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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file the attached amicus curiae brief in support of petitioners. Petitioners have consented to the filing of the brief. Respondents, however, have withheld consent, necessitating this motion.

The Chamber's brief is appropriate and will assist the Court in its consideration of this important case. The Chamber has a direct interest in this case, as many of its members are potentially subject to the False Claims Act ("FCA") and even more would be subject to the statute under the rule adopted by the Sixth Circuit in this case. The Chamber seeks to apprise the Court of the negative consequences to the nation's businesses if that decision is allowed to stand. The Sixth Circuit has held that the FCA can apply even to transactions between private parties where

no claim was ever presented to the federal Government, as long as the transaction involves funds traceable in some manner to the Government. As explained more fully in the Chamber's brief, this decision would not only increase the costs of transactions and litigation but also would make it more difficult for private businesses to resolve disputes on their own in a commercially reasonable manner. The FCA is properly applied to circumstances where the Government has suffered fraud practiced on it, but it should not be expanded to cover private transactions in which no false claim was ever presented to the Government.

This Court has routinely granted the Chamber leave to participate as an amicus curiae in FCA and other cases.[1] Leave to file should likewise be granted here.

Respectfully submitted,

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[1] *See*, *e.g.*, *Texaco Inc.* v. *Dagher*, Nos. 04-805, 04-814 (June 27, 2005); *BASF Corp.* v. *Peterson*, No. 04-81 (May 2, 2005); *American Trucking Associations, Inc.* v. *Michigan Public Serv. Comm'n*, Nos. 03-1230, 03-1234 (Jan. 14, 2005); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, No. 03-724 (Dec. 15, 2003); *Boeing Co.* v. *United States ex rel. Roby*, No. 02-1411 (June 27, 2003).

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BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country.[1] One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief.

The Chamber and its members have a strong interest in this case. The petition raises a significant question regarding the applicability of the False Claims Act ("FCA") in situations where no false claim is actually presented to the federal Government. Many Chamber members are potentially subject to the terms of the FCA because they do business with the Government. But many more would be affected by the FCA if the Sixth Circuit's flawed decision is allowed to stand. In that decision, the court held that FCA liability can attach to any transaction where a claim is paid with funds traceable to the federal Government, even where the claim was never presented to the Government. That decision dramatically expands the FCA—including its potentially crippling penalties and provisions for suits by opportunistic "qui tam relators"—far beyond the statute's intended role of combating *government* fraud.

The Sixth Circuit's decision is inconsistent with the language and structure of the FCA, expands the statute's applicability far beyond its intended purpose of combating fraud on the Government, and is in direct conflict with the D.C. Circuit's decision in *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). The Chamber therefore urges the Court to grant certiorari to provide members of the business community with clear guidance on their potential exposure to FCA liability and to clarify the proper boundaries of the FCA.

SUMMARY OF THE ARGUMENT

The Sixth Circuit held that the False Claims Act—with its draconian penalties and intrusive qui tam relator provisions—applies to transactions between wholly private parties "so long as [a] claim will be paid with government funds." Pet. App. 9a. This unwarranted and dramatic extension of the FCA contravenes the statutory language, directly conflicts with the decisions of other circuits, and, if allowed to stand, would hinder the efficient commercial resolution of private disputes without any corresponding

benefit in combating actual fraud committed against the Government. Petitioners have already cogently explained why the Sixth Circuit's rule conflicts with the statutory language and with other decisions, most notably the D.C. Circuit's decision in *Totten*. The Chamber will not repeat those arguments here, but has filed this brief to further explain the negative consequences to the business community if the Sixth Circuit's decision is allowed to stand.

The FCA is aimed at combating "fraud against the government," regardless of "the form, or function, of the *government* instrumentality upon which such claims were made." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (emphasis added). The Sixth Circuit, however, has dramatically expanded the statute's scope to include alleged fraud practiced not on the Government, but rather on any entity that disburses funds that can be traced in some way to the Government. This expansion of potential liability would improperly bring the FCA to bear on private transactions that do not involve fraud practiced on the Government. For example, where the Government disburses grant funds to be used at the grantee's discretion, and the grantee is overcharged by a private supplier that is paid with the government grant funds, the Sixth Circuit's rule would allow a relator to sue the supplier under the FCA for allegedly overcharging the grantee, even where the Government played no role in paying the funds and even where the private parties are able to fully and satisfactorily resolve the issue between themselves. Interjecting the FCA into such private transactions will only increase burdens on businesses and provide windfalls to opportunistic relators, with no corresponding advancement of the FCA's purpose—combating fraud against the Government.

