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 PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff asserting a cause of action under Section 3729(a)(2) or Section 3729(a)(3) of the False Claims Act is required to prove that a false claim was submitted to the federal government, or whether it is sufficient to establish that the claim was paid using federal funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., were defendants-appellees below and are petitioners in this Court.

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

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The court of appeals' opinion is reported at 471 F.3d 610. Pet. App. 1a. The order denying the petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 62a. The opinion of the United States District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569. *Id.* at 38a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on December 19, 2006. It denied petitioners' timely petition for rehearing and petition for rehearing en banc on April 20, 2007. On June 27, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to August 20, 2007. No. 06A1227. The petition for a writ of certiorari was filed on August 17, 2007, and granted on October 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) 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;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, 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.

STATEMENT

The False Claims Act ("FCA") provides the United States with a remedy for "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). This specialized statute does not provide a remedy, however, for fraud perpetrated by one private party against another—a matter that rests principally within the traditional province of the States. The Sixth Circuit nevertheless held that Sections 3729(a)(2) and (a)(3) of the FCA encompass acts of fraud between private parties where the plaintiff can "show that government money was used to pay [a] false or fraudulent claim," even if no claim was ever submitted to the government itself. Pet. App. 23a. The Sixth Circuit's expansive reading of the FCA extends the statute to *any* claim submitted to a recipient of federal funds, including state and local governments, educational institutions, and private businesses.

The Sixth Circuit's holding that a plaintiff asserting a cause of action under Section 3729(a)(2) or (a)(3) of the FCA need not establish that a false claim was submitted to the federal government, or that the defendant participated in a conspiracy to submit such a claim, is at odds with the language, structure, and history of the FCA, and should be reversed.

1. Congress enacted the FCA in 1863 in response to the extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976). As amended, the statute provides the federal government with a cause of action against anyone who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or ap-

proval" (31 U.S.C. § 3729(a)(1)), or who "knowingly makes [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* § 3729(a)(2). The statute also provides a cause of action against persons who "conspire[ ] to defraud the Government by getting a false or fraudulent claim allowed or paid." *Id.* § 3729(a)(3).

An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." 31 U.S.C. § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the suit. *Id.* § 3730(b)(4).

A defendant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

2. Petitioners Allison Engine Company, Inc., General Tool Company, and Southern Ohio Fabricators, Inc., served as three of the hundreds of subcontractors responsible for a portion of the construction

of the U.S. Navy's Arleigh Burke-class Guided Missile Destroyers. Pet. App. 2a. The two private shipyards that were prime contractors on the project subcontracted construction of the generator sets—which produce the ships' electrical power—to Allison Engine (then a subdivision of petitioner General Motors Corporation). *Id.* Allison Engine then subcontracted part of its responsibilities to General Tool, which in turn subcontracted a portion of its work to Southern Ohio Fabricators. *Id.*

Respondents, former employees of General Tool, filed this suit under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA, alleging that petitioners defrauded the federal government by making claims for payment under their subcontracts with the knowledge that their work did not conform to contractual specifications. Pet. App. 3a. After reviewing the complaint, the United States declined to intervene in the suit. *Id.*[1]

3. After respondents had presented their case to a jury, the United States District Court for the Southern District of Ohio granted petitioners' motion for judgment as a matter of law because respondents failed to introduce evidence that any claim for payment had ever been submitted to the federal government for payment or approval. Pet. App. 60a. Respondents established that Southern Ohio Fabricators had submitted claims to General Tool, that General Tool had submitted claims to Allison Engine, and that Allison Engine had submitted claims

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[1] Respondents also brought claims under the Truth in Negotiations Act, 10 U.S.C. § 2306a. The Sixth Circuit affirmed the district court's grant of summary judgment to petitioners on those claims (Pet. App. 33a), and they are no longer at issue in this case.

to the two prime contractors. There was no evidence, however, that any claims for payment had been submitted to the federal government, either by petitioners themselves or by the prime contractors. *Id.* at 59a.

Finding the D.C. Circuit's opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005), to be "persuasive," the district court held that submission of the allegedly false claims to the government was an element of the FCA causes of action that respondents were asserting under Sections 3729(a)(1), (a)(2), and (a)(3). Pet. App. 56a. In the absence of any evidence that a claim for payment had been submitted to the government, the court concluded that respondents' claims failed as a matter of law. *Id.* at 60a.

4. A divided panel of the Sixth Circuit reversed. The court of appeals held that, although Section 3729(a)(1) does require the submission of a false claim to the government, Sections 3729(a)(2) and (a)(3) do not require proof that a false claim was ever submitted to the federal government for payment or approval. Pet. App. 10a. According to the panel majority, Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds," even if no claim ever passes in front of a government official. *Id.* at 9a.

The Sixth Circuit based this holding on its reading of the statutory language of Sections 3729(a)(1) through (a)(3), and its conclusion that "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government." Pet. App. 7a. The panel majority found unpersuasive petitioners'

argument that the language "paid or approved by the Government" in Section 3729(a)(2) requires the submission of a claim to the federal government for payment or approval. *Id.* at 15a. According to the panel majority, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever it is "paid with government funds." *Id.* at 8a.

