

IN THE
Supreme Court of the United States

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

v.

UNITED STATES EX REL. ROGER L. SANDERS
AND ROGER L. THACKER,
Respondents.

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

**BRIEF OF
TAXPAYERS AGAINST FRAUD EDUCATION FUND
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether United States Navy subcontractors that make false claims for federal Government money can be liable under 31 U.S.C. § 3729(a)(2) or (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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INTEREST OF *AMICUS CURIAE*¹

Taxpayers Against Fraud Education Fund (“TAF”) is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

INTRODUCTION

Since its enactment in 1863, the False Claims Act (“FCA”) has been the Government’s primary tool for ensuring that federal funds are not misused or diverted from their intended purpose, thereby protecting the public from the unnecessary costs of government expenditures for inflated construction costs, defective military materiel, and improper health care reimbursements. Petitioners and their *amici* argue, however, that the FCA has the strictly delimited purpose of protecting the federal treasury only when fraudulent claims are submitted directly to the Government and that the FCA has no role in protecting

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

federal funds spent through an intermediary to accomplish their intended public purpose. In this case, petitioners and their *amici* assert that the Government and the public are not defrauded within the meaning of the FCA when a skilled nursing facility receives substandard supplies purchased with federal Medicare dollars (Chamber Br. 12); that the Government and the public are not defrauded when a hospital has to provide a lower quality of care to its Medicare patients because a vendor overcharges the hospital for services paid out of a fixed amount of federal funds (*id.*); and that the Government and the public are not defrauded when federal dollars are used to pay for defective components of *Arleigh Burke* class guided missile destroyers built for the United States Navy (Pet. Br. 34-35).

The dismissive characterization of such conduct as “fraud perpetrated by one private party against another” (Pet. Br. 33; *see also* Chamber Br. 5, 18) ignores the substantial harm that the Government and the public suffer when waste and abuse reduce the quantity and quality of products and services that taxpayers’ funds can provide. Once the Government distributes funds to contractors and grantees, it maintains a strong interest in ensuring that the funds are spent for their intended purpose. The Government does not transfer money or property to contractors and grantees just for the sake of transferring funds. The FCA not only sensibly protects the formalistic transfer of funds from the federal Government to a direct recipient but also provides a remedy and deterrent when a subcontractor of that recipient commits fraud in the use of federal funds.

SUMMARY OF ARGUMENT

The 1986 amendments to the False Claims Act (“FCA”) explicitly clarify that the FCA encompasses frauds perpetrated indirectly against the Government by recipients of funds from federally funded contracts and programs. The FCA’s broad coverage of frauds committed against recipients of federal funds is confirmed by its plain language, structure, statutory origins, legislative history, and purpose. The Sixth Circuit correctly applied the FCA in holding that presentment of a claim to the Government is not required to violate the FCA, and the decision below should accordingly be affirmed. A contrary result would undermine the 1986 amendments and allow substantial amounts of fraud involving federal funds to go unchecked.

The plain language of Section 3729(c), which was added to the FCA in 1986, evinces Congress’s intent to include fraud committed by subcontractors and other downstream recipients of federal funds, regardless of whether the subcontractors’ claims are ultimately presented to the Government. Section 3729(c) defines “claim” to include claims for money or property made “to a contractor, grantee, or other recipient” of federal funds where “any portion” of the requested money or property comes from the Government. 31 U.S.C. § 3729(c). Requiring a claim to be presented directly to the Government would be inconsistent with Section 3729(c)’s explicit inclusion of claims submitted to a “recipient” of federal money.

Nor does the plain language of either Section 3729(a)(2) or (a)(3) contain any presentment requirement. The absence of a presentment requirement in subsections (a)(2) and (a)(3) is significant in light of the explicit inclusion of a presentment requirement in Section 3729(a)(1). *See Barnhart v.*

Sigmon Coal Co., 534 U.S. 438, 452 (2002) (noting significance of disparate inclusion and exclusion of statutory language in different sections of same act).

Moreover, the lack of a presentment requirement in Sections 3729(a)(2) and (a)(3) is complemented by the structure of the FCA and the statutory origins of those sections. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with the addition of Section 3729(c) to the FCA and violate this Court's "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted). That contextual understanding gains support from the statutory history of the FCA, which establishes that predecessor versions of Sections 3729(a)(2) and (a)(3) did not contain a presentment requirement either.

