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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS ROGER L. SANDERS' AND ROGER L. THACKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioners Allison Engine Company, Inc., General Motors Corporation, General Tool Company and Southern Ohio Fabricators, Inc. There is no true conflict among the circuits nor any conflict with this Court's precedent. There was also no error below, as the Sixth Circuit's well-reasoned decision follows the plain text of the False Claims Act ("FCA"), honors the legislative history of the 1986 FCA amendments, and is fully consistent with past decisions of this Court and those from other circuits. All these sources make clear that the FCA must be broadly construed to reach all fraudulent efforts to obtain taxpayer funds. This reach explicitly extends to Government subcontractors even if their false claims for public monies are not presented or represented directly to an employee of the United States. The United States appeared as *amicus curiae* in the court below to reaffirm this as the accepted view of the FCA. So this case does not raise any new or unsettled questions. It merely confirms that fraud practiced by the Government's subcontractors is forbidden by the FCA.

STATEMENT OF THE CASE

The Petitioners in this case are four Government subcontractors who were paid hundreds of millions of

taxpayer dollars to build generator sets for the United States Navy. In exchange for such large public outlays, these four subcontractors promised by contract to build the generator sets ("Gen-Sets") to exacting Navy specifications. They did not do so.

For many years the Gen-Sets were made with defective materials, by unqualified personnel and without undergoing a variety of mandatory quality-control inspections. Yet these subcontractors falsely certified that the Gen-Sets had actually been built as the Navy demanded, and claimed payment from the Navy's prime-contractor shipyards as though the Gen-Sets were properly made. It is undisputed that every dime of the millions of dollars received by the defendant subcontractors came from the United States Treasury.

The question presented on appeal is simply whether the FCA reaches the subcontractor Petitioners' misconduct even though the Navy's prime-contractor shipyards never re-presented Petitioners' fraudulent claims for payment directly to the Navy. This question was long-ago answered in the affirmative. As the decision below explained at length, Congress made abundantly clear in amending the FCA in 1986 that fraudulent claims made by the Government's subcontractors to its prime contractors are (and must be) actionable in order to responsibly protect taxpayer funds. Pet. App. at 1a-25a.

Protecting the public fisc from the fraudulent claims by the subcontractor Petitioners in this case is

exactly what the FCA was designed to accomplish. Relators Roger Sanders and Roger Thacker (former employees of General Tool Company) brought this case in 1995 because General Tool Company and its co-defendants had for years violated important contract quality provisions in making the Navy's Gen-Sets. These Gen-Sets are mission-critical hardware, supplying all electrical power for the Navy's new fleet of guided-missile destroyers, the *Arleigh Burke* class.

Production of the Navy's destroyers began in the late 1980s by two prime-contractor shipyards. The shipyards subcontracted with Allison Engine Company, Inc. (a division of General Motors Corporation through 1993) to provide the Gen-Sets. In turn, General Motors/Allison hired General Tool Company to assemble the Gen-Sets with the General Motors/Allison jet engine as the power source. Southern Ohio Fabricators, Inc. ("SOFCO") was hired to build the metal Gen-Set bases and enclosures. The Navy's detailed specifications for Gen-Set construction and quality were incorporated into all of the contracts awarded to these defendants.

Petitioners regularly violated the Navy's specifications. From the many Gen-Set defects uncovered during discovery, Relators focused on three at trial: (1) Unqualified SOFCO welders worked on every one of the first 67 Gen-Sets; (2) General Motors/Allison and General Tool Company worked together to install defective Gen-Set gearboxes in the first 52 units; and (3) General Tool Company failed to conduct a quality Final Inspection for almost half of the first 67 Gen-Sets.

These Gen-Set quality defects violated the Navy's specifications, which Petitioners promised by contract to follow for all aspects of their Gen-Set work.

Payment on these contracts occurred nonetheless, with every nickel coming from United States taxpayers. The direct and orderly flow of money from public coffers to these defendants happened in typical fashion on a Government procurement project of this type. Over the course of building destroyers that would eventually cost the taxpayers $1 billion each, the Navy made regular payments to the shipyards after various production milestones were reached. In turn, the shipyards paid invoices submitted by General Motors/Allison based on milestones reached in making the Gen-Sets; General Motors/Allison paid invoices submitted by General Tool Company based on milestones reached in the Gen-Set assembly process; and General Tool Company paid invoices submitted by SOFCO based on milestones reached in making Gen-Set bases and enclosures.

