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 THACKER,
Respondents.

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

BRIEF OF SENATOR CHARLES E. GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Senator Charles E. Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, *codified as amended* at 31 U.S.C. §§ 3729-3733. The 1986 Amendments substantially revised the original False Claims Act as enacted in 1863 and amended from time to time in the intervening decades. A primary focus of the Amendments was to provide the government and *qui tam* plaintiffs with relief from assorted court decisions which limited the reach of the False Claims Act.

Since enactment of the 1986 Amendments, civil cases brought under the False Claims Act have resulted in the return of more than $20 billion to the United States Treasury.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Data supporting this assertion appear on the Department of Justice's Public Affairs website at www.usdoj.gov/opa/pr/2007/November/07_civ_873.html (reporting recoveries through September 30, 2007).

Senator Grassley's views on the intent of Congress with respect to the modern False Claims Act are authoritative not just because he was the principal sponsor of the 1986 Amendments but also because he remains active in Congress defending the original intent of the legislation.

As the primary author of the 1986 amendments and a vigilant observer of their application, Senator Grassley has a strong interest in sharing his intentions in drafting the 1986 amendments, and particularly in asserting that Congress did not intend that 31 U.S.C. §§ 3729(a)(2)-(3) require proof that a claim was submitted to an employee or agency of the United States.

In short, Petitioners ask this Court to construe the statute in a manner diametrically opposed to the clearly-expressed intent of the legislator who proposed it. Senator Grassley, therefore, has directed the preparation of this brief.

SUMMARY OF ARGUMENT

Senator Grassley believes that the Sixth Circuit correctly concluded that 31 U.S.C. §§ 3729(a)(2) and (3) do not require presentment of false claims to a federal agency or employee, and that the result urged by Petitioners and their *amici* is not consistent with the plain language of the False Claims Act. These points will be amplified by the Solicitor General and others.

Senator Grassley's purpose in participating in this proceeding is to ensure that, if the Court finds it necessary to consider the intent of Congress in construing subsections (a)(2) and (a)(3), it understands that the result urged by Petitioners is *assuredly* not what Congress had in mind.

If the Court finds ambiguity in the words of the statute, then the intent of Congress controls, absent inconsistencies—and there are none here—between the statutory language and the legislative history.

There arguably is room for discussion regarding whether the language of 31 U.S.C. § 3729(a) requires presentment of a false claim to a federal actor when subcontractors or grantees are the initial recipient of a claim for payment. While disagreeing with the analysis, Senator Grassley has introduced new legislation to clarify that § 3729(a) does not require presentment to a government employee.[3]

Notwithstanding that effort, subsections 3729(a)(2) and (a)(3), which are at issue in this appeal, are not ambiguous and do not include language which reasonably can be construed to limit the scope of the Act to those claims which are submitted to a federal employee or agent rather than a federal grantee or contractor.

Indeed, now-Chief Justice Roberts, directly contradicting Petitioners' position, has written

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[3] False Claims Corrections Act of 2007, S.2041, 110th Cong. This legislation was introduced specifically to remedy judicial interpretations of the 1986 Amendments which are inconsistent with Congress's intent. Bipartisan legislation also has been introduced in the House of Representatives. False Claims Act Corrections Act of 2007, H.R. 4854, 110th Cong.

that subsection (a)(2) "has no express requirement of presentment to an officer or employee of the United States Government."[4]

But even if these provisions *were* ambiguous, this Court's precedents establish that where ambiguity is found, legislative history is worth considering, and here, the legislative history is bell-clear against Petitioners:[5] Congress did not intend there to be a presentment requirement under subsections 3729(a)(2) or (a)(3).

Given the absence of any reference to presentment in the plain language of these provisions, buttressed by the undisputable legislative history related to them, it is not surprising that the Sixth Circuit got it right. The claims which form the predicate for False Claims Act liability are those made by the subcontractors to the shipbuilders, rather than the claims from

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[4] *United States ex rel. Totten v. Bombardier Corp.*, 363 U.S.App. D.C. 180, 380 F.3d 488, 496 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005).

[5] *See generally Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991) ("we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous").

the shipbuilders to the Navy.

