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

REPLY BRIEF FOR PETITIONERS

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

[Additional Counsel Listed on Inside Cover]

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

Respondents and the United States urge upon this Court a wildly expansive construction of the False Claims Act ("FCA") that is unmoored from its text. That text is not at all ambiguous: Section 3729(a)(2) of the FCA imposes liability only when one seeks to have a false claim "paid or approved by *the Government*." 31 U.S.C. § 3729(a)(2) (emphasis added). Section 3729(a)(3) is similarly circumscribed, imposing liability only where one has conspired to "defraud *the Government*." *Id.* § 3729(a)(3) (emphasis added). There is no evidence in the record that petitioners' allegedly false claims were submitted to, much less paid by, "the Government." Both respondents and the United States acknowledge that petitioners' invoices were submitted only to, and paid only by, higher-tier contractors—not *the Government*. That should be the end of this case. For half a century, this Court has recognized that the FCA's reach is limited to "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

Respondents and the United States contend that the antifraud objectives of the FCA demand that the phrase "paid . . . by the Government" in Section 3729(a)(2) be construed to mean "paid . . . with federal Government funds" (Resp. Br. 21), and that any fraudulent conspiracy to procure such "federal . . . funds" be recognized as one "to defraud the Government" within the meaning of Section 3729(a)(3). *Id.* at 49; *see also* U.S. Br. 11 (asserting that the FCA reaches any circumstance in which "the federal government was the ultimate source of the funds"). But this Court rejected a precisely analogous argument in *Tanner v. United States*, 483 U.S. 107 (1987), holding that a conspiracy to defraud a federally funded

private party did not constitute a "conspir[acy] . . . to defraud the United States." *Id.* at 132. And just as conspiring to defraud a federal grantee is not the equivalent of conspiring to "defraud the Government," being paid with funds that ultimately derive from the federal Treasury is not the same as being "paid . . . *by the Government*." The text of the FCA reaches the latter but not the former.

Respondents and the United States contend that this result cannot be reconciled with the FCA's definition of "claim," which—unlike the two statutory provisions under which respondents are attempting to impose liability—does refer to federal contractors and grantees. 31 U.S.C. § 3729(c). But respondents consistently—and impermissibly—read that definitional section in isolation from the liability-imposing language of Section 3729(a). The FCA does not impose liability on every "claim," or even every "false claim." Thus, the fact that the definition of "claim" encompasses requests for payment directed in the first instance to federal contractors does not establish that claims paid by a contractor are actually "paid . . . by the Government" within the meaning of Section 3729(a)(2) or that a conspiracy to defraud a contractor constitutes a "conspir[acy] to defraud the Government" under Section 3729(a)(3). Section 3729(c) must be read in conjunction with Section 3729(a), which limits liability to fraud directed toward the federal government itself.

Respondents and the United States similarly place great reliance on the fact that the verb "present" does not appear in Sections 3729(a)(2) or (a)(3). But they are wrong to ascribe such talismanic significance to this term. Although sometimes framed for shorthand purposes as whether Sections 3729(a)(2) and (a)(3) include a so-called "presentment

requirement," the issue before the Court is more accurately described as whether a claim must be "submitted to the federal government" for liability to be imposed under those sections. Pet. for Writ of Cert. i. The answer to *that question* is clearly "yes": "[T]he Government" cannot "pa[y] or approve[ ]" a claim unless that claim first has been submitted to the government for payment or approval. Similarly, in order to "conspir[e] to defraud the Government by getting a false or fraudulent claim allowed or paid," the defendant must conspire to get the government to allow or pay a claim—which again requires submission of the claim to the government itself. Petitioners' interpretation of the FCA therefore turns not on "bookkeeping idiosyncrasies" (U.S. Br. 7) but on the statute's plain language.

Ultimately, respondents' and the United States' contentions distill to a simple policy argument: Unless Sections 3729(a)(2) and (a)(3) are read to encompass false claims submitted to federally funded contractors but never submitted to the government, the FCA will not reach all frauds designed to obtain federal funds. This undoubtedly is true, but it is no cause for enlarging the FCA beyond its clear textual limits, nor for exposing all manner of private parties—anyone who transacts business with a federally funded entity—to the FCA's onerous sanctions and incentive-distorting *qui tam* provisions. Indeed, the United States has numerous remedies available against subcontractors who engage in fraud, including the Major Fraud Act, 18 U.S.C. § 1031, which has been construed to provide penalties of up to $10 million and ten years' imprisonment for fraudulent conduct by subcontractors on government projects, without regard to whether a fraudulent claim was ever submitted to the government itself. Particularly in

view of these alternative remedies, respondents' effort to expand the FCA to reach false claims never submitted to the government must be rejected.