As a result of this milestone payment plan, Petitioners collectively submitted thousands of claims for payment for their work on the first 67 Gen-Sets, and all such claims were paid despite the hidden defects in the Gen-Sets. Boxes of these claims for payment were admitted into evidence. These were all false claims for taxpayer funds.

In addition to their false claims for payment, General Motors/Allison and SOFCO explicitly and falsely certified that their Gen-Set work conformed to

all of the Navy's specifications. Every Gen-Set delivered to the shipyards was accompanied by a Certificate of Conformance signed by General Motors/ Allison declaring that the Gen-Set as a whole had been manufactured according to all contract terms. For its part, SOFCO signed and submitted hundreds of Certificates of Conformance attesting that every piece of each Gen-Set base and enclosure met the Navy's specifications. All of these express certifications for the first 67 Gen-Sets were admitted into evidence. All were false, again because the concealed defects meant that the Gen-Sets did not comply with all contract terms or the Navy's specifications.

Petitioners knew, deliberately ignored or recklessly disregarded that the Gen-Sets did not meet the contract terms and Navy specifications.[1] On several occasions, including before Gen-Set work even began, these defendants all learned that some – and often all – SOFCO welders were not military standard qualified to work on this Navy project. Those welders continued working anyway, and without stopping to obtain proper qualifications.

[1] The FCA reaches only "knowing" conduct, which the FCA defines 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).

Over this same period, General Motors/Allison encountered hazardous defects with the Gen-Set gearboxes in violation of their contracts (including continuous oil leaks, a recognized fire hazard on a combat vessel). But those serious problems were not resolved and the gearboxes were not brought into contract compliance. The gearbox defects were patched and concealed without being fixed, the Gen-Sets were shipped, and the defects reemerged after the units were installed in the destroyers. And compounding matters, General Tool Company often omitted entirely the critical Final Inspection of the completed Gen-Sets required by the Navy. To hide this failure, General Tool Company falsified the documentation to make it appear as though the Final Inspection had actually been accomplished.

Relators alleged that by all this misconduct, the defendants violated three distinct sections of the FCA:

> (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 . . .

31 U.S.C. § 3729.

Application of these provisions to the subcontractor Petitioners' conduct in this case was hardly novel. It has long been the law that Government contractors who violate the terms of their contracts, yet make claims for payment under those contracts despite knowing that all contract requirements have not been met, are liable under the FCA. *E.g. United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943); *United States v. Bornstein*, 423 U.S. 303, 313 (1976); *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998). *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).

Thus, in this case, the false claims are the false milestone invoices from each defendant, the false records are the false Certificates of Conformance from General Motors/Allison and SOFCO, and the conspiracy involved General Motors/Allison's and General

Tool Company's collective efforts to conceal gearbox defects. The falsity of the invoices and records, as well as the sufficiency of the defendants' FCA "knowledge," is presumed on appeal.

Going beyond the Navy's prime contractors to pursue these subcontractor defendants for their fraudulent conduct is consistent with this Court's venerable and expressed recognition that Congress meant the FCA to reach beyond the Government's prime contractors to all fraudulent efforts to obtain taxpayer funds: "These provisions [Sections (a)(1), (a)(2) and (a)(3)], considered together, indicate a purpose to reach 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.

More than three decades after *Marcus*, this Court confirmed that the focus of FCA actions alleging fraudulent conduct by subcontractors should be on the subcontractors, not the prime contractors: "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." *Bornstein*, 423 U.S. at 313.

As mandated by this precedent, the Relators in this case focused on the conduct of the fraudfeasor Petitioner subcontractors rather than the blameless shipyard prime contractors. The district court found

this focus to be legally deficient. On motion for a directed verdict at the close of Relators' evidence, the district court accepted as true the following: Petitioners knowingly submitted thousands of false claims for payment for their Gen-Set work, knowingly made and used hundreds of false Certificates of Conformance to get false claims paid, knowingly conspired to get false claims paid, and were paid hundreds of millions of taxpayer dollars as a result of their fraudulent conduct. In other words, the district court accepted as true that these Petitioners did not make the Navy's Gen-Sets as the Navy wanted and as each defendant promised, and concealed the Gen-Set defects with false claims and false statements in order to be paid taxpayer money nonetheless.