Although the plain language, structure, and statutory history of the Act suffice to demonstrate the lack of a presentment requirement, the legislative history of the 1986 amendments to the FCA also squarely supports the Sixth Circuit's decision that presentment to the federal Government is not required. Congress intended to abrogate decisions that interpreted the FCA too restrictively by requiring the presentment of a claim to the Government or by requiring monetary loss to the Government. See S. Rep. No. 99-345, at 21-22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Congress also expressed its approval of cases such as *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976), in which the court held that "false claims submitted to a state Medicaid program, such as MediCal, are claims against the United States within

the meaning of the False Claims Act,” *id.* at 1149. See S. Rep. No. 99-345, at 22.

Finally, Congress enacted the 1986 amendments against the backdrop of an inexorable shift in federal spending from direct expenditures by the Government to indirect expenditures through block grants and other transfers of federal funds to state and local governments and private entities. In giving greater flexibility for such funds to be expended without precise federal mandates or a direct relationship between the ultimate recipient of the funds and the Government, Congress did not intend to insulate those transactions from the FCA’s purview. As even petitioners’ *amici* acknowledge, “[t]he federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants.” Chamber Br. 6. Removing such a vast amount of federal funds from the protection of the FCA would substantially weaken the FCA and make it a much less effective tool to combat fraud and to ensure the proper use of federal funds. Congress amended the FCA in 1986 precisely to avoid that result.

ARGUMENT

I. THE PLAIN LANGUAGE, STRUCTURE, AND STATUTORY ORIGINS OF THE FALSE CLAIMS ACT DEMONSTRATE THAT PRESENTMENT OF A CLAIM TO THE GOVERNMENT IS NOT REQUIRED

The addition of Section 3729(c) to the False Claims Act (“FCA”) in 1986 clearly demonstrates that Congress did not intend for presentment to the Government to be a condition of liability under Sections 3729(a)(2) and (a)(3). Because Section 3729(c) is key to understanding that Sections 3729(a)(2) and (a)(3) contain no presentment requirement, our analysis of the plain language of the FCA begins with Section 3729(c) – the FCA’s expansive definition of the term “claim” – and then considers the plain language of Sections 3729(a)(2) and (a)(3). The absence of any presentment requirement in the text of Sections 3729(a)(2), (a)(3), and (c) is further supported by the statutory structure of the FCA and its legislative origins.

A. The Plain Language Of The Statute Does Not Require Presentment

1. *Section 3729(c) clearly demonstrates congressional intent not to require presentment*

In 1986, Congress added Section 3729(c) to the FCA to clarify that presentment of a claim to the Government is not required to trigger liability under Sections 3729(a)(2) and (a)(3) of the FCA. Rather, Section 3729(c) ensures that the FCA also covers claims that are submitted to any recipient of federal funds. Section 3729(c) provides in its entirety:

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.

31 U.S.C. § 3729(c). By the language it chose, Congress intended for that definition to be additive and not exhaustive. The term “includes” denotes an expansive definition. See 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 152 (5th ed. 1992) (noting that the term “includes” is a term of enlargement and conveys the conclusion that other items not enumerated are includable). Although Congress could have limited the definition of a “claim” to the situation in which a prime contractor submits a request for payment directly to the Government, it chose not to limit the definition in that way.² The plain language therefore evinces the intent for Section 3729(c) to ensure that the FCA covers not just the straightforward case of a prime contractor’s direct submission of a claim to the Government but also a subcontractor’s request or demand to a prime contractor, as long as “any portion of the money or property which is requested or demanded” comes from the federal Government.

Section 3729(c) contains a logical and necessary limiting requirement that some portion of the

² The statute’s definition of “claim” does not even cover a prime contractor’s direct submission of a claim to the Government, providing further evidence that Section 3729(c)’s definition of “claim” is an enlarging rather than exhaustive definition.

requested money or property come from the federal Government. The FCA is not intended to cover frauds that do not involve federal funds or property. Claims made to contractors, grantees, or other recipients come within the Act's ambit "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." 31 U.S.C. § 3729(c). That provision establishes the required nexus between the claim made to, *e.g.*, a contractor and the federal funds used by the contractor to pay the claim. But the plain language of subsection (c) contains no requirement that a claim be presented to the federal Government. Such a requirement would be antithetical to the very purpose of adding subsection (c) to clarify that the FCA covers claims that are presented to recipients of federal funds.

