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 PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GRAYSON & KUBLI, P.C. AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF THE *AMICUS*[1]

The *Amicus*, Grayson & Kubli, P.C., files this brief in support of the Respondents in order to bring to this Court's attention the importance of the Sixth Circuit's decision holding that there is no "presentment" requirement in Sections 3729(a)(2) or 3729(a)(3) of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*. *Amicus* has the consent of all parties to file this brief.

Amicus represents FCA relators in a variety of *qui tam* actions, including in the area of reconstruction fraud in Iraq. There is nothing new about the military's use of private contractors, but the Iraq War has seen outsourcing on an unprecedented scale. *See generally Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report*, *Hearing Before the House Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) ("Iraq Reconstruction Hearing.").

In the proceedings below, the Court of Appeals for the Sixth Circuit correctly held in *United States ex rel. Thacker v. Allison Engine Company, Inc.*, 471 F.3d 610 (6th Cir. 2006) that the district court erred in reading a blanket "presentment" requirement into

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[1] Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief.

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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

all subsections of FCA § 2729(a). Specifically, the Sixth Circuit held that while liability under FCA § 3729(a)(1) turns on whether a claim has been presented to the Government, subsections (a)(2) (proscribing the creation of false records or documents to get a false claim paid) and (a)(3) (conspiracy) of that section include no such "presentment" element.

The Sixth Circuit specifically rejected a sister Circuit's reading of a "presentment" element into FCA §§ 3729(a)(1)-(2) in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). The author of this decision, then-Judge John Roberts, has acknowledged the validity of conflicting views about his analysis. During his Senate confirmation hearing, he observed that "it's certainly possible that the majority in [*Totten*] didn't get it right . . . Judge Garland disagreed, and so it's obviously, to me, a case on which reasonable judges can disagree." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, *Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-159, 109th Cong. 321 (2005). The uncertainty surrounding the *Totten* interpretation of the False Claims Act potentially led to the FCA settlement involving a contractor defrauding Amtrak, under a factual situation that was almost identical to the facts in *Totten*. *See United States ex rel. Cartwright v. Balfour Beatty*, Civil No. 3:99CV02585 (JCH) (D. Ct. 2005).

Grayson & Kubli, P.C.'s specific interest in this matter is its representation of the relators in the

first FCA case involving Iraq reconstruction contractor fraud to go to trial, which resulted in a jury verdict of multiple violations of FCA §§ 3729(a)(1)-(2) and damages amounting to over $10 million. Months later, the trial court entered judgment notwithstanding the verdict on the violations of Sections 3729(a)(1) and 3729(a)(2), ruling that both of these subsections require "presentment" and that there was no evidence that the defendants' false claims and records had been "presented" to officers and employees of the U.S. Government. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 687 (E.D. Va. 2006). The case is on appeal and the United States submitted an *amicus* brief in support of the relators, arguing that "presentment is not a prerequisite for liability under § 3729(a)(2)"—a viewpoint that if accepted by the Fourth Circuit Court of Appeals likely would result in the jury verdict of violations of FCA § 3729(a)(2) being reinstated. *See* Br. for the U.S. as *Amicus Curiae* in Supp. of Appellants in *United States ex rel. DRC, Inc., et al. v. Custer Battles, et al.*, No. 07-1220 at 9-14.

More generally, as congressional oversight hearings have established, in the Iraq War, "tiering of charges by layers of subcontractors exorbitantly inflated the price paid by the Government under cost-plus agreements." Iraq Reconstruction Hearing, *supra*, at 18. The Hearing documented pyramid billing schemes with the "tiering" of charges by multiple layers of subcontractors, often six layers deep. *See id.* at 102. Under the tortured reasoning that the Sixth Circuit soundly rejected, second-tier,

third-tier, and all subordinate contractors would be immune for fraudulently billing a prime contactor that paid the inflated claims out of the Government fisc.

As shown below, the Sixth Circuit's holding in *Thacker* comports with the plain language of § 3729, the legislative history accompanying the most recent change to the statute, and the policy rationales behind the False Claims Act, as recognized by this Court. To hold otherwise would be to grant *de facto* immunity to subcontractors who use false records or conspire in order to get false claims paid with U.S. Government funds.

