No. 07-214

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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December 20, 2007

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INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable Government, supporting the free enterprise system, and opposing abusive enforcement actions and civil litigation by the Government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other Federal courts in several cases raising significant issues regarding the

[1] The parties have consented to the filing of this brief, as reflected in letters filed with the Clerk of the Court. In accordance with Rule 37.6, amicus curiae certifies that counsel for a party did not author this brief in whole or in part and that no entity other than amicus or its counsel made a monetary contribution to the preparation or submission of the brief.

civil False Claims Act ("FCA" or "the Act"), 31 U.S.C. § 3729 *et seq*. *See, e.g.*, *R & F Props. of Lake County, Inc. v. United States ex rel. Walker*, *cert. denied*, 127 S. Ct. 554 (2006); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly*, *cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the FCA. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, *The* Qui Tam *Quagmire: Understanding the Law in an Era of Aggressive Expansion* (WLF Monograph) (1998); John T. Boese, *New False Claims Law Incentives Pose Risk to Contractors and States* (WLF Working Paper) (June 2006); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

Amicus curiae submits that, over the last two decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, their shareholders, and the public at large. The decision of the court of appeals below is particularly troubling because it radically expands the scope of the FCA in ways never intended by Congress and subjects even minor contract disputes with the barest connection to the Federal Government to the FCA, replete with the FCA's *qui tam* enforcement mechanism, treble damages, significant statutory penalties, and attorneys' fees provision. Amicus believes that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in determining whether the FCA requires that a plaintiff in an FCA suit be required to prove a causal link between the alleged fraudulent conduct and the direct loss to the United States Treasury.

SUMMARY OF ARGUMENT

With this case, this Court, for the first time in almost four decades, will address the very core of what is required for there to be a violation of the FCA. Because the FCA was designed to protect the Federal Treasury from fraud, liability under the Act attaches only when the plaintiff establishes a causal connection between the alleged fraud and a loss to the Federal Treasury. Although the decision below purported to adopt a position that was faithful to the language of the Act, the majority's holding critically misstates the basis for liability under the FCA. According to the Court of Appeals for the Sixth Circuit:

> The plain language of the statute, the legislative history, and the decisions of the Supreme Court and other courts lead us to conclude that the district court and the *Totten* court [*United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004)] erred in reading a presentment requirement into all subsections of the False Claims Act. We hold that while liability under § 3729(a)(1) turns on whether a claim has been presented to the government, subsections (a)(2) and (a)(3) do not require such a showing. Rather, a relator under these two subsections must show that government money was used to pay the false or fraudulent claim.

United States ex rel. Sanders v. Allison Engine Co., 471 F.3d 610, 622 (6th Cir. 2007).

While, in other parts of its opinion, the Sixth Circuit pays lip service to the requirement of Government loss, this test expands the FCA to cases in which the United States Treasury suffers no direct financial loss because of the alleged fraud. The Sixth Circuit's expansion of the FCA contradicts the language and the fundamental purpose of the FCA, which require proof of a causal link between the fraud and a direct financial loss to the Federal Treasury.

The Sixth Circuit's rationale for eliminating the requirement of direct financial loss to the Government is that, because the words "presents" or "causes to be presented" do not appear in § 3729(a)(2) or (a)(3), "presentment [of a claim to the Government] is not required as a matter of law to establish a violation of subsection (a)(2) or (a)(3)." *Sanders*, 471 F.3d at 622. That conclusion cannot be squared with the history, the purpose, or the text of the FCA. Petitioners in their brief have cogently explained why the text of subsections (a)(2) and (a)(3) of the FCA (both of which are derivatives of subsection (a)(1)) and the rules of statutory construction mandate reversal, so amicus will not repeat those arguments here. Instead, this brief will focus on the legislative and judicial history of the FCA, which demonstrates that "presentment" as a concept — even if the word itself cannot be found in subsection (a)(2) or (a)(3) — is a necessary element of every FCA case (including cases brought under those two subsections) because the concept of "presentment" is essential to establishing the necessary causal link between the fraud and the loss to the Federal Treasury.

