No.

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act establishes two distinct statute-of-limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Neither The Parsons Corporation nor Cochise Consultancy, Inc. has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Parsons Corporation ("Parsons") and Cochise Consultancy, Inc. ("Cochise") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing this petition until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729–3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

STATEMENT

In the decision below, the Eleventh Circuit acknowledged that it was exacerbating an existing circuit split by departing from the two prevailing interpretations of the False Claims Act's statute of limitations in 31 U.S.C. § 3731(b)(2). According to the Eleventh Circuit, a private individual who files suit on behalf of the government as a False Claims Act relator can invoke the statute of limitations in Section 3731(b)(2)—which runs from the "date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even where the United States has declined to intervene in the suit. 31 U.S.C. § 3731(b)(2); *see also* Pet. App. 54a. As the Eleventh Circuit recognized, that holding "is at odds with the published decisions of two other circuits," which limit the availability of Section 3731(b)(2) to False Claims Act suits filed by the government or in which the government has intervened. Pet. App. 21a (citing decisions of the Fourth and Tenth Circuits). The Eleventh Circuit then went on to hold that, where the United States declines to intervene, the relator does not constitute the relevant "official of the United States" whose knowledge triggers the statute of limitations in Section 3731(b)(2), "reject[ing] the Ninth Circuit's interpretation" to the contrary "as inconsistent with th[e] text" of the statute. *Id.* at 30a.

This three-way circuit split has profound practical implications for False Claims Act litigants. If this suit had been filed in any of five other circuits, it would have been dismissed as time-barred, but, without this Court's review, it will be permitted to proceed under the Eleventh Circuit's novel interpretation of Section 3731(b)(2). This Court should grant review to restore uniformity to the False Claims Act and to prevent the inequitable and congressionally unintended consequences that the Eleventh Circuit's reading of Section 3731(b)(2) would impose on False Claims Act defendants.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). The False Claims Act has been amended on multiple occasions since then, and, in its current iteration, it imposes civil liability in the form of treble damages, as well as civil penalties, on persons who make false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a); *see also* 28 C.F.R. § 85.3(a)(9) (inflation adjustment establishing civil penalties of up to $11,000 per claim for violations before November 2, 2015).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by private persons, known as relators, who sue on the federal

government's behalf, *id.* § 3730(b).[1] A relator may recover up to 30% of the proceeds of a successful action, as well as attorneys' fees and costs. *Id*. § 3730(d). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. The government may then elect either to intervene in the suit or to allow the relator to continue the suit alone. *Id*. § 3730(b).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5 (Oct. 27, 1986). Before that date, the False Claims Act's limitations provision simply provided that "a civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258 (Sept. 13, 1982). The 1986 amendment created two distinct limitations deadlines: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id*. § 3731(b)(2). In enacting that amendment, Congress incorporated into the False Claims Act the language and underlying policies of 28 U.S.C. § 2416(c), which

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[1] Section 3730(h) also creates a private right of action for individuals who believe they have been retaliated against by their employers for assisting in a False Claims Act investigation or proceeding.

tolls the generally applicable statute of limitations on claims filed by the United States when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c).

Although the statute of limitations in Section 3731(b) applies, without qualification, to any "civil action under section 3730," this Court held in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 550 U.S. 409 (2005), that Section 3731(b) does not apply where its application to a particular type of False Claims Act suit would lead to "counterintuitive results." *Id.* at 421. Specifically, the Court held that False Claims Act retaliation actions under Section 3730(h) should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1), because applying Section 3731(b)(1) could lead to the anomalous outcome of a claim's being "time barred before it ever accrues." *Id.*

2. Parsons is an engineering, construction, technical, and management firm that provides services to federal, regional, and local government agencies, as well as to private industrial customers worldwide. Parsons performed numerous contracts for the United States government during the Iraq and Afghanistan wars, including a U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the clean-up of munitions left behind by retreating or defeated enemy forces. Pet. App. 3a–5a. Cochise is a security-services firm that contracts with both the government and government contractors. Cochise was awarded a subcontract and task orders by

Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and Iraqi nationals, among others. *Id*.