SUMMARY OF ARGUMENT

Even before its 1986 amendments, the FCA was written broadly "to reach all types of fraud, without qualification, that might result in *financial loss to the Government*." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added). FCA § 3729(a)(1) applies to any person who: "knowingly makes . . . a false record . . . to get a false or fraudulent claim . . . paid . . . by the Government." *Id.* § 3729(a)(2). By contrast, the language of FCA §§ 3729(a)(2)-(7) contain no such "presentment" language.

The Sixth Circuit's decision that there is no presentment requirement in FCA §§ 3729(a)(2)-(3) therefore should be affirmed. *Thacker*, 471 F.3d at 615. The ruling of the district court in the instant

case,[2] which the Sixth Circuit correctly reversed, misinterprets the FCA by impermissibly legislating a presentment requirement into FCA § 3729(a)(2). Its reading of the FCA is contrary to the FCA's plain language, legislative history and purpose. It is also dangerously unmindful of the real-world implications on the curbing of today's war profiteering occurring in Iraq.

More specifically, FCA § 3729(a)(2) liability inquiry begins and ends with whether the false records were "made to" wrongfully obtain U.S. Government funds as that section explicitly states. In this case, while the district court recognized that "all of the money used to pay the relevant prime contracts and subcontracts . . . came from the government," *see Thacker*, 471 F.3d at 613, it constructed an extra-textual requirement that restricts the reach of the FCA in a manner that Congress did not intend, leaving billions of dollars in U.S. Government funds unrecoverable. The district court decision was legally unsustainable, and the Sixth Circuit correctly reversed.

In appending a "presentment" element to FCA § 3729(a)(2) liability, the lower court's ruling combines the requirements of two distinct liability provisions of the False Claims Act: as noted above, the language of FCA § 3729(a)(1) explicitly attaches liability to those "who . . . *present*[] . . . to an . . . employee of the United States Government . . . a false . . . claim for payment." *Id.* at 614 (emphasis

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[2] The opinion of the U.S. District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569.

added). Section 3729(a)(2), on the other hand, applies to those "who . . . *make*[] . . . a false record . . . to get a false or fraudulent claim . . . paid by the Government." *Id.* (emphasis added). In addition, the district court overly-restricted the plain meaning of FCA § 3729(c), which, by its very terms, defines "claim" to include those which are "made to" recipients of federal funds in which the "United States Government provides any portion of the money or property which is requested or demanded." *Id.* at 614-18. In turn, by impermissibly "amending" § 3729(a)(2), the district court legislated an additional requirement that the fraudfeasor's claim be "paid or approved [directly] by the Government." *Id.* at 615-18.

In addition, the district court overly-restricted the plain meaning of FCA § 3729(c), which defines "claim" to include those 'made to" recipients of federal funds in which the "United States Government provides any portion of the money or property which is requested or demanded." *Id.* By impermissibly "amending" FCA § 3729(a)(2), the district court effectively eliminated the definition of the term "claim' in FCA § 3729(c) insofar as the term "claim" is used in FCA § 3729(a)(2).

In actuality, the plain language of the FCA includes no "presentment" requirement as an element of § 3729(a)(2) liability. Moreover, the applicable legislative history shows beyond question that the result reached by the district court is contrary to the intent of Congress. Finally, because of the unprecedented reliance on private government contractors in the Iraq War, the district court's

flawed reasoning raises a concern for all Americans. The real-world implication of the district court's wayward decision, and that of the *Totten* Court upon which it relied, is that an FCA enforcement-free zone now exists in Iraq, permitting dishonest subcontractors to hide behind prime contractors when it comes to defrauding the U.S. Government.

Amicus respectfully requests this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE HISTORY AND HISTORICAL INTERPRETATION OF THE FALSE CLAIMS ACT DEMONSTRATE THAT "PRESENTMENT" IS NOT AN ELEMENT OF LIABILITY UNDER 31 U.S.C. § 3729(a)(2)-(3).