For the district court, such evidence of fraudulent taking of public money did not trigger the protections of the FCA. The district court found, based solely on reasoning borrowed from *dicta* in the majority opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), that the Petitioners' false claims could never be actionable under any section of the FCA without proof that the prime-contractor shipyards "presented" (or, more accurately, "re-presented") those false claims directly to the Navy. Pet. App. at 47a-56a. Since Relators had not focused their case on the conduct of the non-defendant prime-contractor shipyards, and thus had not evidenced the details of the ministerial process by which the shipyards regularly and indisputably drew

down public funds for payment to the Petitioner subcontractors, the district court dismissed the case.

The Sixth Circuit reversed. While agreeing with the district court (and *Totten*) that "presentment" of false claims to a Government official is required to establish liability under FCA Section (a)(1), the majority held that no such proof is required for liability under Sections (a)(2) or (a)(3). Pet. App. at 4a-25a. The majority then systematically demonstrated that its holding was supported by the plain text of the FCA, the legislative history to the 1986 FCA amendments and the decided weight of authority, and was consistent with the holding (although not the *dicta*) of the *Totten* decision.

The majority first observed that "presentment" simply does not appear in the plain text of Sections (a)(2) or (a)(3), nor was there any apparent reason to add such language. Pet. App. at 7a. On the contrary, Congress added a definition of "claim" in 1986 to clarify that false claims are actionable under the FCA even if they are not "presented" to an employee of the United States, so long as those false claims are paid with taxpayer funds, as they were here. Pet. App. at 6a-8a, *quoting* 31 U.S.C. § 3729(c). To emphasize: It is undisputed that the funds used to pay the Petitioner subcontractors never belonged to the shipyards. The funds used to pay the Petitioner subcontractors were always taxpayer dollars, with the shipyards merely the conduit.

Next, the Sixth Circuit found that its decision to refrain from adding words to the FCA was fully supported by the 1986 legislative history. At that time, both houses of Congress expressed the identical intent for the newly-strengthened FCA and the freshly added definition of "claim." The Senate: "[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." Pet. App. at 8a, *citing* S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275. And the House: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." Pet. App. at 8a-9a, *citing* H.R. Rep. No. 99-660, at 21 (1986).

Finally, the Sixth Circuit also held that its refusal to restrictively interpret the FCA was supported by the weight of authority. Starting many decades ago, this Court "has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly." Pet. App. at 15a, *citing United States v. Neifert-White Co.,* 390 U.S. 228, 232 (1968); *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541-42 (1943). Further, the Sixth Circuit found that this Court's decisions show that one of the primary purposes of the FCA "is to 'protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.'"

Pet. App. 15a, *quoting Neifert-White,* 390 U.S. at 233 (*quoting Rainwater v. United States,* 356 U.S. 590, 592 (1958)). Thus, the majority concluded, "the FCA covers all claims to government money, even if the claimant does not have a direct connection to the government." Pet. App. at 15a.[2]

Following the Sixth Circuit's decision, Petitioners sought rehearing and rehearing *en banc*, both of which were denied. Pet. App. at 62a-63. This Petition followed.

[2] The dissenting opinion below would have affirmed the district court based solely upon the *dicta* logic in the *Totten* majority opinion. In so arguing, the dissent did not address the definition of "claim," the 1986 FCA legislative history, this Court's broad construction of the FCA, or the fact that *Totten* was not a case involving Section (a)(2) of the FCA and, moreover, never even mentions Section (a)(3) of the FCA.

ARGUMENT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE SIXTH CIRCUIT'S INTERPRETATION OF FCA SECTIONS (a)(2) AND (a)(3), AND THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENT.

A. Only One Other Circuit Court Has Addressed The "Presentment" Issue, And Its Ultimate Holding Is Fully Consistent With The Decision Below.