Respondent Billy Joe Hunt is a former Parsons employee who worked in Iraq on the CMC contract. Pet. App. 3a–5a. In his complaint, he alleges that, "some time prior to January 2006 until early 2007," petitioners defrauded the United States in connection with the CMC security subcontract awarded to Cochise. Dist. Ct. D.E. 1 (Compl.) ¶ 89.

According to Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Hunt alleges, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id*. at 3a–4a. When the Parsons employees initially refused to issue the directive, Shaw allegedly forged one, *id*. at 4a, which Hunt claims to have personally observed, Dist. Ct. D.E. 1 (Compl.) ¶ 69.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id*.

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. Pet. App. 5a. As part of that interview, Hunt told the agents about the allegedly fraudulent scheme involving Cochise and Parsons relating

to the munitions-clearing project. *Id*. Hunt was charged with federal crimes for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed this False Claims Act suit against petitioners under seal on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a. The United States declined to intervene, and the complaint was thereafter unsealed. *Id*.

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. Pet. App. 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but maintained that the action was nevertheless timely under Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed the government of the alleged fraud during his 2010 FBI interview. *Id*.

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Acknowledging that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," the court held that the complaint was time-barred under either interpretation of Section 3731(b)(2) adopted by the courts of appeals.

Pet. App. 36a–40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations either was unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id*. at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed. The court held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened, but acknowledged that its conclusion was "at odds with the published decisions of two other circuits." Pet. App. 21a (citing *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the United States' knowledge of the alleged False Claims Act violation, not by the relator's knowledge. *Id.* at 29a–31a. In so holding, the Eleventh Circuit explicitly "reject[ed] the Ninth Circuit's interpretation" that a relator can be the relevant "official of the United States" under Section 3731(b)(2) "as inconsistent with th[e] text" of that provision. *Id.* at 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to

FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

Whether a suit has been filed before the expiration of the statute of limitations is a threshold question in every False Claims Act suit. But, as this case illustrates, the answer to that question will often depend on the jurisdiction in which suit is filed.

If the government has not intervened in a False Claims Act case filed in the Fourth, Fifth, or Tenth Circuits, a relator must file suit within six years of the alleged violation, as prescribed by 31 U.S.C. § 3731(b)(1), and is not permitted to invoke the distinct statute of limitations in Section 3731(b)(2). In the Third and Ninth Circuits, in contrast, the same relator may rely on Section 3731(b)(2), which authorizes suit up to ten years after the violation as long as the complaint is filed within three years of when the responsible "official of the United States" knew or should have known of the alleged fraud. 31 U.S.C. § 3731(b)(2). In those two circuits, the relator is considered to be the relevant "official of the United States" for purposes of Section 3731(b)(2). Thus, if Hunt had filed this suit in any of those five circuits, his complaint would have been time-barred because it is undisputed that he did not file suit until more than six years after the alleged False Claims Act violation and more than three years after he learned of that violation. *See* Pet. App. 5a–6a.

In direct and acknowledged conflict with those circuits, however, the Eleventh Circuit held that Hunt's

complaint should not be dismissed on statute-of-limitations grounds. The Eleventh Circuit first broke from the Fourth, Fifth, and Tenth Circuits by holding that Hunt may rely on the statute of limitations in Section 3731(b)(2) even though the United States has not intervened in this case. It then departed from the Third and Ninth Circuits by holding that the limitations period did not begin to run until the United States government, rather than Hunt himself, learned of the alleged fraud. Thus, a suit that would have been time-barred in every other circuit that has considered the issue (although under two conflicting rationales) was allowed to proceed in the Eleventh Circuit. Resolving that three-way circuit split—and eliminating the intolerable inconsistency that it has generated in the outcomes of False Claims Act litigation—is a compelling reason to grant review.

The necessity for this Court's intervention is underscored by the Eleventh Circuit's departure from the interpretive principles that this Court applied when construing Section 3731(b) in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005). *Graham* directs courts to construe the sometimes "imprecise[ ]" provisions of the False Claims Act within the broader context of the statute as a whole and in a way that will avoid absurd results. *Id.* at 418. Yet, the Eleventh Circuit ignored those considerations. In so doing, it adopted an interpretation of Section 3731(b)(2) that encourages relators to delay the filing of False Claims Act suits—an outcome that is directly at odds with Congress's statutory objectives—and that yields precisely the types of absurd results this Court sought to avoid in *Graham*.