It has long been understood that the original FCA was enacted to "stop [the] plundering of the public treasury" (*United States v. McNinch*, 356 U.S. 595, 599 (1958)) and to "protect the funds and property of the government from fraudulent claims" (*Rainwater v. United States*, 356 U.S. 590, 592 (1958)). As this Court said in *McNinch*, the FCA is designed to remedy fraud that causes the United States to "suffer immediate financial detriment." 356 U.S. at 599. The 1986 Amendments to the statute did not change this fundamental purpose since Congress understood that, regardless of how a false claim makes its way to the Government for payment or approval, "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10, *reprinted in* 1986 U.S.C.C.A.N.

5266, 5275. This singular purpose, to protect the Federal fisc, leaves no room for any interpretation of § 3729(a)(2) or (a)(3) that does not also include the concept of "presentment," which links the alleged fraud to the Government loss. *See United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (Without "presentment of such a claim . . . there is simply no *actionable damages to the public fisc* as required under the [FCA]." (emphasis added)).

While admitting this fundamental purpose of the Act, the Sixth Circuit broadened the concept of "Government loss" to include any loss involving any funds received from the Federal Government, regardless of whether the fraud causes direct financial detriment to the United States Treasury. By defining "Government loss" in this way, the Sixth Circuit was able to conclude that "presentment" of the claim to the Federal Government for payment or approval is not necessary for liability under subsection (a)(2) or (a)(3) because it is enough that funds received from the Federal Government were somehow involved in the fraud. The upshot of this flawed reasoning, however, is that there need not be any causal link between the fraud and the immediate financial detriment to the Federal Treasury — there need not be any evidence that any claim was "presented" to an agency of the Government for payment or approval.

By eliminating "presentment" (or its equivalent), the Sixth Circuit expanded the scope of the Act far beyond anything intended by Congress. The Government, after all, suffers all kinds of "harm" or "loss" that does not have an immediate detrimental impact on the Treasury. A private fraud perpetrated on a Social Security beneficiary or a Federal employee may "involve Federal funds" and may "harm" the Government (because its beneficiary or employee is not free to use the funds for their own benefit as the Government intended), but that private fraud causes no immediate financial detriment to the Federal Treasury.

Similarly, if a prime contractor on a Federal contract pays a falsely inflated subcontractor invoice with money received from the Government, but that prime contractor does not (or cannot) pass that subcontractor invoice on to the Federal Government for payment or approval, there is no direct financial detriment to the Federal Treasury. In these situations, there is no basis for liability under the Act because the Government has suffered no direct loss to the Treasury because of the fraud.

Moreover, while under the Sixth Circuit's test the Federal Treasury need not suffer any direct financial loss arising from the fraud, the FCA awards damages — indeed, treble damages — only to the United States. The Sixth Circuit never explained how *the United States* can recover treble damages when it, in fact, suffers no financial loss. If there is no immediate financial detriment to the Federal Treasury, the treble damages and penalties awarded to the United States under the Act become a pure windfall to the Government, thus unmooring the FCA from its roots as a remedial statute designed to protect the Government from fraud on the Federal fisc.

Requiring "presentment" in FCA actions brought under subsections (a)(2) and (a)(3) ensures that the *United States Treasury* — not some third-party grantee, contractor, or beneficiary — is the victim of the fraud. Regardless of the form it may take, "presentment" is the causal link between the fraud and the loss to the Federal Treasury, and it has been the very core of the FCA from its inception in 1863 to today. Indeed, it is this causal link that grounds the FCA and keeps it from becoming the generalized fraud statute this Court in *McNinch* made clear it was not. 356 U.S. at 599.

