No. 07-214

IN THE
Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., et al.,
Petitioners,
v.
UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN HOSPITAL ASSOCIATION, AND AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country.[1] One of the principal functions of the

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their

Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community, including False Claim Act ("FCA") cases.

Amicus curiae American Hospital Association ("AHA") is the national advocacy organization for U.S. hospitals. It represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 37,000 individual members. AHA leads, represents, and serves health care organizations that provide care to their communities 24 hours a day, seven days a week, 365 days a year. One way in which the AHA promotes the interests of its members is by participating as amicus curiae in cases with important and far ranging consequences for their members—including FCA cases.

Amicus curiae the American Health Care Association and the National Center for Assisted Living ("AHCA/NCAL") are the nation's leading long term care organizations. AHCA/NCAL and their membership are committed to performance excellence and Quality First, a covenant for healthy, affordable and ethical long term care. AHCA/NCAL represent more than 10,000 non-profit and proprietary facilities dedicated to continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 2.5 million of our nation's frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers and homes for persons with mental retardation and developmental disabilities.

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counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The Chamber, AHA, AHCA/NCAL, and their respective members have a strong interest in the proper interpretation of the FCA. Many of the Chamber's members provide goods and services to the Government. The AHA's and AHCA/NCAL's members deliver health care services to millions of Americans, and the federal Government provides funding for many of these services through Medicare and other federally funded programs. Because of the pervasiveness of Government spending throughout the economy, all of the amici's members have a keen interest this case, which asks whether the FCA can apply where no false claim is actually presented to the federal Government for its payment or approval. If the Sixth Circuit's flawed decision is allowed to stand, FCA liability could attach to any transaction where a claim is paid with funds traceable to the federal Government, even where the claim was never presented to the Government for payment or approval. That decision dramatically expands the FCA—including its potentially crippling penalties and provisions for suits by opportunistic "qui tam relators"—far beyond the statute's intended role of combating *government* fraud.

The Chamber, AHA, and AHCA/NCAL therefore urge the Court to reverse the Sixth Circuit's decision.

SUMMARY OF THE ARGUMENT

The FCA is aimed at combating "fraud against the *Government*," regardless of "the particular form, or function, of the *government instrumentality upon which such claims were made*." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (emphases added). The Sixth Circuit, however, has expanded the statute's scope to include alleged fraud practiced not against the Government, but rather against any

entity that disburses funds that can be traced in some way to the Government. This decision, if allowed to stand, will turn what should be ordinary contract disputes enforceable through state law remedies into potentially crippling FCA cases enforceable by private relators seeking draconian penalties of as much as $11,000 per claim.

The relevant language of the FCA provides for liability where a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *paid or approved by the Government*." 31 U.S.C. § 3729(a)(2) (emphasis added).[2] By contrast, the Sixth Circuit held below that the FCA applies to transactions between wholly private parties "so long as [a] claim *will be paid with government funds*." Pet. App. 9a (emphasis added).

This is not just a minor linguistic distinction. By extending the reach of the FCA to transactions where no claim was ever presented to the Government for its payment or approval, the Sixth Circuit adopted an unwarranted and dramatic extension of the FCA. Its interpretation contravenes the statutory language and would hinder the efficient commercial resolution of private disputes without any corresponding benefit in combating actual fraud committed against the Government.

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[2] *See also* 31 U.S.C. § 3729(a)(3) (liability for one who "conspires to defraud the Government" by getting a false claim paid or approved); 31 U.S.C. § 3729(a)(1) (liability for one who knowingly presents, or causes to be presented a false claim "to an officer or employee of the United States Government or a member of the Armed Forces of the United States for payment or approval").

Consider, for example, a grantee that receives grant funds from the Government and that is overcharged by a private supplier. The Sixth Circuit's rule would allow a relator to sue the supplier under the FCA for allegedly overcharging the grantee, even where the Government played no role in paying the funds and even where the private parties are able fully and satisfactorily to resolve the issue between themselves. Interjecting the FCA into such private transactions will only increase burdens on doing business and provide windfalls to opportunistic relators, with no corresponding advancement of the FCA's true purpose—combating fraud against the Government.