I. SECTION 3729(a)(2) REQUIRES THE SUBMISSION OF A FALSE CLAIM TO THE GOVERNMENT FOR PAYMENT OR APPROVAL.

The plain language of Section 3729(a)(2) restricts the reach of that provision to fraud used to get false claims paid or approved by the federal government itself. The efforts of respondents and the United States to extend this statutory language to the use of false records or statements to get a false claim paid by a federally funded private party are uniformly unpersuasive.

A. The Text And Structure Of Section 3729(a)(2) Require Submission Of A False Claim To The Government.

According to respondents and the United States, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever a private party uses funds that originated with the federal government to make a payment. Resp. Br. 25; *see also* U.S. Br. 9. This "indirect payment" theory is nothing more than a poorly disguised attempt to rewrite the FCA.

1. Section 3729(a)(2) refers to a claim "paid or approved *by the Government*." Respondents have never suggested that petitioners' allegedly false statements were made to get the government itself to pay or approve their allegedly false claims. Respondents have instead asserted only that petitioners' allegedly false statements were made with the intention of securing payment from the federally funded prime contractors and higher-tier subcontractors from whom petitioners actually received payment.

But if Congress had intended for Section 3729(a)(2) to encompass claims paid by private parties with federal funds, then it would have drafted the provision to reach claims "paid with Government funds" or claims "paid or approved by a recipient of Government funds." Indeed, Congress is well aware of the distinction between the government itself and government contractors and grantees. The FCA itself recognizes that distinction. *Compare* 31 U.S.C. § 3729(a)(1)-(7) (referring to the "Government"), *with id.* § 3729(c) (referring to a "contractor, grantee, or other recipient" that is "reimburse[d]" by the "Government"). Congress is also well aware of how to draft a statute that is broad enough to reach fraudulent conduct by government subcontractors regardless of whether that conduct ever resulted in submission of a claim to the government. It did so when it enacted the Program Fraud Civil Remedies Act ("PFCRA"), which extends liability to fraudulent claims for federal funds that are never submitted to the government. 31 U.S.C. § 3802(a)(1); *see also* 18 U.S.C. § 1031(a) (punishing fraud by any person "in any procurement of property or services . . . as a subcontractor or supplier on a contract in which there is a prime contract with the United States").[1] In contrast, Congress's use of the "paid . . . by the Govern-

---

[1] Respondents' reliance on the PFCRA (at 56) is badly misplaced. While it may have been anomalous to subject States to the onerous liability provisions of the FCA where the PFCRA exempted the States from "relatively smaller damages" (*Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000)), there is no such anomaly here. It was eminently reasonable for Congress to limit the FCA's more punitive sanctions to fraud against the government itself while extending the PFCRA's less severe penalties to a wider class of fraudulent conduct.

ment" formulation in Section 3729(a)(2) demonstrates that it intended for that provision to have a considerably narrower scope. *See also* S. Rep. No. 99-345, at 9 (1986) ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government *to pay out* sums of money or to deliver property or services.") (emphasis added).

Moreover, the "indirect payment" theory endorsed by respondents and the United States cannot be squared with the statutory context in which the words "paid . . . by the Government" appear. Section 3729(a)(2) encompasses fraudulent efforts to get a claim "paid *or approved* by the Government." Basic rules of syntax require that the verbs "paid" and "approved" have the same subject and object. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret . . . [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citation omitted). In Section 3729(a)(2), the object of both "paid" and "approved" is the allegedly false claim. On respondents' and the United States' construction of the statute, the subject of "paid"—and therefore "approved"—is any federally funded recipient of a false claim. But approval of a claim by the government indisputably requires action by a government official—not even respondents contend that a claim approved by a federal grantee is actually "approved by the Government." Respondents' and the United States' interpretation thus requires "approved" and "paid" to take different subjects—while any federally funded entity can "pa[y]" a false claim, only the government itself may "approve[ ]" such a claim. That

result is incompatible with the syntactical structure of Section 3729(a)(2) and should be rejected.[2]