Arguments to the contrary by Petitioners and their *amici* not only exalt form over substance, they turn a blind eye toward the essence of the 1986 Amendments: ensuring that the False Claims Act reaches *"all* fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S. Rep. No. 99-435 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (emphasis supplied).

The Sixth Circuit properly recognized this, quoting the legislative history at length and finding that Congress *accomplished* its goal of "overrul[ing] restrictive judicial interpretations of the FCA and increas[ing] the reach of the statute" by adding subsection 31 U.S.C. § 3729(c) to the Act. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 615 (6th Cir. 2006).

Notwithstanding the lack of statutory language or legislative history supporting their position, Petitioners' request that this Court adopt the presentment requirement imposed by *Totten* is

inappropriate. The legislative history of the 1986 Amendments is clear and convincing. While Petitioners and their *amici* claim the contrary, the express legislative history does not support their position that presentment is a precondition for liability under (a)(2) and (a)(3). Instead, the legislative history supports the opposite.

Because the Sixth Circuit's decision accurately states how Congress intended these provisions to be applied, its opinion should be affirmed.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRESENTMENT REQUIREMENT UNDER 31 U.S.C. § 3729(a)(2) AND (a)(3)

The Sixth Circuit carefully and correctly held that Sections 3729(a)(2) and (a)(3) make no mention of the presenting of a claim, and that there is no implied requirement of presentment to a government agency or employee. The court looked to the plain language of the statute and also examined the legislative history underlying

the 1986 Amendments. Senator Grassley agrees with the Sixth Circuit's analysis.

Petitioners do not dispute that the many millions of military procurement dollars they received came from the taxpayers of this Nation, appropriated by Congress to buy a major Navy weapons system—the Arleigh-Burke class Guided Missile Destroyers.[6] To have the case taken from the Jury because the claims from the shipbuilders to the United States were not admitted into evidence[7] is not consistent with 31 U.S.C. § 3729(c), and is certainly not consistent with what Congress intended in 1986.

Section 3729(c) states:

> 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

[6] *Sanders*, 471 F.3d at 612.

[7] *Id*. at 613.

> contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

This statute, added in 1986 to cover precisely situations such as this, establishes—and was intended to establish—that if the Act was violated by Petitioners, the violation was complete when the subcontractor submitted a false claim to the shipbuilder. If the shipbuilder failed to present a subcontractor's false claim to the United States (something which could result as easily from bookkeeping error as a prime contractor's payment system) but still paid the subcontractor with government money, the subcontractor has *used a false document to get a false claim paid*, as prohibited by subsection (a)(2).[8]

[8] As the former Chairman and current Ranking Member of the Senate Finance Committee, and as a senior member of the Senate Judiciary Committee, Senator Grassley has devoted his Senate career to vigorous oversight of the Executive Branch. This includes countless investigations into federal spending by the Department of Defense, including investigations in the 1980s which uncovered the purchase of $700 toilet seats by that Department. Senator Grassley knows well that *all* money used to pay for the Navy's destroyer fleet came from the taxpayers of the United States, and that the efforts of those taxpayers through their elected representatives to combat fraud, waste, and abuse of

Allegedly-false claims such as those of Petitioners, where a false claim by a subcontractor is made to a prime contractor, have been held to violate the False Claims Act. In fact, this was a judicially-accepted interpretation of the Act long before the 1986 Amendments.[9]

In *Murray & Sorenson, Inc. v. United States,* 207 F.2d 119, 123 (1st Cir. 1953), the court held that a subcontractor was liable for submission of false claims to a prime contractor: "The fact that the claims . . . were not presented directly to the Government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute."[10] In another case

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that money deserve great respect.

[9] Judge Garland perceptively noted in his dissenting opinion in *Totten* that the Senate Judiciary Committee Report clearly indicates that in enacting the 1986 Amendments, Congress was *clarifying* that claims submitted by subcontractors or others to prime contractors or grantees were always covered under the Act, rather than constituting a new class of liability. *Totten*, 380 F.3d at 508.

