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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 3729(a)(2) and 3729(a)(3) of the False Claims Act impose liability upon anyone who uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government" or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(2), (a)(3). In direct conflict with the decisions of four other circuits, the Sixth Circuit held that Sections 3729(a)(2) and 3729(a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds." The question presented is whether a plaintiff asserting a cause of action under Section 3729(a)(2) or Section 3729(a)(3) of the False Claims Act is required to prove that a false claim was submitted to the federal government, or whether it is sufficient to establish that the claim was paid using federal funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Pursuant to this Court's Rule 29.6, undersigned counsel state that Rolls-Royce North America Holdings, Inc., and Rolls-Royce Group plc are the parent companies of Rolls-Royce Corporation, f/n/a Allison Engine Company, Inc., and that no other publicly held company owns 10% or more of its stock. General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., have no parent companies and no publicly held company owns 10% or more of their stock.

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Petitioners Allison Engine Company, Inc., General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

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 The opinion of the United States District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569.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

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

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

§ 3729. False claims

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

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

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

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

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

STATEMENT

This case provides the Court with the opportunity to resolve a direct and acknowledged circuit split regarding the fundamental requirements for recovering under the False Claims Act ("FCA")—an issue of exceptional importance to the thousands of businesses that regularly perform work on government contracts. In the decision below, the Sixth Circuit explicitly broke ranks with other circuits' well-reasoned interpretations of the FCA's plain language, and exposed businesses in the defense, build-

ing, and professional services industries (among many others) to vastly expanded FCA liability that Congress never intended to impose.

In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit held that a plaintiff pursuing a cause of action under Section 3729(a)(2) of the FCA, 31 U.S.C. § 3729(a)(2), must prove that a false claim for payment was actually submitted to the federal government for payment or approval. In the decision below, the Sixth Circuit expressly "disagree[d] with the *Totten* court's interpretation of the FCA" (Pet. App. 10a), and concluded that a plaintiff asserting a cause of action under Section 3729(a)(2), or a derivative conspiracy cause of action under Section 3729(a)(3), need not establish that the claim was ever presented to the government. *Id.* at 23a. According to the Sixth Circuit, it is sufficient for purposes of Sections 3729(a)(2) and (a)(3) that a "false claim[ ] made to [a] part[y] other than the government . . . will be paid with government funds." *Id.* at 9a. These squarely conflicting decisions deepened the lower courts' already widespread disagreement regarding the existence of a "presentment" requirement in Sections 3729(a)(2) and (a)(3). *Compare, e.g.*, *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) ("To establish a claim under (a)(2), a person must demonstrate that . . . a 'claim' was presented to the government by the defendant, or the defendant 'caused' a third party to submit the 'claim'"), *with United States ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 856 & n.1 (7th Cir. 2006) (holding that Section 3729(a)(2) does not require submission of a false claim to the federal government).

This Court's review is warranted to resolve the direct and irreconcilable circuit split exacerbated by the decision below, to provide government contractors with authoritative guidance regarding their potential FCA liability, and to restore the reasonable textual limitations that Congress established on the FCA's scope.

1. The FCA was enacted in 1863 in response to the extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. As amended, the statute provides the federal government with a cause of action against anyone who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" (31 U.S.C. § 3729(a)(1)), or who "knowingly makes [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government" (*id.* § 3729(a)(2)). The statute also provides a derivative conspiracy cause of action against persons who "conspire[ ] to defraud the Government by getting a false or fraudulent claim allowed or paid" (*id.* § 3729(a)(3)), which applies to persons who have conspired to commit the fraudulent conduct proscribed by Sections 3729(a)(1) and (a)(2). *See, e.g., United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004) (dismissing a relator's conspiracy claim under Section 3729(a)(3) because he "ha[d] not pled actionable claims under sections 3729(a)(1)-(2)").

An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." 31 U.S.C. § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed

under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the suit. *Id.* § 3730(b)(4).