Petitioners argue that *certiorari* should be granted primarily because, according to Petitioners, there is an extensive circuit split on the "presentment" issue. Petitioners claim that as many as six other circuits have now scrutinized the matter (including the Sixth Circuit in this case), with four deciding (in "conflict" with the decision below) that "presentment" actually is impliedly part of Sections (a)(2) and (a)(3). Pet. at 11-18. This is simply incorrect. Beyond the Sixth Circuit in this case, only the District of Columbia Circuit has squarely addressed the "presentment" issue in its divided *Totten* decision. Proof of this is most starkly obvious from the decision below: Neither the majority nor the dissent found or acknowledged any circuit decision other than *Totten* that had previously examined or discussed "presentment."

In fact, the majority below paused to address and dispense with the inaccuracy of this exact assertion. Petitioners argued below, as they do again, that many

other circuits had both reached the "presentment" issue and decided that it was required in all sections of the FCA. After carefully reviewing and discussing each such case cited by the Petitioners, the majority quickly found and concluded – without disagreement from the dissent – that *Totten* was the only circuit court case preceding this one dealing with "presentment." Pet. App. at 18a-21a. The Sixth Circuit summarized: "At most, the cases cited by the defendants imply that the FCA contains a presentment requirement. None of the cases, however, address the precise issue before this court, and we find them unpersuasive in the present case." Pet. App. at 21a. Though Petitioners press the same discredited argument to this Court with some (but not all) different citations, the conclusion is the same. The circuit conflict claimed by Petitioners does not exist.

A cursory review of the four non-*Totten* "conflicting" cases cited by Petitioners reveals that they have nothing whatsoever to do with "presentment." Rather, they each involved a much more fundamental issue: Unlike this case, the relators could not identify any false claims at all, so the courts never inquired (nor was there any reason to inquire) about where or to whom the unidentified false claims may or may not have been "presented." With no false claims, the cases were either dismissed at the pleading stage (*United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir. 2006) and *United States ex rel. Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005)), on summary judgment (*United States ex rel.*

Quinn v. Omnicare, Inc., 382 F.3d 432 (3d Cir. 2004)), or by directed verdict (*United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 683 (10th Cir. 1998)).

In short, these alleged "conflicting" cases had nothing to do with the "presentment" issue squarely addressed in this case. None were cited by the Sixth Circuit as having addressed "presentment." None of the three cases decided after *Totten* (*Joshi*, *Corsello* and *Quinn*) even mentions *Totten* and its prior analysis of "presentment." And the cited case decided before *Totten* (*Aakhus*) was – even though Petitioners say it concerned the "presentment" issue – not cited by either the majority or dissent in *Totten*. Through out-of-context quotes from their "conflicting" cases, the Petitioners are trying to manufacture a dire circuit split where none in fact exists.

Even the supposed conflict with *Totten* is illusory, as the court below also correctly recognized. Unlike this case, *Totten* only involved claims under Section (a)(1), and throughout the six years of the *Totten* litigation at the trial court level, no party raised even the possibility that any other FCA section could have applied. *Totten*, 380 F.3d at 497-498. Only on appeal in *Totten* was Section (a)(2) first addressed, and then only as *dicta* in the debate regarding Section (a)(1) – with the *Totten* majority and dissent disagreeing on whether a literal "presentment" requirement in Section (a)(1) could be reconciled with the text of all parts of the FCA, including Section (a)(2) and the definition of "claim." The Sixth Circuit succinctly described the situation:

> In holding that § 3729(a)(2) contains a presentment requirement, the *Totten* court answers a question it was not asked. The primary issue before the court was whether claims submitted to Amtrak, a federal grantee receiving a portion of its funds from the government, constituted presenting a claim "to the Government." 380 F.3d at 490. There is no discussion of what it means to "present" a claim, and it is unclear from the opinion whether any evidence was put forth, as it was in this case, that the money used to pay the defendants came from the government (rather than from non-government funds). *See id.* As the majority states, none of the parties argued that subsection (a)(2) provided separate grounds for relief during six years of litigation, and the majority would not have even considered the subsection (a)(2) argument had the dissent not raised it *sua sponte*. *Id.* at 497. The subsection (a)(2) analysis seems to be almost an afterthought – not so much a *ruling* on the meaning of subsection (a)(2) as a *response* to the arguments made by the dissent on an issue not raised by the parties. *Id.* at 498. In making this response, the majority seems to have misread the plain language of the statute and its legislative history.