ARGUMENT

I. THE HISTORY AND THE HISTORICAL INTERPRETATION OF THE FALSE CLAIMS ACT DEMONSTRATE THAT THE CONCEPT OF "PRESENTMENT" IS AN ESSENTIAL ELEMENT OF FCA LIABILITY

A. The FCA Was Enacted In 1863 To Protect The Federal Treasury From Fraud

Spurred by a series of sensational Congressional hearings documenting widespread Government losses due to fraud against the Federal Government during the Civil War, Congress enacted the FCA in 1863 to protect against those who would "cheat the United States." Cong. Globe, 37th Cong., 3d Sess. 952 (1863). In contrast to the current version of the Act, the original Act did not differentiate between "making" and "presenting" a claim. Rather, "making" and "presenting" fraudulent claims against the Government were the same offense. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (imposing FCA liability upon any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval . . . any [false, fictitious, or fraudulent] claim upon or against the Government . . . or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim . . ."). "Presentment," itself, was not a magical word. Instead, it reflected the overarching concern of Congress that the Act be used to "ferret[ ] out and punish[ ] these enormous frauds upon our Government" and to prevent the plundering of the Federal Treasury. Cong. Globe, 37th Cong., 3d Sess. 952, 956 (1863).

Over the course of the twenty-month investigation leading up to the passage of the original FCA, Congressional hearings underscored the substantial concern that fraud was undermining the Federal Treasury. At one point in the hearings, which produced over 3,000 pages of testimony, the

Congressional Committee concluded that the fraud was so widespread that it would "lead inevitably to . . . a ruinous profligacy in the expenditure of the public treasure." H.R. Rep. No. 37-2, at 68 (1861). During the course of the investigation, the Committee investigated a mind-boggling variety of fraudulent schemes, all of which caused substantial loss to the Federal Treasury. Some of these schemes included chartering ships at "unconscionable and exorbitant price[s]," *id*. at 17; paying more than double the going prices for vessels that were deemed unseaworthy, *id*. at 20-22; purchasing muskets that were not suitable for service, *id*. at 37-40; and purchasing general supplies "without the price of a single article being previously determined," *id*. at 54.

Once the investigation was over, Congress began debating the necessity of a false claims statute. As one Representative put it, "there is now no law adequate to meet these cases of fraud upon the Government." Cong. Globe, 37th Cong., 3d Sess. 956 (1863). During the debates, it quickly became apparent that the Act's supporters were, like the Congressional Committee before them, concerned about the impact of the widespread fraud on the Federal Treasury. The sponsor of the Act decried "the enormous and flagrant frauds connected with the military service which are perpetually practiced upon the Treasury." *Id.* at 957. Thus, the Act was designed to remedy "the crying evils . . . that our Treasury is plundered from day to day by bands of conspirators . . . for the purpose of defrauding and plundering the Government." *Id.* at 955. Moreover, in focusing on the Federal Treasury, it was clear to many Members during the debates that loss to the Federal Treasury necessarily involved Government action and decision. Indeed, as one representative explained, the Act would cover people "who have failed to perform their duties in the execution of *contracts made with the Government*." *Id.* at 956 (emphasis added).

Examining these debates for itself, this Court concurred that loss to the Federal Treasury was paramount, concluding that the "[d]ebates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that *might result in financial loss to the Government*." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added). Thus, in both the initial investigation into the wartime fraud and the subsequent Senate debates, Congress in 1863 was concerned with one thing: providing a remedy when a fraud on the Government causes a direct loss to the Federal Treasury. Whatever the words used by Congress in its 1863 version of the Act, this concept of "presentment" ensured that the fraud was causally linked to the loss to the Treasury.[2]

B. The 1986 Amendments To The FCA Also Focus On Protecting The Federal Treasury From Loss

As a result of a statutory codification in 1982 that was explicitly designed *not* to alter the purpose or scope of the Act, the form of the FCA was in much the same format as it is today.[3] Congress in 1986 adopted a series of amendments to that statutory language that reinforced the principle that the FCA is designed to protect the Federal Treasury from

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[2] Although Congress amended the FCA in 1943 with an eye toward eliminating "parasitic" *qui tam* suits (*see* Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608), Congress left untouched the underlying purpose of the Act. As one supporter of the amendments explained, the "original statute is aimed at bringing to punishment those who commit frauds upon the Government and to recover money that has been obtained by fraud from the United States Government under contracts between the Government and private citizens." 89 Cong. Rec. 7596 (1943) (remarks of Rep. Revercomb).