The Sixth Circuit attempted to bolster its reading of Sections 3729(a)(2) and (a)(3) by invoking the definition of "claim" in Section 3729(c). 31 U.S.C. § 3729(c). Reading Section 3729(c) in isolation from the liability-creating language of Sections 3729(a)(2) and (a)(3), the panel majority found "nothing in this language to suggest the claim must be shown to have been presented to the government, so long as it can be shown that the claim was paid with government funds." Pet. App. 8a. This conclusion was "solidifie[d]," the panel majority asserted, by the legislative history accompanying the 1986 amendments to the FCA. *Id.*

The Sixth Circuit also rejected petitioners' argument that, if a claim need not be submitted to the government under Section 3729(a)(2), "the presentment requirement in subsection (a)(1) [would be] 'largely meaningless.'" Pet. App. 12a (quoting *Totten*, 380 F.3d at 501). The panel majority contended that "[S]ection (a)(2) contains its own more burdensome requirement" not found in Section 3729(a)(1)—*i.e.*, that "the claim must have actually been paid"—and that a requirement that a claim be submitted to the government under Section 3729(a)(2) was thus unnecessary to prevent litigants from circumventing the presentment requirement in Section 3729(a)(1). *Id.*

The Sixth Circuit therefore concluded that submission of a claim to the government is not an element of the causes of action under Sections 3729(a)(2) and (a)(3), and reversed the judgment as a matter of law in favor of petitioners. Respondents' claims under Sections 3729(a)(2) and (a)(3) should reach a jury, the Sixth Circuit held, because "[d]uring trial, [respondents] put forth evidence that all of the money paid to [petitioners] came from the United States government." Pet. App. 24a.

Judge Batchelder dissented, and would have held that a claim must be submitted to the government in order to impose liability under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA. Pet. App. 33a. Judge Batchelder emphasized that the plain language of the FCA distinguishes between allegations that a defendant defrauded the federal government—which can support FCA liability—and allegations that a defendant defrauded a federal grantee—which cannot. *Id.* at 34a-35a. "Payment of a claim 'by the government'" under Section 3729(a)(2), Judge Batchelder reasoned, "presupposes that the claim has been presented to the government as a request for that payment." *Id.* at 34a. Disagreeing with the panel majority's assertion that any claim paid with federal funds can be deemed "paid . . . by the Government," Judge Batchelder responded that the "term 'by the Government' is not the same as 'with government funds.'" *Id.* She also emphasized that the panel majority's effort to prevent evasion of Section 3729(a)(1)'s presentment requirement was unavailing because the only authority that the majority cited to support the proposition that a "claim must have actually been paid" to give rise to Section 3729(a)(2) liability actually stood for the contrary proposition that payment is not required. *Id.* at 36a.

Because respondents "not only failed but actually refused to produce any evidence that any claim was presented . . . to the government for payment," Judge Batchelder would have affirmed the judgment in favor of petitioners. Pet. App. 37a.

SUMMARY OF ARGUMENT

I. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) of the FCA encompass any false claim paid with government funds—regardless of whether that claim was ever submitted to the federal government—cannot be reconciled with the language, structure, or history of the FCA.

A.1. Section 3729(a)(2) imposes 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). That language unambiguously requires the submission of a false claim to the government itself for payment or approval. If Congress had intended to extend Section 3729(a)(2) to any claim submitted to a private entity that receives federal funds, it would have provided for the statute to apply to any claim "paid with Government funds" or any claim "paid or approved by the Government or by a recipient of Government funds." Its decision not to do so is controlling here.

Indeed, both Congress and this Court are well aware of the distinction between the federal government and private entities that receive federal funding. In *Tanner v. United States*, 483 U.S. 107 (1987), for example, this Court held that a conspiracy to defraud a federally funded private entity does not constitute a "conspir[acy] . . . to defraud the United States." *Id.* at 129. A claim can therefore be "paid or

approved by the Government" within the meaning of Section 3729(a)(2) only when it is submitted to the government itself for payment or approval.

2. This reading of the plain language of Section 3729(a)(2) is confirmed by the FCA's statutory structure and the provision's legislative origins.

If Section 3729(a)(2) did not require the submission of a false claim to the government, then plaintiffs would be able to circumvent the requirement in Section 3729(a)(1) that a claim be "present[ed]" to the government by simply filing suit under Section 3729(a)(2). Such a result would conflict with this Court's consistent admonition that a statute should not be interpreted in a manner that would effectively nullify one of its sections.

Properly construed, Sections 3729(a)(1) and (a)(2) serve complementary functions. Section 3729(a)(1) applies to persons who submit a false claim to the government (or cause such a claim to be submitted), while Section 3729(a)(2) applies to persons who make a false statement to obtain payment or approval of a false claim that has been submitted to the government. Together, the provisions reach both defendants who submit false claims and defendants who make false statements in order to secure the payment of such claims.

This reading is confirmed by the legislative origins of Sections 3729(a)(1) and (a)(2), which were originally part of a single, lengthy sentence that unambiguously made submission of a claim to the government an element of both causes of action and that was recodified without substantive change.

3. None of the Sixth Circuit's reasons for adopting a contrary reading of Section 3729(a)(2) is persuasive.

The Sixth Circuit disregarded the plain language of Section 3729(a)(2) and impermissibly substituted "anyone receiving federal financial assistance" for the phrase the "Government." Neither the definition of "claim" in Section 3729(c) nor the legislative history of the 1986 amendments to the FCA supports this countertextual reading of Section 3729(a)(2). Congress added the definition of "claim" to make clear that Section 3729(a)(2) reaches false claims that are initially submitted to a federally funded private entity and then passed along to the government, not to extend the statute to any claim paid by a private entity with funds that originated from the government.