[10] The *Murray* panel did not address whether the prime contractor submitted the subcontractor's bill to a contracting officer, underscoring that what mattered was the submission of a false claim by the subcontractor to the prime contractor.

involving subcontractors, the Fifth Circuit expressed "no doubt that the False Claims Act covers such an indirect mulcting of the Government." *United States v. Lagerbush*, 361 F.2d 449, 449-50 (3d Cir. 1966) (*per curiam*) (government "paid or reimbursed" all of the prime contractor's costs).

After the 1986 Amendments, courts had no problem concluding that claims to subcontractors or grantees could violate the Act without presentment to a federal actor. The court in *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F. Supp. 919, 920-21 (N.D. Ala. 1989) relied on these pre-1986 cases to squarely reject the proposition that the case had to be dismissed "because the relator did not allege that the Government actually paid or approved a false or fraudulent claim."[11]

District judges reached the same result in,

[11] These cases dispense with the argument of Petitioners' *amicus* Continental Common, Inc., whose singular point is that Congress did not, in 1986, change the language of subsection (a)(2). Congress believed that it had already ensured that subcontractors were liable under the Act for submitting false claims to prime contractors, and merely sought through enactment of subsection (c) to drive the point home.

at least, *United States ex rel. Costa v. Baker & Taylor*, 1998 U.S. Dist. LEXIS 23509 (N.D. Cal. 1998) (relying on plain language of § 3729(c)); *United States v. Nazon*,1993 U.S. Dist. LEXIS 15642 (N.D.Ill. 1993) (applying § 3729(c)); *Wilkins ex. rel. United States v. State of Ohio*, 885 F.Supp. 1055 (S.D. Ohio 1995), *aff'd* 1998 U.S. App. LEXIS 10537 (6th Cir. Ohio May 20, 1998) (§ 3729(c) is "broad enough to include any funds provided directly or indirectly by the United States, regardless of whether the grant was in a fixed amount or open-ended").

These holdings are consistent with what this Court said in *United States ex rel. Marcus v. Hess*: "Government money is as truly expended whether by checks drawn against the Treasury to the ultimate recipient or by grants in aid." 317 U.S. 537, 544-45 (1943).

It is remarkable that, fully 65 years after the Court decided *Marcus*, Petitioners ask it to decide that a party accused of cheating the Navy can avoid liability by adopting the pretense that

"Congress, after proclaiming its purpose to reach fraud regardless of presentment, then subverted that purpose using words that do not mention presentment at all." *Totten*, 383 F.3d at 508 (Garland, J., dissenting).

Presentment to a federal agency or employee is simply not a precondition to liability under subsections (a)(2) and (a)(3). The statute makes no mention of such presentment, and Congress did not intend that it be required. The Courts held, long before the 1986 amendments, that subcontractors are subject to False Claims Act liability regardless of the intricacies of the prime contractor's paperwork. Besides *Totten*—and that decision was wrong, as we explain below— Petitioners and their *amici* have no credible evidence that it did.

II. *TOTTEN'S* HOLDING THAT PRESENTMENT TO A FEDERAL ACTOR IS REQUIRED FOR A FALSE CLAIM TO BE ACTIONABLE IS INCONSISTENT WITH THE INTENT OF CONGRESS

Petitioners argue that the *Totten* majority decision should control this Court's interpretation of (a)(2) and (a)(3). For that to be true, either the statute must be clear on its face (which, as *Totten* itself acknowledges, it is not; 380 F.3d at 496) or the legislative history must be consistent with Petitioners' arguments.

No other court of appeals has agreed with the *Totten* majority. Nor was the Sixth Circuit the first to conclude that presentment is not required under § 3729(a)(2). In *United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853, 856 (7th Cir. 2006), the panel held that (a)(2) requires only that "the defendant made a statement in order to receive money from the government."

Senator Grassley and Congress intended precisely the result the Sixth Circuit reached here. The purpose of the 1986 Amendments was "to

enhance the Government's ability to recover losses sustained as a result of fraud[.]" S. Rep. 99-345 at 1. "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.* at 5275. "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." *Id.*

In 2005, when the now-Chief Justice appeared before the Senate Judiciary Committee for confirmation to this Court, Senator Grassley questioned him closely regarding the unwillingness to accede to the intent of Congress which the *Totten* opinion evidences. The Chief Justice responded that "the statutory language [in § 3729(a)(1)] that said the claim had to be presented to an officer or employee presented too high a hurdle for us to get over in looking at the

legislative history."[12]

Senator Grassley respectfully contests that analysis of the statute. As Judge Garland made clear in his dissenting opinion in *Totten*,[13] and as the Sixth Circuit majority in the case before the Court detailed at length,[14] the 1986 Amendments include a section which was written to support liability in *Totten*.