[3] *See* Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 978. Congress was clear that the 1982 amendments "ma[d]e no substantive change in the law." H.R. Rep. No. 97-651, at 3 (1982). *See* Pet'rs Br. at 22.

loss caused by fraud. These amendments established greater protection for the Federal coffers by establishing a lower evidentiary threshold for such FCA suits, lowering the standard of intent, extending the statute of limitations, and raising the amounts of the relevant damage awards and fines. False Claims Amendments Act of 1986, Pub. L. No. 99-562, Oct. 27, 1986, 100 Stat. 3153.

Moreover, the legislative history of the 1986 Amendments clearly demonstrates that the amendments were designed to reinforce the FCA's objective of protecting the Federal Treasury. The first page of the Senate Report proclaimed that "[t]he purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud *against the Government*." S. Rep. No. 99-345, at 1 (1986) (emphasis added). Later, the Report noted that "[t]he False Claims Act is intended to reach all fraudulent attempts to cause the *Government to pay out sums of money* or to deliver property or services," *id*. at 9 (emphasis added), and that the Act is "intended to protect the *Treasury* against the hungry and unscrupulous host that encompasses it on every side," *id*. at 11 (emphasis added; quotation marks omitted).

The House Report similarly emphasized this theme, stating that "active enforcement of this statute will not only result in a recovery of losses resulting from fraud, but that it will also serve as a deterrent to those who otherwise might consider defrauding the *Government*. Moreover, given the current budgetary situation, it is imperative that the *Government* recoup these fraud losses and deter future fraudulent activities which result in further losses to the *Government.*" H.R. Rep. No. 99-660, at 18 (1986) (emphasis added). Thus, as it did with the original 1863 Act, Congress made clear that the FCA, even as amended, required the fraud to have a causal connection to a direct loss by the Federal Treasury.

C. The Decisions Of This Court Have Consistently Stated That A Causal Link Between Fraud And Direct Loss To The Federal Treasury Is An Essential Element Of The FCA

Consistent with Congressional intent, this Court has, for the past 80 years, upheld the principle that the purpose of the FCA is to protect the Federal Treasury from loss due to fraud. When confronted with the FCA in 1926, this Court explained that "the context of the entire section . . . deals with the wrongful obtaining of money and other property of the Government, with no reference to the impairment or obstruction of its Government functions." *United States v. Cohn*, 270 U.S. 339, 347 (1926).[4] Thereafter, the Court, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-44 (1943), emphasized that the "ultimate goal" of the Act was to remedy "payment of government money to persons who had caused [the Government] to be defrauded." The Court re-emphasized this concept a decade and a half later in *Rainwater*, explaining that "[i]t seems quite clear that the objective of Congress was broadly to protect the *funds and property of the Government* from fraudulent claims." 356 U.S. at 592 (emphasis added).

The same day that *Rainwater* was decided, the Court issued its decision in *McNinch*. In *McNinch*, the Court explained that "the False Claims Act was not designed to reach every kind of fraud practiced on the Government," but, as Congress originally intended, only those that involved the

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[4] Four earlier decisions of this Court addressed the criminal provisions of the FCA enacted in 1863. *See Ingraham v. United States*, 155 U.S. 434 (1894); *Crawford v. United States*, 212 U.S. 183 (1909); *Franklin v. United States*, 216 U.S. 559 (1910); and *United States v. Bowman*, 260 U.S. 94 (1922). In each of these cases, a false claim was presented to a Federal agency or corporation and the fraud resulted in a loss to the Federal Treasury.

"plundering of the public treasury." 356 U.S. at 599. Accordingly, the *McNinch* Court held that an application for Federal credit insurance involving no direct Federal payment was not covered by the FCA, in part because the Federal Government did not "suffer immediate financial detriment." *Id*.

Every FCA case decided by this Court since *McNinch* has been consistent with this approach. In *Neifert-White Co.*, 390 U.S. at 233, for instance, the Court explained that the fraud covered by the FCA reaches "all fraudulent attempts *to cause the Government to pay out sums of money*." (Emphasis added.) Similarly, and most recently, in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003), the Court ruled that the FCA covers fraud by local municipalities because such municipalities can affect the Federal Treasury through fraud: "local governments are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power."

