No. 07-214

In the Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA *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 RESPONDENTS ROGER L. SANDERS AND ROGER L. THACKER

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QUESTION PRESENTED

Whether false claims for federal Government money made by United States Navy subcontractors are actionable under 31 U.S.C. § 3729(a)(2) or § 3729(a)(3) of the False Claims Act, even if the subcontractors' false claims were not presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States.

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Respondents Roger L. Sanders and Roger L. Thacker respectfully request this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

A. The False Claims Act ("FCA") is broadly written "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). Consistent with this purpose, Congress defines actionable false or fraudulent "claims" to include not only claims for federal money "presented" to an employee of the United States, but also claims for federal money submitted to a "contractor, grantee or other recipient" that distributes the federal funds. 31 U.S.C. § 3729(c). This case involves nothing more than a straightforward application of that statutory text.

In light of the FCA's broad definition of "claim," the Sixth Circuit held that Petitioners' false claims submitted to federal Government contractors for federal Government money could support FCA liability under the plain language of Sections 3729(a)(2) and 3729(a)(3). Pet. App. 23a-25a.[1] The Sixth Circuit disagreed with Petitioners' assertion that actionable false claims under Sections 3729(a)(2) and 3729(a)(3)

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[1] Citations to the Petition for Certiorari Appendix are "Pet. App." Citations to Petitioners' Merits Brief are "Pet. Br." Citations to the parties' Joint Appendix in this Court are "JA." Citations to the parties' joint appendix in the Sixth Circuit are "CA App."

had to be "presented" to a Government employee, since a "presentment" requirement is not part of the plain text of these sections—nor was there any apparent reason to add such a term, particularly with a definition of "claim" that plainly reaches false claims for federal money that are not "presented" to the Government. Pet. App. 23a-25a. This conclusion is compelled by the text, structure and purpose of the FCA and should be affirmed.

Petitioners contend that the Sixth Circuit's opinion effects a near-boundless extension of the FCA to reach "*any* claim submitted to a recipient of federal funds[.]" Pet. Br. 3 (emphasis in original). This is incorrect. The Sixth Circuit's opinion and the FCA itself reach only *false or fraudulent* claims for *federal* money. A non-false, non-fraudulent claim for non-federal money has never been actionable under the FCA, even if submitted to an entity that otherwise receives some federal funding, and the Sixth Circuit did not hold differently.

Petitioners' more prevalent theme, though, is their contention that the FCA should not apply because, with Petitioners' false claims for federal money never reaching an employee of the United States, this case only involved "private" fraud among "private" parties. Pet. Br. 3. It is a paper fiction to suggest, as Petitioners do, that fraud against the federal public fisc cannot occur unless a Government employee personally receives a false claim for federal funds. The FCA's clarifying definition of "claim," in fact, codifies the exact opposite. By finding that Petitioners' false invoices for federal money could support FCA liability even though they were not presented to a Government

employee, the Sixth Circuit simply gave full effect to the FCA's broad definition of "claim." Petitioners' disagreement is thus not really with the Sixth Circuit's opinion, but is instead with Congress's chosen method for effectively combating fraud.

B. The facts of this case are undisputed for purposes of this appeal, and they show a decidedly clear fraud against the United States. In 1985, the United States Navy began procuring its new fleet of *Arleigh Burke* class guided missile destroyers from two prime-contractor shipbuilders, Bath Iron Works and Ingalls Shipbuilding, at a cost to the federal Government of approximately one billion taxpayer dollars per ship. Pet. App. 2a-3a. The Navy required every part of its destroyers to be manufactured in strict compliance with a variety of military requirements set forth in the prime contract, and those Navy requirements had to be followed whether the shipyards accomplished the work themselves or hired subcontractors to assist. CA App. 337-346. Accordingly, the shipyards ensured that the Navy's requirements were flowed down to and thus imposed on Petitioners. Pet. App. 3a.

Petitioners are all subcontractors to the Navy's prime-contractor shipbuilders, and were responsible for various aspects of constructing the generator sets ("Gen-Sets") that provide all electrical power needed for each destroyer. Pet. App. 3a-4a. Starting in the late 1980s, the shipyards contracted with Petitioner Allison Engine Company, Inc. (a division of Petitioner General Motors Corporation through 1993) to provide the Navy's Gen-Sets. *Id*. In turn, General Motors/Allison contracted with Petitioner General Tool

Company to assemble the Gen-Sets with the General Motors/Allison jet engine as the power source, and General Tool Company contracted with Petitioner Southern Ohio Fabricators, Inc. ("SOFCO") to build the steel Gen-Set bases and enclosures. *Id*. Over 150 Gen-Sets would eventually be assembled at General Tool Company's facility in Cincinnati, sent to the shipyards for installation, and ultimately delivered to the Navy as part of over 50 completed destroyers. JA 40a-41a.

The Navy's contracts with the shipyards required that all parts of the destroyers, including the Gen-Sets, be made in accord with Navy-approved baseline drawings and Navy military standards, with deviation permitted only "with approval of the Government." CA App. 423. These Navy requirements were incorporated into the subcontracts for all Petitioners, from the shipyard contracts with General Motors/Allison (CA App. 565-575, 599-617), to the General Motors/Allison contracts with General Tool Company (CA App. 855-873), to the General Tool Company contracts with SOFCO (CA App. 714-721). Thus, there was an uninterrupted flow of Navy contract specifications that each of the Petitioners knew they were required to follow in building the Gen-Sets.

In addition, with each delivered Gen-Set, General Motors/Allison provided a written Certificate of Conformance that the unit was manufactured in accord with all of the Navy's baseline configuration and military requirements. CA App. 514-518, 954-963. SOFCO signed hundreds of Certificates of Conformance attesting that all of its work complied with the Navy's requirements. CA App. 995-1050.

The Navy's oversight of Petitioners' work extended beyond the contract terms requiring compliance with military requirements. In each of the Petitioners' subcontracts, the Navy explicitly reserved the right, notwithstanding the lack of direct contractual relations, to inspect Petitioners' work at any point during Gen-Set construction. CA App. 607, 720, 864. The Navy also enjoyed, again despite lack of contract privity, an array of options under the General Motors/Allison contracts with the shipyards to address Gen-Set defects: The Navy could reject a defective Gen-Set; the Navy could equitably reduce the price of a defective Gen-Set that the Navy determined to accept anyway; or, in the end, the Navy could terminate General Motors/Allison's contract for default. CA App. 607-608. In short, the Navy's procurement of its Gen-Sets and the involvement of the subcontractor Petitioners were not "private" matters among "private" parties involving "private" contract requirements.

C. In exchange for their agreements to build the Gen-Sets as the Navy specified, Petitioners received hundreds of millions of dollars of taxpayer funds. CA App. 837-847, 914-953, 966-994. It is undisputed that all money paid to Petitioners for their Gen-Set work came from the United States Treasury. As the General Motors/Allison Gen-Set Program Manager succinctly testified:

> Q. . . . the money as it would flow would come from the Navy or the Treasury Department, taxpayer money, to Bath. That would be sort of the first step. Is that right?

A. Well, you left out, it flows from the taxpayers to the Congress to the Department of Navy to Bath, then us, to –

Q. But, eventually, it's our money, isn't it?

A. Yours and mine.

Q. Right. So it comes from the Navy or the Treasury Department to Bath?

A. Yes.

Q. And then, depending on what milestone or level of production is reached, Bath would then -- let's take just in the gen set project itself. Bath would pay Allison?

A. Bath pays Allison.

Q. And then, again, Bath is paying Allison with what originally was our money. Right?

A. Yes.

Q. Allison would pay General Tool?

A. Allison would pay General Tool.

Q. Again, with what was originally our money?

A. Yes.

> Q. General Tool would pay SOFCO?
>
> A. Yes.
>
> Q. Again, originally with what was our money?
>
> A. Yes.

JA 110a-111a. Thus, there is no question that the payment of federal funds to the prime-contractor shipyards included the amounts that the shipyards used to pay the subcontractor-Petitioners for their Gen-Set work.

The process for disbursing the federal funds to the shipyards and to Petitioners is detailed in the various contracts. The Navy's prime contract with the shipyards established a milestone payment schedule by which the shipyards had to submit regular invoices in order to draw Navy funds, and each of those invoices had to certify both the progress achieved in ship construction as well as the costs that had been incurred by the shipyards. CA App. 410-414. It was established at trial that the shipyards did submit their milestone invoices to the Navy, since Petitioners stipulated that the Navy paid the shipyards an aggregate total of one billion federal dollars for each new destroyer. CA App. 317. While the Navy did not require the prime contractors to submit with their invoices all the claims for payment from the myriad subcontractors working on the destroyer project, the Navy did reserve the right to inspect and audit all documentation upon which the shipyards' invoices

were based, which would include Petitioners' invoices. CA App. 415.