Congress's use of the phrases "if the United States Government provides" and "if the Government will reimburse" in Section 3729(c) does not constitute a presentment requirement. Congress's use of different verb tenses in these two clauses is significant. *See, e.g., United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Here, the use of different verb tenses indicates that Section 3729(c) covers two different situations: (1) the situation where the "contractor, grantee, or other recipient" of federal funds to whom a false claim is submitted has already received from the Government some portion of the money requested by the false claimant; and (2) the situation where the "contractor, grantee, or other recipient" will be reimbursed by the Government at

a later point in time for some portion of the money requested by the false claimant.³

That interpretation of Section 3729(c) also is consistent with a common-sense reading of the statute based on the use of words in common parlance. See *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 582 (1991) (explaining that a “common-sense reading of the statutory language best comport[ed] with the purpose” of the statute at issue); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207-08 (1997) (relying on word’s use in “common parlance” to interpret statutory language). The word “provides” commonly identifies something’s source. Consider the example of a student researching a federally funded highway construction project being built by a state transportation department. If the student asked the project manager, “Who provides

³ In attempting to reconcile Section 3729(c) with Section 3729(a)(1) – which is not at issue in this case and which, unlike Sections 3729(a)(2) and (a)(3), contains an explicit presentment requirement (*see infra* p. 10) – the D.C. Circuit focused on the use of the present-tense form of the verb “provides” in Section 3729(c), explaining that “False Claims Act liability will attach if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government.” *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004). That reading, however, functionally converts Congress’s use of the present tense in the statute to the future tense, making liability contingent upon some event transpiring at a later point in time. *Totten* thus disregards its own recognition “of the Supreme Court’s admonition that ‘Congress’ use of a verb tense is significant in construing statutes.” *Id.* (quoting *Wilson*, 503 U.S. at 333). If Congress had intended for liability to be contingent on a future payment of money or property by the federal Government, it would have drafted Section 3729(c) to read, “if the United States Government *will* provide any portion of the money . . .,” just as it drafted the immediately following clause to read, “if the Government *will* reimburse,” 31 U.S.C. § 3729(c) (emphasis added).

the funding for this project?,” the project manager’s answer would not hinge on whether the federal Government had already transferred all of the federal funds for the project to the state or whether it continued to pay out funds to the state on an ongoing basis. Either way, the correct, and common-sense, answer to the question would be, “The federal Government.”

2. *The plain language of Section 3729(a)(2) contains no presentment requirement*

The plain language of Section 3729(a)(2) contains no presentment requirement. Section 3729(a)(2), which was created when the FCA was recodified in 1982, makes any person liable under the FCA who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 U.S.C. § 3729(a)(2).⁴ The absence of a presentment requirement in that subsection stands in stark contrast to subsection (a)(1), which makes any person liable who “knowingly presents, or causes to be presented,” a false claim to the Government. *Id.* § 3729(a)(1). Congress’s exclusion of a presentment requirement from subsection (a)(2) is significant in the face of its inclusion of a presentment requirement in subsection (a)(1). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (“[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a

⁴ The phrase “by the Government” was added in 1986. As discussed below, this phrase does not introduce a presentment requirement. Rather, the jurisdictional phrase was added to remedy an inadvertent defect in the pre-1986 version, which failed to provide any limitation of the scope of subsection (a)(2) to federal frauds.

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks omitted). Congress clearly knew how to include a presentment requirement when it wanted to, but chose not to do so in Section 3729(a)(2).

Nor did the addition of the phrase “by the Government” at the end of Section 3729(a)(2) in 1986 add a presentment requirement to subsection (a)(2). Rather, the addition of that phrase cured a jurisdictional defect in subsection (a)(2) that Congress inadvertently introduced when it recodified the FCA in 1982. Without the phrase “by the Government,” subsection (a)(2) contained no limitation whatsoever on what kind of claims were covered by the FCA. Because subsection (a)(2) made any person liable who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved,” 31 U.S.C. § 3729(a)(2) (1982), the absence of a definition of claim in the FCA meant that even purely private claims would have been covered by the plain language of the statute. When Congress added an inclusive rather than exhaustive definition of the term “claim” to the FCA in 1986, *see supra* pp. 6-7, its addition of the phrase “by the Government” to Section 3729(a)(2) cured the federal jurisdictional defect in the version of that subsection that existed from 1982 to 1986.