Expanding the FCA to reach any private transaction involving any funds traceable back to the Government would have further wide-ranging negative consequences for the business and health care communities. In its current version, the FCA provides for potentially crippling statutory penalties of up to $11,000 per claim regardless of any damage to the Government, and thus has the potential to impose enormous liability unrelated to actual damages. Extending FCA liability to private transactions not involving claims presented to the Government will thus increase the costs of doing business as subcontractors of those who have received federal monies demand higher prices to account for the risk of unfounded FCA suits.

Moreover, expanding the FCA to all transactions paid with money traceable to the Government will hinder the ordinary mechanisms for the reasonable and expeditious resolution of contract disputes, as relators will interject themselves into private contractual relationships. The result will be an

increase in and prolongation of costly litigation, as bounty-hunting relators look for windfalls even where the Government has suffered no fraud directed against it. This is of particular concern to the AHA and the AHCA/NCAL and their members. While FCA lawsuits have proliferated over the past two decades and the largest subset purport to target health care fraud, the Government declines to intervene in nearly two-thirds of these lawsuits, leaving them to be prosecuted by relators alone. The overwhelming majority of declined health care cases produce no recovery for the United States or relator, and a substantial number are dismissed, but only after burdensome and expensive litigation.

The Sixth Circuit's rule "would make the potential reach of the Act almost boundless," as every transaction with any entity receiving federal funds would potentially be subject to the FCA. *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004). The federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants. Under the Sixth Circuit's view that the FCA applies to any claim that is paid with funds traceable to the Government—even where the Government never knew of the claim—almost any alleged misstatement in a commercial transaction is potentially subject to the reach of the FCA's massive penalties as enforced by self-deputized qui tam relators. It is well-established that the FCA should not displace the ordinary mechanisms for policing compliance with statutory or regulatory violations. It is equally true that the FCA should not displace the ordinary mechanisms for policing compliance with the terms

of private transactions where the Government is never presented with a false claim.

The statutory language nowhere compels this result, and in fact expressly provides otherwise. As relevant here, the FCA imposes liability for knowingly false statements or records that are used "to get a false or fraudulent claim *paid or approved by the Government*." 31 U.S.C. § 3729(a)(2) (emphasis added). In order for the Government to pay or approve a claim, it must of course first have someone present the claim to it. The Sixth Circuit focused on the definition of a "claim," which includes requests for payment that are made to contractors or grantees. But that definition, while covering circumstances where false claims are passed along to the Government by a contractor or grantee, does not alter the requirement that for liability to attach, there must be a false statement or record used to get a false claim paid *by the Government*.

Amici do not condone misstatements or fraud wherever they may occur. But in circumstances where no fraudulent claim is ever presented to the federal Government, common law and other state law remedies should govern and the severe penalties and intrusive qui tam provisions of the FCA should be reserved for circumstances where fraud has actually been practiced upon the Government. The Sixth Circuit's decision should be reversed.

ARGUMENT

I. THE DECISION BELOW EXPANDS THE FCA FAR BEYOND ITS INTENDED PURPOSE.

The intended target of the FCA is "fraud against the Government." *Rainwater*, 356 U.S. at 592. Yet,

under the Sixth Circuit's holding, claims submitted to private parties in the course of purely private transactions will also become actionable under the statute as long as any amount of what might be argued to be federal funds is doled out in response to the claim. In the Sixth Circuit's view, the FCA applies to any claim that is "paid with government funds," Pet. App. 9a, regardless of whether the claim is ever presented to the Government. The court held that a jury is entitled to consider a claim under the FCA based solely on evidence "that all of the money paid to the defendants came from the United States government" and that the defendants knew that allegedly false claims "were paid using government funds." Pet. App. 24a. The court made no analysis of what constitutes "government funds" where contractors receive funds from both government and commercial sources, or when such money might cease being "government funds."

The implications of such an extension of liability under the FCA are staggering. Companies doing business with federal contractors and grantees may find that what used to be only a private dispute about contract requirements can be turned into a full-scale government investigation of improper claims, courtesy of an opportunistic relator eager to recover up to 30% of any award under the FCA. Extending FCA liability to any transaction traced to Government funds is contrary to the statutory text, and would create inefficiencies and complications that are not warranted based on any purported benefits. And because federal dollars permeate the national economy at all levels, the Sixth Circuit's rule, if upheld, will have far-reaching consequences.