This Court should grant review to eliminate the disuniformity in the circuits' application of Section 3731(b)(2)—which will inevitably generate forum-shopping, confusion, and arbitrariness—and to reject the Eleventh Circuit's flawed reading of that provision.

I. THERE IS A THREE-WAY CIRCUIT SPLIT AS TO WHETHER FALSE CLAIMS ACT RELATORS MAY INVOKE SECTION 3731(B)(2).

With the Eleventh Circuit's decision in this case, the federal courts of appeals have now reached three distinct and irreconcilable conclusions as to whether False Claims Act relators may invoke Section 3731(b)(2) where the United States has not intervened in the suit and, if so, whether relators are "official[s] of the United States" whose knowledge of the alleged fraud triggers the start of the limitations period. Review is warranted to provide an authoritative resolution to this sharply disputed question.

A. On one side of the split, the Fourth, Fifth, and Tenth Circuits have all held that the statute of limitations in Section 3731(b)(2) applies only in cases filed by the United States or in which the United States has intervened and that, in all other cases, relators must comply with the six-year statute of limitations established by Section 3731(b)(1).

In *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008), the Fourth Circuit relied on the False Claims Act's text, legislative history, and purpose to hold that Section 3731(b)(2) "extends the [False Claims Act's] statute of limitations beyond six years only in cases in which the United States is a party." *Id.* at 293. In so holding,

the Fourth Circuit relied on four principal considerations.

First, the court emphasized that the text of Section 3731(b)(2) "refers only to the United States—and not to relators"—thereby signaling Congress's intent "to extend the [False Claims Act's] default six-year period only in cases in which the government is a party." *Sanders*, 546 F.3d at 293. The limitations period in Section 3731(b)(2) starts "when the government knows or should know of 'facts material to the right of action,'" the court stated, which "makes perfect sense when referring to an action brought by the government." *Id*. at 293–94. But applying that language where the government has declined to intervene would "make[ ] no sense whatsoever," the court continued, because the government's knowledge of "facts material to the right of action" would not "notify the relator of anything" and thus could not "reasonably begin the limitations period for the relator's claims." *Id*. at 294.

Second, the Fourth Circuit looked to 28 U.S.C. § 2416(c), which "tolls the generally applicable statute of limitations in actions brought by the United States—and only by the United States—until 'facts material to the right of action' are actually or constructively known by an 'official of the United States charged with responsibility to act in the circumstances.'" *Sanders*, 546 F.3d at 294 (quoting 28 U.S.C. § 2416(c)). Congress sought to import Section 2416(c) into the False Claims Act through its 1986 amendments, further "support[ing] the conclusion that the text of Section 3731(b)(2) lengthens the [False Claims Act's] limitations period only when the government is a party." *Id*.

Third, in response to the relator's contention that the reference to a "civil action" in the prefatory clause of Section 3731(b) includes "all civil actions under the" False Claims Act, the Fourth Circuit emphasized this Court's conclusion in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), that the phrase in fact does not cover *all* civil actions under the Act. *See Sanders*, 546 F.3d at 294–95 (citing *Graham*, 545 U.S. at 411). The court of appeals explained that "[w]hen the phrase 'a civil action' is read in context, Section 3731(b)(2)'s restrictive language referring to the United States—and not to relators—makes clear that only a subset of civil actions may benefit from the extended limitations period in Section 3731(b)(2)—those in which the government is a party." *Id.* at 295.