Expanding the FCA to reach any private transaction involving any funds traceable back to the Government would have further wide-ranging negative consequences for the business community. In its current version, the FCA

provides for potentially draconian statutory penalties of up to $11,000 per claim regardless of any damage to the Government, and thus has the potential to impose enormous liability unrelated to actual damages. Extending FCA liability to private transactions not involving the Government therefore will increase the costs of doing business as subrecipients of federal monies demand higher prices to account for the risk of unfounded FCA suits. Moreover, expanding the FCA to all transactions paid with government funds will hinder the ordinary mechanisms for the reasonable and expeditious resolution of contract disputes, as relators (or the Government if it intervenes) will interject themselves into private contractual relationships. The result will be an increase in and prolongation of costly litigation, as bounty-hunting relators look for windfalls even where the Government has suffered no fraud directed against it.

As the D.C. Circuit explained in *Totten*, the Sixth Circuit's rule "would make the potential reach of the Act almost boundless," as every transaction with any entity receiving federal funds would potentially be subject to the FCA. 389 F.3d at 496. The federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants. Under the Sixth Circuit's view that the FCA applies to any claim that "will be paid with government funds," Pet. App. 9a—even where the Government never knew of the claim—almost any alleged misstatement in a commercial transaction is potentially subject to the reach of the FCA's massive penalties as enforced by self-deputized qui tam relators. It is well-established that the FCA should not displace the ordinary mechanisms for policing compliance with regulatory violations. It is equally true that the FCA should not displace the ordinary mechanisms for policing compliance with the terms of private contracts where the Government is never presented with a false claim.

The Chamber does not condone misstatements or fraud wherever they may occur. But in circumstances where no

fraudulent claim is ever presented to the federal Government, common law and other state law remedies should govern and the severe penalties of the FCA should be reserved for circumstances where fraud has actually been practiced upon the Government. Given the direct split in the circuits, the widespread importance of the issue, and the serious negative consequences of the Sixth Circuit's erroneous ruling, this Court's review is warranted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A DIRECT CIRCUIT SPLIT AND IS INCONSISTENT WITH THE LANGUAGE OF THE FCA.

As explained more fully in the petition, the Sixth Circuit's holding that liability can attach under sections 3729(a)(2) and (a)(3) of the FCA simply by a showing that a claim was paid with government funds, without regard to whether the claim was ever presented to the federal Government for payment, is both inherently flawed and in direct conflict with the D.C. Circuit's decision in *Totten*, as well as decisions of the Third, Eighth, and Eleventh Circuits. The Court should grant review to reconcile this conflict and remove the legal uncertainty that now confronts all businesses that engage in transactions with recipients of federal funds.

In *Totten*, the D.C. Circuit held that both sections 3729(a)(1) and 3729(a)(2) require that an alleged false claim be presented to the federal Government as a condition to liability under the FCA. 380 F.3d at 492-502. The D.C. Circuit emphasized that subsection (a)(2) applies when a false record or statement is used to get a false claim "paid or approved *by the Government*," not simply when a claim is paid or approved by a recipient of federal funds. *See id*. at 498-99 (citation omitted). The court rejected the argument that the definition of "claim" in section 3729(c) extended section 3729(a)(2) liability to instances where federal money is paid out by grantees or other recipients of federal funds, because it would render the language "by the Government" in

subsection (a)(2) meaningless. *See id*. at 498. This reading of subsection (a)(2), the court explained, is consistent with the structure and content of the statute as a whole and with Congress's intent in amending the statute in 1982 and 1986. *See id.* at 498-501.

In this case, the Sixth Circuit expressly rejected the *Totten* court's holding. Pet. App. 10a, 15a. In the Sixth Circuit's view, the FCA applies to any claim that is "paid with government funds," Pet. App. 9a, regardless of whether the claim is ever presented to the federal Government. The court held that a jury is entitled to consider a claim under the FCA based solely on evidence "that all of the money paid to the defendants came from the United States government" and that the defendants knew that allegedly false claims "were paid using government funds." Pet. App. 24a. The majority made no analysis of what constitutes "government funds" where contractors receive funds from both government and commercial sources.