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

2. Petitioners Allison Engine Company, Inc., General Tool Company, and Southern Ohio Fabricators, Inc., served as three of the hundreds of subcontractors responsible for a portion of the construction of the U.S. Navy's Arleigh Burke-class Guided Missile Destroyers. Pet. App. 2a. The two private shipyards that were prime contractors on the project subcontracted construction of the ships' generator sets to Allison Engine Company (then a subdivision of General Motors Corporation), which subcontracted part of its responsibilities to General Tool Company, which in turn subcontracted a portion of its work to Southern Ohio Fabricators. *Id.*

Respondents, former employees of General Tool Company, initiated this suit under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA, alleging that petitioners defrauded the federal government by submitting claims for payment under their subcon-

tracts with the knowledge that their work did not conform to contract specifications. Pet. App. 3a. The United States declined to intervene in the suit. *Id.*[1]

3. After respondents had presented their case to a jury, the United States District Court for the Southern District of Ohio granted petitioners' motion for judgment as a matter of law because respondents failed to introduce evidence that any claim for payment was ever submitted to the federal government for payment or approval. Pet. App. 60a. Respondents established that Southern Ohio Fabricators had submitted claims to General Tool, that General Tool had submitted claims to Allison Engine, and that Allison Engine had submitted claims to the two prime contractors. There was no evidence, however, that petitioners' claims for payment had been presented to the federal government, either by petitioners themselves or by the prime contractors. *Id.* at 59a.

Finding "the detailed opinion" in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), to be "persuasive," the district court held that "presentment" of the allegedly false claims to the government was an element of the FCA causes of action that respondents were asserting under Sections 3729(a)(1), (a)(2), and (a)(3). Pet. App. 56a. In the absence of any evidence of presentment, the court concluded that respondents' claims failed as a matter of law. *Id.* at 60a.

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[1] Respondents also brought claims under the Truth in Negotiations Act, 10 U.S.C. § 2306a. The Sixth Circuit affirmed the district court's grant of summary judgment to petitioners on those claims (Pet. App. 33a), and they are not at issue in this petition.

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

The Sixth Circuit premised this holding on its reading of the statutory language of Sections 3729(a)(1) through (a)(3), and its conclusion that "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government." Pet. App. 7a. The panel majority accused the *Totten* court of "hav[ing] misread the plain language of the statute," and found unpersuasive the D.C. Circuit's holding that the language "paid or approved by the Government" in Section 3729(a)(2) requires the submission of a claim to the federal government for payment or approval. *Id.* at 15a. According to the panel majority, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever it is "paid with government funds." *Id.* at 8a.

The Sixth Circuit also rejected the *Totten* court's conclusion that the absence of a presentment requirement in Section 3729(a)(2) "would make the presentment requirement in subsection (a)(1) 'largely meaningless.'" Pet. App. 12a (quoting *Totten*, 380

F.3d at 501). In response to the D.C. Circuit's observation that a presentment requirement is necessary in Section 3729(a)(2) to prevent litigants from circumventing the presentment requirement in Section 3729(a)(1), the panel majority asserted that "[S]ection (a)(2) contains its own more burdensome requirement" not found in Section (a)(1)—*i.e.*, that "the claim must have actually been paid." *Id.*

Having concluded that the "*Totten* court erred in reading a presentment requirement into all subsections of the" FCA, Pet. App. 23a, and that submission of a claim to the government is not an element of the causes of action under Sections 3729(a)(2) and (a)(3), the Sixth Circuit reversed the judgment as a matter of law in favor of petitioners. Respondents' claims under Sections 3729(a)(2) and (a)(3) should reach a jury, the Sixth Circuit held, because "[d]uring trial, [respondents] put forth evidence that all of the money paid to [petitioners] came from the United States government." *Id.* at 24a.

Judge Batchelder dissented, and would have held that presentment is an element of the causes of action under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA. Pet. App. 33a. Embracing the D.C. Circuit's reasoning in *Totten*, Judge Batchelder emphasized that the plain language of the FCA distinguishes between allegations that a defendant defrauded the federal government—which can support FCA liability—and allegations that a defendant defrauded a federal grantee—which cannot. *Id.* at 34a-35a. "Payment of a claim 'by the government'" under Section 3729(a)(2), Judge Batchelder reasoned, "presupposes that the claim has been presented to the government as a request for that payment." *Id.* at 34a. Disagreeing with the panel majority's assertion that any claim paid with federal funds can be

deemed "paid . . . by the government," Judge Batchelder responded that the "term 'by the Government' is not the same as 'with government funds'" because the "former connotes action," while the "latter mere association." *Id.* She also emphasized that the panel majority's effort to prevent evasion of Section 3729(a)(1)'s presentment requirement was unavailing because the only authority that the majority cited to support the proposition that a "claim must have actually been paid" to give rise to Section 3729(a)(2) liability actually stood for the contrary proposition that payment is not required. *Id.* at 36a.