A. The Sixth Circuit's Rule Dramatically Expands The FCA's Scope Beyond Government Fraud.

Section 3729(a)(2) of the FCA requires that a knowingly false record or statement be used "to get a false or fraudulent claim *paid or approved by the Government*," and Section 3729(a)(3) similarly requires a conspiracy "to defraud *the Government*." 31 U.S.C. §§ 3729(a)(2), 3729(a)(3) (emphases added). Eliminating any requirement under these sections that a false claim actually be presented to the Government for its payment or approval, and instead allowing liability to attach to any transaction involving funds traceable to the federal Government, will inappropriately extend the FCA to many situations that do not involve true government fraud.

As Judge Batchelder recognized in her dissenting opinion below:

> [S]uppose [a] prime contractor has been bankrolled by the government and given full authority to pay claims without resort to government approval. The subcontractor's claim is actually paid "by the prime contractor," albeit with government funds. But, in bankrolling the prime contractor, the government did not act in response to the claim. The government may not even know that the subcontractor made a claim. The subcontractor's false statement did not induce the government to do anything.

Pet. App. 34a-35a. In such a scenario, there has been no fraud on the Government. Neither the language nor the purpose of the FCA supports extending liability to subcontractors, subgrantees, or

any other entities that deal with a recipient of federal funds in such a situation.[3]

Judge Batchelder's example is a very real concern. It is common for the Government to enter into firm-fixed-price contracts under which it agrees to pay the prime contractor a set amount, regardless of the actual costs incurred by the contractor during performance of the contract.[4] This is done in part so that the contractor, not the Government, will be primarily responsible for ensuring proper performance by subcontractors. A firm-fixed-price contract "places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss[,] provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties." 48 C.F.R. § 16.202-1 (2007); *see*

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[3] Indeed, serious constitutional questions regarding the Government's and its relators' Article III standing would be raised if the FCA is applied to situations where the Government neither suffers financial loss nor was ever presented with a false claim. *Cf. Vermont Agency Nat'l Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-72 (2000) (examining Article III standing in relation to FCA claims asserted by relator). Even if the FCA were ambiguous as to whether liability can attach in these circumstances—and it is not—the statute should be interpreted to avoid this potential constitutional issue. *See*, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citations omitted).

[4] *See* 48 C.F.R. § 16.101(b) (2007) ("specific contract types [include] firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss)"); 48 C.F.R. § 16.202-2 (2007).

also, e.g., Seaboard Lumber Co. v. *United States*, 308 F.3d 1283, 1295 (Fed. Cir. 2002) (contractor bore risk of "market slump" in fixed price timber contract). "[A] fixed-price contract is ordinarily in the Government's interest." 48 C.F.R. § 16.104(a) (2007); *see also id*. § 16.103(b) (2007) ("A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty."). But in return, a fixed-price contract allows a contractor to "avoid[ ] the costs of more intrusive government supervision." *AT&T* v. *United States*, 307 F.3d 1374, 1381 (Fed. Cir. 2002).

In the case of a firm-fixed-price contract, if a subcontractor overcharges the prime contractor and the error is not caught, any additional funds improperly paid to the subcontractor will come out of the prime contractor's pocket, because the Government has not paid anything more under the fixed-price contract because of the inflated claim. And if the error is corrected, any repayment would be due the prime contractor, not the Government. In either event, the alleged false claim for payment is submitted to the contractor, not the Government, and is never passed along to the Government for its payment or approval. The Government never saw the claim, approved the claim, or paid the claim itself, and suffered no loss as a result of it.

The subcontractor in this example may or may not have acted fraudulently or breached its contract with the prime contractor. But in these circumstances, ordinary remedies are readily available to resolve the dispute. The prime contractor has every incentive to investigate and resolve any issues that may arise,

and, in the event the parties cannot resolve a dispute consensually, common law and other state law remedies are available. Yet under the Sixth Circuit's rule, any stranger to the relationship may file a qui tam action under the FCA on behalf of the Government arguing that the transaction involved federal funds, even though the Government never saw the claim. In such circumstances, the parties would not be able to resolve the dispute on their own because the Government would have to consent to any dismissal. *See* 31 U.S.C. § 3730(b)(1).