Petitioners repeatedly assert that there was no evidence at trial that any claims for payment were ever submitted to the Government at all. Pet. Br. 5, 6. 9, 11, 31. This is incorrect. While the shipyard *invoices* were not given to the Jury, the foregoing evidence (all admitted at trial) sufficiently shows that claims were made to the Navy. In fact, the district court presumed that "the Jury could infer that Bath submitted invoices to the Government because the ships were continuing to be built." Pet. App. 58a. While Petitioners' invoices were not "presented" to the Navy, there certainly was evidence that the *shipyards* "presented" claims to the Navy. The district court simply found no evidence that those presented claims were "false." *Id*. at 58a-59a.

But the false claims at issue in this case were Petitioners' invoices falsely seeking payment of federal money. These were all admitted into evidence. General Motors/Allison were paid approximately three million dollars per Gen-Set from the taxpayer money the shipyards received from the Navy and, as with the shipyards, Allison claimed this money by regular invoices reflecting progress milestones reached in making the Gen-Sets. CA App. 638-654, 914-953. General Tool Company was paid approximately $800,000 per Gen-Set of the taxpayer money that General Motors/Allison received from the shipyards, also pursuant to a milestone payment schedule. CA App. 655-713, 966-994. And SOFCO was paid over $100,000 per Gen-Set of the taxpayer money that General Tool Company received based upon SOFCO's

progress in making Gen-Set bases and enclosures. CA App. 837-847.

Both the flow of federal money from the Government to Petitioners, as well as the flow of Navy requirements that Petitioners knew they had to follow in order to claim those federal dollars, were painstakingly established at trial. This was not a "private" matter involving only "private" parties. It is undisputed that Petitioners knew they were working on a Navy contract funded by federal dollars. The Navy's funds used to pay the Petitioner subcontractors for the Navy's Gen-Sets did not become "private" funds because they were distributed by the prime contractor shipyards. Indeed, the only reason that the shipyards' milestone invoices to the Navy—which were based on progress achieved and costs incurred—could have ever sought any money for the Gen-Sets is because Petitioners themselves sought payment for their Gen-Set work from the shipyards. The public funds used to buy the Navy's Gen-Sets were never "private" funds belonging to the shipyards.

D. Respondents Roger L. Sanders and Roger L. Thacker are former employees of Petitioner General Tool Company, and they brought suit in 1995 as *qui tam* Relators against Petitioners under these FCA provisions:

§ 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.

JA 94a-96a.[2]

At trial, Respondents produced sufficient evidence for the Jury to find that Petitioners regularly violated the Navy's requirements for Gen-Set construction, concealed those violations, and thus falsely claimed payment of hundreds of millions of taxpayer dollars. Pet. App. 24a-25a. The Navy-approved drawing requirements and quality standards required Petitioners, among other things, to ensure that Gen-Set welders were qualified to military standards; that Gen-Set gearboxes were free of oil leaks (which is a decided fire hazard on a combat vessel) and other defects; and that completed Gen-Sets underwent a comprehensive quality Final Inspection so that defects could be identified and corrected before the Gen-Sets were sent for installation into the destroyers CA App. 526, 629-630, 1051.

Over the course of the five-week trial, Respondents introduced evidence that Petitioners knowingly violated these Navy requirements: (1) Unqualified SOFCO welders worked on all of the first 67 Gen-Sets; (2) General Motors/Allison and General Tool Company installed defective and oil-leaking Gen-Set gearboxes in the first 52 units; and (3) General Tool Company

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[2] The FCA defines "knowingly" as follows: "For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information — (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. §3729(b). It is presumed on appeal that Petitioners acted with sufficient FCA "knowledge." Pet. App. 25a.

failed to conduct a quality Final Inspection for almost half of the first 67 Gen-Sets. Pet. App. 4a, 24a-25a. Though these Gen-Sets did not conform to Navy requirements, Petitioners nonetheless made claims for payment and were paid with 100% Navy funds. *Id*.

Applying these facts to the FCA's text, the "claims" at issue were Petitioners' false invoices seeking payment of Navy funds; those invoices were "false or fraudulent" claims because Petitioners sought the Navy's funds despite violating the Navy's contract requirements; the "false records or statements" were the General Motors/Allison and SOFCO Certificates of Conformance falsely declaring that the Navy's Gen-Sets had been made to Navy standards; and the "conspiracy" involved the work by General Motors/Allison and General Tool Company to install and conceal defective Gen-Set gearboxes. JA 64a-66a.

This appeal does not challenge or concern the sufficiency of this evidence, so the accepted factual predicate, as it was for both lower court decisions, is this: Petitioners knew at all times that they were being paid with Navy funds, that Gen-Set quality was controlled by Navy standards, and that the Gen-Sets were mission-critical hardware for the Navy's new destroyers. Petitioners knowingly made false claims for federal funds, knowingly made false records to get false claims for federal funds paid, and conspired to defraud by getting false claims for federal funds paid. Pet. App. 24a-25a. Put simply, the Navy did not get the quality destroyers that it ordered and paid for because dozens of Gen-Sets manufactured by Petitioners violated the Navy's standards.

E. Discovery and trial focused on the Petitioners' actions, not those of the prime-contractor shipyards, because Petitioners (not the shipyards) made the defective Gen-Sets. This approach is precisely consistent with this Court's determination that FCA actions must concentrate on the conduct of the wrongdoer: "A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *United States v. Bornstein*, 423 U.S. 303, 313 (1976). *See also* James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* § 3-16 (Top Gun Publishing, 5th ed. 2007). FCA liability for subcontractor conspiracies is similarly well-settled. *E.g. United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991).

Here, the district court presumed the sufficiency of the evidence that Petitioners had knowingly made false claims for Navy funds, knowingly made false records or statements to get false claims for Navy funds paid, and conspired to get false claims for Navy money paid. Pet. App. 39a-41a, 58a-60a. But the district court found this behavior insufficient to support FCA liability. After the close of Respondents' evidence, the district court directed a verdict for Petitioners by finding, based on the majority opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), that only false claims "presented" to a Government employee could support liability under FCA Sections (a)(1), (a)(2) or (a)(3). Pet. App. 56a.

In dismissing the case, the district court considered two sets of potentially-actionable claims. First, while there was enough evidence that Petitioners' invoices were false, the district court found no evidence that those false claims for payment were "presented" to the Navy. *Id*. at 59a. Second, while there was enough evidence that the prime-contractor shipyards had "presented" claims for payment to the Navy, the district court found no evidence that those claims for payment were "false" because "there is no evidence that Bath had a continuing duty to comply with any 'regulations' let alone certify its compliance with any 'regulations.'" *Id*. at 58a.

The district court did not reconcile its focus on the "false" conduct of the shipyards with *Bornstein*'s requirement that the focus must be on the "false" conduct of the Petitioner subcontractors. *Bornstein*, 423 U.S. at 313. *Bornstein* even found that the number of claims submitted by a prime contractor to the Government was "wholly irrelevant" in determining the number of FCA civil penalties owed by the culpable subcontractor, deciding instead that penalties are appropriately based on the subcontractor's own false claims. *Id*. at 312. Indeed, in *Bornstein* the prime contractor's invoices were primarily relevant as proof that they "included" amounts used to pay the subcontractor's false claims—proof, in other words, that the subcontractor's false claims were paid with federal Government money. *Id*. at 307-308. Respondents in this case offered proof of the same linear connection between Petitioners and the Government fisc, yet this did not satisfy the district court. Pet. App. 58a-59a.

The Sixth Circuit reversed. While agreeing that "presentment" of false claims to a Government employee is a required element of FCA Section (a)(1), the majority opinion found that "presentment" is clearly not in the plain text of Sections (a)(2) or (a)(3). Pet. App. 7a. In light of the FCA's definition of "claim" that includes false claims for federal Government money that are not "presented" to an employee of the United States, the majority below found no basis to add a "presentment" requirement to Sections (a)(2) and (a)(3). Pet. App. at 6a-8a, *quoting* 31 U.S.C. §3729(c). The majority then demonstrated how its decision was fully supported by the legislative history to the 1986 FCA amendments, as well as this Court's repeated refusals to interpret the FCA in a restrictive manner. *Id*. at 8a, 15a-16a.

The dissenting opinion would have affirmed the district court based upon the *Totten* majority opinion. Pet. App. 35a-37a. Notably, in so deciding the dissent did not address or attempt to reconcile its opinion with the FCA's definition of "claim," the 1986 FCA legislative history, or this Court's broad construction of the FCA. As the majority found, these sources demand the same outcome: "Thus, the FCA covers all claims to government money, even if the claimant does not have a direct connection to the government." Pet. App. 15a.