31 U.S.C. § 3729(c) fully and squarely identifies the shipbuilders at issue in this case: contractors who are reimbursed with federal dollars for the money which was requested by the defendant subcontractors.[15]

As Judge Garland wrote in *Totten*:

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[12] *Senate Committee on the Judiciary: S. Hrg. 109-158*, Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, September 14, 2005.

[13] 380 F.3d at 510.

[14] *Sanders*, 471 F.3d at 614-15.

[15] Petitioners' suggestion that subsection (a)(2) *unambiguously* (albeit *silently)* includes a presentment requirement because it includes the phrase "paid or approved by the Government" simply ignores the language of subsection (c). Congress plainly intended that provision to place grantees in the position of the government for presentment purposes.

> As discussed in *United States ex rel. Yesudian v. Howard University*, the conclusion that liability under § 3729(a)(1) requires that a false claim be presented to the government rather than a grantee is difficult to reconcile with § 3729(c), and perhaps impossible to reconcile with the Act's legislative history. 332 U.S. App. D.C. 56, 153 F.3d 731, 737-38 (D.C. Cir. 1998)[.] Nonetheless, subsection (a)(1)'s language renders this reading 'possible,' *Yesudian*, 153 F.3d at 738, and perhaps would not alone warrant a dissent. As discussed below, however, what is a plausible reading of subsection (a)(1)—given its 'presents, or causes to be presented' language—is not plausible for subsection (a)(2), which contains no such language.
>
> Moreover, even if subsection (a)(1) were read as imposing a presentment requirement, reading subsection (a)(2) as not also imposing such a requirement goes a long way toward reconciling § 3729(a) as a whole with § 3729(c) and the legislative history that indicates Congress intended to reach false claims made to grantees.

380 F.3d at 503.

The Senate Judiciary Committee Report which accompanied the 1986 Amendments establishes that in drafting subsection (c), Congress expressly intended to extend False Claims Act liability to claims submitted to recipients of federal funds, including contractors (like the shipbuilders here) and grantees. Congress sought to craft a legislative solution to what the *Totten* majority deduced was "the decision that the Senate Judiciary Committee most clearly intended to overrule"[16]–that of the Seventh Circuit in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that False Claims Act liability could lie only where there was "a claim presented 'upon or against the Government of the United States[.]'"[17]

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[16] 380 F.3d at 495.

[17] The *Totten* majority concluded that the Committee's disagreement with *Azzarelli* was not really a presentment issue because it involved yearly grant funds, and that there was thus no tension between its holding and Congress's desire to overrule. 380 F.3d at 495. While Judge Garland's dissent implies that the majority's distinction parsed too finely, 380 F.3d at 513, the point is moot because the Committee Report also makes clear its intention to repudiate the decision in *United States ex rel. Meyer Salzman v. Salant & Salant, Inc.*, 41 F.Supp. 196 (S.D.N.Y. 1938), which held

The Committee report, moreover, noted approvingly *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1149 (S.D. Cal. 1976) ("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"). S. Rep. No. 99-345 at 21.[18]

The Committee Report clearly outlines Congress's purpose: "[T]o enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *Id.* at 1. Congress wrote § 3729(c) for the expressed purpose of overturning cases which "have limited the ability of the United States to reach fraud perpetrated by federal grantees, contractors or other recipients of Federal funds." *Id.* At 22.

Petitioners' request that this court apply

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that a company which submitted false claims to the Red Cross as the Government's grantee was immune from False Claims Act liability. S. Rep. 99-345 at 21.

[18] The pernicious effect of *Totten* is best demonstrated by the poorly-reasoned district court decision 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), that false billings to state Medicaid programs were not within the ambit of the False Claims Act.

