No. 12-1057

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

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1621, amended a component of the False Claims Act's liability standard and directed that the change "shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act * * * that are pending on or after that date." § 4(f)(1), 123 Stat. 1625. The question presented is as follows:

Whether the amended liability standard applies to this case, which involves requests for payment that were acted upon before June 7, 2008, but in which the plaintiffs' requests for relief in court under the False Claims Act were pending on that date.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 703 F.3d 930. The order of the district court (Pet. App. 37a-56a) is reported at 667 F. Supp. 2d 747.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2012. A petition for rehearing was denied on December 5, 2012 (Pet. App. 57a-58a). The petition for a writ of certiorari was filed on February 22, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA) imposes civil liability on a person who commits any of seven specified deceptive practices involving government funds or

property. See 31 U.S.C. 3729(a)(1)(A)-(G) (Supp. V 2011). A person who violates the FCA may be held liable for civil penalties "plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a) (Supp. V 2011); see *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 769 (2000).

An FCA action may be commenced either by the government itself, 31 U.S.C. 3730(a), or by a private person (known as a "relator") in a *qui tam* action brought "for the person and for the United States Government," 31 U.S.C. 3730(b)(1). See *Stevens*, 529 U.S. at 769. When a relator files a *qui tam* suit, the government may intervene and take over the case. 31 U.S.C. 3730(b)(2), (4)(A) and (c)(1). If the government declines to intervene, the relator has the exclusive right to conduct the litigation. 31 U.S.C. 3730(b)(4)(B). Any damages or civil penalties awarded in a *qui tam* action are divided between the government and the relator. 31 U.S.C. 3730(d).

2. a. Respondents Roger L. Sanders and Roger L. Thacker filed this *qui tam* action in 1995, alleging fraud by petitioners in connection with the construction of electrical generator sets manufactured for use in certain Navy destroyers. 553 U.S. 662, 666.[1] The United States declined to intervene. During a jury trial, respondents introduced evidence that petitioners had presented invoices to the shipyards building the

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[1] Respondents also alleged that petitioners fraudulently withheld cost and pricing data in their negotiations concerning the generator sets. Pet. App. 4a. The district court granted petitioners summary judgment on those claims, which the court of appeals affirmed. *Id.* at 38a-39a. Those claims are no longer at issue. *Id.* at 4a.

destroyers, falsely certifying that petitioners' work had been completed in compliance with the Navy's requirements. *Id*. at 667. "Respondents did not, however, introduce the invoices submitted by the shipyards to the Navy." *Ibid*. At the close of respondents' case, the district court granted petitioners judgment as a matter of law, holding that the FCA requires proof that the false claims were presented to the government. *Ibid*. The court of appeals reversed, holding that proof of intent to cause a false claim to be paid by a private entity using government funds is sufficient to establish liability under the FCA. *Id.* at 668.

This Court reversed. The FCA provision on which the relators premised their suit imposed civil liability on any person 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) (2006). That provision, this Court held, required not only that a false statement result in the use of government funds to pay a fraudulent claim; it was also "necessary for the defendant to intend that a claim be 'paid . . . by the Government' and not by another entity." 553 U.S. at 670 (quoting 31 U.S.C. 3729(a)(2) (2006)); see *id*. at 668-669 ("'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)."). The Court further explained that "a subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim." *Id*. at 671. The Court remanded the

suit to the court of appeals, *id.* at 673, which in turn remanded the case to the district court, Pet. App. 39.

b. Congress responded to this Court's decision by enacting Section 4(a)(1) of the Fraud Enforcement Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. Section 4 of FERA is entitled "CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW." 123 Stat. 1621. The Senate Report described the provision as an effort to "correct" what Congress believed to be "erroneous interpretations of the law that were decided" by this Court "in *Allison Engine*." S. Rep. No. 10, 111th Cong., 1st Sess. 10 (2009) (Senate Report).