Pet. App. at 14a-15a.

As precedential value, then, *Totten*'s only holding is that Section (a)(1) requires "presentment" of a false claim directly to a Government employee to trigger

liability. Since the Sixth Circuit in this case reached the same conclusion, there is no true conflict with *Totten*. Instead, there exists only discord between the actual holding in this case regarding Section (a)(2) and some reasoning (though not a ruling) from *Totten*. And, regarding Section (a)(3), it is undisputed that neither *Totten* nor any other circuit court beyond the Sixth Circuit in this case has ever reached the issue of whether FCA Section (a)(3) requires "presentment."[3]

[3] Petitioners cite a recent Seventh Circuit case as one that both reached the "presentment" issue and agreed with the Sixth Circuit's decision in this case. Pet. at 16, *citing United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006). We agree that *Crews* is consistent with the decision below, but *Crews* did not analyze the "presentment" issue at all, or cite any authority (such as this case or *Totten*). The Seventh Circuit affirmed dismissal of FCA claims involving Medicaid fraud because the Relator did not show how the Medicaid claims were false. *Crews*, 460 F.3d at 857. In so holding, the Seventh Circuit decided to "ignore" the Section (a)(1) allegations because Medicaid claims are never presented to the United States – they are "filed with and administered by" the various States (*Crews*, 460 F.3d at 856 n.1). *Crews* then reached the merits of the Section (a)(2) claims notwithstanding a lack of "presentment" of Medicaid claims to the United States. This is precisely what Congress wanted: "A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act[.]" S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (citation omitted). This statement of Congressional intent is irreconcilable with the Petitioners' assertion that "presentment" is required in Section (a)(2), which certainly explains why the Petition completely ignores the 1986 FCA legislative history.

In sum, the primary reason supporting Petitioners request for *certiorari* is based on misreadings of several circuit court decisions. There is no "extensive disagreement among the circuits" (Pet. at 17) regarding the "presentment" issue that even potentially warrants this Court's attention. Only two circuits have analyzed the topic, both agreed that Section (a)(1) requires "presentment," and only one rendered an actual binding decision on Sections (a)(2) and (a)(3) – holding that "presentment" should not be added where Congress had not done so.

B. The Decision Below Does Not Conflict With This Court's Precedent.

Petitioners' fall-back argument is that the Sixth Circuit's refusal to re-write the FCA to add a "presentment" requirement to Sections (a)(2) and (a)(3) amounts to a conflict with this Court's decision in a criminal case, *Tanner v. United States*, 483 U.S. 107 (1987). Petitioners did not so argue to the district court, to the panel below or to the entire Sixth Circuit in seeking *en banc* review. Nor did the *Totten* decision find *Tanner* applicable to the "presentment" issue in the slightest. Normally one would consider a circuit decision conflicting with this Court's precedent the primary reason advanced for seeking *certiorari*, rather than a secondary matter as it is in the Petition. But Petitioners are right not to rely too heavily on *Tanner*, for it is patently inapplicable and does not at all conflict with the decision below.

Tanner was not a civil FCA case, much less one that involved the proper reach of the FCA or the "presentment" issue. *Tanner* was a criminal case involving the proper reach of the Federal criminal conspiracy statute, 18 U.S.C. § 371. Petitioners claim that this Court's narrow construction of the Federal criminal conspiracy statute in *Tanner* mandates a similar narrow construction of the civil FCA in this case because there is "essentially identical" language at issue in *Tanner* as here. Pet. at 20.

It is generally ill-advised, under long-recognized cannons of statutory interpretation, to rigidly apply the mandates or structure of one Congressional statute to another, *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 813 (2003), or even to ascribe the same meaning to similar terms used in different statutes. *Environmental Def. v. Duke Energy Corp.*, 127 U.S. 1423, 1432 (2007). This is particularly true where Congress has stated policies and goals for one statute that are not the same as those for another statute, notwithstanding similar language. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 174-175 (1983) (O'Connor, J., dissenting). Such is the case here.