Finally, the Fourth Circuit catalogued the "practical difficulties" that could arise if a relator were permitted to invoke Section 3731(b)(2) in the absence of government intervention. *Sanders*, 546 F.3d at 295. For example, because Section 3731(b)(2)'s limitations period is triggered when an "official of the United States charged with responsibility to act" knew or should have known of the alleged fraud, the Fourth Circuit reasoned that permitting relators to rely on Section 3731(b)(2) would lead to a "bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *Id*. at 293. That reading of Section 3731(b)(2) would create serious obstacles for defendants because, "[t]o advance a statute of limitations defense, defendants would be forced to seek out and litigate the identity and knowledge of a government official not a

party to the action." *Id*. at 295. The court also highlighted the various ways in which the purposes of the False Claims Act—to "combat fraud quickly and efficiently" and to "stimulate actions by private parties"—would be undermined if relators could refrain from acting for multiple years before invoking Section 3731(b)(2) to revive otherwise-untimely claims. *Id*. (internal quotation marks omitted).

The Tenth Circuit reached the same conclusion in *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006), holding that "§ 3731(b)(2) was not intended to apply to private qui tam relators," *id.* at 725. Although the court deemed the statutory language of Section 3731(b)(2) "ambiguous," *id*. at 723, it found clarity in the fact that Congress had drawn Section 3731(b)(2) directly from 28 U.S.C. § 2416(c), which permits tolling only where a claim is filed by the government, *id*. at 725. Like the Fourth Circuit, the Tenth Circuit also emphasized that limiting Section 3731(b)(2) to cases in which the United States has intervened, or filed suit itself, would advance the False Claims Act's objective of achieving "*rapid* exposure of fraud against the public fisc." *Id*. at 725. This interpretation of Section 3731(b)(2), the Tenth Circuit explained, would avoid "evisceration of the six-year statute of limitations . . . in the vast majority of cases" because, "[i]f relators could avail themselves of the tolling provisions of § 3731(b)(2), then we are hard pressed to describe a circumstance where the six year statute of limitations in § 3731(b)(1) would be applicable." *Id*. at 726. The court further reasoned that permitting relators to rely on Section 3731(b)(2) where the government has not intervened would "run afoul

of the absurdity doctrine" because Congress "could not have intended to base a statute of limitations on the knowledge of a non-party." *Id*. (citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989)).

The Fifth Circuit has adopted the same interpretation of Section 3731(b)(2). In *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 (5th Cir. 2000) (per curiam) (unpublished), the court concluded that, because Section 3731(b)(2) was passed to "protect[ ] the government from fraud that is not immediately discoverable" and "do[es] not offer similar protection to relators," it is "only available to relators if they are in direct identity with the government." *Id.* at *1. The court explained that, under Fifth Circuit precedent, a relator has an "independent and controlling role in initiating and prosecuting" a False Claims Act suit and thus is "not sufficiently aligned with the United States" to be able to invoke Section 3731(b)(2). *Id.*

B. The Third and Ninth Circuits have adopted a starkly different approach to Section 3731(b)(2). Those two courts have held that a relator may rely on the statute of limitations in Section 3731(b)(2) even where the United States does not intervene—a position directly at odds with that of the Fourth, Fifth, and Tenth Circuits—but that the limitations period is triggered by the *relator's* knowledge of the alleged fraud, not by the government's knowledge.

In *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), the Ninth Circuit held that Section 3731(b)(2) is "clear and unambiguous," and makes "[n]o distinction" between civil actions brought by the government and those brought by relators. *Id.*

at 1214. The Ninth Circuit reasoned that, if Congress "wanted to restrict the operation of the tolling provision to suits brought by the government, it easily could have done so. It did not." *Id*. at 1215. The Ninth Circuit found the parallels between 31 U.S.C. § 3731(b)(2) and 28 U.S.C. § 2416(c)—on which both the Fourth and Tenth Circuits relied—unpersuasive. According to the Ninth Circuit, "[t]hat Congress used the same language in both provisions proves nothing, except perhaps that when Congress did not clearly provide that the tolling provision of 31 U.S.C. § 3731(b)(2) applies only to the government, as it did for 28 U.S.C. § 2416(c), it meant for § 3731(b)(2) to apply to *qui tam* plaintiffs as well." *Id*. at 1216.