The D.C. Circuit's holding in *Totten* is consistent with decisions from the Third, Eighth, and Eleventh Circuits applying a presentment requirement to subsection (a)(2) and (a)(3).[2] Conversely, the Seventh Circuit is aligned with the Sixth Circuit in its willingness to extend liability under

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[2] *See United States ex rel. Quinn* v. *Omnicare Inc.*, 382 F.3d 432, 438 (3d Cir. 2004) (to establish liability under §§ 3729(a)(1) and (2), relator must prove that "the defendant presented or caused to be presented to an agent of the United States a claim for payment") (citation omitted); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (§ 3729(a)(3) "subjects to civil liability entities that * * * conspire to submit false claims to the government for payment or approval" and Fed. R. Civ. P. 9(b) requires relator to plead "what dates the defendants allegedly submitted the false claims to the government") (citations omitted); *Corsello* v. *Lincare, Inc.,* 428 F.3d 1008, 1012 (11th Cir. 2005) (holding that "[t]he act of submitting a fraudulent claim to the government is the 'sine qua non of a False Claims Act violation'") (citation omitted).

section 3729(a)(2) of the FCA without regard to whether a claim was, in fact, presented to the United States. *See United States ex rel. Crews* v. *NCS Healthcare of Illinois, Inc.,* 460 F.3d 853, 856 n.1 (7th Cir. 2006) ("ignoring" relator's claim under § 3729(a)(1) because defendant had not filed any claim with an officer or employee of the United States but reaching merits of relator's claim under § 3729(a)(2) despite lack of presentment to the federal Government).

As explained in the petition, the Sixth Circuit's statutory analysis is fundamentally flawed, and improperly exposes any person or entity that receives money emanating from the federal Government—no matter how removed the transaction at issue is from the Government—to the harsh penalty provisions of the FCA. And in light of the current circuit split, persons and entities serving as subcontractors, subgrantees, or other subrecipients of federal funds face inconsistent exposure to these enhanced damage provisions of the FCA. The Court should grant certiorari to clarify the confusion created by these conflicting opinions, and to provide clear guidance to all persons and entities who may receive money from a recipient of federal funds about their potential exposure to this major federal law.

II. THE DECISION BELOW EXPANDS THE FCA FAR BEYOND ITS INTENDED PURPOSE AND INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE.

The intended target of the FCA is "fraud against the government." *Rainwater*, 356 U.S. at 592. Yet, under the Sixth Circuit's holding, claims submitted to private parties in the course of purely private transactions will also become actionable under the statute as long as any amount of what might be argued to be federal funds is doled out in response to the claim. The implications of such an extension of liability under the FCA are staggering. Companies doing business with federal contractors and grantees may find that what used to be only a private dispute about contract requirements can be

turned into a full-scale government investigation of improper claims, courtesy of an opportunistic relator eager to recover up to 30% of any award under the FCA. The balance of any such recovery would go to the Government, though it may never have had presented to it the claim that is the source of recovery. Extending FCA liability to any transaction touched by federal funds is contrary to the statutory text, and would create inefficiencies and complications that are not warranted based on any purported benefits. And because federal dollars permeate the national economy at all levels, the Sixth Circuit's decision will have far-reaching consequences.

A. The Sixth Circuit's Rule Dramatically Expands The FCA's Scope Beyond Government Fraud.

Eliminating a "presentment" requirement for claims asserted under sections 3729(a)(2) or (a)(3) of the FCA, and instead allowing FCA liability to attach to any transaction involving funds traceable to the federal Government, will inappropriately extend the FCA to many situations that do not involve true government fraud.

As Judge Batchelder recognized in her dissenting opinion below:

> [S]uppose [a] prime contractor has been bankrolled by the government and given full authority to pay claims without resort to government approval. The subcontractor's claim is actually paid "by the prime contractor," albeit with government funds. But, in bankrolling the prime contractor, the government did not act in response to the claim. The government may not even know that the subcontractor made a claim. The subcontractor's false statement did not induce the government to do anything.

Pet. App. 34a-35a. In such a scenario, there has been no fraud on the Government. Neither the language nor the purpose of the FCA supports extending liability to subcontractors, subgrantees, or any other entities that deal with a recipient of federal funds in such a situation.