In *Tanner*, 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 federal financial assistance 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. Without support in the plain text or legislative history, this Court refused to adopt such a broad interpretation of a criminal statute.

The exact evidence of Congressional intent missing in *Tanner* is present regarding the civil FCA.[4]

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[4] The decisional framework in *Tanner* also cannot be comfortably applied in the civil FCA context because *Tanner* involved a criminal statute. As the *Tanner* Court itself repeatedly recognized, doubts about the reach of a criminal statute are construed in favor of narrow construction precisely because it concerns criminal penalties: " '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). In addition: "A criminal statute, after if not before it is judicially construed, should have a discernable meaning." *Tanner*, 465 U.S. at 132, *citing Dixson*, 465 U.S. at 512 (dissenting opinion).

In two powerful and undeniable ways, Congress expressed its intent that the FCA broadly reach fraudulent conduct aimed at recipients of federal dollars – rather than be limited to conduct aimed directly against the United States – so long as taxpayer funds are involved. First, of course, is the definition of "claim," ignored by Petitioners, which defines actionable "claims" to include those that are not presented directly to a Government employee:

> *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). In this case, the United States provided all the monies that were requested by the subcontractor Petitioners from the prime contractor shipyards.

Second, the legislative history of the 1986 FCA amendments is generous with statements that Congress meant the FCA to be broadly construed, not "stingy" as it was in *Tanner*, and specifically meant the FCA to apply to the conduct of subcontractors such as the Petitioners. In addition to the passages quoted above from the Senate and House that false

claims include those made to parties "other than the Government" (S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275; H.R. Rep. No. 99-660, at 21 (1986)), Congress also meant with the 1986 FCA amendments to broadly 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, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287, *citing United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981).

Petitioners in this case perpetrated fraud on the federal Government's prime contractor shipyards who paid Petitioners with taxpayer funds. Petitioners thereby perpetrated fraud on America's taxpayers. Congress identified this precise behavior as covered by the FCA.

Petitioners' reliance on *Tanner* as "conflicting" authority is therefore misplaced. Congress stated its intention to achieve with the FCA expansive protection for fraud practiced on the public fisc, whether direct or indirect. Congress did not state such an intention regarding the criminal conspiracy statute at issue in *Tanner*. The Sixth Circuit below correctly rejected the Petitioners' effort to achieve through the courts a limitation on the FCA that Congress determined to eliminate, and nothing in this Court's *Tanner* decision "conflicts" with or impacts that result in the least.

II. THE SIXTH CIRCUIT'S DECISION ADHERES TO THE PLAIN TEXT OF THE FALSE CLAIMS ACT, THE 1986 FCA LEGISLATIVE HISTORY AND THIS COURT'S PRECEDENT.

A. The Sixth Circuit Correctly Found That "Presentment" Is Not A Requirement Of Section (a)(2) Or Section (a)(3).

With no true circuit split or any "conflicting" opinion from this Court, Petitioners spend pages addressing the merits of the legal issue and repeating the arguments rejected in the court below. Pet. at 21-25. Though there is no apparent reason for rearguing the merits, since Petitioners' simple disagreement with the lower court decision is insufficient justification for this Court to grant *certiorari*, we briefly respond.

Curiously, Petitioners assert that the Sixth Circuit's opinion "disregards the plain language and legislative origins" of the FCA (Pet. at 21). Yet it is the Petitioners themselves who have done exactly that. The plain language of Section (a)(2) and Section (a)(3) is clear enough. "Presentment" does not appear in either.

Beyond avoiding the plain language, Petitioners nowhere cite or discuss the legislative history to the 1986 FCA amendments. And while the FCA's definition of "claim" is quoted in a footnote, Petitioners devote not a single word to reconciling their view that "presentment" of false claims to a Government official

is always required to trigger FCA liability even though the definition of "claim" says the opposite.

The decision below does not suffer these infirmities. It is based on a logical, straightforward application of classic statutory construction decisional framework, whereby the court examined the text of the FCA, its legislative history and interpretive caselaw. The result is entirely harmonious – the text, legislative history and caselaw all confirm that the FCA was meant to reach the conduct in this case. Pet. App. at 7a-18a.