A. The Plain Language of 31 U.S.C. §§ 3729(a)(2)-(3) Contains No Presentment Requirement.

To determine the meaning of a statute, this Court first looks to the plain language of the statute itself. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citing *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The plain language of the FCA states that actual presentment of a claim to the Government is required under one, but not all, of the statute's sections. Namely, only subsection 3729(a)(1) of the

statute makes any mention of presenting a claim to the Government or Armed Forces. FCA §§ 3729 (a)(2)-(3), which are separate FCA violations, contain no such presentment language.

As noted above, Subsection (a)(1) applies to any person who "knowingly makes . . . a false record . . . to get a false or fraudulent claim paid . . . by the Government." Subsection (a)(2) requires only that a defendant "make[ ]" or "use[ ]" a "false record or statement" in order to induce the Government to pay or approve a claim. FCA § 3729(a)(2). Subsection (a)(3) requires a conspiracy to defraud the Government to pay or allow a false claim. *Id.* at § 3729(a)(3).

By its terms, FCA § 3729(a) not only applies to a defendant who "presents" a false claim to the Government, but also to a defendant who "makes" a false record to get a false claim "paid . . . by the Government." *Id.* at § 3729(a)(1)-(2). Courts, respecting the different language in each of these two distinct FCA liability provisions, echo the warning of the Supreme Court that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). Indeed, evidently with the exception of a lone Texas district court[3] and the *dicta*

[3] *United States ex rel. Farmer v. City of Houston*, 2006 WL 2382327 (S.D. Tex. 2006).

statements from a split panel in *Totten*, discussed at greater length, *infra*, every single court that has addressed this issue has recognized this cause of action, even though a subcontractor does not directly bill the U.S. Government. *See e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (holding that a collusive bidding process by contractors employed by a local government to work on Public Works Administration projects could give rise to a claim under the FCA).

In addition to grafting the "presentment" language of FCA § 3729(a)(1) to FCA § 3729(a)(2) and disregarding this accepted theory of FCA liability, the lower court inserted an additional requirement into FCA § 3729(a) by attaching liability only when the fraudfeasor was paid directly by the Government. This is contrary to the Supreme Court's admonition against "reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997)

Moreover, the district court ignores the explicit definition of "claim" outlined in § 3729(c). The definition of "claim" in part (c) further supports the reading that presentment is not required under all sections of the statute. Most importantly for this case and others like it, § 3729(c) explicitly states that a claim is "*any* demand . . . for money or property which is made to a contractor . . . if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor . . . for any portion of the money or property which is requested or demanded." *Id.* § 3729(c) (emphasis

added). Thus Congress, in adding this definitional section to the Act, explicitly clarified that the fraudfeasor cannot escape liability by simply arguing that the claims were submitted to a recipient of federal funds (*i.e.*, the prime contractor), and not directly to the Government. The focus of this language is on the money *paid out by the Government* in response to a false statement or fraudulent request for payment. There is nothing in this language to suggest the claim must have been presented to the Government, so long as it can be shown that the claim was paid with Government funds.

The statute should be accorded the meaning expressed by its clear language. Congress wrote FCA § 3729(a)(2) without including a "presentment" requirement. Congress wrote a definition of actionable "claims" to include those not submitted to the Government. It is presumed that Congress acted deliberately in its drafting. *See Bates*, 522 U.S. at 29. Clearly, the language of the FCA and these fundamental principles of statutory construction demonstrate that "presentment" is not an element of liability under FCA §§ 3729(a)(2)-(3).

B. The Legislative History Accompanying the Most Recent Change to the False Claims Act Does Not Support Reading a Presenting Requirement Into 31 U.S.C. §§ 3729(a)(2)-(3).

The plain language of FCA §§ 3729(a)(2)-(3) includes no "presentment" requirement and the

FCA's definition of "claim" unambiguously reaches false claims for federal dollars that are not "presented" to a federal Government employee; therefore, the Court does not need to look further to affirm the Sixth Circuit. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (holding that "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.*). The fact that Petitioners delve at length into the origins and legislative history of the FCA to support an implied addition of "presentment" to FCA § 3729(a)(2), Pet. Br. at 21-22, 26-28, undermines their argument that the plain meaning of this subsection contains a presentment requirement in (a)(2). *Id.* at 21. The legislative history, in fact, shows that Congress did not limit the FCA's reach to only false records directly "presented" to the Government.