Similar to firm-fixed-price government contractors and federal grantees, hospitals receive Medicare payments from the Government through a prospective payment system based on predetermined national and regional rates for caring for a patient with a particular diagnosis. *See* 42 U.S.C. § 1395ww. Skilled nursing facilities also receive Medicare payments through a prospective payment system. *See* 42 U.S.C. § 1395yy. Such payments are used by the health care provider to cover a variety of costs arising out of a patient's care, including costs of supplies and services provided by third-party vendors. If a hospital or skilled nursing facility is allegedly overcharged by a vendor, that overcharge has no effect on payments by the Government under the prospective payment system, yet under the Sixth Circuit's theory the vendor may nonetheless become the subject of a qui tam lawsuit. The qui tam relator will therefore effectively be assigned the right to sue the hospital's or skilled nursing facility's own supplier, dragging the health care provider into a burdensome investigation and complex litigation for what would otherwise be a straightforward

commercial matter to be resolved between the hospital and the vendor.

In these ways and others, the Sixth Circuit's rule dramatically expands the reach of the FCA beyond those who actually deal with the Government or make claims against it to all transactions that can conceivably be traced to federal Government funds. As the *Totten* court recognized, the "'effective' presentment approach" now adopted by the Sixth Circuit "would make the potential reach of the Act almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." 380 F.3d at 496.

The expansion of the FCA under the Sixth Circuit's rule is breathtaking. The federal Government spends more than $2.8 trillion per year, accounting for about 20% of the nation's gross domestic product. *See* USA Spending, *Contracts and Other Spending in Billions of Dollars*, FY 2006 (www.usaspending.gov/index.php); Congressional Budget Office, *A 125-Year Picture of the Federal Government's Share of the Economy, 1950 to 2075* (2002) (www.cbo.gov/ftpdoc.cfm?index=3521&type=0&sequence=0). If FCA liability attaches whenever a claim is paid with funds traceable to the federal Government, *see* Pet. App. 8a-9a, the statute will thus be extended to billions of dollars' worth of private transactions.

Moreover, as next shown, imposing such potentially "boundless" liability on anyone who touches any funds traceable to the federal Government would raise both transaction and litigation costs, benefiting opportunistic relators but adding little if anything to the fight against actual government fraud.

B. The FCA's Draconian Penalties And Qui Tam Provisions Make It Important To Limit Its Reach To Actual Fraud Practiced On The Government.

The liability facing a private company in a contract or other common law dispute with another private company is quantitatively and qualitatively different from the liability of a company facing an FCA claim. As this Court has recognized, "the current version of the FCA imposes damages that are essentially punitive in nature[.]" *Vermont Agency of Natural Res.*, 529 U.S. at 784 (citation omitted). The statute provides for recovery of three times the amount of damages sustained by the Government plus a penalty of no less than $5,500 and as much as $11,000 for each claim. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9) (2007). Under the current prevailing law in the lower courts, "[n]o damages need be shown in order to recover the penalty" under the FCA. *United States ex rel. Hagood* v. *Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (citing *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 n.5 (1956)).[5]

If, as often happens, a relator alleges that multiple similar false claims were made under a contract, the potential liability for statutory penalties will be enormous without regard to any damage allegedly suffered by the Government. Indeed, FCA cases can

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[5] *See also*, *e.g.*, *United States* v. *Advance Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995) (awarding $365,000 in penalties even though plaintiff failed to prove actual damages at trial), *aff'd mem.*, 86 F.3d 1159 (8th Cir. 1996); *United States ex rel. Virgin Islands Housing Auth.* v. *Coast General Constr. Servs. Corp.*, 299 F. Supp. 2d 483, 490 (D.V.I. 2004) (awarding $50,000 in penalties where no actual damages to Government).

involve requests for penalties in the hundreds of millions of dollars. The amount sought in an FCA case will thus always exceed—and often far exceed—what could be sought in a traditional common law action. The statute contemplates such penalties where there has been fraud practiced on the Government through a false record or statement used to get a false claim "paid or approved by the Government." 31 U.S.C. § 3729(a)(2). But extending this kind of potentially crippling punitive liability to all circumstances where a claim is paid with funds traceable to the federal Government will result in increased costs to consumers and windfalls to potential relators, without a corresponding benefit in combating fraud practiced on the Government.

If the potential for such extensive liability is extended to any company that does business with another entity that receives federal funds, it will be natural for such companies to prepare for and mitigate the risk of exposure by increasing the costs for such products and services. It is at least debatable whether the Government would be well-served by such far-ranging increases in costs in circumstances where it never receives a false claim. But regardless, such massive liability should be reserved for those acts that truly constitute fraud on the Government—false claims presented to the Government for payment or approval.