B. The Sixth Circuit's reading of Section 3729(a)(3) is equally unpersuasive. The scope of liability under that derivative conspiracy provision is defined by the scope of liability under Sections 3729(a)(1) and (a)(2). Because a claim must be submitted to the government under those two sections, Section 3729(a)(3) applies only to conspiracies to submit a false claim to the government. The plain language of Section 3729(a)(3)—which encompasses "conspir[acies] to defraud the Government," rather than conspiracies to defraud recipients of federal funding—confirms this interpretation.

Because respondents failed to introduce any evidence at trial that false claims were submitted to the federal government—either by petitioners themselves or by the project's prime contractors—petitioners were entitled to judgment as a matter of law on respondents' claims under Sections 3729(a)(2) and (a)(3).

II. The Sixth Circuit's expansive interpretation of the FCA extends the statute to a vast array of con-

duct that Congress never intended it to reach. For example, if the decision below is affirmed, Sections 3729(a)(2) and (a)(3) will apply to *any* claim for payment submitted to any state or local government, any educational institution, or any private business that receives federal funding. Alleged fraud between private parties, however, is properly redressed under state law, not under the specialized liability provisions of the FCA.

Reversal is required to restore the textual bounds that Congress imposed on the scope of the FCA.

ARGUMENT

I. SECTIONS 3729(a)(2) AND (a)(3) REQUIRE PROOF THAT A FALSE CLAIM WAS SUBMITTED TO THE GOVERNMENT OR THAT A DEFENDANT PARTICIPATED IN A CONSPIRACY TO SUBMIT SUCH A CLAIM.

FCA liability can be imposed under Sections 3729(a)(2) and (a)(3) only where the plaintiff can establish that a false claim was submitted to the federal government or that the defendant participated in a conspiracy to submit such a claim. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds" (Pet. App. 9a) is directly at odds with the plain language, statutory structure, and legislative origins of the FCA.

A. Section 3729(a)(2) Requires The Submission Of A False Claim To The Government For Payment Or Approval.

1. This Court's interpretation of Section 3729(a)(2) can begin and end with the statute's plain language. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). Section 3729(a)(2) imposes FCA liability on any person who "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). Congress's intention in enacting this provision could not have been clearer: The phrase "paid or approved *by the Government*" unambiguously establishes that Congress intended to impose liability where a false claim has been submitted to the federal government for payment or approval. Indeed, for a claim to be "paid or approved by the Government," it first must be submitted to the government.

The submission of a false claim to a private entity that receives funding from the federal government is not equivalent to the submission of a claim to the government itself. If Congress had intended to extend Section 3729(a)(2) to the submission of false claims to federally funded private entities, then it would not have required the claim to be "paid or approved by the Government." *Cf.* 5 U.S.C. § 4101(3) ("'Government' means the Government of the United States"); *id.* § 5911(a)(1) (same). It would instead have provided for the imposition of liability where the claim was "paid with Government funds" or where it was "paid or approved by the Government or by a recipient of Government funds." Indeed, when drafting statutes, Congress frequently references the concept of "Government funds." *See*, *e.g.*, 3

U.S.C. § 108(a) (referencing "Government funds"); 5 U.S.C. § 5724(a) (same); *id.* § 5725(a); 12 U.S.C. § 244; 41 U.S.C. § 115(a). It would have done so in Section 3729(a)(2) if it intended to extend the FCA to any false claim paid by a private entity with money received from the government.

Congress is well aware of the distinction between the federal government itself and federally funded private entities. *See*, *e.g.*, 28 U.S.C. § 2671 ("the term 'Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States*") (emphasis added).[2] Indeed, that distinction is reflected in Section 3729(c) of the FCA, which distinguishes between the "Government" and a "contractor, grantee, or other recipient" that is "reimburse[d]" by the "Government" for the payment of a claim. 31 U.S.C. § 3729(c). By selecting the language "paid or approved *by the Government*," Congress therefore restricted the reach of Section 3729(a)(2) to the submission of a false claim to the government itself for payment or approval.[3]

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[2] *See also* 5 U.S.C. § 3371 (distinguishing between a "Federal agency" and a "federally funded research and development center"); 41 U.S.C. § 103 (defining the terms "prime contractor," "subcontractor," and "Government agency"); *Forsham v. Harris*, 445 U.S. 169, 179 (1980) ("The legislative history [of 5 U.S.C. § 552(e)] indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of 'agency.'").

[3] The plain meaning of the term "Government" as referring only to the United States Government—not to federally funded private entities—is confirmed by the legislative history of the

This Court has consistently recognized the legal distinction between the federal government and private entities that receive federal funding. In *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that defendants who allegedly conspired to defraud a private company that received federal financial assistance did not engage in a "conspir[acy] . . . to defraud the United States" within the meaning of 18 U.S.C. § 371 because a private entity that receives federal funding does not constitute the "United States." 483 U.S. at 129.[4] Much as respondents do here, the government had argued in *Tanner* that a "recipient of federal financial assistance and the subject of federal supervision[ ] may itself be treated as 'the United States.'" *Id.* The Court determined that the "interpretation of § 371 proposed by the Government . . . ha[d] not even an arguable basis in the plain language of § 371." *Id.* at 131. The "Government's sweeping interpretation" of the statute, the Court explained, "would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States'"—in direct contravention of the statutory language en-

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1982 amendments to the FCA. *See* H.R. Rep. No. 97-651, at 2-3 (1982) ("Certain standard changes are made uniformly throughout the revised Title 31 . . . . 'United States Government' is substituted for 'United States' (when used in referring to the Government) . . . . Thereafter, in the same section, 'Government' is used . . . .").