The FCA is the Government's primary tool for combating contractor fraud. It was enacted for the specific purpose of punishing war profiteering, *viz.*, the decrepit horse and mules, faulty rifles and ammunition, and rancid provisions that unscrupulous military contractors sold to the Union Army during the Civil War. See H.R. Rep. No. 37-2, at 54 (1861). President Lincoln deputized whistleblowers to bring forth evidence of fraud, and to litigate such cases against war profiteers, in the name of the Government. In this context, in 1863, Congress enacted the FCA. Act. of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. *See* also Cong. Globe, 37th Cong., 3d Sess. 952 (1863). It is clear from the current incarnation of the FCA that Congress

intended for it to have the broadest reach possible, *see S. Comm. On the* Judiciary, *False Claims Act of 1986*, S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, and its legislative history echoes the Sixth Circuit's interpretation of the statutory language. *Id.*

The Committee Reports written when Congress restructured FCA § 3729 in 1986, breaking section (a) into additional subsections and adding subsection (c), indicate that Congress intended to broaden the reach of the FCA to cover fraudulent claims submitted by subcontractors that result in loss to the Government. Public Law 99-562, 100 Stat. 3159 (1986). Notably, prior to the 1986 amendments to the FCA, some courts applied a misinterpretation similar to *Totten*, ruling that false claims submitted to a recipient of federal funds were not covered by the False Claims Act. [4]

The purpose of the 1986 change was "to enhance the Government's ability to recover losses sustained as a result of fraud . . . " S. Rep. No. 99-

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[4] *See, e.g.*, *United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938). Congress wanted to overrule this case, which concerned a situation nearly identical to the one in the instant case: false claims for federal funds were not presented directly to a Government employee, so the trial court found that the FCA was not implicated. S. Rep. No. 99-435 at 22 (1986). In *Salzman*, the district court dismissed an FCA action involving false claims submitted to the Red Cross – and not re-presented to a Government employee – reasoning that even though the Red Cross received federal grant money, it was not the "government" for FCA purposes. 41 F. Supp. at 197.

435, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Senate Report goes on to note that the amendment was "aimed at correcting restrictive interpretations of [the FCA]" by the courts[5] "in order to make the [FCA] a more effective weapon against Government fraud." *Id.* at 5269. The Report clearly states that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 5274. "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.* at 5275. "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." *Id.*

The House Report reached a similar conclusion: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986). There is no indication that a claim must be presented to the Government in order to be actionable. Petitioners presume that "loss to the United States" only happens "if the claim was ultimately passed along to the government." Pet. Br. at 28 (quoting S. Rep. No. 99-435, at 10 (1986). But this is a disingenuous reading. Congress did not need to clarify that claims "passed along" to the Government are actionable, since subsection (a)(1)

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[5] *Id.*

already prohibits "causing" presentment of false claims.

Be rewording the statute and adding subsection (c), Congress accomplished its desired expansion of the FCA. The addition of the § 3729(c) definition of "claim" unambiguously etched the underlying congressional intent into the False Claims Act. Congress, specifically intending to reject the kind of reasoning that the district court espoused in the present case, clarified that "a false claim is actionable although the claim or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10. Indeed, Congress endorsed the Supreme Court's interpretation that the Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). As this Court recently noted, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex. rel. Chandler*, 538 U.S. 119, 129 (2003).

The House and Senate reports evidence that Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute, including making the FCA applicable to cases in which the Government sustains a financial loss, regardless of

whether the false claim is actually presented directly to the Government.

C. Policy and Precedent Do Not Support Reading a Presentment Requirement Into FCA §§ 3729(a)(2)-(3).

While the plain language and legislative history of the statute provide a conclusive answer to the question presented, the narrow view of the FCA's scope advanced by Petitioners does not comport with the weight of authority interpreting the False Claims Act. The Supreme Court has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly. *See Neifert-White Co.*, 390 U.S. at 232; *Marcus*, 317 U.S. at 541-42.