Judge Batchelder's example is a very real concern. It is common for the Government to enter into fixed-price contracts under which it agrees to pay the prime contractor a set amount, regardless of the actual costs incurred by the contractor during performance of the contract. *See* Donald P. Arnavas, *Government Contract Guidebook* § 4.17 at 4-12 (3d ed. 2001). Fixed-price contracts "place the maximum risk on the contractor * * * and impose the minimum administrative burden on the Government." *Id*. (citation omitted). In such circumstances, if a subcontractor overcharges the prime contractor and the error is not caught, any additional funds improperly paid to the subcontractor will come out of the prime contractor's pocket, because the Government has not paid anything more under the fixed-price contract because of the inflated claim. And if the error is corrected, any repayment would be due the prime contractor, not the Government. In either event, the alleged false claim for payment is submitted to the contractor, not the Government. The Government never saw the claim and suffered no loss as a result of it.

The subcontractor in this example may or may not have acted fraudulently or breached its contract with the prime contractor. But in these circumstances, ordinary remedies are readily available to resolve the dispute. The prime contractor has every incentive to investigate and resolve any issues that may arise, and, in the event the parties cannot resolve a dispute consensually, common law and other state law remedies are available. Yet under the Sixth Circuit's rule, any stranger to the relationship may file a qui tam action under the FCA on behalf of the Government arguing that the transaction involved federal funds, even though the Government never saw the claim. In such circumstances, the parties would not be able to resolve the dispute on their own. *See* 31 U.S.C. § 3730(b)(1).

The Sixth Circuit's rule dramatically expands the reach of the FCA beyond those who actually deal with Government or

make claims against it to all transactions that can conceivably be traced to federal Government funds. As the *Totten* court recognized, the "effective" presentment approach now adopted by the Sixth Circuit "would make the potential reach of the Act 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. As with the fixed-price contractor, if a federal grantee is allegedly overcharged by one of its own vendors but that overcharge has no effect on payments under the government grant, the vendor will nonetheless face the specter of a qui tam suit seeking punitive FCA liability for what would otherwise be a commercial matter to be resolved between the parties to the transaction.

The expansion of the FCA under the Sixth Circuit's rule is breathtaking. The federal Government spends more than $2.7 trillion per year, accounting for about 20% of the nation's entire gross domestic product. *See* Congressional Budget Office, *A 125-Year Picture of the Federal Government's Share of the Economy, 1950 to 2075* (2002) (www.cbo.gov/ftpdoc.cfm?index=3521&type=0&sequence=0). If FCA liability attaches whenever a claim "will be paid with government funds," even where it is never presented to the Government, Pet. App. 9a, the statute will thus be extended to billions of dollars' worth of private transactions. Particularly given the direct split in the circuits, a decision that would effectively federalize such an enormous swath of otherwise private transactions warrants this Court's intervention.

Moreover, as next shown, imposing such potentially "boundless" liability on anyone who touches any funds traceable to the federal Government would raise both transaction and litigation costs, benefiting opportunistic relators but adding little if anything to the fight against actual government fraud.

B. The FCA's Draconian Penalties And Qui Tam Provisions Make It Important To Limit Its Reach To Actual Fraud Practiced On The Government.

The liability facing a private company in a contract or other common law dispute with another private company is quantitatively and qualitatively different from the liability of a company facing an FCA claim. As this Court has recognized, "the current version of the FCA imposes damages that are essentially punitive in nature[.]" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (citation omitted). The statute provides for recovery of three times the amount of damages sustained by the Government plus a penalty of no less than $5,500 and as much as $11,000 for each claim. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9) (2006). "No damages need be shown in order to recover the penalty" under the FCA. *United States ex rel. Hagood* v. *Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (citing *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 n.5 (1956)); *see also*, *e.g.*, *United States* v. *Advanced Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995) (awarding $365,000 in penalties even though plaintiff failed to prove actual damages at trial), *aff'd mem.*, 86 F.3d 1159 (8th Cir. 1996); *United States ex rel. Virgin Island Housing Auth.* v. *Coast General Constr. Servs. Corp.*, 299 F. Supp. 2d 483, 491 (D.V.I. 2004) (awarding $50,000 in penalties where no actual damages to Government).