Totten's flawed presentment analysis to this case is inappropriate. The language of the Act does not compel it. Application of the *Totten* presentment requirement to subsections 3729(a)(2) and (a)(3) is sharply contradicted by Congress's intent as expressed in the legislative history. The court in *Totten* got it wrong, and it would be contrary to the will of the legislative branch if this Court were now to extend to subsections 3729(a)(2) and (a)(3) a requirement that a claim be presented directly to a government employee.

III. PETITIONERS AND THEIR *AMICI* TAKE SUBSTANTIAL LIBERTIES IN THEIR PURPORTED ANALYSIS OF CONGRESSIONAL INTENT

Petitioners studiously ignore the legislative history clearly set out in S.R. No. 99-345. Petitioners assert that

> Congress's intention in enacting [subsection (a)(2)] could not have been clearer: The phrase 'paid or approved *by the Government*' unambiguously establishes that Congress intended to impose liability where a false claim has been submitted to the federal government for payment or

> approval. Indeed, for a claim to be 'paid or approved by the Government,' it first must be submitted to the government.

Br. Pet. at 13 (emphasis in original). This claim is an obvious attempt to avoid inquiry into the *actual* intent of Congress, as made clear in the legislative history, while suggesting that Congress's intention "could not have been clearer" to reach the result Petitioner advocates.

It is not surprising that Petitioners provide no credible support for their view of the legislative purpose of Congress, for they are patently wrong about what was intended. Congress wanted to reach precisely the sort of "indirect mulcting of the Government" which is alleged to have occurred in this case, and went out of its way to generate both statutory language (31 U.S.C. § 3729(c)) and legislative history (S. Rep. 99–345) to do so.

Petitioners seem to suggest that the Sixth Circuit's decision exposes to liability, for example, the company which sells a shipbuilder its Post-It notes, simply because the shipbuilder is a government contractor. This fanciful prediction is

neither what the Sixth Circuit held nor what Congress intended. Rather, that court held that liability under subsection (a)(2) depends upon proof "that the subcontractor's use of the false statement resulted in the payment of the claim by the government." *Sanders*, 471 F.3d at 621. The court also relied on case law holding that the falsity of a claim, to be actionable, must be material, *i.e.*, capable of influencing the government's decision to pay. *Id.* at 623 n.7.

In this case, there was plenty of testimony that the ship-builders paid for Petitioners' generator sets with money obtained from the Navy. Br. Resp. at 3-4. Petitioners' parade of horribles is an analytically-untested smokescreen intended to influence with hyperbolic policy claims the Court's analysis of the plain language of §§ 3729(a)(2)–(3). While Petitioners are free to approach Congress with their concerns, their appeals to emotion are misplaced in this forum.

Petitioners' *amici* U.S. Chamber of Commerce, *et al.* suggest that Congress must *sub*

silentio have intended to imply a presentment requirement in (a)(2) and (3) because the claim has to be paid or approved and, according to the Chamber, "[q]uite simply, the Government cannot pay or approve a claim that the Government never saw." Br. *Amicus* at 25.

This argument ignores subsection (c), which Congress intended to put a prime contractor or grantee in the position of the United States for purposes of the submission of a claim. The Senate Report states that Congress specifically intended that subsection (c) cover situations where, after "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 and requires only that the grantee shall make periodic reports of its disbursements and activities." S. Rep. No. 99-345 at 21.

Congress did not intend to require re-presentment of claims against money of which "it substantially relinquishes all control over the

disposition." The argument that Congress intended to require presentment as a precondition to liability under (a)(2) or (a)(3) is simply not supported by the legislative record.

Petitioners' arguments are not supported by the legislative history of the 1986 Amendments. The Court should not credit their claims that Congress *intended* the result they urge. Congress did not, and no one is in a better position to attest thereto than Senator Grassley.

CONCLUSION

This Court should not set the False Claims Act back a century by insisting that, despite the clear and unambiguous language of §§ 3729(a)(2) and (a)(3) and the clear intent of Congress, the Act has application only where there is presentment to the United States, rather than to a contractor or grantee.

This Court should not adopt the flawed *Totten* analysis. To imply such a requirement where Congress not only did not write it, but made

clear that it intended otherwise, is contrary to both the principles of statutory interpretation set forth in the Court's precedents and the expressed will of the United States Congress.

The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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