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

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an already extensive circuit split regarding the existence of a "presentment" requirement in Sections 3729(a)(2) and (a)(3) of the FCA. It also conflicts with this Court's interpretation of an indistinguishable fraud statute and misconstrues the plain language of the FCA, thereby expanding the statute well beyond the limits imposed by Congress. For all of these reasons, this Court's review is warranted.

The Sixth Circuit's holding that FCA liability can attach whenever "the claim will be paid with government funds" (Pet. App. 9a) is directly and explicitly at odds with *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), where the D.C. Circuit held that a claim must be "'paid or approved *by the Government*'" itself—rather than by a recipient of federal funding—to give rise to FCA

liability. *Id.* at 498 (quoting 31 U.S.C. § 3729(a)(2) (emphasis in original)). The Third, Eighth, and Eleventh Circuits agree with the D.C. Circuit that presentment of a false claim to the federal government is a prerequisite to liability under Sections 3729(a)(2) and (a)(3). The Seventh Circuit, on the other hand, has endorsed the Sixth Circuit's position that submission of a claim to a private entity that receives federal funds is sufficient to trigger FCA liability. Only this Court can authoritatively resolve this sharply divisive and frequently recurring issue.

The Sixth Circuit's conclusion that fraud directed at any federally funded private entity can give rise to FCA liability is also flatly inconsistent with this Court's holding in *Tanner v. United States*, 483 U.S. 107 (1987), that a conspiracy to defraud a federal grantee does not constitute a "'conspir[acy] . . . to defraud the United States.'" *Id.* at 128 (quoting 18 U.S.C. § 371). Only where a defendant "conspired to cause [the federal grantee] to make misrepresentations to the [government]," the *Tanner* Court explained, has there been a conspiracy to defraud the United States. *Id.* at 132. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) apply to fraud directed at a federally funded contractor is utterly at odds with *Tanner*'s reasoning.

The Sixth Circuit's statutory analysis is also deeply flawed on its own terms. Sections 3729(a)(2) and (a)(3) apply to persons who "get a false or fraudulent claim paid or approved by the Government" (31 U.S.C. § 3729(a)(2)), or who "conspire[ ] to defraud the Government" (*id.* § 3729(a)(3)). The Sixth Circuit effectively substituted the words "federally funded private entity" for the "Government" in each of these provisions. As the D.C. Circuit recognized in *Totten*, and Judge Batchelder reiterated in

her dissent, however, "get[ting] a false claim paid or approved by [a federal grantee] is *not* . . . 'get[ting] a false or fraudulent claim paid or approved by the Government.'" 380 F.3d at 498 (quoting 31 U.S.C. § 3729(a)(2)) (emphasis added); *see also* Pet. App. 34a (Batchelder, J., dissenting).

The staggering implications of the Sixth Circuit's decision amplify the need for this Court's review. The Sixth Circuit's expansive reading of Sections 3729(a)(2) and (a)(3) extends the FCA to claims submitted to any private entity that receives federal funding and that uses a portion of that funding to pay a claim—thereby displacing state common-law fraud causes of action designed to resolve disputes between private parties, in favor of the FCA's onerous civil penalty and treble-damages provisions designed to remedy "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). The consequences of this decision will be most dramatic for subcontractors on government projects, who—at least in the Sixth and Seventh Circuits—are now confronted with potentially crippling FCA liability whenever they submit claims for payment to a federally funded prime contractor or higher-tier subcontractor, whether or not a claim for payment is ever submitted to the government.

The petition for a writ of certiorari should be granted to resolve this pervasive lower-court conflict and to reject the Sixth Circuit's profoundly flawed reading of the FCA.