The purpose of the FCA is to "protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the Government instrumentality upon which such claims were made. *Neifert-White*, 390 U.S. at 233 (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). Thus, the FCA covers all claims to Government money, even if the claimant does not have a direct connection to the Government.

For instance, in *Marcus*, the Court held that a collusive bidding process by contractors employed by a local government to work on Public Works Administration projects could give rise to a claim under the FCA. 317 U.S. at 543. Although the workers contracted with the local government rather than the United States and were paid by the local

authorities, the fact that the funds for the project derived from the federally-funded Public Works Administration meant that the FCA applied. The Court focused on the federal money being used to pay the fraudulent claims rather than the presence of a local intermediary. *Id.* at 544. Although the Court did not address the issue of whether the claim had to be presented to the Government, *Marcus* was an early indication that the FCA should be construed broadly.

The Court reaffirmed this position in *Neifert-White*, when it held that a "claim" does not merely encompass a claim for payment, but can also include an application for a loan of federal money. 390 U.S. at 231-232. Noting that the case "involves a false statement made with the purpose and effect of inducing the Government immediately to part with money," the Court ruled that the definition of "claim" within the FCA cannot be so narrowly defined. *Id.* at 232. "This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233.

A number of Circuit Courts have followed the Supreme Court's lead in avoiding an overly-narrow construction of the FCA. In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), citing *Marcus* and *Neifert-White*, the Fourth Circuit noted that the FCA should be construed broadly, *id.* at 786, and held that "any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." *Id.* at 788. It set forth a test

for FCA liability contrary to the one established in *Totten*: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or forfeit moneys due (*i.e.*, that involved a 'claim')." *Id.*

The Third Circuit has come closest to holding that presentment is not required under the statute. In *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966), a post-*Marcus* / pre-*Neifert-White* case, the court upheld a finding of liability under the FCA for claims submitted to a private corporation that received funding from the Government. *Id.* The key issue for the court was that the funds used to pay the claimant originated with the Government. *Id.* This alone was sufficient to find liability under the FCA. "We have no doubt that the False Claims Act covers such an indirect mulcting of the government." *Id.*

Restrictively construing the FCA, as Petitioners do, is at odds with the FCA's plain text, legislative history, policy rationales, and this Court's precedent.

II. WHY *TOTTEN* DOES NOT APPLY.

A. The *Totten* Decision.

The district court in the instant case relied on the D.C. Circuit's decision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), and ruled

that liability under the FCA § 3729(a)(2) required a showing that a false record was *presented to the government*, either by the defendants or by the prime contractor.

The issue in *Totten* was whether the submission of a false claim to Amtrak, which Amtrak paid with funds including federal grant money, violated the FCA. The court, with a dissent by U.S. Circuit Judge Merrick Garland, held that it did not because Amtrak was a federal grantee, not part of the Government, and liability under the FCA is contingent upon a showing that the false claim was "presented to an officer or employee of the Government." 380 F.3d at 490.

To reach this conclusion, the court first noted the plain language of FCA § 3729(a)(1) requiring presentment to the Government. *Id.* at 497. The court next held that subsection (a)(2) also contains a presentment requirement. Though the presentment language is not present in subsection (a)(2), the majority reasoned that because the two sections were previously part of the same clause, subsection (a)(2) must be read in conjunction with the presentment language in subsection (a)(1). *Id.* at 499-500.

The court read the "by the government" language in FCA § 3729(a)(2), which was added as part of the 1986 amendments, as referring back to the presentment language in subsection (a)(1), *id.* at 499, despite the fact that these clauses are disjunctive and a litigant need only satisfy subsection (a)(1) or (a)(2) to prove an FCA violation.

See 31 U.S.C. § 3729(a). The court also read this language as limiting the reach of FCA § 3729(c). *Id.* at 499. By adding the clause, the court reasoned, "Congress was reinforcing – rather than abandoning – the distinction between the Government and its grantees that might otherwise have been blurred by the addition of Section 3729(c)." *Id.* The court thus concluded that any claim brought under the FCA requires evidence that an actual claim was presented to the Government before liability can attach. *Id.* at 502.