The *Totten* court concluded that Congress must have added the words “by the Government” for the purpose of “referring back to the presentment requirement of Section 3729(a)(1).” 380 F.3d at 499. *Totten* based its conclusion on the principles of statutory construction that (1) where avoidable, “no

clause, sentence, or word shall be superfluous, void, or insignificant,” *id.* (quoting *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004)), and (2) “when Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect,” *id.* (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)) (alteration omitted). The *Totten* court failed to recognize that Congress needed to add the words “by the Government” to cure the jurisdictional defect in Section 3729(a)(2), thus addressing both preceding principles of statutory construction about which the *Totten* court professed concern. Had it recognized that the phrase was added to cure the jurisdictional defect in subsection (a)(2) that existed from 1982 to 1986, the *Totten* court presumably would not have had to develop the less persuasive explanation that Congress intended the phrase to refer back to subsection (a)(1)’s presentment requirement.⁵

3. Section 3729(a)(3)’s broad conspiracy provision contains no presentment requirement

The plain language of the FCA’s broad conspiracy provision does not contain a presentment requirement either. Section 3729(a)(3), in its entirety, makes any person liable who “conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.” 31 U.S.C. § 3729(a)(3). The plain language of that subsection could not be

⁵ If Congress had intended to add a presentment requirement to Section 3729(a)(2), it likely would have done so in a much less cryptic manner by tracking the straightforward language used in subsection (a)(1), making any person liable who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *presented to the Government* for payment or approval.”

clearer, and notably subsection (a)(3) cannot be read to require presentment of a claim to the Government. Section 3729(c)'s explicit definition of "claim" to include any request to a "contractor, grantee, or other recipient" of federal funds simply provides further support for the conclusion that Congress did not intend Section 3729(a)(3) to contain a presentment requirement.

Petitioners and their *amici* understandably shy away from Section 3729(a)(3)'s plain language. Instead, they attempt to assert that the scope of liability under subsection (a)(3) is "defined by the scope of liability under Sections 3729(a)(1) and (a)(2)." Pet. Br. 29. But that is not how Congress drafted subsection (a)(3). Had Congress wished to limit subsection (a)(3) in that way, it simply would have drafted the conspiracy provision to make any person liable who "conspires to violate paragraph (1) or (2) of this section." *See, e.g.*, 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

B. The Statutory Structure Of The FCA Confirms The Lack Of A Presentment Requirement In This Case

The FCA's structure confirms that, consistent with their plain language, Sections 3729(a)(2) and (a)(3) do not impose a requirement that a claim be presented to the federal Government to be covered by the FCA.

1. Section 3729(a)(1) logically contains a presentment requirement while Section 3729(a)(2) does not

The statutory structure of the FCA supports the inclusion of a presentment clause in subsection (a)(1) but not in subsection (a)(2). Subsection (a)(1) intends to cover the kind of false document, such as an invoice, that either might be presented directly to the Government by a contractor⁶ or might be forwarded without change from a prime contractor to the Government for payment after the prime contractor receives the invoice from a subcontractor.⁷ Subsection (a)(2) covers the kind of false document that a subcontractor might submit for payment to a prime contractor that does not simply forward the false document to the Government without change. Rather, the prime contractor either pays the subcontractor using federal funds the contractor has already received or incorporates the subcontractor's false information into an invoice that the contractor submits to the Government for reimbursement. Sections 3729(a)(1) and (a)(2) thus cover both the situation in which a false claim is presented to the Government and the situation in which a false document is used by a subcontractor to induce a recipient of federal funds to pay the subcontractor. Such a reading explains why subsection (a)(1) contains a presentment clause while subsection (a)(2) does not, and it gives effect to the plain language of Sections 3729(a)(1) and (a)(2) without conflicting with Section 3729(c).

⁶ The contractor “knowingly presents” the false claim to the Government.

⁷ The subcontractor “causes [the false claim] to be presented” to the Government by the contractor.

2. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with Section 3729(c)'s inclusive definition of "claim"

Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) of the FCA would conflict with Section 3729(c)'s inclusive definition of "claim" that includes claims submitted to a "contractor, grantee, or other recipient" of federal funds. This Court has consistently followed the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citation omitted). Rather than focusing on a single section in isolation to interpret a statute, the Court should "adopt that sense of [the] words which best harmonizes with [the] context and promotes [the] policy and objectives of [the] legislature." *Id.* at 221 n.10 (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)); *see also Richards v. United States*, 369 U.S. 1, 11 (1962) ("[W]e must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy.") (internal quotation marks and alteration omitted); 2A Singer, *Statutes and Statutory Construction* § 46.05, at 103 (noting need to construe each section in connection with other sections). Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would undermine the 1986 addition of Section 3729(c)'s inclusive definition of "claim" to the FCA. Such an interpretation is contrary to the plain language of Sections 3729(a)(2) and (a)(3) and would conflict with the FCA's overall objective to apply broadly to frauds involving federal money or property, even when a claim

is presented to a “contractor, grantee, or other recipient” of federal funds. 31 U.S.C. § 3729(c).