I. THE DECISION BELOW CONFLICTS WITH FOUR OTHER CIRCUITS' READINGS OF SECTIONS 3729(a)(2) AND (a)(3).

The direct conflict between the D.C. Circuit's decision in *Totten* and the Sixth Circuit's holding in the

decision below is part of an extensive division among the circuits regarding the existence of a presentment requirement in Sections 3729(a)(2) and (a)(3) of the FCA.

A. In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit, in an opinion authored by then-Judge Roberts, concluded that Section 3729(a)(2) of the FCA did not apply to the submission of allegedly false claims for payment to Amtrak. *Id.* at 498. The court held that Section 3729(a)(2) requires proof that a claim was actually presented to the government and that the relator's claim therefore failed because there was no evidence that Amtrak, which is not a government entity, ever passed the defendants' claims along to a government official. *Id.* at 502.

The D.C. Circuit identified a presentment requirement in the "paid or approved by the government" language of Section 3729(a)(2). 380 F.3d at 498. "Making false records or statements to get a false claim paid or approved by Amtrak," the court reasoned, "is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* (quoting 31 U.S.C. § 3729(a)(2)).[2]

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[2] The decision drew a lengthy dissent from Judge Garland. Like the Sixth Circuit, he read the "paid or approved by the government" language in Section 3729(a)(2) as requiring only a "false claim[ ] paid with government money," rather than a false claim actually submitted to the government for payment or approval. *Totten*, 380 F.3d at 505 (Garland, J., dissenting). Judge Garland premised much of his analysis on the FCA's definition of the term "claim," which includes:

The Sixth Circuit's conclusion in the decision below is directly at odds with the D.C. Circuit's holding in *Totten*. Asserting that "the *Totten* court erred in reading a presentment requirement into all subsections of the False Claims Act," the Sixth Circuit held that "subsections (a)(2) and (a)(3) do not require . . . a showing" that "a claim has been presented to the government." Pet. App. 23a. "Rather," the court continued, "a relator under these two subsections must show that government money was used to pay the false or fraudulent claim." *Id.* Because respondents introduced evidence at trial that the claims for payment that petitioners submitted to other subcontractors and to the project's prime contractors were "paid with government funds," the panel majority held that respondents were entitled to reach the jury on their claims under Sections 3729(a)(2) and (a)(3). *Id.* at 9a, 24a. The panel majority reached this conclusion even though it is undisputed that respondents did not produce any evidence that a claim for payment was ever submitted to the federal government. *Id.* at 24a.

[Footnote continued from previous page]

> any request or demand . . . 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). According to Judge Garland, a presentment requirement in Section 3729(a)(2) would nullify this definition by excluding from the FCA's reach claims that grantees pay with government funds. *Totten*, 380 F.3d at 511.

The conflict between the holdings of the D.C. Circuit in *Totten* and the Sixth Circuit in the decision below is explicit and irreconcilable. Indeed, the United States itself has acknowledged the existence of this circuit split. *See* Br. of the United States as *Amicus Curiae* at 10, *United States ex rel. DRC, Inc. v. Custer Battles, LLC* (4th Cir. filed June 8, 2007) (No. 07-1220) ("the Sixth Circuit has addressed the same presentment issue [as the D.C. Circuit in *Totten*] and has reached the diametrically opposite conclusion").

That conflict encompasses not only whether Section 3729(a)(2) includes a presentment requirement but also whether Section 3729(a)(3) requires presentment. Although the D.C. Circuit did not explicitly address that issue, its holding necessarily extends to Section 3729(a)(3) because that section imposes liability for conspiracies to engage in the conduct proscribed by Sections 3729(a)(1) and (a)(2). The scope of liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2). *See, e.g., United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Because [relator's] FCA claims [under Sections 3729(a)(1) and (a)(2)] fail to state a claim, there can be no conspiracy" under Section 3729(a)(3)). In light of the derivative nature of Section 3729(a)(3), the D.C. Circuit's holding that both Sections 3729(a)(1) and (a)(2) require the submission of a claim to the government for payment or approval necessarily establishes that liability can attach under Section 3729(a)(3) *only* where a defendant has engaged in a conspiracy to submit a false or fraudulent claim to the government.