[4] The statute provides that, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined" and/or imprisoned. 18 U.S.C. § 371.

acted by Congress. *Id.* at 132. The Court concluded that only "[i]f the evidence presented at trial was sufficient to establish that [the defendants] conspired to cause [the private company] to make misrepresentations to the [federal government]" could the conviction stand because only then would the United States itself have been the target of the fraud. *Id.*

This Court's holding in *Tanner* makes clear that a private entity's federally funded status does not transform it into the federal government for fraud purposes. Indeed, this Court has repeatedly emphasized that "[g]rants of federal funds generally do not . . . serve to convert the acts of the recipient from private acts to governmental acts." *Forsham v. Harris*, 445 U.S. 169, 180 (1980). The Court has therefore held, for example, that "written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not 'agency records' within the meaning of the [Freedom of Information] Act," unless "copies of those data have . . . been obtained by"—*i.e.*, submitted to—"a federal agency." *Id.* at 171. This principle holds true even where a private entity receives *all* of its funding from the federal government. *See United States v. Orleans*, 425 U.S. 807, 809 (1976) (holding that a nonprofit corporation that was funded entirely by the federal government was not a "federal instrumentality or agency for purposes of [the] Federal Tort Claims Act").

Lower courts have recognized this distinction between efforts to defraud the federal government itself and fraud directed to private entities that receive federal funding. In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit, in an opinion authored by then-Judge Roberts, held

that Section 3729(a)(2) of the FCA did not apply to the submission of allegedly false claims for payment to Amtrak, a private entity funded by the federal government. *Id.* at 498. The court explained that Section 3729(a)(2) requires proof that a claim was actually submitted to the government and that the relator's claim therefore failed because there was no evidence that Amtrak ever passed the defendants' claims along to a government official. *Id.* at 502. The D.C. Circuit emphasized that "[m]aking false records or statements to get a false claim paid or approved by [a federally funded private company] is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* at 498 (quoting 31 U.S.C. § 3729(a)(2)); *see also* Pet. App. 34a (Batchelder, J., dissenting) ("The term 'by the Government' is not the same as 'with government funds.'").

Under the well-established principles recognized by this Court in *Tanner* and applied by the D.C. Circuit in *Totten*, a claim can only be "paid or approved by the Government" within the meaning of Section 3729(a)(2) if the claim was directly submitted to the government for payment or approval or if the claim was submitted to a private entity that thereafter passed it along to the government for that purpose.

The context in which the clause "paid or approved by the Government" is used confirms this reading of the statute. If the phrase "claim paid or approved by the Government" in Section 3729(a)(2) actually meant "claim . . . paid with government funds," as the Sixth Circuit held (Pet. App. 9a), then the words "by the Government" would be utterly superfluous because the term "claim" is already defined by the FCA to include requests for payment where "the United States Government provides any portion

of the money." 31 U.S.C. § 3729(c).[5] If Congress had intended for Section 3729(a)(2) to encompass any false claim paid with federal funds, it would have been unnecessary for it to include the "by the Government" language because that meaning would have been conveyed by the remainder of the statutory language, which—when read in conjunction with Section 3729(c) and without the "by the Government" limitation—reaches anyone who "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved," where "the United States provides any portion of the money" or will reimburse the payment. 31 U.S.C. § 3729(a)(2), *id.* § 3729(c).

It is firmly settled that a court should avoid reading a statute in a manner that renders any portion of its language superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). This canon of statutory construction indicates that a "claim paid or approved by the Government" must be something other than a "claim . . . paid with government funds." The only plausible reading of Section 3729(a)(2) is therefore that the phrase "by the Government" requires sub-

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[5] Section 3729(c) provides:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, 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).

mission of a claim to the government itself for payment or approval.[6]

2. The requirement that a false claim be submitted to the federal government under Section 3729(a)(2) is reinforced by the FCA's statutory structure and the legislative origins of Section 3729(a)(2).

The Sixth Circuit's conclusion that Section 3729(a)(2) does not require submission of a false claim to the government effectively nullifies the presentment requirement that is indisputably included in Section 3729(a)(1). *See* Pet. App. 23a (acknowledging that Section 3729(a)(1) requires presentment); Opp. to Pet. for Writ of Cert. 25. If Section 3729(a)(2) did not require the submission of a claim to the federal government, then plaintiffs would simply bring suit under Section 3729(a)(2) and assert that the allegedly false claim itself constituted the requisite "false record or statement" in order to evade the presentment requirement in Section

[6] Interpreting Section 3729(a)(2) to encompass claims submitted to federally funded private entities would also raise difficult constitutional questions. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that "the United States' injury in fact suffices to confer standing" on relators pursuing *qui tam* actions on the government's behalf. *Id.* at 774. In cases where a false claim has never been submitted to the federal government for payment or approval, however, it is doubtful whether the government itself has been injured by a defendant's alleged fraud, and relators may therefore lack Article III standing to pursue an FCA action on the government's behalf. In order to avoid calling into question the constitutionality of the FCA's *qui tam* provisions, this Court should construe Section 3729(a)(2) (and Section 3729(a)(3)) as requiring the submission of a false claim to the government for payment or approval. *See Stevens*, 529 U.S. at 787 (the FCA "should be construed so as to avoid difficult constitutional questions").

3729(a)(1). Under the Sixth Circuit's reading of Section 3729(a)(2), "the plain language requirement in (a)(1) that claims be presented to an officer or employee of the Government would only trip up those foolish enough to rely on (a)(1) rather than (a)(2)." *Totten*, 380 F.3d at 501.