SUMMARY OF ARGUMENT

I. Congress wrote the FCA broadly to reach all fraudulent efforts to obtain taxpayer funds. Since these efforts include fraudulent claims for taxpayer money that are never "presented" to a federal

Government employee, Congress clarified with the FCA's definition of "claim" that those false claims can support liability, provided they falsely seek federal Government money. 31 U.S.C. § 3729(c). FCA Sections (a)(2) and (a)(3) do not condition liability on "presentment" of false claims to the Government, and the Sixth Circuit correctly refused to add such a requirement.

A.1. There is no implied requirement in Section (a)(2) that actionable false claims must be "presented" to a federal Government employee, as Petitioners contend. "Presenting" a false claim for federal money to a federal employee is prohibited by Section (a)(1), not Section (a)(2). Congress knew how to condition FCA liability on "presentment," but did not do so in Section (a)(2).

2. Section (a)(2) liability is for making false statements "to get a false claim paid or approved by the Government." The Government can certainly pay false claims without direct involvement of its own employees, so payment "by the Government" does not require "presentment" of false claims to the Government, as Petitioners presume. Congress clarified this exact point with the definition of "claim."

B.1. Implying a "presentment" requirement in Section (a)(2) would render the definition of "claim"—which defines actionable claims to include those *not* presented to the Government—superfluous. Petitioners mistakenly argue that Congress added the definition of "claim" merely to clarify that false claims submitted to private entities can support FCA liability if they are thereafter presented to the Government.

But this basis for liability is already actionable under Section (a)(1), which prohibits *causing* presentation of false claims. Likewise, adding "presentment" to Section (a)(2) would render the entire section meaningless. The making of false records to get false claims "presented and paid or approved" would thereby *cause* presentation of the false claim, which is actionable under Section (a)(1).

2. The phrase "by the Government" in Section (a)(2) does not add, *sub silentio*, a "presentment" requirement. Instead, "by the Government" clarifies that false claims actionable under Section (a)(2) must seek federal Government money. This clarification is needed because the FCA's definition of "claim" does not limit actionable claims to those seeking federal Government money. Petitioners also incorrectly say that if "presentment" is not an element of Section (a)(2), then Section (a)(1) would have no meaning—anyone lacking evidence of "presentment" would simply bring suit under Section (a)(2). This improperly rewrites the definition of "claims" to mean only "records or statements." But Congress defined claims to be *any* request or demand for Government money or property. "Claims" are not synonymous with "records or statements."

C. The FCA's origins and legislative history also show that "presentment" is not always required for FCA liability. Congress reiterated in 1986 that, for example, a false claim to a Government grantee, or to a State under a program financed in part by the United States, is a false claim to the United States without need for any further "re-presentment" of the

false claim to the Government. S. Rep. No. 99-345 at 10 (1986).

1. As originally enacted in 1863, "presentment" of a false claim was but one type of prohibited conduct, along with "making" false claims and "making" (or "using") false records or statements to obtain payment of false claims. In each instance, the false claims supporting liability must have been for federal Government funds or property. The false claims did not also have to be "presented" to the Government. When Congress added the current definition of "claim" in 1986, Congress clarified the broad reach of the FCA to include false claims that are not "presented" to a Government employee. Congress did not nullify that definition by silently intending the phrase "by the Government" to mean "presentment."

2. Congress meant the new definition of "claim" to overrule judicial opinions that had restricted the reach of the FCA. One of those opinions involved dismissal of a case where false claims for federal money were submitted to the Red Cross but not re-presented to a Government employee. *United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196, 197 (S.D.N.Y. 1938). A blanket FCA "presentment" requirement would improperly revive *Salzman* and its restrictive interpretation of the FCA contrary to Congressional intent. S. Rep. No. 99-345 at 21 (1986).

3. The FCA is a broadly-worded statute with a clearly intended expansive scope. This Court has consistently construed the FCA in liberal fashion. Petitioners essentially ignore this and argue for a narrow construction because some other statutes are

worded and thus construed restrictively. *See, e.g., Tanner v. United States*, 483 U.S. 107 (1987). This is improper. Congress has different goals for other statutes, but meant to reach broadly with the FCA.

D. As with the plain text of Section (a)(2), FCA Section (a)(3) contains no requirement that a false claim for federal money must be "presented" to a federal Government employee. Liability is for conspiring to defraud the Government, and "presenting" false invoices to the Government is not the only method of defrauding the Government. Section (a)(3) liability is not, as Petitioners' contend, "derivative" of liability under Sections (a)(1) or (a)(2). It is written to reach much different conduct, and adding a "presentment" requirement would render it meaningless. It would then be merely an example of conduct that violates Section (a)(1).

II. Adhering to the plain text of Sections (a)(2) and (a)(3) as well as the definition of "claim," the Sixth Circuit held that Petitioners' false claims for Navy funds were actionable because they were *false* claims for *federal Government* funds. Petitioners' assertions that this case involved "private" claims for "private" funds are untrue.

If "presentment" is added to Sections (a)(2) and (a)(3), the Government's ability to use the FCA to combat fraud would be profoundly restricted in ways that Congress never intended. Most notably, false claims submitted to Medicare and Medicaid would no longer be actionable under the FCA because those claims are not presented to the Government. This would end decades of successful FCA prosecutions

whereby billions of fraudulently obtained Medicare and Medicaid funds have been returned to the Treasury.

The Sixth Circuit applied the FCA to reach clear fraud committed by Petitioners against the Navy. That Petitioners' invoices were not re-presented to the Navy does not alter the character of their fraudulent conduct. Congress intended the FCA to reach this behavior, so the Sixth Circuit's decision should be affirmed.

ARGUMENT

I. PETITIONERS CAN BE LIABLE UNDER FCA SECTIONS (a)(2) AND (a)(3) EVEN THOUGH THEIR FALSE CLAIMS FOR FEDERAL MONEY WERE NEVER PRESENTED OR RE-PRESENTED TO THE UNITED STATES.

A. The FCA's Plain Language And Structure Show That Section (a)(2) Does Not Contain A "Presentment" Requirement.

1. Proper interpretation and construction of the FCA begins with its plain language. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), *citing Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The inquiry then continues with consideration of the words "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Isolated treatment of FCA sections—which Petitioners advocate—is improper because "[s]tatutory language has meaning only in context[.]" *Graham County Soil*

& Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 415 (2005), *citing Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Both the plain language and context of the FCA confirm that "presentment" is not a requirement of Section (a)(2).

It is undisputed that the text of Section (a)(2) does not mention "presentment." This is because the act of "presenting" a false or fraudulent claim to a Government employee is already prohibited by Section (a)(1). Instead, Section (a)(2) reaches entirely different behavior: Knowingly *making or using a false record or statement* in order "to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). On its face, then, Section (a)(2) is not concerned with the "presentation" of anything to a Government employee, so long as the other elements of liability are satisfied.

All elements are met in this case: (a) Petitioners made and used hundreds of false records and statements, namely the General Motors/Allison and SOFCO Certificates of Conformance falsely certifying that the Gen-Sets were made as required by the Navy (CA App. 514-518, 954-963, 995-1050); (b) Petitioners acted with sufficient FCA "knowledge" that those Certificates of Conformance were false (Pet. App. 24a); and (c) Petitioners made false claims (their false milestone invoices) that were indisputably paid by the federal Government with federal Government funds—as the testimony of the General Motors/Allison Program Manager confirmed, all payments for the Gen-Sets came from Navy funds. JA 110a-111a. Nothing further is required to demonstrate Petitioners' liability under Section (a)(2).

Two other FCA provisions reinforce the conclusion that "presentment" is not part of Section (a)(2). First, Section (a)(1) explicitly does prohibit the knowing "presentment" of a false claim "to an officer or employee of the United States Government or a member of the Armed Forces of the United States[.]" 31 U.S.C. § 3729(a)(1). If Congress wanted Section (a)(2) to reach only false records or statements that are made in connection with "presentment" of a false claim to a Government employee, Congress could easily have done so by using the "presentment" language from Section (a)(1). Congress did not do so and intentionally omitted such language from Section (a)(2).

Second, Congress clarified by the definition of "claim" that FCA liability does not necessarily depend upon "presentment" of false claims to a Government employee. 31 U.S.C. § 3729(c). This is why the FCA defines actionable false claims to include those that are *not presented* to a Government employee, upon proof that such false claims are for federal Government money or property. *Id*. ("'claim' includes any request or demand . . . 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[.]") Petitioners' false claims clearly fall within this definition, and Petitioners do not argue otherwise.