C. The FCA’s Statutory History Is Consistent With The Lack Of A Presentment Requirement In Sections 3729(a)(2) And (a)(3)

The lack of a presentment requirement in the plain language of current Sections 3729(a)(2) and (a)(3) is consistent with prior versions of the FCA. Before Sections 3729(a)(1) and (a)(2) were broken out into separate sections in 1982, they were part of the same section. In relevant part, that section made any person liable

[1] 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, military, or naval service of the United States, any *claim upon or against the Government of the United States, or any department or officer thereof*, knowing *such claim* to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill, receipt, voucher”

31 U.S.C. § 231 (1976) (emphases and enumeration added). The first reference to “claim” is unambiguously modified immediately thereafter by the words “upon or against the Government of the United States, or any department or officer thereof.” Subsequent references to such claim clearly refer back to a claim upon or against the United States or one of its departments, *i.e.*, a claim for federal funds.⁸ As in

⁸ Petitioners argue for a far more unnatural reading that “such claim” refers to a claim that “would be presented or

the current version of Sections 3729(a)(1) and (a)(2), the explicit inclusion of a presentment requirement in the first clause of Section 231 makes the omission of a presentment requirement in the second clause significant. *See Barnhart*, 534 U.S. at 452.

Similarly, prior to the 1982 recodification, the FCA's conspiracy provision did not contain a presentment requirement. The conspiracy clause of Section 231 made any person liable "who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." 31 U.S.C. § 231 (1976). Accordingly, the precursor of neither current Section 3729(a)(2) nor Section 3729(a)(3) contained a presentment requirement even before the 1982 recodification of the FCA.

caused to be presented to the United States." Pet. Br. 21 (quoting *Totten*, 380 F.3d at 500). In arguing against the *Totten* dissent's straightforward reading, the majority stated that it failed "to see how the dissent's reading is any different from our own: a claim could not be upon or against the Government unless it was presented to the Government." 380 F.3d at 500 n.7. The majority opinion thus appears to take the position that the phrase "present or cause to be presented" in Section 231 does the same work as the phrase "upon or against the Government," even though both phrases appear in the same clause. That explanation, however, is inconsistent with the *Totten* majority's own invocation of the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.* at 499 (quoting *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 489 n.13).

II. CONSTRUING THE FALSE CLAIMS ACT NOT TO CONTAIN A PRESENTMENT REQUIREMENT ENSURES THAT VAST AMOUNTS OF FRAUD REMAIN WITHIN THE SCOPE OF THE ACT

A. Congress Intended The 1986 Amendments To Overrule Cases That Limited The FCA's Scope Of Coverage And To Approve Broad Judicial Interpretations Of The FCA

The legislative history of the 1986 amendments complements the plain language and structure of the statute and confirms that Congress amended the FCA in 1986 to ensure that presentment of a claim to the federal Government is not required to trigger liability under the FCA. Congress specifically intended for Section 3729(c) to overrule by statute such decisions as *United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938), and *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). See S. Rep. No. 99-345, at 21-22 (1986) (discussing addition of Section 3729(c)), reprinted in 1986 U.S.C.C.A.N. 5266.⁹ Reading a presentment requirement into the FCA would conflict with Congress's goal of abrogating those decisions.

In *Salzman*, the court dismissed the plaintiff's FCA suit against a defendant that had allegedly presented false claims to the Red Cross. Although the

⁹ The Senate Report's section-by-section analysis of the provision now codified at 31 U.S.C. § 3729(c) refers to "subsection (d)" due to Congress's intervening elimination of an unrelated, proposed subsection (b) dealing with consequential damages. See S. Rep. No. 99-345, at 20, 21. Subsection (d) of the version of the bill analyzed in the Senate Report became the subsection that was ultimately enacted as Section 3729(c).

Red Cross received “a donation from the government and administered it for the purpose specified,” the court concluded that the complaint did not state a cause of action under the FCA because the Red Cross was not part of the Government and the false claims had therefore not been presented to a department of the Government. *See* 41 F. Supp. at 197. The Senate Judiciary Committee, which had principal responsibility for the bill that became the 1986 amendments, cited *Salzman* with disfavor as an example of cases in which courts found the FCA to be inapplicable. It explained that “[s]ome courts have concluded that once the United States has made the grant to the State, local government unit, or other institution, it substantially relinquishes all control over the disposition of the money or commodities.” S. Rep. No. 99-345, at 21. The Committee then noted that “the judicial determination may follow that a fraud against the grantee does not constitute a fraud against the Government of the United States with the result that the False Claims Act is inapplicable.” *Id.* In summarizing its reasons for adding Section 3729(c) to the FCA, the Committee clearly and unambiguously indicated its intention to overrule such “cases which have 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.” *Id.* at 22. Consequently, under the amended FCA, the allegedly fraudulent claims presented to the Red Cross in *Salzman* would have been actionable, even though the claims were not presented to the Government.

