer appeared in the WSLA to modify "offenses." *Compare* 18 U.S.C. § 590a (Supp. III 1943) *with* 18 U.S.C. § 590a (Supp. IV 1945). There is no support in the legislative history for the

proposition that this omission – either by design or effect – expanded the WSLA to include civil claims.

In fact, when Congress intended for a wartime suspension of limitations to apply to civil claims in addition to criminal offenses, it knew what language to use. Only two months after Congress enacted the August 1942 act relating to fraud offenses, Congress enacted an analogous statute for antitrust violations. Act of Oct. 10, 1942, ch. 589, 56 Stat. 781. That antitrust provision expressly applied to "violations," including criminal offenses and civil claims, via use of the "subject to civil proceedings" phrase:

> [T]he running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate.

Id. The antitrust bill fell within the purview of the same Congressional committees that had reported on the 1942 fraud bill – namely each chamber's Judiciary Committee – and, while considering the antitrust bill, these committees expressly referred to the earlier fraud bill, noting that the language in the new antitrust bill had been adapted to reach "violations * * * both civil and criminal." S. REP. NO. 77-1592, at 1 (1942); H.R. REP. NO. 77-2480, at 1 (1942).

Much like the 1942 act relating to fraud against the government, the 1942 antitrust act was a temporary measure: It was linked to a fixed date (June 30, 1945), and it was applicable to offenses "now" actionable under "existing statutes." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781. The Senate committee explained that the date in the antitrust bill was "selected because it is 6 months after December 31, 1944, which has been used by the Congress as an estimated date of the termination of the war and it is felt that the suspension should continue 6 months after the termination of the war." S. REP. NO. 77-1592, at 1 (1942); *accord* H.R. REP. NO. 77-2480, at 1 (1942). Unlike the WSLA of 1942, the antitrust suspension never was amended to a permanent form. *See* 15 U.S.C. § 16 note (1946).

Under these circumstances, there is no room for argument that Congress's 1944 amendments to the WSLA – which continued to refer to an "offense" and contained no reference to civil proceedings – were designed to allow a wholesale expansion of the WSLA's reach. The words used by Congress to reach civil violations in the contemporaneously-enacted antitrust provision preclude any conclusion that Congress changed the statute's meaning indirectly through deletion of the words "now indictable." Indeed, Congress would not have continued to use the word "offense" if it had intended to expand the WSLA's application to civil frauds, since the meaning of the word "offense" in 1944 remained decidedly criminal. *Black's Law Dictionary* 1232 (4th ed. 1951) ("[a] crime or misdemeanor; a breach of the criminal laws"); *Black's Law Dictionary* 1282 (3d ed. 1933) (same).

It also is telling that, ten years later, this Court discerned no such expansion of the WSLA when it described the post-amendment WSLA as having "its origin in the Act of August 24, 1942," while dispensing with the 1944 amendments in a footnote stating that the 1942 act "was amended in 1944 by the insertion of more specific references to war contracts and to the handling of property." *Bridges*, 346 U.S. at 217 & n.15; *see also United States v. Smith*, 342 U.S. 225, 228-29 (1952) (reasoning, after the 1944 amendments, that the act targeted "crimes of fraud perpetrated against the United States," and analyzing the purpose of the act in terms of "law-enforcement officers").

This legislative history demonstrates that introduction of the phrase "now indictable under any existing statutes" in 1942 (or 1921) related to the amendment's retroactivity. The act already was limited to criminal offenses through the use of the word "offense," which had appeared without exception in the general statute of limitations for non-capital crimes since 1790. *See* Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. Congress repealed the 1921 extension in 1927, returning the statute of limitations to roughly its pre-1921 state without the "now indictable" language. *Compare* 18 U.S.C. § 582 (1934) *with* Rev. Stat. § 1044 (1878); *see also* 18 U.S.C. § 582 (1925-26). Thus, removal of the phrase "now indictable under any existing statutes" in 1944 (or 1927) did not tacitly expand "offense" to include a civil claim.

F. Codification Within Title 18 In 1948 Confirmed The WSLA's Criminal-Only Application

After the 1944 amendments, the WSLA remained unchanged until 1948, when, as part of a Title 18 overhaul, former 18 U.S.C. § 590a (1946) became 18 U.S.C. § 3287 (Supp. II 1949), and Congress added new language making the provision applicable to future wars. This re-codification, enacted on June 25, 1948, became effective on September 1, 1948, and remained in force for 60 years, providing:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed

> by the President or by a concurrent resolution of Congress.
>
> Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section.