B. The division among the circuits regarding the existence of a presentment requirement in Sections 3729(a)(2) and (a)(3) extends well beyond the D.C. Circuit's decision in *Totten* and the Sixth Circuit's holding in the decision below. The split is pervasive and therefore highly unlikely to be resolved without this Court's intervention.

The Third, Eighth, and Eleventh Circuits agree with the D.C. Circuit that Sections 3729(a)(2) and (a)(3) include a presentment requirement. In *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004), the Third Circuit unequivocally endorsed a presentment requirement, explaining that "[i]n order to prove FCA liability under §§ 3729(a)(1) and (2)"—and, hence, under the derivative conspiracy cause of action in Section 3729(a)(3)—a relator "must prove that . . . the defendant presented or caused to be presented to an agent of the United States a claim for payment." *Id.* at 438 (internal quotation marks omitted).[3]

Similarly, in *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir. 2006), the Eighth Circuit held that Section "[3729](a)(3) . . . subjects to civil liability entities that knowingly . . . conspire to submit false claims to the government for payment or approval." *Id.* at 556. The Eleventh Cir-

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[3] The lower courts' profound confusion over the presentment issue is exemplified by the fact that the Third Circuit had earlier held that the FCA applies to all claims paid with government funds, without regard to presentment. *See United States v. Lagerbusch*, 361 F.2d 449, 449 (3rd Cir. 1966) (per curiam) (holding that the FCA applied to claims that a private corporation had paid with government funds, and asserting that there was "no doubt that the False Claims Act covers such an indirect mulcting of the government").

cuit endorsed the same interpretation of the FCA in *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), where the court explained that Section "[3729](a)(2) of the False Claims Act subject[s] to civil liability entities that knowingly submit false or fraudulent claims to the government for payment or approval." *Id.* at 1012. "The act of submitting a fraudulent claim to the government," the court continued, "is the *sine qua non* of a False Claims Act violation." *Id.* (internal quotation marks omitted).

The Seventh Circuit, however, has sided with the Sixth Circuit's position that presentment is not an element of the causes of action under Sections 3729(a)(2) and (a)(3). In *United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006), the Seventh Circuit concluded that a relator's claims under Section 3729(a)(1) failed because there was no evidence that a false claim was ever submitted to the government, while also holding that the relator's Section 3729(a)(2) claim could proceed without evidence of presentment. *Id.* at 856 n.1. The court explained that it would "ignore [the relator's] claim based on subsection (1), as it [was] undisputed at summary judgment that [the defendant] never filed any claim with an officer or employee of the United States." *Id.* Despite the absence of any evidence of presentment, the court reached the merits of the relator's Section 3729(a)(2) claim because, according to the Seventh Circuit, liability attaches under that section whenever "(1) the defendant made a statement in order to receive money from the government, (2) the statement was false, and (3) the defendant knew it was false." *Id.* at 856 (internal quotation marks omitted). Like the Sixth Circuit, then, the Seventh Circuit does not consider submission of

the allegedly false claim to the government to be an element of a Section 3729(a)(2) cause of action.

C. The extensive disagreement among the circuits as to whether Sections 3729(a)(2) and (a)(3) of the FCA include a presentment requirement represents a compelling reason for this Court to grant review. The lack of uniformity among the lower courts' interpretations of these provisions generates regulatory confusion for the thousands of businesses—in the defense, building, and professional services industries, among others—that regularly perform subcontracts on federally funded projects. In the Sixth and Seventh Circuits, those businesses are exposed to potential FCA liability whenever they submit a claim for payment to a prime contractor or higher-tier subcontractor, "so long as the claim will be paid with government funds" (Pet. App. 9a) and regardless of whether a claim is ever submitted to the federal government for payment or approval. Conversely, in the Third, Eighth, Eleventh, and D.C. Circuits, a subcontractor can be held liable under Sections 3729(a)(2) and (a)(3) only where it "knowingly submit[s] false or fraudulent claims to the government for payment or approval" (*Corsello*, 428 F.3d at 1012), whether by directly presenting the claim to the government or submitting it to a prime contractor or higher-tier subcontractor who subsequently passes the claim along to the government for its review.