If, as often happens, the Government or a relator alleges that multiple similar false claims were made under a contract, the potential liability for statutory penalties will be enormous without regard to any harm allegedly suffered by the Government. Indeed, FCA cases can involve requests for penalties in the hundreds of millions of dollars. The amount sought in an FCA case will thus always exceed—and often far exceed—what could be sought in a traditional common law action. The statute contemplates such penalties where there has been fraud practiced on the Government through a

false claim that has been "paid or approved by the Government." 31 U.S.C. § 3729(a)(2). But extending this kind of potentially crippling punitive liability to all circumstances where a claim "will be paid with government funds," Pet. App. 9a, will result in increased costs to consumers and windfalls to potential relators, without a corresponding benefit in combating fraud practiced on the Government. If the potential for such extensive liability is extended to any company that receives federal funds in a transaction with another private entity, it will be natural for such companies to prepare for and mitigate the risk of exposure by increasing the costs for such products and services. It is at least debatable whether the Government would be well-served by such far-ranging increases in costs in circumstances where it never receives a false claim. But regardless, such massive liability should be reserved for those acts that truly constitute fraud on the Government—false claims presented to the Government for payment.

That is particularly true given the FCA's unique provisions allowing private qui tam relators to bring suits on behalf of the Government in circumstances where they would otherwise have no interest. Relators are entitled to between 25% and 30% of any recovery if the government does not intervene in the lawsuit, and between 15% and 25% of the recovery if the government does intervene. 31 U.S.C. § 3730(d)(1), (2). Successful qui tam relators are also entitled to seek recovery of attorneys' fees. *See id*. Because of these provisions, a cottage industry has grown up as attorneys and others seek to profit from these bounties.[3] In most qui tam cases, the Government elects not to intervene at all. *See* Government Accountability Office, *Information on False Claims Act Litigation* 29 (Dec. 15, 2005) (www.gao.gov/

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[3] As the banner of one qui tam website proclaims: "Collect Millions by Reporting Fraud." *See* Whistleblower Qui Tam Law Center, Whistleblower Lawsuits (www.whistleblower-qui-tam.com/pages/whistleblower-lawsuits.html).

new.items/d06320r.pdf) (between 1987 and 2005, the Government intervened in, or settled before intervening in, only 27.28% of all qui tam cases).

Although the FCA's qui tam provisions are conducive to abuse, they are predicated in part on the theory that relators can serve a purpose where the Government, due to its large outlays and sometimes limited investigatory resources, may have difficulty ferreting out fraud practiced on it. *See* S. Rep. No. 99-345, at 7-8 (1986). But that theory has little or no relevance to transactions between a subcontractor and prime contractor. Allowing FCA cases—including qui tam cases—to be brought against any company that deals with a recipient of federal funds will unnecessarily federalize what should be private contract claims. Without the FCA, parties will still have every incentive to investigate and resolve claims of contract non-compliance either consensually or through the usual common law remedies. Under the Sixth Circuit's reasoning, however, an opportunistic qui tam plaintiff could base an FCA complaint on the breach of a private contract provision between a federal grantee and its supplier or a contractor and its lower tier subcontractor, if the breach resulted in an allegedly false claim being paid by an entity that receives federal funds. If the FCA applies, the issue becomes much more difficult to resolve, because no settlement can be reached without the participation of the relator or the Government and because the potentially massive penalties increase a plaintiff's incentives to institute questionable litigation. Even if the parties seek to resolve the issue between themselves, the prospect of a qui tam FCA action would remain for years to come.

Federalizing these otherwise private contract disputes will thus hinder their resolution and prolong any litigation that may arise. And litigation would become much more expensive and difficult, given the FCA's complexity. Indeed, the Sixth Circuit's decision introduces yet more complexity, since it begs the question of what constitutes "federal funds."

As the *Totten* court recognized, "it remains unclear whether 'federal monies' * * * are still 'federal monies' when passed along to subgrantees or subcontractors, employees and suppliers of subgrantees and subcontractors, and so on." 380 F.3d at 502. Because all money is ultimately fungible, in many situations it will be difficult to develop a workable test as to whether a particular transaction does or does not involve federal funds triggering the FCA. By contrast, it is a relatively simply matter to determine whether a claim has been presented to the federal Government.

It is settled that the FCA should not be used to displace the normal mechanisms for enforcing compliance with federal regulations. *See*, *e.g.*, *United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996). Likewise, the statute should not displace the normal mechanisms for addressing and resolving subcontractor claims that are never presented to the federal Government for payment.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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