18 U.S.C. § 3287 (1952) (codifying Act of June 25, 1948, ch. 645, sec. 1, § 3287, 62 Stat. 683, 828 (effective Sept. 1, 1948, 62 Stat. 862)).

This re-codification continued the use of the term "offense" along the unbroken chain of criminal meaning assigned to this term when the 1921 act was passed, Rev. Stat. §§ 1043-44 (1878) (treating offenses as "capital" and "not capital"); Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1088, 1152 (classifying certain offenses as "[f]elonies" while providing that "[a]ll other offenses shall be deemed misdemeanors"), when the 1942 and 1944 acts were passed, 18 U.S.C. § 541 (1940) (classifying certain offenses as "[f]elonies" while "[a]ll other offenses shall be deemed misdemeanors" and "petty offenses"); 18 U.S.C. §§ 581, 581a, 581b, 582 (1940) (treating offenses as punishable by death and "not capital"), and when the re-codification took place, 18 U.S.C. § 1 (1952) (classifying all offenses as "felony" or "misdemeanor," some of the latter of which are further classified as "petty offense[s]"); 18 U.S.C. §§ 3281-82 (1952) (treating offenses as "[c]apital" and "not capital"). The continued placement of the WSLA in the criminal code with these definitions is highly probative of Congress's intent to use "offense" to mean "crime."

The Solicitor General's brief opposing grant of *certiorari* in this case concedes the validity of such reasoning when discussing the meaning of "offense" in the federal conspiracy statute: "Congress's use of the term 'misdemeanor' to describe less serious 'offense[s]' suggests that Congress used the term 'offense' * * * to mean 'crime.'" Brief for the United States as *Amicus Curiae* at 10 n.3, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, No. 12-1497 (May 27, 2014); *cf.* 18 U.S.C. § 541 (1940); 18 U.S.C. § 1 (1952). The United States was even more cognizant of this context in 1959 when it told this Court that the WSLA only applied to "criminal violations" and that there was "no suspension of limitations on civil actions." Brief for the United States at 9, *Koller v. United States*, 359 U.S. 309 (1959) (No. 362). Indeed, in 1959, the felony-misdemeanor dichotomy still was codified saliently as the first section of Title 18. 18 U.S.C. § 1 (1958) (titled "Offenses classified" and providing that every offense is a "felony" or "misdemeanor").[8]

G. The Legislative History Of The 2008 WSLA Amendments Further Supports Limiting The WSLA To Crimes

After 60 years with the WSLA in its 1948 form, Congress amended the provision in September 2008, expanding its application to instances in which there has been a Congressional "authorization for the use of the Armed Forces" – as opposed to a formal war

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[8] This provision is no longer in effect, having been repealed in 1984 as part of enabling legislation for the Federal Sentencing Guidelines. *See* 18 U.S.C. § 1 note (2012).

declaration – and adding language lengthening the after-hostilities suspension period from three years to five years. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, § 8117, 122 Stat. 3574, 3647 (2008).[9]

The lengthening of the suspension period from three to five years is particularly significant because the new period coincided with the modern statute of limitations for federal non-capital crimes, 18 U.S.C. § 3282 (2012), just as the three-year period specified in the previous version of the WSLA had coincided with the three-year statute of limitations then in effect, *compare* 18 U.S.C. § 582 (1946) *with* 18 U.S.C. § 590a (1946). The parallel was considered purposeful in 1946. *See Smith*, 342 U.S. at 229 ("That seems to us to be an alteration in the statutory scheme, one that destroys its symmetry. Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly."). In fact, the Senate Judiciary Committee's report on the 2008 amendments (as a stand-alone bill, before consolidation into an appropriations act) emphasized that this extension was to "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses." S. REP. NO. 110-431, at 2 (2008).

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[9] Notwithstanding a duplicative and apparently inadvertent amendment enacted later in 2008, which was retroactively repealed in 2009, this version remains current. 18 U.S.C. § 3287 (2012).