This Court has repeatedly cautioned against reading one section of a statute in a manner that would effectively nullify another section. *See*, *e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992). The requirement that a claim be submitted to the federal government in order to impose liability under Section 3729(a)(2) ensures that the presentment requirement in Section 3729(a)(1) retains viability. Indeed, properly conceived, Sections 3729(a)(1) and (a)(2) serve different, but highly complementary, functions. Section 3729(a)(1) applies to anyone who "presents" a false claim to the government or who "causes" such a claim "to be presented." 31 U.S.C. § 3729(a)(1). The section therefore focuses on the act of submitting a false claim to the government. Section 3729(a)(2), in contrast, applies to anyone who "makes" or "uses," or "causes to be made or used, a false record or statement *to get* a false or fraudulent claim paid." *Id.* § 3729(a)(2) (emphasis added). The section applies not to the act of submitting a false claim itself but to the act of making a false statement in order to obtain payment or approval of a false claim submitted to the government. To establish liability under Section 3729(a)(2), a plaintiff must therefore prove that the defendant made a false statement and that the statement was made to obtain payment or approval of a false claim that has been submitted to the government. Sections 3729(a)(1) and (a)(2) accordingly

serve distinct functions and together reach both persons who submit false claims to the government and persons who make false statements in an effort to get such claims paid.

This interpretation is confirmed by the legislative origins of Section 3729(a)(2). Sections 3729(a)(1) and (a)(2) were originally part of one long sentence that imposed liability upon any person

> who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, . . . knowing such claim to be false, fictitious, or fraudulent; . . . [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of *such* claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry . . . .

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (emphasis added). The predecessor language to Section 3729(a)(2) unambiguously required the submission of a claim to the government because "the reference to 'such claim' was a shorthand reference to the claim already identified in the current subsection (a)(1)—that is, a claim that would be presented or caused to be presented to the United States." *Totten*, 380 F.3d at 500. The term "such" was removed from the statute in 1982 when Congress divided the single, lengthy sentence into the numbered subsections of present-day Section 3729(a). Congress was clear,

however, that the amendment "ma[de] no substantive change in the law." H.R. Rep. No. 97-651, at 3 (1982). Section 3729(a)(2) therefore preserved the presentment requirement that Congress established when it enacted the statute in 1863.

3. Notwithstanding the plain language, statutory structure, and legislative origins of Section 3729(a)(2), the Sixth Circuit held that the provision encompasses "false claims made to parties other than the government so long as the claim will be paid with government funds" and regardless of whether any claim is ever submitted to the federal government for payment or approval. Pet. App. 9a. None of the arguments that the Sixth Circuit offered in support of its countertextual reading of Section 3729(a)(2) is persuasive.

First, the Sixth Circuit argued that the plain language of the FCA supported its holding because "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government or Armed Forces. Subsection[ ] (a)(2) . . . , which [is a] separate bas[i]s for liability, contain[s] no such presentment language." Pet. App. 7a. The Sixth Circuit's reading of Section 3729(a)(2) is flawed because it is premised exclusively on the fact that the term "present" used in Section 3729(a)(1) is not found in Section 3729(a)(2). That observation does not answer the question whether a plaintiff pursuing a claim under Section 3729(a)(2) must establish that a false claim was submitted to the federal government. The plain language of Section 3729(a)(2)—which requires payment or approval of a false claim "*by the Government*"—establishes that submission of a false claim to the government is required. The Sixth Circuit's holding disregards that unambiguous language, and—like the government's reading of 18

U.S.C. § 371 in *Tanner*—impermissibly "substitute[s] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government]'" in Section 3729(a)(2). 483 U.S. at 132.

Congress's use of the phrase "paid or approved by the Government" in Section 3729(a)(2)—rather than the term "present"—to convey this meaning does not undermine this conclusion. Congress's word choice simply reflects the fact that Section 3729(a)(2) prohibits the use of false statements to obtain payment or approval of a false claim that has been submitted to the government, rather than the use of such statements to effectuate the presentment of a false claim to the government in the first instance.[7]

The Sixth Circuit also relied on the definition of "claim" in Section 3729(c) to support its conclusion that submission of a false claim to the government is not required under Section 3729(a)(2). The Sixth Circuit contended that the "focus of this language"—which encompasses "any request or demand . . . for money or property which is made to a contractor . . . if the United States provides any portion of the money"—"is on the money paid out by the govern-

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[7] The Sixth Circuit was therefore mistaken to rely on the canon of construction that "counsel[s] against attributing the same meaning to different language in the same statute" in concluding that Section 3729(a)(2) does not require the submission of a false claim to the government. Pet. App. 10a-11a. Sections 3729(a)(1) and (a)(2) are worded differently because they encompass different conduct. Although both sections ultimately require proof that a false claim was submitted to the government, Section 3729(a)(1) requires proof that the defendant "present[ed]" such a claim, while Section 3729(a)(2) requires proof that the defendant made a false statement in order to obtain payment or approval by the government of a false claim that either the defendant or someone else had submitted.

ment" and that "[t]here is nothing in this language to suggest the claim must be shown to have been presented to the government." Pet. App. 7a-8a. The Sixth Circuit's reliance on Section 3729(c) is misplaced, however, because the court of appeals read the definition of "claim" in Section 3729(c) in isolation from the liability-creating language of Section 3729(a)(2), which imposes liability on anyone who makes a false statement "to get a false or fraudulent claim paid or approved by the Government." Thus, while the Sixth Circuit is correct that nothing in Section 3729(c) itself requires the submission of a claim to the government, the plain language of Section 3729(a)(2) unambiguously requires that a claim be submitted to the government for payment or approval. The definition of "claim" in Section 3729(c) does not alter this element of a cause of action under Section 3729(a)(2). It instead makes clear that a request for payment submitted to and paid by a federally funded private entity is not excluded from the scope of the FCA, if—as required by Section 3729(a)(2)—a claim is thereafter submitted to the government for reimbursement or approval.