The FCA definition of "claim" unambiguously articulates a decided Congressional policy: False claims for federal Government money are actionable even if a federal Government employee does not personally receive the false claim or personally

distribute the falsely claimed federal money. 31 U.S.C. § 3729(c). Thus, to responsibly protect the federal public fisc against fraud, the FCA is not stymied by the particular *entity* that receives a false claim for federal funds, or that distributes the falsely-claimed federal funds. Protecting the *federal funds* from fraudulent claims is the goal, whether those funds are administered and distributed by the federal Government or by a "contractor, grantee or other recipient" charged with those tasks. *Id*.

2. Though neither the term nor the concept of "presentment" is part of Section (a)(2), Petitioners say that Congress "unambiguously" intended the phrase "paid or approved by the Government" in Section (a)(2) to require proof that false claims are "presented" to a Government employee also. Pet. Br. 13. According to Petitioners, "for a claim to be 'paid or approved by the Government,' it first must be submitted to the government." Pet. Br. 13. This is a conclusion, not a reasoned explication of Congressional intent based on the words of the FCA, and merely captures the outcome sought by Petitioners.

But the Government does not actually have to pay or approve anything for Section (a)(2) to be violated. Instead, as its plain text states, this section prohibits knowingly making or using false records or statements. Payment or approval of a false claim is not the trigger for liability, but merely defines the purpose for which the false records or statements are made or used. Thus, if payment or approval of a false claim does not have to occur, then there is no reason that the false claim need be "presented" to the Government at all.

Petitioners ignore the most instructive evidence of Congressional intent—the words of the statute: "The starting point in discerning congressional intent is the existing statutory text[.]" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004), *citing Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Congress wrote Section (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. *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.")

This presumption of Congressional deliberation is appropriate here. Congress made "presenting" a false claim to a Government employee one of several distinct bases for liability, not a definition of the kinds of false claims that are actionable under other FCA sections. The FCA already has such a definition of actionable "claims," and it does not have a general "presentment" requirement. 31 U.S.C. § 3729(c).[3]

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[3] Petitioners argue that if Congress meant for Section (a)(2) liability to extend beyond claims that are "presented" to a Government employee, then Congress would have "provided for the imposition of liability where the claim was 'paid with Government funds[.]'" Pet. Br. 13. Again, actual payment is not required for FCA liability to attach. It is simply not the conduct of the defrauded party at which the liability provisions of this statute are directed. And Congress did clarify by the definition of "claim" that actionable claims include those that seek federal Government "money or property"—provided those claims are *false*. 31 U.S.C. § 3729(c). Petitioners are reading Section (a)(2) in

Unsupported by the FCA text, Petitioners' conclusion that "paid or approved by the Government" can only mean that a claim "first must be submitted to the Government" is a *non sequiter*. This conclusion depends, in the first instance, on giving the same meaning to different words. As the Sixth Circuit correctly found, this Court has "consistently counseled against attributing the same meaning to different language in the same statute." Pet. App. 10a-11a, *citing Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[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.")

Petitioners' solitary construction of "by the Government" also ignores other plain interpretations of that phrase that do *not* require adding anything to it or the FCA. For instance, as noted by the *Totten* dissent: "The statutory language requires no such result. In common parlance, the fact that expenses are 'paid by' an entity does not mean that the entity paid them directly. When a student says that his college living expenses are 'paid by' his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses." *Totten*, 380 F.3d at 506, *citing Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary,

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isolation rather than considering the FCA as a whole and all of its provisions in context.

words in a statute are assumed to bear their ordinary, contemporary, common meaning.")

The federal Government pays for the goods and services it procures, or entitlements it provides, without always having its own employees receive the invoices or write the checks—a fact this Court long-ago recognized in rejecting rigid constructions of the FCA that render its protection of federal taxpayer funds "dependent upon the bookkeeping devices used for their distribution." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943).

Moreover, reading the phrase "paid or approved by the Government" as synonymous with "presented to the Government and paid or approved by the Government" adds an element of liability to Section (a)(2). This runs counter to this 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). Congress certainly knew how to make "presentment" a requirement for liability, having done so for Section (a)(1), but Congress did not use such language for Section (a)(2).[4]

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[4] Adding "presentment" to Section (a)(2) is also inconsistent with Petitioners' agreement with the Sixth Circuit's dissent that a false claim for federal money does not have to be paid in order to trigger liability. Pet. Br. 24-25, *citing* Pet. App. 36a (Batchelder, J., dissenting). Since Section (a)(2) concerns, in Petitioners' words, making a false record or statement "with the objective of getting" a false claim paid (Pet. Br. 25), then Section (a)(2) is fully violated by one who has the necessary "objective" at the time of making the

B. The FCA Definition Of "Claim" And Section (a)(2) Will Be Meaningless If "Presentment" Is Added To Section (a)(2).

1. Petitioners' suggested addition of a "presentment" requirement to Section (a)(2) suffers from an even more fundamental flaw: It would render both the definition of "claim" and Section (a)(2) itself meaningless. Petitioners recognize that this Court "should avoid reading a statute in a manner that renders any portion of the language superfluous." Pet. Br. 18, *citing Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Petitioners twice violate this canon.

Petitioners argue that actionable "claims" always "must be submitted to the Government." Pet. Br. 13. The FCA definition of actionable "claims" includes those that are not presented to the Government. 31 U.S.C. § 3729(c). These are irreconcilable statements that Petitioners do not address. If false claims must always be presented to a Government employee, then the FCA's definition of "claim" has no meaning.

Petitioners attempt to save the definition of "claim" by asserting that it merely clarifies 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." Pet. Br. 24. But in this scenario, when the false claim is "thereafter

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false record or statement, whether the false claim is ever "presented" to or paid by anyone.

submitted" to a Government employee, the person who originally made the false claim has (eventually) *caused* that false claim to be presented to a Government employee. This conduct is already actionable under Section (a)(1) without need for the definition of "claim." 31 U.S.C. 3729(a)(1) (liability for one who "presents, or causes to be presented, to an officer or employee of the United States Government . . ."). Thus, if there is a blanket requirement that false claims for federal money must be "presented" to a Government employee to support FCA liability, then the definition of "claim" is nullified.

Likewise, a "presentment" requirement in Section (a)(2) would render that statutory provision meaningless. If a person knowingly makes a false record or statement in order to get a false claim for federal money "presented" to the Government and paid, the false record or statement will be one of the *causes* for the "presentment" of the false claim. This conduct is already actionable under Section (a)(1) without need for Section (a)(2). With a "presentment" requirement in Section (a)(2), this section thus becomes no more than an *example* of conduct that violates Section (a)(1)—a false claim is presented because a false record is made—rather than a separate liability-creating provision.

Rendering the definition of "claim" and Section (a)(2) meaningless by adding a "presentment" requirement to Section (a)(2) is not sound statutory construction. *Hibbs*, 542 U.S. at 101.

2. Petitioners eventually contend that their reading of "by the Government" as including a

"presentment" requirement is more than an interpretive conclusion; they say it is mandatory in order to give that phrase any meaning at all. Pet. Br. 17-18. Their argument is this: (i) Section (a)(2) prohibits making false records or statements "to get a false claim paid or approved by the Government"; (ii) the phrase "by the Government" cannot merely require that the false claims are paid with federal Government funds because, according to Petitioners, the requirement that actionable false claims must be paid with Government funds is already part of the FCA's definition of "claim"; (iii) thus, there must be another meaning for "by the Government"; and (iv) the "only plausible reading of Section (a)(2) is therefore that the phrase 'by the Government' requires submission of a claim to the government itself for payment or approval." Pet. Br. 18-19.

This logic fails. The phrase "by the Government" serves the very purpose that Petitioners say it need not serve: It clarifies that actionable false claims under Section (a)(2) must be false claims that seek federal Government money or property. Petitioners say that this would be duplicative because the FCA definition of "claim" already limits actionable false "claims" to those that seek federal Government money or property, but Petitioners have misread the definition of "claim."

The FCA's definition of "claim" is not an exclusive list of actionable false claims. It is, instead, a non-exhaustive list of the types of claims that may be actionable under the FCA, and this list "includes" false claims that are paid with federal Government money—but the definition does not, of itself, exclude

any claims from the reach of the FCA. 31 U.S.C. § 3729(c). Thus, without the qualifying phrase "by the Government," Section (a)(2) would reach those who make false records or statements "to get a false or fraudulent claim paid or approved"—by anyone, without necessary regard for whether federal Government money was sought by the false or fraudulent claims. With the phrase "by the Government," Section (a)(2) reaches only false claims made for federal Government funds, which is the intended scope of the FCA.

The phrase "by the Government" in Section (a)(2) is needed for the very reason that the definition of "claim" is not the limiting factor that Petitioners suggest. The phrase does not have to contain a "presentment" requirement to give it natural meaning and purpose.