Section 3729(c) also was intended to overrule *Azzarelli*. *See id.* *Azzarelli* involved false claims submitted to a highway project in Illinois for which the federal Government provided 70 percent of the

funds, through the State of Illinois. *See* 647 F.2d at 758. The federal Government's contribution of highway funds to the State of Illinois was a fixed sum each year. The federal Government was thus insulated from any risk of loss resulting from overcharges related to the submission of false claims to the highway project. *See id.* at 761. Because the federal contribution was a fixed sum and the federal Government consequently did not suffer any financial injury, the *Azzarelli* court affirmed the district court's dismissal of the FCA complaint. *See id.* at 762.

Congress's intention to overrule *Azzarelli*, therefore, disproves petitioners' suggestion that Congress intended for Section 3729(c) to apply only when the payment of a false claim made to a party other than the Government would ultimately result in a loss to the Government. *See* Pet. Br. 28. *Azzarelli* presented a situation in which no loss could have resulted to the federal Government due to the fixed nature of the Government's contribution to the State of Illinois. By adding Section 3729(c) to overrule *Azzarelli*, Congress clearly intended for the FCA to apply even when no loss would result to the federal Government. Accordingly, it makes no difference under Section 3729(c) whether the Government has already provided the funds to the "contractor, grantee, or other recipient" or whether it "will reimburse such contractor, grantee, or other recipient" at some later date. *See supra* pp. 6-10.

The Sixth Circuit's interpretation of the FCA not only is consistent with Congress's intent to overrule cases like *Salzman* and *Azzarelli* but also gives effect to legislative approval of the decision in *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976). The Senate Report

approvingly discussed *Davis* in some detail. See S. Rep. No. 99-345, at 22. In *Davis*, the plaintiff alleged that the defendants submitted numerous false claims to California’s MediCal program, which was approximately 50 percent funded by the federal Government. See 411 F. Supp. at 1145. The precise question presented in *Davis* was “whether *claims presented to a state agency* in accord with the Federal Medicaid program . . . are claims against the United States government within the meaning of the Federal False Claims Act.” *Id.* at 1144 (emphasis added). The court rejected the defendants’ argument “that the mere fact that federal funds are advanced for a state program is insufficient to warrant a characterization of fraudulent claims under that program as claims against the United States government.” *Id.* at 1146. Instead, *Davis* concluded that “claims filed under the state program should be considered claims against the United States within the meaning of the False Claims Act.” *Id.* at 1147.

In its approving discussion of *Davis*, the Senate Report focused on the fact that *Davis* held that “claims submitted to MediCal” came within the scope of the FCA. S. Rep. No. 99-345, at 22. Moreover, the Report concluded its discussion of *Davis* by indicating that “[s]imilar reasoning should apply in other circumstances where claims are submitted to State, local, or private programs funded in part by the United States.” *Id.* Consistent with the plain language of Section 3729(c), the legislative history of the 1986 amendments discusses both the cases that Congress sought to overrule and those it approved. That explanatory history demonstrates Congress’s intent for Section 3729(c) to ensure that narrow judicial

readings of the FCA would not unduly limit its scope.¹⁰

The opening and concluding sentences of the Senate Report’s “section-by-section analysis” of subsection (c) perhaps best explain congressional intent in adding Section 3729(c): (1) “New subsection ([c]) clarifies that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of Federal funds,” *id.* at 21 (opening sentence); and (2) “Thus, the Committee intends the new subsection ([c]) to overrule *Azzarelli* and similar cases which have 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,” *id.* at 22 (concluding sentence). Upholding the Sixth Circuit’s decision would promote the clear purpose of Section 3729(c) as articulated by Congress, whereas a contrary decision would substantially limit the FCA’s ability to reach fraud perpetrated on recipients of federal funds.