2. Section 3729(c)'s definition of "claim" does not alter this conclusion. Although a "claim" includes requests for payment initially directed to a federally funded contractor, such claims can only give rise to liability under Section 3729(a)(2) where the defendant uses a false record or statement to get "the Government" to "pa[y]" such a claim. Thus, while the definition of "claim" makes clear that a claim need not be submitted to the federal government in the first instance, liability under Section 3729(a)(2) still requires the eventual submission of a claim to the government for payment or approval. Otherwise, the government could not pay or approve the claim.

Respondents and the United States suggest that this reading of the interaction between Sections 3729(a)(2) and 3729(c) renders the definition of "claim" superfluous because the "causes to be presented" language of Section 3729(a)(1) already en-

---

[2] Respondents emphasize that a person "can be guilty of embezzling 'money or things of value of the United States' (18 U.S.C. § 641) even though the federal funds are 'administered by a nonfederal agency'" (Resp. Br. 43 n.8), but, in doing so, they miss the point. Whether, in some circumstances, money paid by the United States to a grantee retains its federal character does not remotely affect the question before this Court—whether claims paid by a private party with federal funds are "paid . . . by the Government." Moreover, it is far from "undisputed" (Resp. Br. 5) that the contractual payments to petitioners were made with federal funds, and if this case is remanded for retrial under respondents' theory of the FCA, they will be required to establish—both factually and legally—that the payments that petitioners received from prime contractors and higher-tier subcontractors were actually made with government funds.

compassed a defendant's submission of a false claim to a federal contractor who then passed the claim along to the government. *See* Resp. Br. 28; U.S. Br. 15. They are incorrect. Section 3729(a)(1) does not apply where a defendant submits a false statement in support of a false claim that a third party has submitted to a federally funded contractor. If that claim (and the defendant's supporting documentation) are passed along to the government by the contractor, the defendant cannot be said to have "caused" the false claim to be presented because the defendant's supporting documentation did not render the claim false or induce the contractor to pass the claim along to the government. Section 3729(c) clarified that such a defendant could be held liable under Section 3729(a)(2), even though the claim in question was not initially submitted to the federal government.[3]

Indeed, it is respondents and the United States who render a portion of the FCA's language superfluous through their reading of Section 3729(c). If the definition of "claim" in Section 3729(c) extended Section 3729(a)(2) to anyone who uses a false record or statement to get a false claim paid with federal

---

[3] Similarly, the United States is mistaken when it contends that "petitioners' construction of Section 3729(c) . . . accords operative effect to the definition of 'claim' only when the contractor or grantee submits an after-the-fact request for reimbursement" and thus nullifies the language in Section 3729(c) that extends the definition of "claim" to situations where the United States "provides any portion of the money." U.S. Br. 16. To the contrary, that language clarifies that the FCA applies not only where a federally funded contractor submits a defendant's claim to the government for reimbursement but also where a federal grantee receives an advance payment of federal funds that it distributes to a claimant after its claims have been passed along to, and approved by, the United States.

funds, then the "by the Government" language in Section 3729(a)(2) would be deprived of any operative effect because its meaning would already be conveyed by reading the remaining language of Section 3729(a)(2) in conjunction with Section 3729(c). *See* Pet. Br. 18.

Respondents seek to evade this inevitable consequence of their statutory construction by suggesting that, without the words "by the Government," Section 3729(a)(2) would reach efforts to get false claims paid "by anyone," without regard to whether the fraud had any connection to the federal government. Resp. Br. 30. Respondents contend that the insertion of the "by the Government" language as part of the 1986 FCA amendments was therefore necessary "to clarify, in light of the additional broad definition of 'claim,' that Section (a)(2) was limited to only false claims for federal Government money or property" and did not extend to strictly private fraud. *Id.* at 38-39. But respondents overlook the fact that the FCA has always been understood to be limited to fraud upon the government (*see Rainwater v. United States*, 356 U.S. 590, 592 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943)) and that, consistent with that history, the definition of "claim" is restricted to requests for payment initially directed to federally funded parties. *See* 31 U.S.C. § 3729(c) (referencing "request[s]" or "demand[s] . . . to a contractor, grantee, or other recipient if the United States Government provides any portion of the money . . . or if the Government will reimburse such contractor, grantee, or other recipient"). The addition of that definition thus would not have necessitated clarification that the FCA does not extend to private fraud wholly unconnected to the government. The "by the Government" language must

therefore have been added for a different reason: to clarify that, even though the definition of "claim" is broad enough to reach requests for payment initially submitted to federally funded private parties, that provision did not alter the well-established principle that the FCA is limited to fraud against the federal government itself.