In light of the recent proliferation of FCA litigation, the Question Presented in this case is a frequently recurring one with profound real-world consequences. *See* U.S. Government Accountability Office, Information on False Claims Act Litigation 25 (2005), *at* http://www.gao.gov/new.items/d06320r.pdf [hereinafter GAO Report] (indicating that the aver-

age annual number of *qui tam* FCA filings between 2001 and 2005 is more than double the average number for 1991 through 1995). In the absence of this Court's review, the question whether Sections 3729(a)(2) and (a)(3) require presentment will continue to divide the lower courts and foster intolerable legal uncertainty in suits in which tens, and often hundreds, of millions of dollars in damages are at stake. *Compare United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 790 n.4 (E.D. Va. 2007) (finding the Sixth Circuit's "recent h[o]ld[ing] that presentment is not required under 31 U.S.C. § 3729(a)(2)-(3)" to be "unpersuasive"), *with United States ex rel. Maxfield v. Wasatch Constructors*, 2005 U.S. Dist. LEXIS 10162, at *29 (D. Utah 2005) (finding "the analysis of the *Totten* dissent . . . to be persuasive").

This Court should grant certiorari to provide the lower courts with authoritative guidance on this exceptionally important and frequently recurring issue.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) of the FCA do not include a presentment requirement also conflicts with this Court's resolution of a nearly identical issue in *Tanner v. United States*, 483 U.S. 107 (1987).

In *Tanner*, this Court held that defendants who allegedly conspired to defraud a private company that received federal financial assistance did not engage in a "conspir[acy] . . . to defraud the United States" within the meaning of 18 U.S.C. § 371 because a private entity that receives federal funding does not constitute the "United States." 483 U.S. at

129.[4] The Court explained that the "Government's sweeping interpretation" of the statute "would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States.'" *Id.* at 132. The Court concluded that only "[i]f the evidence presented at trial was sufficient to establish that [the defendants] conspired to cause [the private company] to make misrepresentations to the [federal government]" could the conviction stand because only then would the United States itself have been the target of the fraud. *Id.*

The Sixth Circuit's conclusion that Sections 3729(a)(2) and (a)(3) do not require the submission of a false claim to the government cannot be reconciled with this Court's decision in *Tanner*. The Sixth Circuit's holding that the FCA encompasses "false claims made to parties other than the government so long as the claim will be paid with government funds" (Pet. App. 9a) rests upon reasoning that *Tanner* explicitly rejected: It "substitute[s] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government]'" in Sections 3729(a)(2) and (a)(3). *Tanner*, 483 U.S. at 132. The Sixth Circuit's rejection of a presentment requirement in Sections 3729(a)(2) and (a)(3) is therefore directly at odds with *Tanner*'s holding that a private entity's federally funded status does not transform it into the federal government for fraud purposes. *Id.* Indeed, this Court has repeatedly emphasized that

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

"[g]rants of federal funds generally do not . . . serve to convert the acts of the recipient from private acts to governmental acts." *Forsham v. Harris*, 445 U.S. 169, 180 (1980); *see also United States v. Orleans*, 425 U.S. 807, 809 (1976) (holding that a nonprofit corporation that received all of its funding from the federal government was not a "federal instrumentality or agency for purposes of [the] Federal Tort Claims Act").

The conflict between the decision below and *Tanner* is especially stark with regard to Section 3729(a)(3) because the "conspire[s] . . . to defraud the United States" language at issue in *Tanner* is essentially identical to the "conspires to defraud the Government" language in Section 3729(a)(3). The Sixth Circuit's holding that a conspiracy to submit a false claim to a federally funded contractor constitutes a "conspir[acy] to defraud the Government," even where that false claim is never passed along to the government, is in direct tension with *Tanner*'s conclusion that a conspiracy to make a false statement to a federal grantee only amounts to a "conspir[acy] . . . to defraud the United States" where the defendants "conspired to cause [the private company] to make misrepresentations to the [federal government]"—that is, where the defendants conspired to cause the federal grantee to present the fraudulent statement to the government. 483 U.S. at 132.

This Court's review is therefore warranted for the additional reason that the Sixth Circuit's interpretation of Sections 3729(a)(2) and (a)(3) squarely

conflicts with this Court's reading of an indistinguishable fraud statute in *Tanner*.[5]

III. THE SIXTH CIRCUIT'S ERRONEOUS READING OF SECTIONS 3729(a)(2) AND (a)(3) RAISES ISSUES OF EXCEPTIONAL IMPORTANCE TO ALL GOVERNMENT CONTRACTORS.