The committee's 2008 report stated that the 1942 act had "extended the time prosecutors had to bring charges relating to criminal fraud offenses against the United States," *id.*, and made no mention of any subsequent expansion to include civil claims. The committee report assumed throughout – using decidedly criminal terms – that the WSLA applies specifically to crimes. *See, e.g.*, *id.* at 4 ("statute of limitations for criminal fraud offenses"); *id.* ("statute of limitations * * * to bar criminal actions in investigations of contracting fraud"); *id.* ("grant of immunity for fraudulent conduct by war contractors that has gone undiscovered or unprosecuted"); *id.* at 5 ("standard statute of limitations for all criminal fraud provisions"); *id.* at 7 ("should be vigorously prosecuted"); *id.* ("as soon as a crime has been committed"); *id.* ("prosecution for most federal crimes must begin within five years of the commission of an offense"); *id.* ("liability for criminal offenses"); *id.* at 8 ("statute of limitations for a criminal offense").

There is no indication in the statute's text or any 2008 legislative history that Congress intended to expand the WSLA to apply to civil claims or that it ratified any prior civil application. This most recent history is fully consistent with how the WSLA always has been viewed by Congress – as an extension of *criminal* statutes of limitations.

II. THE CIVIL FCA DOES NOT SATISFY THIS COURT'S WSLA TEST

Even assuming that the WSLA, despite its history and purpose as an exception to criminal statutes of limitations, could be read to apply to

certain civil statutes, it should not apply to the modern-day civil FCA. Because Congress lowered the scienter threshold for civil FCA liability in 1986, the FCA does not satisfy this Court's longstanding requirement that fraud must be "an essential ingredient" of any offense subject to the WSLA.

In two criminal cases decided the same day in 1953, this Court, relying on earlier decisions interpreting the WSLA's predecessor, addressed the application of the WSLA to criminal offenses for which the statute of limitations had otherwise run. *See Grainger*, 346 U.S. at 242 & n.13; *Bridges*, 346 U.S. at 221. The earlier decisions limited the extended statute of limitations to crimes "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." *United States v. Noveck*, 271 U.S. 201, 203-04 (1926) ("[T]he alleged purpose to defraud the United States is not an element of the crime defined in [the statute] on which the indictment is based."); *see also McElvain*, 272 U.S. at 638-39 (rejecting the government's argument that defrauding the United States was "an ingredient of the crime charged"); *cf. Scharton*, 285 U.S. at 521-22 (holding in tax evasion case under an analogous revenue provision that, unless the "intent to defraud" was "an element of a specified offense," the extended statute of limitations did not apply).

In *Bridges*, the Court held that "[t]he purpose of the Wartime Suspension of Limitations Act is * * * to suspend the running of [the statute of limitations] only where *fraud* against the Government is *an essential ingredient of the crime*." 346 U.S. at 222

(emphasis added). Applying that "essential ingredient" standard to the criminal offense of making a false statement in a naturalization proceeding, the Court held that the WSLA did not suspend the statute of limitations because, "although fraud often accompanies" a false statement, that "offense is complete without proof of fraud." *Id.*

In *Grainger*, the Court applied the same "essential ingredient" test to criminal charges that the defendants had "present[ed] * * * for payment or approval, to [the Government], any claim upon or against the Government * * * knowing such claim to be false, fictitious, or fraudulent" and had conspired to make false claims. 346 U.S. at 238, 241-43. Applying the WSLA to this crime, the *Grainger* Court explained: "The statement of the offenses here carries with it the charge of inducing or attempting to induce the payment of a claim for money or property involving *the element of deceit that is an earmark of fraud*." *Id.* at 243 (emphasis added).

The Court has not reexamined the "essential ingredient" test since *Bridges* and *Grainger*, but it remains applicable today. That test mandates that the statute at issue include fraud as a core element, with the offender acting with the level of scienter typically associated with criminal fraud. The modern FCA falls outside of the WSLA's reach under the "essential ingredient" test because, while FCA violations bear the indicia of fraud, Congress expressly eliminated any requirement that FCA liability be predicated on a specific intent to defraud.

In 1986, Congress amended the civil FCA by lowering the threshold showing of intent previously required under the pre-amendment FCA and extending liability to those persons who "ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim." H.R. REP. NO. 99-660, at 21 (1986). One rationale for this amendment was the Senate's view that the stricter "actual knowledge of fraud" and specific intent to defraud standards "presently prohibit[] the filing of many civil actions to recover taxpayer funds lost to fraud." S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276.

The Justice Department supported the changes to the intent standard: "[W]e do not think that we should have to prove a criminal standard of specific intent to defraud the Government. That is the kind of standard which is associated with criminal penalties, rather than civil penalties * * *." *Legislation to Combat the Growth of Fraud Against the Federal Government Through the Filing of False Claims by Government Contractors Before the S. Comm. on the Judiciary*, 99th Cong. 3 (1986) (statement of Richard K. Willard, Assist. Att'y Gen., Civ. Div., Dept. of Justice).