3. Respondents' contention that requiring submission of a claim to the government "adds an element of liability to" Section 3729(a)(2) is similarly misplaced. Resp. Br. 26. Petitioners are not arguing, as respondents suggest, that liability under Section 3729(a)(2) is limited to circumstances where a false record or statement is used to get a claim "'presented to the Government *and* paid or approved by the Government.'" *Id.* (emphasis added). Section 3729(a)(2) imposes liability on defendants who use a false record or statement to get a false claim "paid or approved by the Government," not to get a claim submitted to the government. Evidence of submission of a claim to the government—whether by the defendant or a higher-tier contractor—is essential to liability under Section 3729(a)(2) because it establishes that the defendant made or used the false statement to get a false claim "paid or approved *by the Government*," rather than by a private entity. But the defendant's participation in the submission of the claim to the government is not necessary for Section 3729(a)(2) liability to attach.[4]

---

[4] *United States v. Bornstein*, 423 U.S. 303 (1976), does not remotely establish, as respondents suggest, that "the focus [of this case] must be on the 'false' conduct of the Petitioner subcontractors," without regard to whether the prime contractors ever passed along or otherwise submitted false claims to the federal government. Resp. Br. 14; *see also* U.S. Br. 29. In

Moreover, even if liability under Section 3729(a)(2) could attach without proof that a claim was actually submitted to the government, the plaintiff would still be required to establish that the defendant made or used a false statement with the intention of getting the government to pay or approve a false claim—a showing that respondents here stubbornly refused even to attempt to make. *See* Pet. App. 5 n.3.[5]

Respondents are therefore also incorrect when they suggest that petitioners' reading of Section 3729(a)(2) would render that provision superfluous. *See* Resp. Br. 28. Sections 3729(a)(1) and (a)(2) serve distinct functions. Section 3729(a)(1) applies to the act of presenting a false claim to the government or engaging in conduct that "causes" such a claim to be presented. Section 3729(a)(2) applies to defendants who use a false record or statement in an effort to get

---

[Footnote continued from previous page]

Bornstein, there was no dispute that false claims had been submitted to the government—indeed, the Court emphasized that the defendant was "liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States" (429 U.S. at 311)—and the only issue before the Court was the procedure for computing the number of false claims for which the defendant was liable.

[5] For this reason, the United States is incorrect to suggest (at 19 n.5) that, even under petitioners' reading of the FCA, the evidence presented at trial was sufficient to go to a jury. There was absolutely no evidence at trial regarding the prime contractors' submission of invoices to the federal government. Thus, even if the jury could have inferred that the prime contractors submitted some such invoices, there was no evidentiary basis for finding those claims to be false because their content was completely unknown.

a false claim paid or approved by the government. *See Hess*, 317 U.S. at 544 (the predecessor to current Section 3729(a)(2) "include[d] those who do the forbidden acts for the purpose of 'aiding to obtain' payment of fraudulent claims"). The defendant need not have submitted the claim or engaged in conduct that caused the claim to be submitted to be liable under Section 3729(a)(2).

In fact, it is respondents' reading of Sections 3729(a)(1) and (a)(2) that would result in superfluity. If Section 3729(a)(2) did not require submission of a false claim to the government, then any plaintiff who would have otherwise filed suit under Section 3729(a)(1) would instead file suit under Section 3729(a)(2)—in order to avoid the presentment requirement—and simply allege that the falsity in the claim at issue constituted a false statement used "to get a false claim . . . paid." *See*, *e.g.*, *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414 (6th Cir. 2002) (Medicare cost reports held to be both false claims under Section 3729(a)(1) and false records or statements used to get a false claim paid under Section 3729(a)(2)). This Court should reject a reading of the FCA that would render one of its two principal liability-creating provisions utterly superfluous.[6]