Petitioners next argue that Section (a)(1) would be rendered meaningless unless "presentment" is required in Section (a)(2). Pet. Br. 19. They say that plaintiffs who cannot proceed under Section (a)(1)—because they are unable to prove "presentment" of false claims to a Government employee—would always be able to avoid the problem by merely re-labeling the un-"presented" false claims as "false records or statements" and bring the allegations under Section (a)(2). Pet. Br. 19-20. This improperly re-defines actionable false "claims" as limited to false "records or statement."

The FCA definition of "claim" includes (but is not limited to) "*any* request or demand" for federal Government money or property, not merely those in

the form of a false "record or statement." 31 U.S.C. § 3729(c) (emphasis added). Had Congress meant to restrict actionable false "claims" to false "records or statements," Congress would have defined false "claims" as "any *records or statements* that request or demand" federal Government money or property. While false "records or statements" can certainly be types of actionable claims, Congress plainly did not restrict the FCA so that false "records or statements" are the *only* types of actionable claims. The FCA text makes clear that "claims" are not synonymous with "records or statements," and there is no reason to so limit the reach of the FCA.

Moreover, Sections (a)(1) and (a)(2) are complementary since they reach distinctly different behavior—the former is violated every time a false claim for federal money is "presented" to a federal Government employee, and the latter violated every time a false record or statement is made to get a false claim for federal money paid. Thus, even if there is some overlap between Sections (a)(1) and (a)(2), giving effect to both provisions would be entirely consistent with Congress's intent and this Court's recognition that the FCA should be construed to "reach all types of fraud[.]" *Neifert-White Co.*, 390 U.S. at 232. Adding a "presentment" requirement to Section (a)(2) achieves the opposite, since it restricts the FCA by reading Section (a)(2) out of the Act.

The objective in construing the FCA must be to give it "a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative

purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926). Petitioners' argument that "presentment" is an element of Section (a)(2) is not based on a literal application of the FCA, and even if it were, it is not a sensible construction because it leads to the absurd consequence of negating two other provisions of the FCA. The Sixth Circuit, on the other hand, sensibly construed the FCA so that all sections are given effect, and its decision is explicitly consistent with the broad purpose Congress intended.

C. Congress Intended The FCA To Reach All False Claims For Federal Money, Including Those That Are Not "Presented" To A Government Employee.

Since the plain language of the FCA's definition of "claim" unambiguously reaches false claims for federal money that are not "presented" to a federal Government employee, and since the plain language of Section (a)(2) does not make "presentment" an element of liability, this Court need look no further to affirm the Sixth Circuit. *Lamie*, 540 U.S. at 534, *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When 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.") *See also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (no need to "resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.")

Though Petitioners recognize this canon, Pet. Br. 13 (*citing Sullivan v. Stroop*, 496 U.S. 478, 482 (1990)), they yet delve at length into both the origins and legislative history of the FCA to support an implied addition of "presentment" to Section (a)(2). Pet. Br. 21-22, 26-28. This is tacit acknowledgment, certainly, that the FCA's plain language does not "unambiguously" contain a presentment requirement in Section (a)(2). And, contrary to Petitioners' assertions, the FCA's origins and legislative history demonstrate that Congress did not limit the FCA's reach to false claims presented to the Government.

Petitioners say that "[n]othing 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." Pet. Br. 26. Actually, Congress was not really "extending" the FCA, so much as clarifying the broad reach that Congress always meant and that courts (including this Court) had generally recognized: "For example, a false claim to a 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*. S. Rep. No. 99-345 at 10 (1986) (emphasis added), *citing United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1144 (S.D. Cal. 1976). Congress did not say, as Petitioners would have it, that false claims for federal money submitted to grantees or States are false claims to the United States "only if they are re-presented to the United

States." Congress said the opposite—re-presentment is not required.[5]

1. The FCA Textual Origins Show That "Presentment" Has Never Been A Requirement Of Section (a)(2).

Before reaching the 1986 legislative history, Petitioners argue that the text of previous versions of the FCA "unambiguously" required presentation of false claims to the federal Government, and that this requirement somehow survived the 1986 amendments. Pet. Br. 21-22. Both assertions are contradicted by the plain text of the FCA.

The original FCA language from 1863 did not separately number the bases for liability that are now Sections (a)(1) and (a)(2), which were instead part of the same sentence:

> . . . 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, or any department or officer

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[5] The context of this Congressional statement is instructive. It is the final sentence in a paragraph identifying the broad range of actionable false claims, which begins by stating that false claims for federal money do certainly include those presented to a federal Government employee. S. Rep. No. 99-345 at 10 (1986). By then stating that false claims for federal money included those *not* presented to a Government employee (*id.*), Congress obviously understood the distinction—and intended *both* to be actionable.

> thereof, 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.

These words do not, as Petitioners contend, "unambiguously" always require "presentment" of a false claim to a Government employee for FCA liability. Pet. Br. 21. Quite the opposite. "Presentation" of a false claim to the Government is but one of several bases for liability in the original FCA, just as in the current version. Other behavior supporting liability under the 1863 version included "making" a false, fictitious, or fraudulent claim; "making" a false record or statement to obtain payment of a false, fictitious, or fraudulent claim; and "using" a false record or statement for the purpose of obtaining payment of a false fictitious, or fraudulent claim. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. In each instance, the false "claims" supporting liability must have sought federal Government money or property because those false claims had to be made "upon or against the Government of the United States." *Id*. There was no textual qualification that actionable "claims" could only be those "presented" to a Government employee. *Id*.

Notwithstanding the silence in the plain text, Petitioners contend that there was an implied requirement in the 1863 version of the FCA that making or using false records to get payment of false claims—the behavior that is now prohibited by current Section (a)(2)—did not support FCA liability unless the false claims were also "presented" to the Government. Pet. Br. 21, *citing Totten*, 380 F.3d at 500. This is so, according to Petitioners, because the 1863 version of the FCA reached the making or using of false records only if they were "for the purpose of obtaining, or aiding in obtaining, the approval or payment of *such claim*"—and Petitioners say the phrase "such claim" referred "unambiguously" back in the statutory text to claims "presented" to the Government. *Id*.

This is a flawed reading of the 1863 FCA. The phrase "such claim" did not refer only to claims "presented" to the Government. The phrase "such claim" appeared earlier in the statutory text as a reference both to false claims "made" upon or against the Government as well as to false claims upon or against the Government that were "presented" to a Government employee. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. Thus, "such claim" unmistakably referred to all claims "upon or against the Government"—not just the subset that were also "presented" to the Government.

Indeed, if prohibited false "claims" in the 1863 text were only those "presented" to the federal Government, then the acts of "making" a false claim, "making" a false record or statement, or "using" a false record or statement to obtain payment of a false claim for federal money would have been rendered

meaningless. "Making" false claims, "making" false records or "using" false records would have merely been *examples* of how to *cause* the "presentment" of a false claim to the federal Government—and "causing" presentation of a false claim was already prohibited. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. But Congress did not write the 1863 statute so that "presentment" was the only actionable conduct. Congress included "making" false claims, and "making" (or "using") false records or statements to obtain payment of false claims, as separate bases for liability that each must be given meaning. *See Hibbs*, 542 U.S. at 101.

The 1863 version of the FCA has been re-codified multiple times, and in 1982 the liability provisions were divided into separate sections:

> **§ 3729. False claims**
>
> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force 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;

Public Law 97-258, 96 Stat. 978 (1982). Congress apparently meant its 1982 re-codification to be cosmetic only. H.R. Rep. No. 97-651 at 3 (1982). Congress thus explicitly kept intact its distinction that "presenting" a false claim to the Government is but one type of prohibited behavior, not a requirement for liability under all FCA sections.

When Congress amended the FCA in 1986, it added the current definition of "claim" as well as the phrase "by the Government" to the end of Section (a)(2). Public Law 99-562, 100 Stat. 3159 (1986). As noted above, the simultaneous addition of these provisions at once clarified Congress's century-old intended broad reach of the FCA, and also ensured that Section (a)(2) could not thereafter be construed to reach beyond false claims for federal Government money. For Petitioners, the addition of the phrase "by the Government" in 1986 "establishes" that presentment is required in Section (a)(2). Pet. Br. 13. Yet Petitioners also contend that "presentment" has been part of the FCA since 1863. Pet. Br. 22. This, of course, begs the question: If "presentment" has always been a requirement of Section (a)(2), Congress would not have needed to "establish" that element of liability by adding the phrase "by the Government" in 1986. Congress inserted "by the Government" for another reason—and that was to clarify, in light of the additional broad definition of "claim," that Section

(a)(2) was limited to only false claims for federal Government money or property.