The Sixth Circuit's decision not only deepens an existing circuit split and contravenes this Court's precedent, but it also disregards the plain language and legislative origins of Sections 3729(a)(2) and (a)(3). By casting aside the textual limitations on the FCA's scope, the Sixth Circuit's holding exposes subcontractors on federally funded contracts to onerous FCA liability in circumstances where Congress never intended the FCA to apply. It is critically important to all government contractors—as well as to many other recipients of federal funds—that this Court grant review in order to reestablish the textual bounds that Congress imposed on the FCA's reach.

A. The Sixth Circuit's holding that a claim need not be submitted to the federal government for liabil-

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[5] Moreover, although this Court has not previously had occasion to address whether Sections 3729(a)(2) and (a)(3) include a presentment requirement, the Court has emphasized in several FCA decisions that presentment was essential to the imposition of liability. *See United States v. Bornstein*, 423 U.S. 303, 311, 313 (1976) (holding that a subcontractor was liable for a separate statutory violation for each act that caused a prime contractor "to submit false claims to the Government," and explaining that the subcontractor was "liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) (holding that FCA liability attached where "[i]t was a prerequisite to respondents' payment by the local sponsors that . . . estimates be filed, transmitted to, and approved by, [federal agency] authorities").

ity to attach under Sections 3729(a)(2) and (a)(3) is directly at odds with the plain language of those provisions. Section 3729(a)(2) applies to anyone 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). As the D.C. Circuit held in *Totten*, the "paid or approved by the Government" language unambiguously requires submission of a false claim to the government for payment or approval. 380 F.3d at 498. "Making false records or statements to get a false claim paid or approved by [a federally funded private company]," the D.C. Circuit correctly reasoned, "is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* (quoting 31 U.S.C. § 3729(a)(2)); *see also* Pet. App. 34a ("The term 'by the Government' is not the same as 'with government funds'") (Batchelder, J., dissenting).[6]

Indeed, if the phrase "claim paid or approved by the Government" in Section 3729(a)(2) actually meant "claim . . . paid with government funds," as the Sixth Circuit held (Pet. App. 9a), then the words "by the Government" would be utterly superfluous because the term "claim" is already defined to include requests for payment where "the United States provides any portion of the money." 31 U.S.C.

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[6] The Sixth Circuit's decision to reject a presentment requirement in favor of an inquiry into whether a federally funded private company made a payment "with government funds" (Pet. App. 9a) also has practical shortcomings because, "[w]hen federal and nonfederal funds have been commingled, it is difficult to prove whether specific . . . dollars from that account are federal or nonfederal." *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983) (per curiam).

§ 3729(c). The well-established canon against rendering any portion of a statute superfluous therefore indicates that a "claim paid or approved by the Government" must be something other than a "claim paid with government funds." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). As the D.C. Circuit concluded, that language requires submission of the claim to the government for payment or approval.

The structure of the FCA confirms this straightforward reading of the plain language of Section 3729(a)(2). The Sixth Circuit's conclusion that Section 3729(a)(2) does not include a presentment requirement effectively nullifies the presentment requirement that is indisputably included in Section 3729(a)(1). *See* Pet. App. 23a (acknowledging that Section 3729(a)(1) requires presentment). Sections 3729(a)(1) and (a)(2) impose partially overlapping prohibitions—"knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" and "knowingly mak[ing], us[ing], or caus[ing] 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)(1), (a)(2). If Section 3729(a)(2) did not require the submission of a claim to the federal government, then the presentment requirement of Section 3729(a)(1) would be rendered "largely meaningless" (*Totten*, 380 F.3d at 501) because plaintiffs would simply bring suit under Section 3729(a)(2) in order to evade that requirement. Under the Sixth Circuit's holding, "the plain language requirement in (a)(1) that claims be presented to an officer or employee of the Government would only trip up those foolish enough to rely on (a)(1) rather than (a)(2)."