That is particularly true given the FCA's unique provisions allowing private qui tam relators to bring suits on behalf of the Government in circumstances where they would otherwise have no interest. Relators are entitled to between 25% and 30% of any recovery if the government does not intervene in the lawsuit, and between 15% and 25% of the recovery if

the government does intervene. 31 U.S.C. § 3730(d)(1), (2). Successful qui tam relators are also entitled to seek recovery of attorneys' fees. *See id*. Because of these provisions, a cottage industry has grown up as attorneys and others seek to profit from these bounties.[6] In most qui tam cases, the Government elects not to intervene at all. *See* Government Accountability Office, *Information on False Claims Act Litigation* 29 (Dec. 15, 2005) ("GAO Report") (www.gao.gov/new.items/d06320r.pdf) (between 1987 and 2005, the Government intervened in, or settled before intervening in, only 32.5% of health care-related cases and only 27.28% of all qui tam cases).

As courts have recognized, a relator's claims can be motivated by "opportunism rather than legitimate whistle-blowing." *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006). That is because "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). "*Qui tam* relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Id*. Indeed, that is what happened in both this case and *Totten*, where relators attempted to expand the statute beyond its bounds in cases where the Government elected not to intervene.

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[6] As the banner of one qui tam website proclaims: "Collect Millions by Reporting Fraud." Whistleblower Qui Tam Law Center, Whistleblower Lawsuits (www.whistleblower-qui-tam.com/pages/whistleblower-lawsuits.html).

Where the Government elects not to intervene, relators rarely recover judgments and when they do the amounts are usually small.[7] But the *in terrorem* effect of these lawsuits is large. The impact of qui tam relator–driven FCA litigation has hit health care entities the hardest. Almost half of all qui tam cases brought between 1987 and 2005 involved claims of health care fraud. *See* GAO Report, *supra*, at 28. Although the Government declines to intervene in most of these cases, and many others are ultimately dismissed, it is not before the defendant hospital, health care system, or other health care entity—many of which are not-for-profit corporations—is subjected to expensive and time-consuming litigation. *See*, *e.g.*, *Sanderson*, 447 F.3d at 876; *United States ex rel. Karvelas* v. *Melrose–Wakefield Hosp.*, 360 F.3d 220, 242-43 (1st Cir. 2004); *United States ex rel. Clausen* v. *Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1315 (11th Cir. 2002).

Although the FCA's qui tam provisions are conducive to abuse, they are predicated in part on the theory that relators can serve a purpose where the Government, due to its large outlays and sometimes limited investigatory resources, may have difficulty ferreting out fraud practiced on it. *See* S. Rep. No. 99-345, at 7-8 (1986). But that theory has little or no relevance to transactions between a subcontractor and prime contractor, or a grantee and its vendors, that do not involve claims presented to the Government for its payment or approval.

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[7] *See Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) ("[o]f the 1,966 cases that the government has refused to join, only 100 have resulted in recoveries (5%)"); GAO Report, *supra*, at 36 (noting that the median recovery in declined qui tam cases is just over $22,000).

Allowing FCA cases—including qui tam cases—to be brought against any company that deals with a recipient of federal funds will unnecessarily federalize what should be private contract claims. Without the FCA, parties will still have every incentive to investigate and resolve claims of contract non-compliance either consensually or through the usual common law remedies. Under the Sixth Circuit's reasoning, however, an opportunistic qui tam plaintiff could base an FCA complaint on the breach of a private contract provision between a hospital and its supplier or a contractor and its lower tier subcontractor, if the breach resulted in an allegedly false claim being paid by an entity that receives federal funds. If the FCA applies, the issue becomes much more difficult to resolve, because no settlement can be reached without the participation of the relator or the Government and because the potentially massive penalties increase a relator's incentives to institute and continue questionable litigation. Even if the parties seek to resolve the issue between themselves, the prospect of a qui tam FCA action would remain for years to come. Making the Sixth Circuit's decision even more problematic, because of the operation of the statute, the "victim" in a private dispute is precluded from intervening or bringing its own lawsuit to litigate or compromise its own claims. *See* 31 U.S.C. § 3730(b)(5).