In arguing for error below, Petitioners address only select portions of the Sixth Circuit's decision and reasoning, and thus do not acknowledge or resolve inconsistencies. Perhaps most notable, as they failed to do below, Petitioners still do not explain how the FCA definition of "claim" would have any meaning if "presentment" is engrafted into Sections (a)(2) and (a)(3). Petitioners note the "well-established cannon" of statutory construction against rendering any part of a statute superfluous (Pet. at 23, *citing Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)), yet Petitioners do precisely that. If all claims must be "presented" to a Government employee in order to trigger FCA liability, then the definition of "claim" – which, again, specifically says that actionable claims include those not presented to a Government employee – would become meaningless. By ignoring the contrary definition of "claim," Petitioners bypass this discord altogether.

Petitioners also never acknowledge that their goal (adding "presentment" in two places where Congress did not put it) is presumptively faulty. As the court below observed at length:

> The Supreme Court has consistently counseled against attributing the same meaning to different language in the same statute. *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (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.") (internal quotation marks omitted); *Russello v. United States,* 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("We refrain from concluding [ ] that the differing language in two subsections has the same meaning in each.").

Pet. App. at 10a-12a (internal footnote omitted). Congress included "presentment" in Section (a)(1), but did not include it in Sections (a)(2) or (a)(3). Petitioners refuse to even consider that this decision is a strong, even dispositive indication of Congressional intent.

Focusing instead solely on the words of Section (a)(2), Petitioners say that "presentment" must be required in Section (a)(2) for two reasons. First, Section (a)(2) addresses false claims that are paid or approved "by the Government." Petitioners say that this phrase cannot merely mean that actionable false

claims must be paid with Government funds, because one part of the definition of "claim" – one part that Petitioners do not ignore – already requires that actionable false claims must be paid with Government funds. Pet. at 22. Thus, Petitioners say that "by the Government" must have another meaning, otherwise it would be superfluous. Pet. 22-23. The hidden meaning, for Petitioners, is that "by the Government" means that actionable false claims must be "presented" to the Government.

Petitioners' text-only focus fails because they have misread the definition of "claim." The definition of "claim" is a non-exhaustive list of the types of claims that may be actionable under the act, and merely "includes" claims paid with Government funds. 31 U.S.C. § 3729(c) (" 'claim' includes . . . ") The phrase "by the Government" in Section (a)(2) therefore is needed for the very reason that the definition of "claim" is not as effective as Petitioners suggest. "Claim" is not by definition limited to Government funds, so "by the Government" accomplishes that limitation in Section (a)(2). Thus is the FCA harmoniously construed.

Second, Petitioners say that a "presentment" requirement is needed in Section (a)(2) or else the explicit "presentment" requirement in Section (a)(1) would be "effectively nullifie[d.]" Pet. at 23. The reason, according to Petitioners, is that a relator unable to bring Section (a)(1) allegations where false claims were not "presented" directly to a Government employee would merely re-label the false claims as

"false records or statements" and bring the allegations under Section (a)(2). Pet. at 23-24. This illogically conflates the definition of "claim" with the definition of "record or statement."

The FCA definition of "claim" includes (but is not limited to) *any* request or demand, not merely those in the form of a "record or statement." And "claims" are certainly not always "records or statements." For instance, a claims process may be established to provide for regularly-scheduled payments that do not involve a separate implementing "record or statement" each time (e.g. monthly installment payments transferred electronically). These routine claims, if false, would be actionable under Section (a)(1) though not under Section (a)(2).

Moreover, distinctly different behavior is prohibited by Section (a)(1) and Section (a)(2), which makes these provisions obviously complimentary, and importantly so. Since "claims" are not necessarily "records or statements," the damage to the United States relating to submission of a false claim may differ from damage flowing from a false statement, and the number of civil penalties will vary also. *E.g. Bornstein*, 423 U.S. at 313. Thus, even if there is some overlap between Sections (a)(1) and (a)(2), they address different conduct and provide the United States with different and more comprehensive tools to fully redress fraudulent conduct.