B. How the *Totten* Court Misinterpreted and Misapplied the FCA.

The *Totten* court misinterpreted the FCA for several reasons. First, the plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented directly to the Government to be actionable. Congress could have chosen to include the presentment language of subsection (a)(1) in other parts of the FCA and did not. The Supreme Court has consistently counseled against attributing the same meaning to different language in the same statute. *See Barnhart*, 534 U.S. at 452 ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Moreover, reading presentment into subsection (a)(2) would give it almost the same

meaning as subsection (a)(1), rendering the latter largely superfluous. *See Totten*, 380 F.3d at 507 (Garland, J., dissenting). The "cardinal principle of statutory construction," however, is "to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal citations, quotations, and alterations omitted). The FCA should not be read so as to make the meanings of subsections (a)(1) and (a)(2) indistinguishable. *Id.*

The *Totten* majority reasons that the opposite reading – that subsection (a)(2) does not have a presentment requirement – would make the presentment requirement in subsection (a)(1) "largely meaningless." *Totten*, 380 F.3d at 501. *See also* Pet. Br. at 19. Why, the *Totten* majority asks, would any plaintiff bring a claim under subsection (a)(1) when she could just use the more lenient subsection (a)(2) for all claims? 380 F.3d at 501. *See also* Pet. Br. at 22. The answer is because subsection (a)(2) contains its own, more burdensome requirement: the claim must have actually been paid. This is not an element of all FCA violations under § 3729(a). As the Supreme Court and other courts have held, an individual can be liable under the FCA for presenting a fraudulent claim to the Government, even if the Government discovers the fraud in time and does not actually pay out any money. *See Rex Trailer Co. v. United States*, 350

U.S. 148, 153 & n.5 (1956); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).[6]

In holding that § 3729(a)(2) contains a presentment requirement, the *Totten* court answers a question it was not asked. Indeed, the Sixth Circuit described the *Totten* analysis as a mere "afterthought," which was "not so much a *ruling* on the meaning of subsection (a)(2) as a *response* to the arguments made by the dissent on an issue not raised by the parties." *Thacker*, 471 F.3d at 618. In making this unnecessary response, the majority seems to have misread the plain language of the statute and its legislative history.

The primary issue before the court in *Totten* was whether claims submitted to Amtrak, a federal grantee receiving a portion of its funds from the Government constituted presenting a claim "to the Government." *Totten*, 380 F.3d at 490. There is no discussion of what it means to "present" a claim, and it is unclear from the opinion whether any evidence was put forth that the money used to pay the defendants came from the Government (rather than from non-government funds). *See id.*

As the majority points out, during six years of litigation, none of the parties argued that subsection (a)(2) provided separate grounds for relief, and the

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[6] Contrary to the district court's opinion in the instant matter and Petitioners' argument, *Rivera* does not stand for the proposition that a claim must be presented to the government in order to be actionable. The court did not address this issue, as the claim at issue in *Rivera* was presented to the government. 55 F.3d at 710.

majority would not have even considered the subsection (a)(2) argument had the dissent not raised it *sua sponte*. *Id.* at 497.

C. Why the Sixth Circuit Was Correct In Rejecting *Totten*.

Petitioners do not hide their disdain for the FCA and "its potentially crippling penalties and provisions for suits by opportunistic 'qui tam relators,'" Pet. Br. at 3 (quotes in original), "seeking draconian penalties of as much as $11,000 per claim." *Id.* at 4. Petitioners characterize these brave whistleblowers as "bounty-hunting relators looking for windfalls even where the Government has suffered no fraud directed against it." *Id.* at 6.

Petitioners mischaracterize the Sixth Circuit's decision as turning "ordinary contract disputes," *id.*, and "fraud perpetrated by one private party against another," *id.* at 33, into actionable FCA cases. Petitioners raise the specter that "[t]he 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." Pet. Br. at 3 (quoting *Totten*, 380 F.3d at 496) (emphasis added)).

That is not what the Sixth Circuit said. The Sixth Circuit and the FCA are concerned only with false or fraudulent claims that "will be paid with government funds." 471 F.3d at 615. The Sixth Circuit never held, or even suggested, that a non-false or non-fraudulent claim for non-federal money

(even if submitted to an entity that receives some federal funding) is actionable under the FCA.