In every one of these cases, liability depended upon there being a direct causal link between the fraud and the loss to the Federal Treasury.

D. Recent Appellate Decisions Also Require Proof Of The Causal Link Between Fraud And A Loss To The Federal Treasury

1. Appellate Decisions Defining The Word "Claim" Require A Direct Effect On The Treasury

Virtually every appellate decision since 1986 to consider the definition of a "claim" under the Act has held that any such "claim" requires an impact on the Federal fisc. As the Court of Appeals for the Eleventh Circuit has explained, the "submission of a claim . . . [is] the *sine qua non* of a False Claims Act violation." *United States ex rel. Clausen v. Lab.*

Corp. of America, 290 F.3d 1301, 1311 (11th Cir. 2002). Without the "presentment of such a claim . . . there is simply no *actionable damage to the public fisc* as required under the False Claims Act." *Id*. (emphasis added).

Looking at this issue from a different angle, the Court of Appeals for the Third Circuit in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3rd Cir. 2001), applied the same principle. In *Hutchins*, an allegedly false claim for the funds of a bankrupt corporation was submitted to a Federal Bankruptcy Trustee, so the false claim, although submitted to a Federal official, could not result in a loss to the Federal Treasury. The court of appeals held that

> the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the *False Claims Act*. Unless these claims would result in economic loss to the United States government, liability under the False Claims Act does not attach.

Id. at 184 (emphasis in original). Significantly, the Third Circuit found no support in any of the other circuits that "a false statement to the government which would not cause the government economic loss gives rise to False Claims Act liability." *Id*. at 183.

Likewise, the Court of Appeals for the District of Columbia Circuit, in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 n.6 (D.C. Cir. 2004), agreed that the FCA is limited to false claims "where the Government directly or indirectly provides the funds and suffers the loss." The same is true of the Court of Appeals for the Fourth Circuit, which has held that "the False Claims Act at least requires the presence of a claim — a call upon the government fisc — for liability to attach." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999).

Other circuits have indirectly held that the FCA requires a direct causal link between the fraud and the loss to the Federal fisc. *See, e.g.*, *United States ex rel. Stevens v. Vermont Agency of Natural Res.*, 162 F.3d 195, 206 (2d Cir. 1998) (citing approvingly this Court's decision in *Rainwater* that "the statute's purpose has been described as broadly to protect the funds and property of the Government from fraudulent claims") (internal quotation marks omitted), *rev'd sub nom. on other grounds*, 529 U.S. 765 (2000); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000) (the theory behind the *qui tam* provision is that it is "one of the least expensive and most effective means of preventing frauds on the Treasury") (quoting *Schumer*, 520 U.S. at 949); *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 768 (9th Cir. 1997) (explaining that "the injury suffered in a False Claims Act case is injury to the federal treasury, and . . . qui tam plaintiffs . . . have been authorized by Congress to sue based on the government's loss"); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) ("Congress viewed qui tam prosecutions as providing a means to achieve *rapid* exposure of fraud against the public fisc." (emphasis in original)).[5]

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[5] By reading the definition of "claim" in 31 U.S.C. § 3729(c) to somehow eliminate the need for the causal link between the fraudulent conduct and a loss to the Federal Treasury, the Sixth Circuit majority succumbed to a few key misperceptions.

For one, § 3729(c) makes clear that there is no reason "presentment" must *precede* the Government's initial payment or funding to a Federal grantee or contractor. Indeed, given the complexities and vagaries of Federal contracting and grant giving, there likely will be many situations where the Government advances funds to a contractor or a grantee, whether as progress payments, seed money, or some other advance payment. Hence, § 3729(c) includes a broad definition of "claim" to include Federal monies paid in advance. The fact that the Government advanced the funds does not

2. The Requirement Of "Materiality" Is Directly Dependent On A Causal Link Between The Fraudulent Conduct And The Government's Loss

Another set of appellate decisions — those finding "materiality" to be an essential element for FCA liability — also supports the proposition that "presentment" is required for liability to attach under subsections (a)(2) and (a)(3).