In the end, while Petitioners' individual arguments to add "presentment" language to Sections

(a)(2) and (a)(3) each fail for a variety of reasons, the overriding theme and fundamental flaw is this: Petitioners are interpreting the FCA disjointedly to achieve a specific end, rather than harmoniously to give effect to all aspects of the statute and Congressional intent. Petitioners are thus proceeding exactly contrary to this Court's mandates: "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

Furthermore, a party "should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 133, *citing Brown v. Gardner,* 513 U.S. 115 (1994). While Petitioners clearly hope to manufacture a hole in the coverage of the FCA to allow subcontractors greater opportunity to pillage the public fisc, neither the language nor the legislative history nor the context of the FCA supports such effort.

Petitioners have carefully avoided placing their views of Section (a)(2) and (a)(3) in the context of the entire FCA statutory scheme. Thus have Petitioners ignored, rather than harmonized, parts of the FCA (as well as the legislative history) that conflict with adding "presentment" to Sections (a)(2) and (a)(3). The goal should be to give the FCA "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). The court below did give a sensible and harmonious construction to the FCA that is indisputably consistent with clear and stated legislative purpose. There was no error.

B. The Sixth Circuit's Decision Does Not Raise New Issues But Instead Simply Reaffirms The Accepted Broad View Of The FCA.

Petitioners close their remarks with alarm that the Sixth Circuit's decision "will have profound consequences for the thousands of businesses that regularly perform subcontracting work on federally funded contracts." Pet. at 25. No it will not. The Sixth Circuit's decision, like the FCA itself, will only have consequences for the extreme minority of the Government's subcontractors – those who seek to obtain taxpayer funds through knowing fraudulent conduct.

Having failed to address the full text and structure of the FCA, and having completely ignored Congressional intent, Petitioners cast the Sixth Circuit's opinion as an outlier, one that "exposes subcontractors on federally funded contracts to onerous FCA liability in circumstances where Congress never intended the FCA to apply." Pet. at 21. Again,

the Sixth Circuit could not logically do anything to expose subcontractors to FCA liability. Subcontractors run afoul of the FCA by their own conduct. And the circumstances of this case involve the exact type of behavior that Congress explicitly intended the FCA to reach, and in force. After all, one of the stated reasons for the 1986 FCA amendments was to overturn judicial decisions 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, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287 (citation omitted).

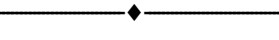
It is impossible to reconcile Petitioners' narrow interpretation of the FCA with the broad view of the FCA required by Congress and noted by this Court. So Petitioners pretend that the 1986 FCA legislative history doesn't even exist. Petitioners also refuse to address the broad view of this remedial statute consistently affirmed by this Court.

At one point, Petitioners suggest that fraud perpetrated by Government subcontractors on Government prime contractors should be remedied as a private matter between private parties under state law, since the subcontractors do not have direct contractual relations with the Government. Pet. at 26 (citations omitted). But this Court held almost 65 years ago that contract privity is irrelevant, since the FCA reaches all those who fraudulently obtain Government funds "without regard to whether that person had direct contractual relations with the

government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943).

Both Congress and this Court have thus stated plainly and repeatedly that fraud practiced against taxpayer money by Government subcontractors is not a private matter between private parties involving private funds. Petitioners' fraud in this case was indisputably practiced against taxpayer funds. The destroyers do not belong and have never belonged to the shipyards. The defective Gen-Sets do not belong and have never belonged to the shipyards. And it was not the shipyards' money that was misappropriated by Petitioners. The destroyers and defective Gen-Sets are the property of the Navy, and the money fraudulently obtained by Petitioners was taxpayer funds.

The simple truth is that the FCA was and always had been written and intended to protect the public fisc from fraudulent conduct throughout the procurement process, whether the fraudfeasors proceed directly or indirectly against taxpayer dollars. It has thus always been clear that the FCA reaches the conduct of Government subcontractors, such as the Petitioners in this case, who seek taxpayer funds from Government prime contractors despite knowingly failing to comply with critical contractual requirements for combat vessels. The Sixth Circuit merely restated this well-known rule. There is no need for this Court to do so also.



CONCLUSION

The Petition for Writ of Certiorari should be denied.

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