The Ninth Circuit then turned to the question of whose knowledge—the relator's or the government's—triggers the statute of limitations under Section 3731(b)(2) where the United States has not intervened in the case. The court concluded that, because "[*qui tam* relators] sue on behalf of the government as agents of the government," a relator is the person "'charged with responsibility to act' to enforce the" False Claims Act, *Hyatt*, 91 F.3d at 1217 n.8 (quoting 31 U.S.C. § 3731(b)(2)), and the relator's "duty to act" on his claim is "triggered by his own knowledge, not the knowledge of others," *id*. at 1218. If the limitations period began running "when officials within the United States government learned of the alleged fraud," the Ninth Circuit reasoned, relators could "wait a full ten years after learning of the deceit before suing," which would "frustrate the purposes of a limitations period and the purposes of the Act." *Id*.

The Third Circuit adopted the Ninth Circuit's approach in *United States ex rel. Malloy v. Telephonics*

Corp., 68 F. App'x 270 (3d Cir. 2003). The court endorsed the position that the statute of limitations in Section 3731(b)(2) was available to the relator, even though the government had not intervened in the suit, and that, in determining whether the claim was timely, it was the relator's knowledge, not the government's knowledge, that was determinative. *See id.* at 273 ("The time at which [the relator] became aware of the fraud . . . is important, because it determines whether we apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2)."). The court concluded that, because the relator had "knowledge of the alleged fraud more than three years before [the] action was filed, his only basis for asserting that his claims are timely is to proceed under the six year limitations period of § 3731(b)(1)," which the relator was likewise unable to satisfy. *Id.*

C. The Eleventh Circuit charted an entirely new course in the decision below, deepening the existing division among the circuits by adopting a third approach to interpreting Section 3731(b)(2). In direct conflict with each of the five other circuits that have addressed the issue, the Eleventh Circuit held not only that a relator may rely on Section 3731(b)(2) where the United States has not intervened in the case, but also that the limitations period is triggered by the *United States'* knowledge of the alleged fraud, not by the relator's. No other circuit follows that approach.

The Eleventh Circuit held that "the phrase 'civil action under section 3730' in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene."

Pet. App. 14a. "[N]othing in § 3731(b)(2)," the court continued, "says that its limitations period is unavailable to relators when the government declines to intervene." *Id*. In so ruling, the Eleventh Circuit "recognize[d] that [its] decision" to permit relators to rely on Section 3731(b)(2) in the absence of government intervention was "at odds with the published decisions of two other circuits," *id.* at 21a (citing *Sanders*, 546 F.3d at 293; *Sikkenga*, 472 F.3d at 726), but declared that "[t]hese cases do not persuade us" because "[t]hey reflexively applied the general rule that a limitations period is triggered by the knowledge of a party," *id.*

The Eleventh Circuit then went on to hold that "it is the knowledge of a government official, not the relator, that triggers the limitations period" in Section 3731(b)(2) because "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a. In reaching that conclusion, it expressly considered and rejected the Ninth Circuit's contrary approach in *Hyatt*, accusing that court of "creat[ing] a new legal fiction that because the relator 'sue[d] on behalf of the government,' the relator became a government agent and the government official charged with responsibility to act." *Id.* (alteration in original) (quoting *Hyatt*, 91 F.3d at 1217 n.8).

* * *

This three-way circuit split is not merely theoretical. It has serious practical ramifications for False Claims Act litigants. The Eleventh Circuit held that Hunt's complaint should not have been dismissed

as untimely because he was entitled to invoke Section 3731(b)(2) and because he alleged that "the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents," which is less than three years before he filed suit. Pet. App. 31a. If Hunt had filed his complaint in the Fourth, Fifth, or Tenth Circuits, however, he would not have been permitted to invoke Section 3731(b)(2) because the government declined to intervene, and his complaint would have been dismissed as time-barred because he indisputably filed suit after the six-year statute of limitations under Section 3731(b)(1) had expired. *Id.* at 5a–6a. And if he had filed his complaint in the Third or Ninth Circuits, his complaint likewise would have been untimely because, although he would have been entitled to rely on Section 3731(b)(2), the three-year limitations period would have begun to run when Hunt learned of the alleged fraud, between 2006 and "early 2007," rather than in 2010 when he informed the FBI of those allegations. *Id.* at 33a; *see also id.* at 34a (referring to the "undisputed allegation that [Hunt] was at least aware of, if not involved in, the fraudulent scheme as it was occurring in 2006").