[Footnote continued from previous page]

torpedo a "presentment" requirement because, even where a subcontractor, grantee, or other recipient has received money from the Government *before* a third party submits a false claim to a prime contractor or Federal grantee, § 3729(c) is satisfied if the Government and the contractor or grantee engage in a reconciliation process (often at the end of the day, month, or year). To the extent the subcontractor's or third-party's false or fraudulent statements or claims are incorporated into that reconciliation process, the "presentment" requirement is satisfied.

Furthermore, there is no need for "presentment" to mean that the prime contractor or grantee must re-present those same invoices or else submit false statements or records "directly to the government." *Sanders*, 471 F.3d at 616 n.4; *see also Totten*, 380 F.3d at 503 (Garland, J., dissenting) (rejecting the notion that the claim must be "re-present[ed]" to a federal employee). Section 3729(c) is properly read to allow the presentment requirement to be satisfied where a subcontractor defrauds a prime contractor who consequently presents a claim to the Government that has been rendered false by the subcontractor's fraud. In that circumstance, a direct causal link is established between the subcontractor's fraud and the loss to the Federal Treasury by the prime contractor's submission to the Government, regardless of whether the subcontractor's invoices or records themselves are submitted by the prime contractor to the Government. The fact that a person may be liable under the FCA "without regard to whether that person had direct contractual relations with the government," *Marcus*, 317 U.S. at 544, does not obviate the need for false claims to be "presented" to the Government for liability to attach under subsections (a)(2) and (a)(3).

The notion that a violation of either of these subsections does not require a direct loss to the Federal Treasury cannot be squared with the fact — now nearly universally accepted by the Federal courts of appeals — that "materiality" is an essential element of an FCA action. Every circuit that has addressed the issue has adopted "materiality" as an element of an FCA action. *See United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992); *United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1459 (4th Cir. 1997); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999); *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 886-87 (8th Cir. 2003); *United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994). The Court of Appeals in the Second Circuit, in *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001), while not calling the requirement "materiality," adopted the identical principle.

"Materiality," in turn, means that there must be a causal link between the fraud (whether the false claim itself or a false statement in support of a false claim) and the Federal Government's decision to pay the claim. As the circuit courts have explained:

- "Only those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay . . . are properly considered 'claims' within the meaning of the FCA." *Costner*, 317 F.3d at 887 (quotation marks omitted).
- Materiality depends upon "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *Berge*, 104 F.3d at 1459.
- The "FCA imposes liability only for false statements or conduct which are material to a false or fraudulent

> claim for money or property from the Government." *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 443 (6th Cir. 2005).

Accepting that "materiality" is an element under the FCA, it then necessarily follows that "presentment" is an essential element as well because "presentment" is the causal link between the fraud and the loss to the Federal Treasury. For example, the outcome of so-called "false certification" cases, which have proliferated since 1986, is determined by whether the alleged false certification was material *to the Government's decision to pay*. *See, e.g.*, *United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 605 (7th Cir. 2005); *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382 (5th Cir. 2003). The focus, in the context of the materiality analysis, on whether the false statement is material to the *Government's* decision to pay necessarily requires eventual presentment of the claim to the United States for payment or approval. If there is no need to show presentment to the Government, there would be no need to analyze whether the false statement was material to the Government's decision to pay the claim. Under the Sixth Circuit's test, however, it would be enough if some of the funds used to pay the claim were obtained at some point from the Federal Government, without any decision or action by the Government to pay or approve the false claim.