---

[6] Respondents suggest that their reading of Section 3729(a)(2) would not allow plaintiffs to circumvent the presentment requirement of Section 3729(a)(1) because "false 'records or statements' are not the only types of actionable claims." Resp. Br. 31 (emphasis omitted). While respondents may be correct that false claims can come in many forms, they all have one thing in common: falsity. Thus, whatever the form of the claim at issue, if submission of a claim to the government were not required in Section 3729(a)(2), any plaintiff could bring suit under that provision and allege that the false aspect of the

B. The Legislative History Does Not Support Respondents' Counter-textual Interpretation Of Section 3729(a)(2).

Respondents' attempt to muster support for their interpretation of Section 3729(a)(2) from the FCA's legislative origins is also unavailing.

Respondents and the United States contend that the original version of the FCA did not require submission of a claim to the government because liability could be imposed on anyone who "ma[d]e . . . or present[ed] . . . any [false] claim upon or against the Government." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696. They argue that a claim can be *made* upon the government without ever being *submitted* to the government. Resp. Br. 37; U.S. Br. 21. These efforts to distinguish between making a claim upon the government and presenting a claim upon the government are conclusively undermined by the fact that Congress removed the reference to "mak[ing]" a false claim in 1982. Because the 1982 FCA amendments "ma[de] no substantive change in the law" (H.R. Rep. No. 97-651, at 3 (1982)), the elimination of the "mak[ing]" a false claim language cannot have narrowed the statute's scope. "Mak[ing]" a false claim "upon or against the Government" must therefore have been functionally equivalent to "present[ing]" a false claim to the government—and liability under either clause would have required submission of a claim to the government.

[Footnote continued from previous page]

claim constituted a "false record or statement" that was used "to get a false or fraudulent claim paid."

The legislative history accompanying the 1986 FCA amendments is equally unhelpful to respondents' position.[7] The House and Senate Reports indicate that Congress added the definition of "claim" in Section 3729(c) in order to codify the result in cases holding that FCA liability may attach where a false claim is submitted to a federally funded intermediary and then passed along to the government. *See*, *e.g.*, S. Rep. No. 99-345, at 10 (citing *Hess*, 317 U.S. 537). Although the Senate Report favorably cited two cases in which FCA liability was imposed even though a claim had seemingly never been submitted to the government (*see id.* (citing *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966) and *United States ex rel. Davis v. Long's Drugs, Inc.*, 411

---

[7] Any support that respondents could have otherwise obtained from the legislative history is foreclosed by the fact that the 1986 Senate and House Reports were issued before the "by the Government" language, which clarified that the provision requires submission of a claim to the government itself for payment or approval, was added to Section 3729(a)(2). Respondents suggest that "it is not reasonable to suppose that Congress silently and simultaneously reversed course" by first adding the definition of "claim" to purportedly extend the FCA to fraud against federally funded private entities and then, without comment, adding the "by the Government" language to clarify that a claim must be submitted to the government for payment or approval before liability can attach. Resp. Br. 39 n.6; *see also* U.S. Br. 14 n.3. This Court has repeatedly made clear, however, that a statute's plain language controls even in the face of congressional silence. *See*, *e.g.*, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute"). The absence of congressional deliberations thus cannot alter the fact that the "by the Government" language of Section 3729(a)(2) requires a claim to be submitted to the government for payment or approval.

F. Supp. 1144 (S.D. Cal. 1976))), it immediately followed the citations to each of those decisions with a citation to a case in which a claim was submitted to a federally funded private entity and then passed along to the government. *See id.* (citing *Hess*, 317 U.S. 537, and *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953) ("The fact that the claims in this case were not presented directly to the government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute."). These conflicting citations are too slim a reed on which to rest the weight of respondents' countertextual argument that Congress—by adding the "by the Government" language to the end of Section 3729(a)(2)—intended to extend the FCA to claims never submitted to the government.[8]

II. SECTION 3729(a)(3) REQUIRES PROOF OF A CONSPIRACY TO SUBMIT A FALSE CLAIM TO THE GOVERNMENT.

Like Section 3729(a)(2), the language of Section 3729(a)(3)—which reaches anyone who "conspires to