Responding to the D.C. Circuit's analysis in *Totten*, the Sixth Circuit further contended that construing Section 3729(a)(2) to impose liability in the absence of the submission of a claim to the government would not nullify Section 3729(a)(1) because "subsection (a)(2) contains its own more burdensome requirement—the claim must have actually been paid." Pet. App. 12a. The Sixth Circuit conceded, however, that "[t]o [its] knowledge, no authority exists either supporting the proposition that a claim must have been paid or approved to establish a violation of subsection (a)(2) or rejecting it." Pet. App. 13a n.5. Indeed, as Judge Batchelder recognized in dissent, the

only authority cited by the panel majority on this point actually supported the "contrary" proposition. *Id.* at 36a (Batchelder, J., dissenting); *see also id.* at 12a-13a (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 & n.5 (1956) (noting that, "[o]n several of the projects involved in [*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)], fraud was discovered by the Government in time for payments to be withheld" but that FCA liability was nevertheless imposed), and *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss")).

Moreover, the plain language of Section 3729(a)(2) authoritatively forecloses the Sixth Circuit's unsubstantiated reading of the statute as requiring that a claim "have actually been paid." Pet. App. 12a. The statute applies to anyone who makes or uses 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). As explained above, this provision applies to the act of making or using a false record or statement with the objective of getting a false or fraudulent claim paid or approved by the government. Liability does not depend on whether that claim was actually paid or approved by the government, but on whether the defendant made or used the false statement or record in an effort to secure payment or approval of a false claim that had been submitted to the government.

The Sixth Circuit's conclusion that Section 3729(a)(2) does not require the submission of a claim to the government therefore obliterates the distinction between Sections 3729(a)(1) and (a)(2), and ef-

fectively renders Section 3729(a)(1) dead letter. Under the Sixth Circuit's holding, there would be absolutely no reason for a plaintiff to bring suit under Section 3729(a)(1)—which would require proof that the defendant submitted a claim to the government—when the plaintiff could bring a cause of action regarding the same conduct under Section 3729(a)(2) without being required to establish that a claim was ever submitted to the government.

The Sixth Circuit's reliance on the legislative history to the 1986 FCA amendments is similarly unpersuasive. In that year, Congress added the definition of "claim" in Section 3729(c), and explained that the amendment was intended "to enhance the Government's ability to recover losses sustained as a result of fraud." S. Rep. No. 99-345, at 1 (1986). Nothing in the legislative history, however, suggests that Congress intended to extend the FCA's reach to false claims that were never submitted to the government for payment or approval. Indeed, unless the government has paid or approved a fraudulent claim submitted to it, there has been no financial loss to the government. *Cf. McNinch*, 356 U.S. at 599 ("an application for credit insurance does not fairly come within the scope that Congress intended the [FCA] to have" because "[i]n agreeing to insure a home improvement loan the [government] disburses no funds nor does it otherwise suffer immediate financial detriment").

As an initial matter, any suggestion that the 1986 legislative history supports the Sixth Circuit's holding is conclusively rebutted by the fact that the revisions to the FCA considered by the House and Senate Reports did not yet include the "by the Government" language in Section 3729(a)(2), which was added after publication of those reports. H.R. Rep.

No. 99-660, at 1 (1986); S. Rep. No. 99-345, at 39. That language clarifies that a false claim must be paid or approved "by the Government" itself to give rise to liability under Section 3729(a)(2) and precludes any attempt to manufacture support for the Sixth Circuit's holding from the 1986 legislative history.

Moreover, the content of the reports themselves does not support the Sixth Circuit's reading of Section 3729(a)(2). The Senate Report explained, for example, that the "purpose" of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud *against the Government*." S. Rep. No. 99-345, at 1 (emphasis added). The cases cited in the House and Senate Reports suggest that, consistent with this purpose, Congress added the definition of "claim" in Section 3729(c) to ensure that the FCA was not limited to claims that were submitted directly to the government but that it also encompassed claims that were initially submitted to a private company and then passed along to the government for final approval and/or reimbursement. Indeed, the Senate Report explained that "[c]ase law supports federal jurisdiction and a violation of Federal criminal law when false claims are presented to the United States by an intermediary" (S. Rep. No. 99-345, at 21-22 (internal quotation marks omitted)), and approvingly cited this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), as the type of outcome that it intended to codify through the definition of "claim" in Section 3729(c). *See* S. Rep. No. 99-345, at 10. In *Hess*, this Court held that the FCA applied to a scheme in which the defendants submitted inflated claims to local governments that used federal funds to pay the claims and then passed the claims along to

the federal government for final approval. *Id.* at 542-43. The Court explained that FCA liability attached because the claims "were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis." *Id.* at 545.