2. The 1986 FCA Legislative History Confirms That "Presentment" Is Not An Element Of Section (a)(2).

Turning to the 1986 FCA legislative history, Petitioners selectively cite the Senate Report to inaccurately ascribe to Congress a narrow construction of the FCA that includes a blanket "presentment" requirement. Pet. Br. 27-28.[6] Congress meant the definition of "claim," according to Petitioners, "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

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[6] Before trying to use the 1986 legislative history for their benefit, Petitioners contend that none of it is instructive because the phrase "by the Government" was not added to Section (a)(2) until after the Senate and House reports were published. Pet. Br. 26. "But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *Bornstein*, 423 U.S. at 310. In light of Congress's repeatedly stated goal in 1986 that it meant to clarify a broad reach for the FCA, it is not reasonable to suppose that Congress silently and simultaneously reversed course and added the phrase "by the Government" to eviscerate the definition of "claim" and restrict the FCA to reach only false claims made to a Government employee. *See Rockwell Int'l Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397, 1408, 167 L. Ed. 2d 190, 206 (2007) (absent a clear statutory limitation, the Court will not infer one.)

government for final approval and/or reimbursement." Pet. Br. 27. But there was no need for Congress to add the definition of "claim" to ensure this reach because false claims "passed along to the Government" have been actionable since 1863 because the false claimant has *caused* the presentation of the false claim to the Government. 31 U.S.C. § 3729(a)(1).

The 1986 legislative history is replete with statements articulating Congress's true motivation in adding the definition of "claim," which was to clarify that a false claim for federal money, even if not made to the federal Government, "is a false claim to the United States." S. Rep. No. 99-345 at 10 (1986). The Senate broadly stated that "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." S. Rep. No. 99-345 at 10 (1986), *citing United States v. Lagerbusch*, 361 F.2d 449 (3rd Cir. 1966) *and Murray & Sorenson, Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953).[7] Using almost the same broad

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[7] In *Lagerbusch*, the Third Circuit rejected the argument "that the False Claims Act is inapplicable because the appellant's false representations were made to and the consequent undeserved payments of money were made by Hercules Powder Co., a private corporation which employed him." *Lagerbusch*, 361 F.2d at 449. The protections of the FCA were triggered, the court found, because "the United States paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the appellant." *Id*. This is precisely the situation here. Petitioners' false representations and false claims for

language, the House said that "claims 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).

Since these statements of Congressional intent are irreconcilable with a "presentment" requirement, Petitioners assign different meaning to Congress's plain words—just as Petitioners do with the FCA's plain text. Thus, when Congress said that false claims to non-Government parties are actionable if they "ultimately result in loss to the United States," Petitioners presume that "loss to the Government" only happens "if the claim was ultimately passed along to the government." Pet. Br. 28, *quoting* S. Rep. No. 99-345, at 10 (1986). But this is not what Congress said. Nor did Congress need to clarify that claims "passed along" to the Government are actionable, since Section (a)(1) prohibits "causing" presentment of false claims.

In adding the definition of "claim" in 1986, Congress meant to clarify the broad reach of the FCA and thus overrule judicial opinions that had "limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. Rep. No. 99-345 at 22 (1986). Petitioners are therefore mistaken in asserting that the definition of "claim" merely

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federal money were made to private corporations, yet it is undisputed that the Navy paid for all the sums fraudulently obtained by Petitioners.

"codified" results in cases that broadly construed the FCA, cases which had already *augmented* the ability of the Government to use the FCA to combat fraud effectively. Pet. Br. 27-28. While Congress certainly did agree with the judicial decisions broadly interpreting the FCA, "codifying" this agreement would not have been necessary had there been no decisions restricting the Government's ability to use the FCA to combat fraud. But there were such decisions.

One of the cases Congress meant to overrule concerned precisely the situation involved here: 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. 99-345 at 22 (1986), *citing United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938). 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. *Salzman*, 41 F. Supp. at 197. Congress intended the definition of "claim" to overrule *Salzman*. S. Rep. No. 99-345 at 22 (1986).

A restrictive construction of the FCA that adds a "presentment" requirement to Section (a)(2) would improperly revive *Salzman* contrary to Congressional intent. It would also mark a departure from this Court's unfailingly broad construction of the FCA: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive

reading, even at the time when the statute imposed criminal sanctions as well as civil." *Neifert-White*, 390 U.S. at 232.

3. Petitioners' Reliance On Other Statutes To Restrictively Interpret The FCA Is Misplaced.

While Petitioners acknowledge that the FCA is designed to reach all fraud against the Government (Pet. Br. 27), they attach great significance to the direct involvement of a Government employee in the process—implying that fraud against the Government does not occur unless the fraudulent claim is seen by a Government employee. But this Court has always understood that "Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. . . . These funds are as much in need of protection from fraudulent claims as any other federal money[.]" *Marcus*, 317 U.S. at 544.[8]

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[8] Indeed, one can be guilty of embezzling "money or things of value of the United States" (18 U.S.C. § 641) even though the federal funds are "administered by a nonfederal agency." *United States v. Largo*, 775 F.2d 1099, 1102 n.3 (10th Cir. 1985). *See also, e.g., United States v. Long,* 996 F.2d 731 (5th Cir. 1993) (university funds received from a state agency, but originating in the federal treasury, retained their federal character for purposes of § 641); *United States v. Foulks,* 905 F.2d 928 (6th Cir. 1990) (federal grant funds in the possession of the Toledo Salvation Army still considered federal funds); *United States v. Scott*, 784 F.2d 787, 790-91 (7th Cir. 1986) (§ 641 applied to theft of funds from a local government agency that was primarily funded by the federal government).

Though Petitioners hint at a rule that fraud against the Government cannot occur without the involvement of a Government employee, they never do squarely advocate that extreme. This means, importantly, that Petitioners do not argue that Congress lacks the *authority* to protect federal funds that are falsely claimed from non-Government entities where no federal Government employee ever sees the false claim. Petitioners assert, instead, the much different notion that Congress did not mean to do so with the FCA. Pet. Br. 14. With the text and legislative history of the FCA demonstrating the opposite, Petitioners look beyond the FCA to support their conception of Congressional intent.

Citing several statutes that reference "Government funds" or distinguish between the federal Government and a federal Government "contractor, grantee, or other recipient" of federal funds—including the FCA itself—Petitioners first note that Congress well-knows the difference between the federal Government and a non-federal Government entity. Pet. Br. 13-14 (citations omitted). From this, Petitioners conclude that Congress must have intended FCA Section (a)(2)'s reference to false claims paid "by the Government" to mean false claims paid *personally* by a federal Government employee after *personally* receiving the false claim. *Id*. The FCA's definition of "claim" provides the exact opposite. Indeed, in that definition Congress identified the difference between the federal Government and its contractors specifically to overcome that distinction in order to reach all false claims for federal money, including those that are not submitted to the federal Government. 31 U.S.C. § 3729(c).

This broad FCA purpose should not be given effect, say Petitioners, because Congress enacted other statutes with different goals that were achieved in a narrower fashion. Pet. Br. 15-16. It is inappropriate, under recognized canons of statutory interpretation, to rigidly apply the mandates or structure of one Congressional statute to another where Congress's stated policies and goals are not the same, notwithstanding similar language. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 174-175 (1984) (O'Connor, J., dissenting). Such is the case with the statutes cited by Petitioners.

The first is the federal criminal conspiracy statute, 18 U.S.C. § 371. In *Tanner v. United States*, 483 U.S. 107 (1987), the defendants conspired to defraud a private company of funds that were borrowed from a federally-financed bank and secured by a federal credit agency. *Tanner*, 483 U.S. at 110. The Government prosecuted the defendants under 18 U.S.C. § 371, which prohibits two or more people from conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose[.]" The Government argued for a broad construction of § 371 so that conspiratorial conduct aimed at recipients of federally-financed loans would be treated as against "the United States" for purposes of § 371. *Tanner*, 483 U.S. at 131.

This Court rejected the Government's suggested reading of § 371 for two main reasons. First, "the interpretation of § 371 proposed by the Government in this case has not even arguable basis in the plain language of § 371." *Tanner*, 483 U.S. at 131. Second, the Government's interpretation "has wrested no aid from § 371's stingy legislative history." *Tanner*, 483

U.S. at 131. Since Congress had not indicated its agreement with the Government's construction of § 371, either in the plain text or legislative history, this Court refused to adopt such a broad interpretation of a criminal statute. *Tanner*, 483 U.S. at 132.