¹⁰ In *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff’d on other grounds*, 470 F.3d 1350 (11th Cir. 2006), the court dismissed an FCA case involving allegedly false claims submitted by the defendants to the Alabama Medicaid Agency. The court noted that 70 percent of the Alabama Medicaid Agency’s costs were borne by the United States. *See id.* at 1304. However, because the Alabama Medicaid Agency’s rules did not require the subsequent submission of the claim to the federal Government, the court embraced *Totten’s* logic and dismissed the complaint, “finding no basis in the FCA for a relator to pursue recovery on behalf of the United States for fraud of the kind allegedly perpetrated upon . . . the Alabama Medicaid Agency.” *Id.* at 1304, 1306. Such a result is inconsistent with Congress’s approval of *Davis*.

**B. Accepting Petitioners' Interpretation
Would Remove Vast Amounts Of Fraud
From The FCA's Reach**

**1. *The 1986 amendments ensure that the
FCA protects federal funds broadly
even when those funds are spent
through grants and contracts***

The correct interpretation of the FCA, set forth above, ensures that the Act continues to function as an effective tool for combating fraud involving federal funds. On the other hand, accepting petitioners' construction could result in vast amounts and categories of fraud involving federal funds falling outside the coverage of the protective umbrella provided by the FCA. Between this Court's 1943 decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and Congress's amendment of the FCA in 1986, federal spending in the form of grant payments alone increased from \$900 million to more than \$112 billion. Even measured as a percentage of total federal government outlays, grant spending increased tenfold from 1.2 percent in 1943 to 11.3 percent in 1986. See *Budget of the United States Government: Historical Tables Fiscal Year 2008*, Table 6.1 – Composition of Outlays: 1940-2012 (2007), available at <http://www.gpoaccess.gov/usbudget/fy08/hist.html>. Congress thus added Section 3729(c) to the FCA in 1986 against the backdrop of a dramatic shift in the deployment of federal funds from direct spending to spending through grantees and other recipients of federal funds.

Congress added Section 3729(c) in 1986 to ensure that, notwithstanding the changing nature of federal spending, federal funds would continue to be protected by the FCA by virtue of subsection (c)'s enlargement of the definition of "claim" to include

claims made to contractors, grantees, and other recipients of federal funds. The Senate Report explicitly identified the purpose of the 1986 amendments as “mak[ing] the statute a more useful tool against fraud in modern times.” S. Rep. No. 99-345, at 2. Petitioners and their *amici* attempt to portray Congress’s successful protection of federal funds through the FCA as a parade of horrors resulting in the potential applicability of the Act to “billions of dollars’ worth” of transactions. Chamber Br. 13; *see also* Pet. Br. 33-35. But providing broad protection of federal funds is exactly what Congress intended the FCA to do and is consistent with how this Court has directed that the FCA should be interpreted. *See United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Marcus*, 317 U.S. at 541-42 & n.5. Petitioners’ attempt to remove billions of dollars of federal expenditures from the FCA’s coverage cannot be squared with the clear language and purpose of the FCA.

Contrary to petitioners’ and their *amici*’s arguments, the FCA protects the federal Government and the public from the harm caused by fraud more broadly than when there is an “immediate financial detriment to the Federal Treasury.” WLF Br. 6; *see also* Pet. Br. 28 (emphasizing need for payment of false claim to result in loss to the United States). That argument is inconsistent with Congress’s explicit statement of its intent to overrule *Azzarelli*. *See* S. Rep. No. 99-345, at 22. And it cannot be reconciled with the Senate Report’s plain but powerful statement that “[t]he cost of fraud cannot always be measured in dollars and cents.” *Id.* at 3. The Senate Judiciary Committee’s example of how “fraud erodes public confidence in the Government’s ability to efficiently and effectively manage its programs” is particularly fitting in the context of the defective

generator sets built for the Navy destroyers in this case:

Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scen[a]rio exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security.

Id. Congress clearly intends for the FCA to protect the use of federal funds for their intended purpose, not just the formalistic transfer of those funds from the federal treasury to the contractors, grantees, and other recipients that are responsible for spending the money entrusted to them by the Government.