---

[8] The Senate Report's cryptic reference to *United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938), is no more illuminating. In that case, the district court's conclusion that fraudulent claims submitted to the Red Cross did not trigger FCA liability rested at least in part on the fact that the Red Cross received only a one-time "donation from the government." *Id.* at 197. *Salzman* thus relied on similar reasoning to *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that the FCA did not extend to fraud upon federal grantees who received a fixed-sum payment from the government, whether or not a false claim was ever submitted to the government. *Id.* at 762. Congress explicitly intended for the 1986 FCA amendments to overrule *Azzarelli* and similarly reasoned cases. S. Rep. No. 99-345, at 15.

defraud the Government by getting a false or fraudulent claim allowed or paid"—restricts the statute's reach to fraud against the federal government. This Court has already concluded that a conspiracy to defraud a federally funded private entity does not constitute a "conspir[acy] . . . to defraud the United States" unless the defendant "conspired to cause [the private company] to make misrepresentations to the [federal government]." *Tanner v. United States*, 483 U.S. 107, 132 (1987). Indeed, the statute at issue in *Tanner* was worded in broader terms than Section 3729(a)(3) because it applied to conspiracies to "defraud the United States . . . *in any manner*." 18 U.S.C. § 371 (emphasis added). If submitting a false claim to a federally funded private entity does not fall within the expansive language of Section 371, it follows *a fortiori* that it cannot come within the narrower language of Section 3729(a)(3), which is limited to conspiracies to defraud the government "by getting a false or fraudulent claim allowed or paid."

The United States contends that *Tanner* is irrelevant because the Court there "*agreed* with the government that 'under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud.'" U.S. Br. 23 (quoting *Tanner*, 483 U.S. at 129) (emphasis in original). In this case, however, the government itself was not the "target" of petitioners' purported fraud because petitioners' alleged conspiracy did not "cause [the prime contractors] to make misrepresentations to the [federal government]" by passing along or otherwise making false claims to the government. *Tanner*, 483 U.S. at 132. The "targets" of the alleged fraud were instead the private contractors who received claims for payment from petitioners and paid those claims.

Nor can *Tanner* be distinguished, as respondents suggest, on the ground that the Court was construing a criminal statute. Resp. Br. 46-47 & n.9. This Court has recognized that the FCA itself has many of the characteristics of a criminal statute. *See Stevens*, 529 U.S. at 784 ("the FCA imposes damages that are essentially punitive in nature"). Moreover, *Tanner*'s holding was not premised on any of the interpretive canons peculiar to the criminal setting, which were referenced by the Court only in passing. 483 U.S. at 131. It instead rested on the fact that "the interpretation of § 371 proposed by the Government"—that a conspiracy to defraud a federally funded private entity constituted a "conspir[acy] . . . to defraud the United States"—"ha[d] not even an arguable basis in the plain language of § 371." *Id.*

The United States also suggests that respondents' Section 3729(a)(3) claim should have gone to the jury because "it was an essential feature of the alleged fraudulent scheme that the Navy be kept unaware of the defects in equipment for which the United States had contracted and paid." U.S. Br. 22. But it was no less an "essential feature" of the fraudulent scheme in *Tanner* to keep the United States unaware of the defendants' fraudulent procurement activity than it was here to keep the United States ignorant of petitioners' allegedly deficient subcontracting work. The United States is thus not a "target" of a fraudulent conspiracy simply because it was "essential" that the government be kept in the dark about the activity. Indeed, every perpetrator of fraud—no matter whom he is defrauding—wants to conceal his activities from the federal government.

Respondents further contend that, if Section 3729(a)(3) requires a conspiracy to submit a false

claim to the government, then all of the conduct covered by Sections 3729(a)(1) and (a)(2) will be encompassed by Section 3729(a)(3), rendering that provision "meaningless." Resp. Br. 50. Section 3729(a)(3), however, enables the government to bring suit against "co-conspirators who might not themselves have violated" either Section 3729(a)(1) or (a)(2) but who conspired with others to violate those provisions. *Beck v. Prupis*, 529 U.S. 494, 507 (2000).[9]

III. Requiring Submission Of A Claim To The Government Is Consistent With The Objectives Of The FCA.

Both respondents and the United States contend that reversal of the decision below will undermine the antifraud objectives of the FCA and leave the government without a remedy for subcontractor fraud. These policy arguments are misdirected to this Court and unpersuasive in any event.