II. THE STRUCTURE OF THE FCA DEMONSTRATES THAT "PRESENTMENT" IS AN ESSENTIAL ELEMENT OF ALL FCA ACTIONS

This legislative and judicial history demonstrates that the essence of an FCA violation is a fraud that causes a direct loss to the Federal Treasury. Because of this purpose and design, every FCA cause of action must include "presentment" (or its equivalent) for the simple reason that, without proof that someone within the Federal Government was given the opportunity (in the context of subsections (a)(1)-(a)(3)) to pay or approve a claim tainted by fraud, there cannot be a causal link between the alleged fraud and the direct harm to the Federal Treasury. Respondents have suggested that the "presentment" of a false claim to the Government is a technicality — a statutory loophole — reflecting merely a "ministerial process." Resp'ts Br. in Opp. at 9. As a result, they have also argued that it ought to be enough to show in this case that the prime contractor shipyards were "merely the conduit" for taxpayer dollars to the subcontractor defendants. *See id*. at 9-10. They have argued, therefore, that it is irrelevant whether the Federal Government was defrauded, and that it is irrelevant if there was any direct harm to the Federal Treasury, so long as Federal money is somehow involved. If upheld, these views, which the majority below adopted, expand the reach of the FCA far beyond its long-standing and singular purpose: to redress frauds perpetrated on the Government and that cause a direct loss to the Federal Treasury.

Petitioners have properly explained the language of subsections (a)(2) and (a)(3), and how established principles of statutory construction require reversal, so amicus need not repeat those arguments here. What went unsaid, however, is that the entirety of the FCA — that is, all subsections of 31 U.S.C. § 3729(a) — demonstrates that liability requires a causal link between the fraud and a loss to the Federal Treasury.

A. The Liability Provisions Of § 3729(a) Demonstrate The Need For A Causal Link Between Fraud And Direct Loss To The Government

This link between the fraud and the Federal Treasury can be found in each subsection of § 3729(a):

- Subsection (a)(1) applies only if a person "*presents, or causes to be presented [a false claim], to an officer or employee of the United States Government or a member of the Armed Forces of the United States*";
- Subsection (a)(2) requires that a person must use a false record "to *get* a false or fraudulent *claim paid or approved by the Government*";
- Subsection (a)(3) penalizes anyone who "conspires *to defraud the Government* by getting a false or fraudulent claim *allowed or paid*";
- Subsection (a)(4) penalizes anyone who "has possession . . . of property or money used, or to be used, by the Government and, *intending to defraud the Government* or willfully to conceal the property, *delivers, or causes to be delivered*, less property than the amount for which the person receives a certificate or receipt";
- Subsection (a)(5) states that any person "*intending to defraud the Government, makes or delivers the receipt* without completely knowing that the information on the receipt is true";
- Subsection (a)(6) penalizes anyone who "buys, or receives as a pledge of an obligation or debt, public property *from an officer or employee of the Government, or a member of the Armed Forces*"; and
- Subsection (a)(7) penalizes anyone who "makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation *to pay or transmit money or property to the Government*."

31 U.S.C. §§ 3729(a)(1)-(a)(7) (emphasis added).

Even though only subsection (a)(1) uses the phrase "presents, or causes to be presented," each of these subsections was written to require a demonstrable causal connection between the fraud and the Federal Government's action or inaction upon the false claim, false statement, false receipt, or false record, with a resulting loss to the Federal Treasury, in order to give rise to FCA liability. Take, for example, the so-called "reverse false claim" provision found in 31 U.S.C. § 3729(a)(7), added in 1986. While the word "presentment" logically does not appear (because there is no claim), this provision clearly foresees a causal link between the fraud ("a false record or statement") and a direct loss to the Federal Treasury ("conceal[ing], avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government").

Without this causal link — without proof of "presentment" or its equivalent — there can be no FCA liability under any of the subsections of § 3729(a).

B. The Damages Provisions Of The FCA Also Demonstrate The Need For A Causal Link Between Fraud And Direct Loss To The Government

The clearest proof that the structure of the FCA requires a causal link between the fraud and the Federal Treasury is the calculation of damages under the Act. The damages section of the FCA is also found in 31 U.S.C. § 3729(a), and it provides in pertinent part:

> Any person who [violates subsections (a)(1) to (a)(7)] 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 . . . . [Emphasis added.]