These inconsistent approaches will foster forum-shopping by plaintiffs seeking the venue with the longest limitations period, uncertainty for courts grappling with three competing interpretations of the False Claims Act's statute of limitations, and unfairness for defendants subject to different limitations periods depending on the jurisdiction in which they are sued. As it has done before, the Court should grant review in this case to ensure that, no matter the jurisdiction in which a False Claims Act suit is filed, its

timeliness is evaluated under a single, nationally uniform standard. *See Graham*, 545 U.S. at 414 (granting certiorari "to resolve a disagreement among the Courts of Appeals regarding whether § 3731(b)(1)'s 6-year statute of limitations period applies to § 3730(h) retaliation actions").

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S OPINION IN *GRAHAM*.

In addition to exacerbating an existing circuit split, the Eleventh Circuit's decision conflicts with this Court's opinion in *Graham*, which established an interpretive approach to Section 3731(b) that the Eleventh Circuit failed to apply in this case.

In *Graham*, this Court held that the limitations period in Section 3731(b)(1) does not apply to False Claims Act retaliation actions brought under 31 U.S.C. § 3730(h), even though, by its terms, Section 3731(b) is applicable to any "'action under section 3730.'" 545 U.S. at 422 (quoting 31 U.S.C. § 3731(b)). Explaining that "[s]tatutory language has meaning only in context," the Court construed Section 3731(b) in the context of the broader False Claims Act and with due regard for the necessity of avoiding absurd outcomes. *Id.* at 415.

The Court began by highlighting that, whereas Section 3731(b)(1) links the start of the limitations period to "the date on which the violation of section 3729 is committed," retaliation claims under Section 3730(h) "need not allege that the defendant submitted a false claim" in violation of Section 3729, "leaving the limitations period without a starting point." *Graham*, 545 U.S. at 416. "Applying § 3731(b)(1) to

[False Claims Act] retaliation actions" thus "sits uneasily with § 3731(b)(1)'s language, which assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729' certain from which to start the time running." *Id*. (second alteration in original). That "textual anomaly," the Court reasoned, "at a minimum, shows that § 3731(b)(1) is ambiguous about whether 'action under section 3730' means all actions" or simply actions under subsections (a) and (b). *Id*.

To resolve the ambiguity, the Court relied on two interpretive guideposts. First, looking to the other provisions of the False Claims Act, it emphasized that "the very next subsection of the statute also uses the similarly unqualified phrase 'action brought under section 3730'" to refer only to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 417–18 (citation omitted). That "implicit limitation of the phrase" showed that "Congress used the term 'action under section 3730' imprecisely in § 3731" and "sometimes used the term to refer only to a subset of § 3730 actions." *Id*. at 418. Accordingly, it was "reasonable to read the same language in § 3731(b)(1) to be likewise limited." *Id*.

Second, the Court relied on the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham*, 545 U.S. at 418. Under Section 3731(b)(1), however, the "statute of limitations for [False Claims Act] retaliation actions begins to run . . . on the date the actual or suspected [False Claims Act] violation occurred," not on the date of the retaliatory conduct. *Id.* To avoid the "counterintuitive results" that would arise from

the application of Section 3731(b)(1) to retaliation claims, such as the possibility that a retaliation claim could be "time barred before it ever accrues," the Court concluded that retaliation claims should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1). *Id*. at 421.

The reasoning in *Graham* confirms that the provisions of the False Claims Act should not be construed in isolation and must be interpreted in a way that avoids absurd results, even if their plain language appears to point in a different direction. And, with respect to Section 3731(b) in particular, the Court recognized that the "civil action" language at the outset of the section may be subject to "implicit limitation[s]" depending on the statutory context and the "results" that might occur. *Graham*, 545 U.S. at 416, 418, 421.