Id. The D.C. Circuit's conclusion that both Sections 3729(a)(1) and (a)(2) require the submission of a false claim to the government ensures that the presentment requirement in Section 3729(a)(1) retains viability.[7]

The Sixth Circuit's interpretation of Section 3729(a)(3) is equally flawed. As an initial matter,

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[7] The Sixth Circuit's holding also disregards the legislative origins of Sections 3729(a)(2). Sections 3729(a)(1) and (a)(2) were originally part of one long sentence that imposed liability upon any person

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

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (emphasis added). As the D.C. Circuit explained in *Totten*, the predecessor language to Section 3729(a)(2) unambiguously included a presentment requirement because "the reference to 'such claim' was a shorthand reference to the claim already identified in the current subsection (a)(1)—that is, a claim that would be presented or caused to be presented to the United States." 380 F.3d at 500. The term "such" was removed from the statute in 1982 when Congress divided the single, lengthy sentence into the numbered sections of present-day Section 3729(a). Congress was clear, however, that the amendment "ma[de] no substantive change in the law." H.R. Rep. No. 97-651, at 3 (1982). Section 3729(a)(2) therefore preserved the presentment requirement that Congress established when it enacted the statute in 1863.

because Section 3729(a)(3) applies only to conspiracies to engage in the conduct prohibited by Sections 3729(a)(1) and (a)(2), *see, e.g.*, *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004), and both of those sections, properly construed, require presentment of a false claim to the government, a conspiracy is only actionable under Section 3729(a)(3) where the conspirators intended to submit a false claim to the government.

This conclusion is confirmed by the plain language of Section 3729(a)(3). This Court recognized in *Tanner* that a statute that applies to "conspir[acies] to defraud the Government" does not encompass conspiracies to defraud federally funded private entities, unless the object of the conspiracy was "to cause [the private company] to make misrepresentations to the" government by passing along the defendant's fraudulent statement to a government official. 483 U.S. at 132. As this Court admonished the government for doing in *Tanner*, the Sixth Circuit's reading of Section 3729(a)(3) would, "in effect, substitute[ ] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government].'" *Id.* Fidelity to Congress's intentions when enacting the FCA proscribes such efforts to rewrite the plain statutory language.

B. The Sixth Circuit's failure to adhere to the plain language, statutory structure, and legislative origins of the FCA will have profound consequences for the thousands of businesses that regularly perform subcontracting work on federally funded contracts.

Under the Sixth Circuit's expansive reading of Sections 3729(a)(2) and (a)(3), subcontractors are susceptible to the FCA's severe financial penalties—

fines of between $5,500 and $11,000 per false claim, plus treble damages—anytime they submit claims for payment to federally funded prime contractors or higher-tier subcontractors. *See* GAO Report 31 (indicating that the average recovery in an FCA action is more than $10 million). Accordingly, if the decision below is left undisturbed, every construction company hired as a subcontractor on a federal building, every accounting firm hired by a prime contractor to monitor the finances of a federal project, and every engineering firm hired to perform one of the hundreds of subcontracts relating to the construction of a naval vessel will be subject to FCA liability based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government. Such alleged fraud is properly addressed under state common-law causes of action, which provide adequate remedies for fraud perpetrated by one private party against another, rather than under the FCA, which is a specialized statute that addresses "fraud practiced on *the government*." *United States v. McNinch*, 356 U.S. 595, 599 (1958) (emphasis added); *cf. Metric Constructors, Inc. v. United States*, 314 F.3d 578, 581 (Fed. Cir. 2002) ("subcontractors in a government contract are not in privity with the government").

Indeed, the implications of the Sixth Circuit's decision extend well beyond subcontractors on government projects. The Sixth Circuit asserted that Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds." Pet. App. 9a. Under this expansive reading of the FCA, the statute would apply to *any* claim for payment submitted to *any* entity that receives federal funding and that uses at least a portion of that funding to

pay the claim. The D.C. Circuit recognized the implications of such reasoning in *Totten*, explaining that the absence of a presentment requirement "would make the potential reach of the [FCA] almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." 380 F.3d at 496; *cf. Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari") (Scalia, J., concurring in denial of certiorari).

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

This Court's review is necessary to restore the reasonable textual limitations that Congress placed on the FCA's scope and that the Sixth Circuit disregarded in the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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