Twice in this provision, the statute makes clear that the FCA is designed to reimburse *the Federal Government* for direct losses suffered *by the Government*, not the losses suffered by a contractor or a grantee which happened to use, in whole or in part, money received from the Government to pay the claim.

If, as Respondents argue and the Sixth Circuit found, there is no essential element of "presentment" — that is, if there is no requirement of a causal link between the fraud and the loss to Federal Treasury — there would be no reason to limit liability "to the United States Government" and to allow recovery of only "the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). If the only requirement is that "government money" is involved, the damages should be awarded to the party defrauded, including any Federal contractor or grantee. In such cases, the damages should be calculated on the basis of the harm suffered by the Federal contractor or grantee, not on the "damages which the Government sustains." Clearly, this is not the case, or what Congress intended.

To the extent it is argued that Government programs are somehow "harmed" by fraud perpetrated on those who have received Federal funds, such a generalized theory of "loss to the Government" is not the type of "loss" for which the FCA (as opposed to some other cause of action) provides a remedy. Even where the Government bestows Federal funds on a recipient with specific intentions for the use of those funds, the notion that the Government somehow suffers a "loss" whenever such funds are diverted away from that original purpose runs headlong into the long-established principle that the FCA is aimed at frauds that cause the United States to disburse money or to "otherwise suffer immediate financial detriment." *McNinch*, 356 U.S. at 599.

Moreover, such generalized harm cannot be squared with this Court's decision in *Cohn*, which held that "harm" under the FCA does not include interference with a Government function. In *Cohn*, the Court held that the FCA covered only the "wrongful obtaining of money and other property of the

Government, with no reference to the impairment or obstruction of its Government functions." *Cohn*, 270 U.S. at 347.

This Court has repeatedly emphasized that, while the FCA has become, in many ways, a punitive statute, it also remains a remedial statute. *See Chandler*, 538 U.S. at 130; *United States v. Halper*, 490 U.S. 435, 442-43 (1989), *abrogated on other grounds by Hudson v. United States,* 522 U.S. 93 (1997); *Marcus*, 317 U.S. at 549. If, as the Sixth Circuit ruled, FCA liability can be found regardless of any showing of an actual loss to the Government, this damages provision becomes a windfall for the Government or, worse, a purely punitive statute. That is not the purpose of the Act, and there is no reason to read the Act this way; the Sixth Circuit committed error when it did so.

C. "Presentment" Is Required Under § 3729(a)(2) And (a)(3) To Ensure Proof That The Government Is The Victim Of The Alleged Fraud

For these reasons, the presence of the word "presents" in subsection (a)(1) — and the absence of that specific word in subsections (a)(2) and (a)(3) (or, for that matter in subsections (a)(4), (a)(5), (a)(6), and (a)(7)) — is not dispositive. This word need not be given talismanic meaning. Indeed, although the word "present" can carry connotations of formal or ceremonial "presentment" (*see, e.g.*, Webster's Third New World International Dictionary 1793 (1986)), the term is general enough to allow for the vagaries of modern Government contracting and grant programs. Indeed, rather than focusing on the word "present" as a formal act, what is more critical is "presentment" as a concept — the need in any FCA case for the Government or *qui tam* relator to prove that the false or fraudulent claim was eventually placed before the Government for the Government to make a decision on whether to pay or approve that claim — and the resulting loss to the Federal Treasury if the false claim is paid. Properly understood, "presentment" is a requirement that, at some point, the Government was called upon to act on the fraudster's false claim or false statement in support of a false claim, thus ensuring that the Federal Government was the victim of the alleged fraud and that the fraud would adversely affect the Federal Treasury. Simply stated, proof of "presentment" connects the dots between the fraudulent activity and the loss to the Federal Treasury.

CONCLUSION

The FCA is a broad statute, but it has clear and critical limits. The mere fact that the Federal Government has an interest in a program is not relevant. Nor is the fact that the Government may have funded the program. For liability to attach under the FCA, what is critical is that the fraud result in a direct loss to the Federal Treasury. "Presentment" of a claim made false by the fraud provides that critical link. Because the Sixth Circuit's test for FCA liability did not include this critical link, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 20, 2007