Respondents contend that, if liability under Sections 3729(a)(2) and (a)(3) is restricted to cases in which a false claim has been submitted to the government, then the government will be unable to seek redress for subcontractor fraud on federal projects.

---

[9] Neither respondents nor the United States provides a sound basis for distinguishing *Beck* or discounting the support it provides for the conclusion that Section 3729(a)(3) is a derivative conspiracy provision. *See* Resp. Br. 51 n.12; U.S. Br. 24. *Beck* established that a plaintiff can "bring suit for civil conspiracy only if he ha[s] been injured by an act that was itself tortious." 529 U.S. at 501. Thus, in a suit in which the government was allegedly injured by fraudulent conduct that violated Sections 3729(a)(1) and (a)(2), a conspiracy claim under Section 3729(a)(3) must fail if a defendant cannot be held liable under either of those sections due to the absence of proof that a claim was ever submitted to the government.

In reality, the government has regularly invoked several highly effective tools to police fraud by subcontractors, including the Major Fraud Act, which imposes penalties of up to $10 million and ten years' imprisonment on a "subcontractor or supplier on a contract in which there is a prime contract with the United States" where the subcontractor "knowingly executes . . . any scheme or artifice with the intent . . . to obtain money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1031(a). The Major Fraud Act even authorizes the Attorney General to pay rewards to private citizens who report fraud to the government and thus provides the same whistleblowing incentive as the FCA. *Id.* § 1031(g)(1). Other sanctions that have been imposed upon fraudulent subcontractors include criminal liability for making false statements under 18 U.S.C. § 1001 and debarment from future government contracting opportunities. *See* 48 C.F.R. § 9.400.

Respondents are also incorrect when they contend that petitioners' reading of Sections 3729(a)(2) and (a)(3) would insulate Medicare and Medicaid fraud from FCA liability. Resp. Br. 54. In many cases, the claims that are submitted to a state or private health-care intermediary are passed along to the federal government—as Congress was no doubt aware when it enacted the 1986 FCA amendments. *See* S. Rep. No. 99-345, at 21-22 (citing *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974) (upholding a conviction under the criminal version of the FCA, 18 U.S.C. § 287, where a physician's false Medicare claim was passed along to the government by a private intermediary)). Moreover, even if there are situations in which false Medicare and Medicaid claims are not submitted to the federal government

itself, there are civil and criminal provisions specifically designed to address Medicare and Medicaid fraud. *See* 42 U.S.C. § 1320a-7a(a)(1); *id.* § 1320a-7b.

Thus, while a decision rejecting the Sixth Circuit's expansive interpretation of the FCA would leave the federal government with a number of powerful tools with which to combat fraud, a decision endorsing the Sixth Circuit's countertextual understanding of the FCA would—as respondents' own *amici* recognize—extend this specialized antifraud statute to any claim submitted to any private company, local government, or educational institution that receives funding from the federal government, even if the false claim does not injure the government. *See* Taxpayers Against Fraud Br. 20 ("Congress clearly intended for the FCA to apply even when no loss would result to the federal Government.").

Indeed, the United States appears to recognize the staggering implications of the Sixth Circuit's holding, and attempts to cabin its reach by suggesting that the FCA should apply to a claim submitted to a federally funded private entity only when the "contractor or grantee, in making the payment, was acting in furtherance of its responsibilities under the relevant federal program." U.S. Br. 30 n.8. There is nothing, however, in any provision of the FCA—including Section 3729(c) (which encompasses *any* "recipient of federal funds")—that substantiates this furtherance-of-federal-responsibilities standard. It emerges *ex nihilo*. If the "paid . . . by the Government" language of Section 3729(a)(2) does encompass, as respondents and the United States urge, any claim paid with government funds, there is no textual, structural, or historical basis for confining the

FCA's scope to claims paid by federal contractors acting in their federal capacity.

Under the Sixth Circuit's holding, then, *any* claim for payment submitted to a federally funded contractor, federal grantee, or other recipient of federal funds could give rise to treble damages and civil penalties under the FCA. The statute's language, structure, and history establish that Congress intended no such thing when it enacted the FCA to remedy "fraud practiced on the Government." *McNinch*, 356 U.S. at 599.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

February 13, 2008