Petitioners claim that this Court's narrow construction of the federal criminal conspiracy statue mandates a similar narrow construction of the civil FCA because "*Tanner* makes clear that a private entity's federally funded status does not transform it into the federal government for fraud purposes." Pet. Br. 16. The issue here is not whether a private entity is "transformed" into the federal Government. The issue is whether Congress meant to protect federal funds distributed by private entities where the false claim for those federal funds is never presented to a Government employee. *Tanner* did not hold that fraud against the federal Government fisc could occur only by direct contact with a Government employee. *Tanner* merely held that Congress did not intend a broad reach for the criminal conspiracy statute. *Tanner*, 483 U.S. at 132.

The exact evidence of Congressional intent missing in *Tanner* is present regarding the civil FCA. Most notable is the definition of "claim," where Congress expressed its intent that fraud against federal money can occur even if the false claims are not presented directly to a federal Government employee. 31 U.S.C. § 3729(c).[9] In addition, the legislative history to the

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[9] This Court narrowly interpreted *Tanner* because it involved a criminal statute, and any doubts about the reach of a criminal

FCA amendments unequivocally confirms that Congress meant the FCA to reach *all* false claims for federal money. S. Rep. No. 99-345 at 10 (1986); H.R. Rep. No. 99-660 at 21 (1986). *Tanner* does not support a restrictive interpretation of the FCA.[10]

The same is true regarding the two other statutes cited by Petitioners. In *Forsham v. Harris*, 445 U.S. 169 (1980), this Court refused to extend the reach of the Freedom of Information Act (5 U.S.C. § 552(a)(4)(B)) to include documents in the possession of federal grantees because Congress clearly did not intend that result: "Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so[.]" *Forsham*, 445 U.S. at 180. And in *United States v. Orleans*, 425 U.S. 807 (1976), this Court found that Congress intended the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671 *et seq.*) to apply only to

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statute are construed in favor of narrow construction: "'If the legislative history fail[ed] to clarify the statutory language,' the Court observed, 'our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.'" *Tanner*, 483 U.S. at 131, *quoting Dixson v. United States*, 465 U.S. 482, 491 (1984) (additional citation omitted).

[10] Petitioners fault the Sixth Circuit for failing to address, "let alone, attempt to distinguish" the *Tanner* decision. Pet. Br. 31. This is because Petitioners themselves did not address or argue to the Sixth Circuit that *Tanner* had any applicability to this case. Likewise, *Tanner* is not mentioned in either the *Totten* majority opinion or dissent. In truth, *Tanner* does not support the narrow interpretation of the FCA advanced by Petitioners.

federal Government employees and agencies, not federally-funded local community action councils. *Orleans*, 425 U.S. at 813-817. Unlike those other statutes, Congress clearly expressed its intent that the FCA reach Petitioners' false claims for federal money despite the lack of "presentment" to a federal Government employee. 31 U.S.C. § 3729(c).

In sum, it is of no real moment that Congress has different goals in mind for its varied statutes, and sets to achieve those goals with appropriate language. Congress does not always intend to reach broadly, of course, but it meant to do so with the FCA by reaching all fraudulent efforts to injure the federal public fisc, even when a federal Government employee is not involved.[11]

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[11] Petitioners suggest in a footnote a possible constitutional challenge to the FCA, arguing that without "presentment" added to Section (a)(2), "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." Pet. Br. 19 n.6. When the Government pays for quality hardware and receives defective hardware instead, the Government is injured. This truism is at the heart of *Bornstein*, where this Court recognized that a subcontractor's manufacture of defective radio parts, which were incorporated into radios sold to the Government by the prime contractor, injured the Government even though the subcontractor's invoices were not submitted to the Government. 423 U.S. at 313. *Bornstein* also answers the concern (expressed by the majority in *Totten*, 380 F.3d at 496) that without "presentment," there might be potential "quadruple" liability for subcontractors—treble damages under the FCA in addition to single damages in a suit brought by the prime contractor. This would not occur because whatever possible action the prime contractor might have against

D. An Actionable Conspiracy To Defraud The Government Under Section (a)(3) Does Not Require Proof That False Claims Were "Presented" To The Government.

The plain text of FCA Section (a)(3) contains no requirement that a false claim for federal money must be "presented" to a federal Government employee. 31 U.S.C. § 3729(a)(3). Instead, it imposes liability upon anyone who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" *Id*. Here, the Sixth Circuit found sufficient evidence that General Motors/Allison and General Tool Company conspired to defraud the federal Government by getting false claims for federal money paid in connection with their installation of defective gearboxes in the Navy's Gen-Sets. Pet. App. 24a-25a.

Petitioners read a "presentment" requirement into Section (a)(3) in two ways. First, they argue that liability under Section (a)(3) is "derivative" of liability under Sections (a)(1) and (a)(2), so "liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2)." Pet. Br. 29, *citing United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1304-05 (N.D. Ala. 2004), *aff'd on other grounds*, 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). But by subordinating Section (a)(3), Petitioners have read

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the subcontractor, the prime contractor could not logically collect and keep amounts for damages sustained by the *Government*. *Bornstein*, 423 at 314 and n.9.

that provision out of the FCA. As with Section (a)(2), a "presentment" requirement in Section (a)(3) would transform that provision into merely an *example* of how to violate Section (a)(1)—if a conspiracy to defraud the Government must include "presentment" of a false claim for federal money to a Government employee, the conspirators have *caused* presentment of a false claim. Such conduct is already actionable under Section (a)(1). This is another improper effort to vitiate provisions of the FCA. *Hibbs*, 542 U.S. at 101.

There is no reason to render Section (a)(3) a meaningless "derivative." Its plain text reaches distinct misbehavior. Liability under Section (a)(3) does not require presentment (as is required under Section (a)(1)) and does not require the making or using of false records or statements to effectuate the fraudulent scheme (as is required under Section (a)(2)). Instead, Section (a)(3) requires concerted action between two or more persons "to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" 31 U.S.C. § 3729(a)(3). Again, though there may be some overlap among the behavior prohibited by Sections (a)(1), (a)(2) and (a)(3), the Sixth Circuit gave each statutory provision independent meaning to assist in the Congressional goal of reaching all types of fraud perpetrated on the federal Government. Pet. App. 7a-8a, 12a-14a. Petitioners would have this Court construe the FCA restrictively so that Sections (a)(2) and (a)(3) reach no fraudulent conduct beyond that already encompassed by Section (a)(1).

The two district court FCA cases cited by Petitioners as support for their assertion that Section

(a)(3) is a "derivative" form of liability contain no statutory analysis. One decision assumed, without discussion, that the analysis in *Totten* supporting a "presentment" requirement in Section (a)(2) applies also to Section (a)(3)—even though *Totten* did not concern Section (a)(3) allegations at all and, more importantly, *Totten's* Section (a)(2) analysis was based on the phrase "by the Government," which does not appear in Section (a)(3). *Atkins*, 345 F. Supp. 2d at 1304-05, *citing Totten*. The other decision cited by Petitioners merely cites *Atkins* and the district court's decision in this case without further analysis. *Conner*, 459 F. Supp. 2d at 1091, *citing Atkins and Sanders*. Thus, *Atkins* and *Conner* are not independent support for Petitioners' construction of Section (a)(3).[12]

Beyond their assertion that Section (a)(3) is a "derivative action," Petitioners contend that the section's language "clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself[.]" Pet. Br. 30. But the "conspiracy" prohibited by Section (a)(3), as its plain text states, is to "defraud

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[12] Petitioners also cite this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000), which held that a RICO conspiracy has to include proof that another RICO provision is violated. *Id*. at 505-506. This holding does not support Petitioners' claim that an FCA Section (a)(3) conspiracy has to include proof of a Section (a)(1) or (a)(2) violation because the RICO conspiracy provision—unlike the FCA conspiracy provision—is defined as a conspiracy to violate another RICO provision. 18 U.S.C. § 1962 (d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.") FCA Section (a)(3) is not defined as a conspiracy to violate Sections (a)(1) or (a)(2).

the Government," not to "submit a false claim to the Government." 31 U.S.C. § 3729(a)(3). And Congress clarified with the definition of "claim" that defrauding the Government can occur even if the false claims for federal money are not submitted to a federal Government employee. This does not mean, as Petitioners argue, that Section (a)(3) applies to "fraud against private companies that receive federal funding[.]" Pet. Br. 30. Section (a)(3) applies to fraud against the federal Government, and whether the false claims for federal money are made to a federal Government employee or to a private company that distributes the federal money, the result is the same: The federal Government has been defrauded of taxpayer dollars.

Section (a)(3) unambiguously does not include a "presentment" requirement. No sound basis exists for adding such a term, particularly because doing so would render this independent statutory provision meaningless.