The 1986 amendments codified the result in *Hess* and in other cases where FCA liability was imposed even though the claim had not been submitted directly to the federal government but had instead been passed along to the government by a federally funded private intermediary. *See* S. Rep. No. 99-345, at 10; *id.* at 21-22 (citing with approval *United States v. Beasley*, 550 F.2d 261, 271 (5th Cir. 1977), *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir. 1975), and *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974), each of which involved the submission of a false claim to the government through a private intermediary). The Senate Report therefore explained that, under the amendments, "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*"—*i.e.*, if the claim was ultimately passed along to the government. S. Rep. No. 99-345, at 10 (emphasis added).[8]

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[8] Congress also intended for the definition of "claim" to overrule the Seventh Circuit's decision in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that the FCA did not apply to fraud upon federal grantees who received a fixed-sum payment from the government (whether or not the fraudulent claim was subsequently passed along to the government for approval). *Id.* at 762. The Senate Report explained that the definition of "claim" "made clear the United States may bring an action whether the grant obligation is open-ended or fixed." S. Rep. No. 99-345, at 15.

Finally, the Sixth Circuit contended that "the FCA is a remedial statute, and should be construed broadly." Pet. App. 15a. That well-worn principle of statutory construction does not give a court license to disregard the plain language of a statute. *See Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 808 (2007) (where statutory "text does not support [a] proposition[,] . . . the statute's remedial purpose cannot compensate for the lack of a statutory basis"). Section 3729(a)(2) requires that a claim be "paid or approved *by the Government*," and none of the reasoning offered by the Sixth Circuit can justify that court's departure from the plain meaning of this language—that a claim must have been submitted to the government itself for payment or approval.

B. Section 3729(a)(3) Requires A Conspiracy To Submit A False Claim To The Government.

For many of the same reasons that Section 3729(a)(2) of the FCA requires the submission of a false claim to the federal government for payment or approval, liability can only be imposed under Section 3729(a)(3) where the defendant has conspired to submit a false claim to the federal government itself.

As an initial matter, Section 3729(a)(3) is a derivative civil conspiracy provision that imposes liability for conspiracies to engage in conduct that would violate the FCA. *Cf. Beck v. Prupis*, 529 U.S. 494, 505-06 (2000) ("consistency with the common law requires that a RICO conspiracy plaintiff allege injury from . . . an act that is independently wrongful under RICO"). The scope of liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2). *See*, *e.g.*, *United States ex rel. Atkins v. McInteer*, 345 F. Supp.

2d 1302, 1304-05 (N.D. Ala. 2004) ("When *Totten* held that the direct presentation of a claim to a federal employee is required for stating an FCA claim, it follows that an agreement between two or more persons to present a fraudulent claim to [a state agency], a *grantee*, is not an actionable conspiracy under § 3729(a)(3)."), *aff'd*, 470 F.3d 1350 (11th Cir. 2006); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Because [relator's] FCA claims [under Sections 3729(a)(1) and (a)(2)] fail to state a claim, there can be no conspiracy" under Section 3729(a)(3)). Because the submission of a false claim to the government is a prerequisite to the imposition of liability under either Section 3729(a)(1) or (a)(2), liability can only be imposed under Section 3729(a)(3) where the defendant participated in a conspiracy to submit a false claim to the government.

This result is confirmed by the language of Section 3729(a)(3) itself. Section 3729(a)(3) applies to anyone who "conspires to defraud *the Government* by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3) (emphasis added). That language clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself, rather than to a federally funded private entity. As explained above, Congress is well aware of the distinction between the federal government and recipients of federal funding. *See supra* pg. 14. If Congress had intended for Section 3729(a)(3) to encompass fraud against private companies that receive federal funding, it would have provided for the statute to apply to anyone who "conspires to defraud the Government *or a recipient of Government funds*." Congress's decision not to do so is dispositive here.

Indeed, the "conspires to defraud the Government" language in Section 3729(a)(3) is essentially identical to the "conspire[s] . . . to defraud the United States" language at issue in *Tanner*—which this Court held to apply only to conspiracies to defraud the United States, not to conspiracies to defraud a private company that receives federal funds. 483 U.S. at 132. The Sixth Circuit's holding that a conspiracy to submit a false claim to a federal contractor constitutes a "conspir[acy] to defraud the Government," even where that false claim will never be passed along to the government, is directly at odds with *Tanner*'s conclusion that a conspiracy to make a false statement to a federal grantee only amounts to a "conspir[acy] . . . to defraud the United States" where the defendants "conspired to cause [the private company] to make misrepresentations to the [federal government]"—that is, where the defendants conspired to cause the federal grantee to submit the fraudulent statement to the government. *Id.*

The Sixth Circuit did not mention—let alone, attempt to distinguish—*Tanner*, and did not offer any reasoning for its atextual reading of Section 3729(a)(3) beyond that offered in support of its interpretation of Section 3729(a)(2). Reliance on a tenuous reading of legislative history and on inapposite canons of construction, however, cannot displace the plain language of Section 3729(a)(3), which unambiguously restricts the provision to conspiracies to get false claims paid or approved by the federal government itself.

* * *

Here, it is undisputed that respondents failed to produce any evidence at trial that a claim for payment was ever submitted to the federal government

or that petitioners participated in a conspiracy to submit such a claim to the government. *See* Pet. App. 5a n.3 ("Counsel for relators admitted at the hearing on the Rule 50(a) motion, '[W]e haven't shown you [the prime contractor's] invoices to the United States, and we're not going to show you those because they are totally irrelevant under the False Claims Act.'") (second alteration added). In the absence of any evidence that a false claim was submitted either directly to the federal government, or to a higher-tier subcontractor or prime contractor that then passed along a false claim to the government, petitioners cannot be held liable for "knowingly mak[ing] [or] us[ing] . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government" under Section 3729(a)(2). Nor can they be held liable for "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid" under Section 3729(a)(3). Petitioners were therefore entitled to judgment as a matter of law at the conclusion of respondents' case.