The Eleventh Circuit ignored these interpretive principles, construing Section 3731(b)(2) in isolation from the rest of the False Claims Act and disregarding the potentially illogical outcomes that its interpretation could generate. For example, as the Tenth Circuit emphasized, permitting relators to invoke Section 3731(b)(2) in the absence of government intervention "would result in evisceration of the six-year statute of limitations in § 3731(b)(1) in the vast majority of cases." *Sikkenga*, 472 F.3d at 726; *see also*, *e.g.*, *Corley v. United States*, 556 U.S. 303, 314, 317 (2009) (rejecting a "literal reading" of a statute that would lead to absurd results and render other provisions within the same statute "nonsensical and superfluous"). Moreover, as the Fourth Circuit highlighted, there could be "bizarre" consequences to applying Section 3731(b)(2) where the United States has not intervened, such as triggering the start of the limitations period by the

knowledge of a nonparty, which "would . . . cause innumerable headaches for both defendants and the government during discovery." *Sanders*, 546 F.3d at 293, 295; *see also*, *e.g.*, *Public Citizen*, 491 U.S. at 454, 463–64 (rejecting a "literalistic reading" of a statutory provision where it would lead to "odd" practical results).

This interpretation of Section 3731(b)(2) would also lead to results incompatible with Congress's purpose in enacting the False Claims Act because, as the Fourth Circuit again recognized, it would provide relators with "a strong financial incentive to allow false claims to build up over time before they filed" suit, rather than immediately initiating litigation that would bring a prompt end to the defendant's fraud. *Sanders*, 546 F.3d at 295; *see also*, *e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201, 202 (1979) (rejecting "literal construction" of statutory provision where it was within neither the "spirit nor . . . intention" of the broader statute as a whole).

The Eleventh Circuit's hyper-literal reading of Section 3731(b)(2)—at the expense of statutory cohesion, logic, and congressional objectives—is impossible to reconcile with the mode of analysis that this Court endorsed in construing the False Claims Act's statute of limitations in *Graham*. This Court should grant review to reiterate and reinforce the interpretive principles it established in *Graham*.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THE COURT TO RESOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE TO FALSE CLAIMS ACT LITIGANTS.

The question presented in this case has far-reaching consequences for False Claims Act litigants because it is implicated in the vast majority of False Claims Act suits. Hundreds of False Claims Act complaints are filed each year—more than 700 were filed in 2017—but the United States generally intervenes in only about 25% of *qui tam* actions, which means that in three-quarters of those cases, courts and litigants must grapple with the question whether the statute of limitations in Section 3731(b)(2) is available to the relator. Civil Division, U.S. Department of Justice, Fraud Statistics—Overview (Dec. 19, 2017), https://tinyurl.com/ybfoto57; Pet. App. 9a n.4. The financial implications of that question are staggering: the government recovered nearly $3.7 billion from False Claims Act litigation in 2017 alone. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://tinyurl.com/ycx97lf7.

The prevalence of False Claims Act litigation and the tremendous financial stakes underscore the critical importance of establishing a nationally uniform approach to the applicability of Section 3731(b)(2). Defendants should not be left to guess which of the three conflicting approaches to the False Claims Act's statute of limitations a court will decide to follow. Nor should they be subjected to potentially devastating False Claims Act liability in a suit filed in Miami or Los Angeles that would have been time-barred had it

been filed in Charlotte or Denver. Such arbitrariness is fundamentally inconsistent with the principles of predictability and closure on which statutes of limitations are premised. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

This case is an excellent vehicle for resolving this profoundly important, frequently recurring False Claims Act question. The Eleventh Circuit's published opinion squarely raises both facets of this three-way circuit split: whether a relator can invoke Section 3731(b)(2) where the government has not intervened *and*, if so, whether the statute of limitations begins to run based on the relator's knowledge, or based on the United States' knowledge, of the alleged violation. A decision from this Court will therefore provide a conclusive answer to each aspect of the circuit conflict. And a holding that Section 3731(b)(2) is unavailable where the government has not intervened, or is triggered by the knowledge of the relator (rather than the knowledge of the United States), will put an end to this litigation without the need for further proceedings below. The Court should take advantage of this valuable opportunity before this three-way circuit split fosters even more confusion, unpredictability, and unfairness.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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