II. THE SIXTH CIRCUIT'S DECISION GAVE FULL EFFECT TO THE BROAD SCOPE CONGRESS ESTABLISHED FOR THE FCA.

By adding the definition of "claim" in 1986, Congress plainly reaffirmed its long-standing intent that the FCA broadly reach all fraudulent efforts to obtain federal taxpayer funds, including false claims for federal money that are never submitted to a federal Government employee. 31 U.S.C. § 3729(c). 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), *quoting Neifert-White Co.*, 390 U.S. at 232. Restrictively construing the FCA, as Petitioners advocate, is thus at odds with the FCA's plain text, Congressional intent and this Court's precedent.

In finding that Petitioners' false claims for federal money could support FCA liability under Sections (a)(2) and (a)(3), the Sixth Circuit followed the plain text of those Sections—neither of which include a "presentment" requirement—as well as the definition of "claim," which confirms that "presentment" is not a prerequisite for liability. Pet. App. 7a-8a. Turning to the facts of this case, the Sixth Circuit found Petitioners' invoices could support FCA liability because they were claims for *federal Government* money, and those claims were false because Petitioners had violated the *federal Government* conditions regarding distribution of the federal Government funds. Pet. App. 24a-25a.

Petitioners are thus incorrect to describe this case as involving "fraud perpetrated by one private party against another." Pet. Br. 33. Petitioners did not make claims for "private" funds, did not violate "private" contract specifications regarding construction of the Navy's Gen-Sets, and thus did not perpetrate fraud against "private" prime contractor shipyards. Rather, the Navy ordered Gen-Sets of an exacting quality, retained oversight and inspection authority covering all the work done by Petitioners—including rights to terminate the Gen-Set contracts for default—and paid Petitioners completely with Navy funds. *See supra* pp. 3-12. By violating the Navy's

quality requirements, Petitioners undoubtedly injured the Navy even though they were not in direct privity with the Navy. *Bornstein*, 423 U.S. at 313. It is therefore misguided for Petitioners to contend that this is a "private" matter to be resolved under "state-law" remedies for "private" fraud. Pet. Br. 33.

By ignoring the facts of this case—and thus the foundation for the Sixth Circuit's decision—Petitioners also incorrectly assert that the Sixth Circuit's decision is a "dramatic expansion" of the FCA so that it "would apply to *any* claim for payment submitted to *any* entity that receives federal funding." Pet. Br. 34 (emphasis in original). The Sixth Circuit applied the FCA to reach claims for *federal* funds made by Petitioners despite violating *federal* contract specifications. This is a straight application of the FCA's text, which does not concern "any" claim, but instead reaches false claims for federal Government funds. 31 U.S.C. § 3729(a)(1); 31 U.S.C. § 3729(a)(2); 31 U.S.C. § 3729(a)(3); 31 U.S.C. § 3729(c). Petitioners argue that a "presentment" requirement should be presumed throughout the FCA to ensure that the FCA reaches only fraud against the federal Government, but in reality the FCA is already so focused by its requirement that actionable claims falsely seek federal money.

A blanket "presentment" requirement would, on the other hand, eliminate the definition of "claim" and dramatically restrict the FCA. Most notably, false claims submitted to Medicare and Medicaid would no longer be actionable under the FCA because those claims are not presented to a federal Government

employee, which is the opposite result that Congress intended:

> Under the Medicare program, claims are not submitted directly to the Federal agency, but rather to private intermediaries—usually insurance companies—which are subsequently reimbursed by the United States. However, false Medicare claims have been uniformly held to be within the ambit of the False Claims Act, though the claims were actually filed with, and paid by insurance companies. . . . Although the Federal involvement in the Medicaid program is less direct, claims submitted to State agencies under this program have also been held to be claims to the United States under the False Claims Act.

S. Rep. No. 99-345 at 21 (1986), *citing Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975); *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976).

Prosecution of Medicare and Medicaid fraud under the FCA has continued uninterrupted since 1986, returning billions of fraudulently obtained taxpayer dollars to the federal public fisc. *See* http://www.taf.org/STATS-FY-2007.pdf. If "presentment" of false claims is always required, then Medicare and Medicaid claims would be outside the reach of the FCA, and the Government's ability to use the FCA to redress fraud would be limited—contrary to the plain language of the FCA and Congressional intent. S. Rep. No. 99-345 at 22 (1986).

Furthermore, a restrictive "presentment" requirement would inappropriately disjoin the remedies available to the Government under the FCA and the companion Program Fraud Civil Remedies Act ("PFCRA"). 31 U.S.C. § 3801, *et seq.* As this Court recognized not long ago, the PFCRA is "a sister scheme creating administrative remedies for false claims" that Congress "designed to operate in tandem with the FCA." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 and n.17 (2000). Finding the reach of the PFCRA "virtually identical" to the FCA, this Court held that comparing the two statutory schemes is appropriate because "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." *Id.* at 786 n.17, *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Though the scope is the same, the PFCRA is structured somewhat differently than the FCA. In particular, while the PFCRA also prohibits "presenting" false claims, that prohibition is not limited in any section of the PFCRA to false claims presented to a federal Government employee. 31 U.S.C. § 3802(a)(1). Liability under the PFCRA simply depends, as provided in its definition of "claim," upon the "presentation" of false claims for federal Government money or property—whether that property or money is in the possession of the federal Government, or in the possession of a private entity that received the federal property or money. 31 U.S.C. § 3801(a)(3)(B). As an administrative option for the Government, the PFCRA reaches only fraudulent

claims valued at $150,000 or less (*id*. at § 3803(c)(1)), and liability is capped at double damages and a civil penalty of $5,000. *Id*. at § 3802(a)(1). For fraudulent claims actionable under the PFCRA, the Government may still elect to pursue the matter under the FCA. *United States v. Watkins*, 2002 U.S. Dist. LEXIS 10029 *2 (N.D. Ill. 2002).

By construing the FCA so that "presentment" of false claims to a federal Government employee is always required, Petitioners would render the FCA inapplicable to much of the fraudulent conduct actionable under the PFCRA. This yields an anomalous result: The Government would have a remedy if someone submitted to a prime contractor a false claim for $150,000 of federal Government money, but the Government would have no remedy if that false claim sought $150,001. Congress certainly did not mean to incentivize larger frauds.

In the end, Petitioners' true objections are not to the Sixth Circuit's decision, but rather to the FCA itself. For instance, Petitioners say that if the Sixth Circuit's decision is affirmed, then the FCA will thereafter reach "every construction company hired as a subcontractor on a federal building . . . based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government." Pet. Br. 34-35, *citing Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002). This reach of the FCA is not new at all. As written and consistently applied, the FCA has long reached subcontractors even when their false claims are not "passed along" to the Government, since subcontractor violations of federal Government

requirements may cause a prime contractor's invoice to the Government to be false. *E.g. Bornstein*, 423 U.S. at 308. The restriction suggested by Petitioners, whereby subcontractors would be liable only if their own false claims are "passed along" to the Government, would immunize most subcontractors from FCA liability because their invoices (as in this case and in *Bornstein*) are usually not "passed along" to the Government.

Trying to support this result, Petitioners quote *Metric Constructors* for the proposition that "subcontractors in a government contract are not in privity with the government[.]" Pet. Br. 35. But contract privity is irrelevant, as this Court held almost 65 years ago that the FCA reaches "any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Marcus*, 317 U.S. at 544-45. The FCA's mission is to protect federal Government money and property from fraud, regardless of contract privity or whether a subcontractor's false invoice for federal money is "passed along" to a Government employee.

Petitioners close by arguing that this Court should restrictively interpret the FCA so that FCA litigants will not have to address the "complicated" problem of determining whether fraudulent claims sought federal, rather than non-federal funds. Pet. Br. 35-36. Tracing government funds is commonplace in a variety of lawsuits and is routinely dealt with by litigants and courts. Resolving evidentiary issues by restricting the FCA is not appropriate and, in any event, Respondents

solved any such issue in this case without any complication at all: The General Motors/Allison Program Manager testified that all funds paid to the Petitioners came from the Navy and, ultimately, the United States taxpayers. JA 110a-111a. Respondents also demonstrated that Petitioners falsely claimed those Navy funds because Petitioners had not satisfied the Navy's contract requirements. This case thus shows that a false invoice presented to a federal Government employee is certainly not the only method to prove that fraud has been practiced against Government funds.

This is, in fact, the crux of the Sixth Circuit's decision. Petitioners fraudulently obtained Navy funds by virtue of false claims, false statements and conspiracy. This could not be clearer fraud against the Government even if the prime-contractor shipyards were not positioned as intermediaries between Petitioners and the falsely-claimed federal money. The Navy received defective Gen-Sets, and the Sixth Circuit simply held that whether the Navy also received Petitioners' fraudulent invoices is irrelevant. This is an unexceptional application of the FCA and should be affirmed.

CONCLUSION

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

Respectfully submitted,

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