As enacted, the 1986 amendments provide a new definition of "knowing" that includes intentional fraud as well as "deliberate ignorance of the truth or falsity of the information" and "reckless disregard of the truth or falsity of the information." *See* 31 U.S.C. § 3729(b)(1) (2012). Since 1986, the civil FCA affirmatively has stated that "no proof of specific

intent to defraud" is required to prove knowledge under the statute. *Id.*; *see also United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 296 (D.C. Cir. 1994) ("[T]he government need not prove that [the defendant] had *an intent to deceive* when it knowingly or recklessly made false statements to the government." (emphasis added)).[10]

In *Bridges*, the Court rejected the government's argument that "proof of a specific intent to defraud is an essential ingredient of the offense." 346 U.S. at 223-24. In so doing, the Court focused on "the statute creating the offense": "It is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act." *Id.* at 222-23. Lower courts deciding whether the WSLA applies to the post-1986 civil FCA have reached differing conclusions.

In *United States v. Wells Fargo Bank, N.A.*, the district court did not properly account for the civil FCA's statutory definition when applying the WSLA to a civil FCA action. *See* 972 F. Supp. 2d 593, 611-12 (S.D.N.Y. 2013). Instead, the court conflated

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[10] Notwithstanding the statute's affirmation that no specific intent to defraud is required to establish FCA liability, courts properly continue to require that FCA complaint allegations bearing fraud indicia must be pled with particularity in accordance with Rule 9(b) of the Federal Rules of Civil Procedure. *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995) (holding that the reduced intent requirement does not conflict with the pleading requirement, since "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally" under Rule 9(b) (quoting Fed. R. Civ. P. 9(b)) (internal quotation marks omitted)).

the criminal False Claims Act standard for "knowing" – as analyzed in *Grainger* – and the statutorily defined standard for "knowing" under the post-1986 civil FCA. *Id.* However, the criminal False Claims Act has no comparable statutory definition imposing criminal liability based on a "reckless disregard" scienter standard. *See* 18 U.S.C. § 287 (2012). In contrast, Congress specifically defined a lower intent threshold in the civil FCA and wrote into the statute that "'knowing' and 'knowingly' * * * require no proof of specific intent to defraud." 31 U.S.C. § 3729 (b)(1) (2012).[11]

In *Landis*, D.C. Circuit Judge Robert L. Wilkins (sitting by designation) properly rejected the WSLA's application to the FCA. 2014 U.S. Dist. LEXIS 83313, at *67-72. Citing the civil FCA's history, the court reasoned "that civil FCA actions under the modern version of the statute do not require proof of fraud as an 'essential element,' which is required by the holdings in *Bridges* and *Grainger* for the WSLA to apply." *Id.* at *68-71. Judge Wilkins described as "rather unilluminating" the district court's decision

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[11] Moreover, courts have found that the elements of criminal false claims include "the specific intent to violate the law or * * * a consciousness that what he was doing was wrong." *United States v. Slocum*, 708 F.2d 587, 596 (11th Cir. 1983) (citation omitted) (internal quotation marks omitted). For example, in *United States v. Maher*, the Fourth Circuit approved a jury instruction stating that, under the criminal false claims statute, criminal intent "could be proved by either a showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law." 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

in *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd per curiam*, 254 F.2d 90 (D.C. Cir. 1958) (affirming without discussion of the WSLA), a 1950s-era case applying the WSLA to the 1948 version of the civil FCA, because the *McCans* court did not discuss *Grainger* and the specific intent requirement, and "its 'holding' that the WSLA applied to a civil FCA case was actually dictum." *Landis*, 2014 U.S. Dist. LEXIS 83313, at *71 n.27. Judge Wilkins also minimized the import of the Fourth Circuit's decision in the present case, since that court never addressed *Grainger*'s "specific intent to defraud" requirement. *Id.*[12]

Even assuming that some civil violations fall within the WSLA's ambit, the civil FCA cannot be one of them since it cannot satisfy this Court's requirement that the WSLA's application be limited to those offenses with intentional "fraud" as an essential ingredient.

[12] There is no valid argument that Congress essentially ratified application of the WSLA to the modern-day civil FCA through the 2008 amendments to the WSLA since no court had applied the WSLA to the post-1986 civil FCA prior to the 2008 WSLA amendments.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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