II. THE DECISION OF THE COURT OF APPEALS DRAMATICALLY EXPANDS THE FCA'S SCOPE BEYOND THE LIMITS ESTABLISHED BY CONGRESS.

By casting aside the textual limitations restricting the scope of the FCA, the Sixth Circuit extended the statute's onerous liability provisions to a vast range of conduct that Congress never intended the statute to reach. The decision below should be reversed to reestablish the textual bounds that Congress imposed on the FCA.

The FCA is a specialized statute that addresses "fraud practiced on *the Government*." *United States v. McNinch*, 356 U.S. 595, 599 (1958) (emphasis

added). This Court has explained that "the objective of Congress" in enacting the FCA "was broadly 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." *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (emphasis added); *see also* S. Rep. No. 99-345, at 1. It was not Congress's intention for the FCA to displace state common-law causes of action, which are the traditional means of remedying fraud perpetrated by one private party against another. *See Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 445 (1963) (Brennan, J., concurring) (referring to the "traditional state interest" in providing "protection against fraud and deception").[9]

According to the Sixth Circuit, however, the FCA encompasses any false claim "paid with government funds" (Pet. App. 9a), and therefore applies whenever an allegedly false claim is submitted to any of the tens of thousands of private entities—including state and local governments, educational institutions, and private businesses—that receive some amount of funding from the federal government. *See Orleans*, 425 U.S. at 816 ("Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well."). Indeed, under

[9] Congress's intention to enact the FCA as a remedy for fraud perpetrated against the federal government itself is evident from the legislative history accompanying the original 1863 statute. *See* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay *from the Government* during the present war . . . . [W]ith a view to apply a more speedy and vigorous remedy in *cases of this kind* the present bill has been prepared.") (emphases added).

the Sixth Circuit's expansive reading of the FCA, the statute would apply to *any* claim for payment submitted to *any* entity that receives federal funding. The D.C. Circuit recognized the implications of such reasoning in *Totten*, explaining that, if Section 3729(a)(2) does not require proof that a claim was submitted to the government, "the potential reach" of the FCA would be "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.

This dramatic expansion of the FCA's scope is at odds with the congressional objectives that animate the statute, and will have profound—and congressionally unintended—consequences for thousands of businesses, including every business that performs subcontracting work on federally funded contracts. Under the Sixth Circuit's countertextual reading of Sections 3729(a)(2) and (a)(3), subcontractors are susceptible to the FCA's severe financial penalties—fines of between $5,500 and $11,000 per false claim, plus treble damages—anytime they submit claims for payment to federally funded prime contractors or higher-tier subcontractors. *See* U.S. Government Accountability Office, Information on False Claims Act Litigation 31 (2005), *at* http://www.gao.gov/new.items/d06320r.pdf (indicating that the average recovery in an FCA action is more than $10 million). Thus, if the decision below is affirmed, every construction company hired as a subcontractor on a federal building, every accounting firm hired by a prime contractor to monitor the finances of a federal project, and every engineering firm hired to perform one of the hundreds of subcontracts relating to the construction of a naval vessel will be subject to FCA li-

ability based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government. *Cf. Metric Constructors, Inc. v. United States*, 314 F.3d 578, 581 (Fed. Cir. 2002) ("subcontractors in a government contract are not in privity with the government"). The unambiguous language of the FCA—together with Congress's well-defined intentions when enacting the statute—establish, however, that such alleged fraud is properly addressed through traditional state-law causes of action, not through the specialized mechanisms of the FCA.

This expansion of the FCA creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies. The possibility of abusive litigation is augmented by the fact that the civil penalties and treble-damages awards available in FCA suits impose tremendous settlement pressure upon even those companies that have meritorious defenses. Many companies simply cannot face the risk of going to trial and being assessed potentially bankrupting FCA liability, and are therefore compelled to accept settlements that provide undeserved windfalls to relators and their counsel.

The Sixth Circuit's decision to extend the FCA to any payment made "with government funds" (Pet. App. 9a) will also vastly complicate the task of trying FCA cases because, "[w]hen federal and nonfederal funds have been commingled, it is difficult to prove whether specific . . . dollars from that account are federal or nonfederal." *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983) (per curiam). If the Sixth Circuit's decision is affirmed, discovery and trial in FCA actions will be immeasurably complicated by efforts to trace the origin of funds used by

federal grantees to pay allegedly false claims. Many such suits will likely devolve into a battle between accounting experts attempting to explain to a jury the source of the specific funds used to pay a claim. *Cf. United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159-60 (2d Cir. 1986) (drug proceeds commingled with legitimate funds are potentially traceable through the "first-in, first-out," pro rata "averaging," and "first-in, last-out" methods). Where a federal grantee does not keep the funds it receives from the government segregated from those it receives from other sources, this will be a time-consuming and complex evidentiary inquiry. In this case, for example, there are three levels of subcontractors involved, and—if this case is retried—it will be necessary for respondents to demonstrate that the prime contractors paid Allison Engine with "government funds," that Allison Engine then used those same funds to pay General Tool, and that General Tool then remitted those funds to Southern Ohio Fabricators.

The far-reaching and profoundly disruptive implications of the Sixth Circuit's reading of the FCA confirm what the statute's plain language, structure, and history unambiguously convey: Sections 3729(a)(2) and (a)(3) apply only where a false claim has been submitted to the federal government or where the defendant participated in a conspiracy to submit such a claim.

CONCLUSION

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

Respectfully submitted.

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