Federalizing otherwise private contract disputes will thus hinder their resolution and prolong any litigation that may arise. And litigation would become much more expensive and difficult, given the FCA's complexity. Indeed, the Sixth Circuit's decision introduces yet more complexity, since it begs the question of what constitutes "federal funds." As the

Totten court recognized, "it remains unclear whether 'federal monies' * * * are still 'federal monies' when passed along to subgrantees or subcontractors, employees and suppliers of subgrantees and subcontractors, and so on." 380 F.3d at 502. Because all money is ultimately fungible, in many situations it will be difficult to develop a workable test as to whether a particular transaction does or does not involve federal funds triggering the FCA. By contrast, it is a relatively simple matter to determine whether a claim has been presented to the federal Government. In light of the considerable problems and complications that can arise from an overly broad interpretation of the liability sections of the FCA, the provisions should be interpreted consistently with the statutory language, and only be applied to situations where false claims are actually presented to the Government.

Eliminating any requirement that the Government ever see a claim before FCA liability can attach would also call into question other critical requirements stemming from the FCA's purpose to combat "fraud against the Government." *Rainwater*, 356 U.S. at 592. Because the FCA is a fraud statute, Federal Rule of Civil Procedure 9(b) applies, which "means that a relator must provide details that identify particular false claims for payment that were submitted *to the Government*." *Karvelas*, 360 F.3d at 232 (1st Cir. 2004) (emphasis added). A relator's failure to "identify a specific claim submitted *directly to the United States*" is fatal under Rule 9(b). *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 564 (6th Cir. 2003) (emphasis added); *see also Clausen*, 290 F.3d at 1312 ("Clausen's failure to allege with any specificity if—or when—any actual

improper claims were submitted *to the Government* is indeed fatal to his complaint * * *.") (emphasis added).

Similarly, because of its nature as a remedy against government fraud, every circuit to have addressed the issue has held that the FCA includes a materiality requirement, so that a false statement is not actionable unless it actually (or in some courts, potentially) affects "*the government's* decision to pay." *United States ex rel. Laird* v. *Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 261 (5th Cir. 2007) (emphasis added); *see also Costner* v. *URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) (statute covers only actions which have "the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due"). Eliminating any requirement that the Government ever see a claim will divorce the statute from its intended and proper purpose of combating government fraud.

The Sixth Circuit's attempt to harmonize its ruling with the materiality requirement only shows the flaws in its interpretation. According to the court, under the materiality test "[s]o long as it can be shown that the government paid out money in response to a claim, no evidence is needed under this test that a claim was presented to the government." Pet. App. 17a. *See also* Pet. App. 25a n.7 ("A reasonable jury could easily find that the government's funding decision could have been influenced by the defendants' fraudulent claims * * *."). This holding is inherently contradictory: it cannot be shown that "the government paid out money in response to a claim" or that "the government's funding decision

could have been influenced by * * * claims" where the Government was never presented with the claims in the first place.

It is settled that the FCA should not be used to displace the normal mechanisms for enforcing compliance with federal statutes and regulations. *See United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."); *accord United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997). Likewise, the statute should not displace the normal mechanisms for addressing and resolving subcontractor claims that are never presented to the federal Government for payment or approval.

II. THE DECISION BELOW IS INCONSISTENT WITH THE LANGUAGE OF THE FCA.

As explained more fully in petitioner's brief, the plain language of the FCA nowhere compels a holding that liability can attach under Sections 3729(a)(2) and (a)(3) of the FCA simply by showing that a claim was paid with funds traceable to the Government, without regard to whether the claim was ever presented to the federal Government for payment. In fact the statute expressly provides otherwise.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others * * *. [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). The plain language of section 3729(a)(2) is

unambiguous: a person is liable to the United States only when that person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved *by the Government*." (emphasis added).

This provision makes clear that a false claim must be submitted by someone to the Government for payment or approval in order for FCA liability to attach. Quite simply, the Government cannot pay or approve a claim that the Government never saw. Section 3729(a)(2) does not apply to a claim submitted solely to a government contractor or grantee, or any other private recipient of government funds, just because the claim is paid with money traceable to the federal Government. Such a holding would render the statutory language "paid or approved *by the Government*" meaningless. *See Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'") (citations omitted).