Yet Petitioners persist in their hyperbole and hypotheticals:

> 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.

Pet. Br. at 8. However, in the case at bar, the Navy ordered generator sets of an exacting quality – which requirements were flowed down to and imposed on Petitioners – to provide electrical power needed for guided missile destroyers. Petitioners received hundreds of millions of taxpayer dollars, all from the U.S. Treasury, in exchange for the agreements to build the generator sets according to certain contract specifications.

Petitioners knew they were working on a Navy contract funded by federal dollars, and that the Navy's funds used to pay the Petitioner subcontractors did not magically become "private" funds just because they were disbursed by the prime contractor shipyards. The public funds used to buy the Navy's generator sets were never "private" funds belonging to the shipyards. Petitioners did not make claims for "private" funds, did not violate "private" contract specifications regarding construction of the

generator sets, and did not perpetrate fraud against "private" prime contractor shipyards. By violating the Navy's quality requirements and producing defective generator sets, Petitioners injured the Navy even though they were not in direct privity with the Navy. *United States v. Bornstein*, 423 U.S. 303, 313 (1976) (holding that FCA actions must concentrate on the conduct of the actual wrongdoer.)

The Sixth Circuit recognized that, the district court, by relying on *Totten*, "held that liability under the FCA required a showing that a false or fraudulent claim was *presented to the government*, either by the defendants or by the prime contractor." 471 F.3d at 614 (emphasis in original). But the Sixth Circuit specifically rejected this restrictive view of the FCA.

Petitioners' main hypothetical – in which the Government bankrolls the prime contractor via a firm-fixed-price contract (and therefore if a subcontractor overcharges the prime contractor, any additional funds improperly paid to the subcontractor will come out of the prime contractor's pocket), Pet. Br. at 10-12 – may present a situation in which the Government is unable to establish the required causal connection because it cannot prove presentment. However, that inability to prove a particular type of claim factually without proof of presentment does not mean that, as a matter of law, presentment is required as an element of all claims under subsection (a)(2). Alternatively, the payment with Government funds (although already in the hands of the prime contractor) might permit the inference that the claim had been paid by the

Government. The flaw in the case would be the omission of the proof of causal connection, *i.e.*, a showing that the false statement was used "to get" the claim paid.

Petitioners' second example of a prospective payment system (Pet. Br. at 12-13), such as Medicare, based on predetermined national and regional rates, suffers from the same flaw. The problem of whether a relator has presented sufficient proof of causal connection is an evidentiary question. Petitioners have characterized what is a problem of adequacy of proof in various hypothetical contexts as a question of statutory interpretation. Ironically, if "presentment" is added to subsections (a)(2) and (a)(3), decades of successful health care fraud prosecutions under the FCA would be profoundly restricted, especially in the case of false claims submitted to Medicare. Those claims would no longer be actionable because they are not "presented" to the Government, but rather to private intermediaries – usually insurance companies – which are subsequently reimbursed by the United States. *See Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975), *cert. denied*, 423 U.S. 830 (1975) (holding that claims submitted to intermediaries under Medicare and Medicaid are claims to the United States under the False Claims Act.).

The plain meaning, legislative history, and policy rationale of the FCA, as well as the Supreme Court's history of avoiding an overly-narrow construction of the Act, dictate that the decision of the Sixth Circuit should be affirmed. *Thacker* does not impose "'boundless' liability on anyone who

touches any funds traceable to the federal Government." Pet. Br. at 13. In fact, under the current prevailing law in the lower courts, "[n]o damages need to be shown in order to recover the penalty" under the FCA. *Rex Trailer*, 350 U.S. at 153 n.5 (1956)).

Petitioners' transparent contempt for the FCA is obvious and their disagreement is not really with the Sixth Circuit's opinion, but with the law Congress enacted as its primary tool to combat "fraud against the Government." *Rainwater*, 356 U.S. at 592.

CONCLUSION

For the reasons set forth above and by the Respondents, the decision of the Sixth Circuit Court of Appeals that presentment evidence is not required for subsection (a)(2) and (a)(3) of the FCA should be affirmed as a matter of law.

Respectfully submitted,

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