Even where the federal treasury does not suffer an immediate financial loss, the FCA acts as more than just “a purely punitive statute” as claimed by *amicus* Washington Legal Foundation. WLF Br. 26. It acts of course as the strong deterrent against fraud intended by Congress. *See* S. Rep. No. 99-345, at 4 (describing FCA as a “powerful tool in deterring fraud”); *see also* Chamber Br. 17 (recognizing powerful deterrent effect of FCA lawsuits).¹¹ Moreover,

¹¹ Contrary to the arguments of *amici* Chamber of Commerce, American Hospital Association, and American Health Care Association, private parties involved in federal projects do not “have every incentive to investigate and resolve claims of contract non-compliance.” Chamber Br. 18. Rather, prime contractors actually may have a disincentive to ferret out fraud in many circumstances. By remaining ignorant of their subcontractors’ deficient performance or substitution of lower quality parts, prime contractors can avoid any financial detriment to

the FCA's damages provision does not result in "a windfall" to the Government in such circumstances. WLF Br. 26. Rather, the damages that "the Government sustains," 31 U.S.C. § 3729(a), would be no different than damages in a product substitution case where a party contracts for a particular product but receives a lower quality product instead. The Government's damages would compensate it for the difference in the quality of the product it should have received compared to the product it did receive, enabling the Government to procure replacement products if necessary. *Amicus's* argument that Section 3729(a)'s damages provision requires presentment of a claim to the Government under the FCA is thus unavailing. *See* WLF Br. 24-25.

The federal Government spends more than \$900 billion a year through contracts and grants. *See* USASpending.gov, <http://www.usaspending.gov> (chart listing contracts and grants for fiscal year 2006 totaling \$905.8 billion). The FCA protects those funds from fraud by expansively defining "claim" to include any request or demand for those funds, even when the request is made to one of the contractors, grantees, or other recipients of that federal largesse rather than to the federal Government itself. The Sixth Circuit's accurate interpretation of the FCA protects the integrity of those expenditures. A contrary interpretation, however, would fail to give effect to Congress's 1986 amendments to the FCA in recognition of the changing landscape of federal spending, and it would potentially remove billions of dollars of federal funds from the FCA's coverage.

themselves, avoid liability under the FCA, and simultaneously avoid protracted disputes with their subcontractors to remedy the subcontractors' defective performance.

2. *The FCA's reach is limited to frauds involving federal funds*

Petitioners' concerns about the potentially boundless reach of the FCA do not provide a basis for reversing the Sixth Circuit's decision. Contrary to the specter raised by petitioners, the FCA would not "apply to *any* claim for payment submitted to *any* entity that receives federal funding." Pet. Br. 34. For liability to attach under Section 3729(c), some portion of the money requested by the false claimant from the contractor, grantee, or other recipient of federal funds must have been either provided by the federal Government or later reimbursed to the contractor, grantee, or other recipient by the federal Government. See 31 U.S.C. § 3729(c). It therefore remains an essential element of FCA liability to establish a nexus between some portion of the requested money or property and its federal source. That requirement imposes a practical limitation on the FCA's reach.

Moreover, the FCA's broad protection of federal funds is a product of the plain language of Section 3729(c). Congress ensured that the FCA would extend broadly to frauds involving federal funds by imposing liability for claims submitted to recipients of federal funds as long as "*any* portion" of the funds requested or demanded comes from the federal Government. *Id.* (emphasis added). Congress could have chosen to impose a more restrictive requirement, such as requiring that at least half (or even all) of the funds requested come from the federal Government, but it did not do so. Petitioners' discontent with the reach of the statute should thus be addressed to Congress rather than the Court.

Petitioners' purported concern that the Sixth Circuit's interpretation of the FCA will "vastly compli-

cate the task of trying FCA cases” (Pet. Br. 35) also is misplaced. Plaintiffs have the burden of establishing the federal origin of some portion of the money or property requested, and, to the extent they cannot do so, they will be unable to bring successful cases under the FCA. Petitioners’ suggestion that “discovery and trial in FCA actions will be immeasurably complicated by efforts to trace the origin of funds used by federal grantees” (*id.* at 35-36) is similarly unavailing. Such tracing efforts are routine in the federal Government’s myriad prosecutions for money laundering offenses, for example. *See* 18 U.S.C. § 1956(a)(1) (requiring proof that a prohibited financial transaction involve the proceeds of a specified unlawful activity); *id.* § 1957(a) (requiring proof of a “monetary transaction in criminally derived property”).

In interpreting prior versions of the FCA, this Court has previously explained that it is a remedial statute whose provisions should be construed broadly. In *Neifert-White*, this Court explained why “claim” should be given an expansive reading: “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.” 390 U.S. at 232. Since the Court decided *Neifert-White*, Congress has added Section 3729(c)’s expansive definition of the term “claim,” which further emphasizes Congress’s intent for the FCA to apply broadly and to overrule decisions that interpreted it narrowly. Accordingly, consistent with the plain language of the FCA, its structure, legislative history, and purpose, as well as the Court’s own admonition against reading the FCA restrictively, the Court should not

read a presentment requirement into Sections 3729(a)(2) and (a)(3).

CONCLUSION

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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