Indeed, reading Section 3729(a)(2) to broadly extend liability to any case where a false claim is paid with funds traceable to the Government would allow subsection (a)(2) to "swallow" subsection (a)(1). *Totten*, 380 F.3d at 501. For claims involving false records or statements, there would be no reason for a relator to proceed under subsection (a)(1) of the statute with its undisputed "presentment" requirement when he or she could readily establish liability under subsection (a)(2) without having to prove presentment of a false claim to the Government. The FCA should not be read to allow one section of the statute to effectively eviscerate another. Instead, as the *Totten* court recognized, the two subsections should be read in harmony: "(a)(2) is

complementary to (a)(1), designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not *themselves* present a claim for payment or approval." 380 F.3d at 501. Interpreted in this commonsense way, Section 3729(a)(1) covers situations where a person has directly submitted a false claim to the Government, whereas Section 3729(a)(2) covers additional situations where a person has made a false record or statement that is then used to get someone else to submit a false claim to the Government for payment or approval.[8]

Nothing in the definition of "claim" in Section 3729(c) eliminates the requirement in Section 3729(a)(2) that for liability to attach someone must try to get the claim "paid or approved by the Government." "Claim" is defined to include a "request or demand" for money or property

> which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). This means that a false claim is not excluded from the reach of the FCA simply because it is made in the first instance to a

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[8] The Sixth Circuit's answer to this anomalous result was to conclude that subsection (a)(2) only extends liability when a claim is actually paid by the Government. Pet. App. 12a. As the dissent below correctly pointed out, however, this reading of the statute finds no support in the statutory language or FCA precedent. Pet. App. 36a.

government contractor or grantee. But Section 3729(c) is merely a definitional section that does not, and cannot, alter the operative *liability* provision of Section 3729(a)(2), which unambiguously requires that a false claim—regardless of to whom it is initially made—must still be presented by someone to the Government for its payment or approval. Read in this way, Section 3729(c) further confirms the distinction between subsections (a)(1) and (a)(2), under which subsection (a)(2) liability can attach where a false claim is passed along to the Government by a contractor or grantee.[9]

The meaning of section 3729(a)(3) also is not subject to reasonable debate. This provision provides for liability when a person "conspires to defraud *the Government* by getting a false or fraudulent claim allowed or paid[.]" (emphasis added). By its plain language, this section does not encompass conspiracies to defraud government contractors,

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[9] There is legislative history that the definition of "claim" was added to overrule, *inter alia*, *United States* v. *Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). *See* S. Rep. No. 99-345, at 22 (1986). In *Azzarelli*, the claims at issue had been submitted to a state agency that received federal funding, and no FCA liability was found. Because the statute is clear on its face, there is no need for the Court to consider legislative history, which can never override the actual statutory language. *See Connecticut Nat'l Bank*, 503 U.S. at 254; *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). But nothing in this bit of history signals an intent to override the inherent presentment requirement of subsection (a)(2), given that the requirement had been satisfied in *Azzarelli*. *See* 647 F.2d at 760; *see also Totten*, 380 F.3d at 495 ("this presentment requirement was satisfied in *Azzarelli*"). Indeed, even the dissenting judge in *Totten* recognized that "imposing a presentment requirement does not interfere with the overruling of *Azzarelli*." *Totten*, 380 F.3d at 513 (Garland, J., dissenting).

grantees, or other federal funding recipients. *Cf. Tanner* v. *United States*, 483 U.S. 107, 129 (1987) (recipient of federal financial assistance and the subject of federal supervision cannot be treated as the "United States" for conspiracy claim pursuant to 18 U.S.C. § 371). Moreover, read in conjunction with Sections 3729(a)(1) and (a)(2), both of which require presentment of a claim to the Government as a condition to imposition of FCA liability, section 3729(a)(3) plainly applies to similar conspiracies to defraud the Government by having a false claim allowed or paid by the Government.

The Sixth Circuit's statutory analysis is fundamentally flawed. And, as explained above, those flaws expand the statute far beyond its intended purpose. The Court should therefore hold that the harsh penalty and meddlesome qui tam provisions of the FCA are properly reserved for those situations where the Government has actually been presented with a false claim, and do not federalize all allegedly fraudulent transactions involving funds traceable in some way to the federal Government.

CONCLUSION

For the foregoing reasons and those in petitioners' brief, the judgment below should be reversed.

Respectfully submitted,

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