Section 4(a)(1) of FERA amended Section 3729(a)(2) by deleting "to get," the words this Court had "found created an intent requirement for false claims liability under that section." Senate Report 12; see 553 U.S. at 668-669. In its place, FERA added the words "material to." § 4(a), 123 Stat. 1622. The amended provision thus imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011); see 31 U.S.C. 3729(b)(4) (Supp. V 2011) ("the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). For purposes of Section 3729's liability provisions, the term "claim" is defined to include a "request or demand * * * for money or property" that "is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the

United States Government * * * provides or has provided any portion of the money or property requested or demanded; or * * * 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(b)(2)(A) (Supp. V 2011).[2]

FERA made a number of other amendments to the FCA. See § 4(b)-(e), 123 Stat. 1623-1625. Congress provided generally that amendments made by FERA would be effective on the date of enactment and applicable to conduct occurring on or after that date. § 4(f), 123 Stat. 1625. Congress directed, however, that certain amendments would apply retroactively. First, Section 4(f)(1) states that the amendment made by Section 4(a)(1) "shall take effect as if enacted on June 7, 2008"—two days before this Court issued its prior decision in this case, see 553 U.S. at 662—and will "apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date." § 4(f)(1), 123 Stat. 1625. Second, Section 4(f)(2) specifies that certain other amendments "shall apply to cases pending on the date of enactment." § 4(f)(2), 123 Stat. 1625.

3. a. Congress enacted FERA while this case was pending before the district court on remand. Pet. App. 39a-40a. Petitioners filed a motion to preclude retroactive application of the amended liability provision, 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011), or, in the

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[2] The definition of "claim" quoted in the text was enacted as part of FERA. The prior definition was codified at 31 U.S.C. 3729(c) (2006). Though the two definitions differ in some respects, both encompass a "request or demand * * * for money or property" that "is made to a [United States government] contractor, grantee, or other recipient," provided that certain conditions are satisfied.

alternative, to declare the retroactive application of that provision an unconstitutional violation of the Ex Post Facto Clause and petitioners' due process rights under the Fifth Amendment. Pet. App. 7a, 40a. The relators opposed that motion, and the United States filed a Statement of Interest in the district court also opposing petitioners' motion. *Id.* at 6a.

The district court granted petitioners' motion, concluding that the amended liability provision does not govern this case under the applicable effective-date provision. Pet. App. 41a-44a. The court noted that the effective-date provision made the liability provision applicable "to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after" June 7, 2008. *Id.* at 42a (quoting FERA § 4(f)(1), 123 Stat. 1625). The court acknowledged that "this case was pending on" that date. *Ibid.* The court concluded, however, that the interpretation of the effective-date provision was controlled by the FCA's definition of "claim" as "any request or demand, whether under a contract or otherwise, for money or property." *Id.* at 43a (quoting 31 U.S.C. 3729(b)(2)(A) (Supp. V 2011)). Because petitioners had presented their requests for payment "in the late 1980s and early 1990s," and none of those requests were pending on June 7, 2008, the district court held that FERA's amendment to the liability provision was inapplicable to this case. *Ibid.* The court also found support for its interpretation in the fact that FERA's other retroactive effective-date provision referred to "cases" instead of "claims." *Id.* at 44a (discussing § 4(f)(2), 123 Stat. 1625).

The district court further held, in the alternative, that retroactive application of the amended liability

provision to petitioners would violate the Ex Post Facto Clause. Pet. App. 44a-55a. The court stated that "Congress intended to impose punishment when it enacted the FCA and the amendments thereto." *Id.* at 51a; see *id.* at 46a-51a. The court viewed that conclusion as sufficient to make retroactive application of the statute an ex post facto violation. See *id.* at 45a (citing *Smith* v. *Doe*, 538 U.S. 84, 92 (2003)). The district court further concluded that, even if Congress had not intended the FCA to be punitive, retroactive application of the amendments enacted by FERA would violate the Ex Post Facto Clause because those amendments are "punitive in nature and effect." *Id.* at 55a; see *id.* at 51a-55a.[3]

Following its decision, the district court granted the United States' motion to intervene, and it granted motions by both the United States and respondents to certify the interlocutory ruling for immediate appeal under 28 U.S.C. 1292(b). Pet. App. 9a.

b. The court of appeals granted the petitions for interlocutory appeal and reversed. Pet. App. 1a-36a.

Focusing principally on statutory text and structure, the court of appeals held that the term "claim" in FERA's effective-date provision "refers to a civil action or case" and not to a request for payment. Pet. App. 22a; see *id.* at 10a-22a.[4] The court noted that the

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[3] The district court declined to address petitioners' argument that retroactive application of the FERA's amendment to the applicable liability provision would violate petitioners' rights under the Due Process Clause. Pet. App. 41a.

[4] The court of appeals observed that five other courts of appeals have addressed whether the term "claim" in FERA's effective-date provision refers to a request for relief in court or instead to a request for payment. Pet. App. 18a-19a (discussing *Gonzalez* v.

effective-date provision that governs here applies to "claims under the False Claims Act," while FERA's other effective-date provision applies to "cases pending on the date of enactment." *Id.* at 10a (quoting § 4(f)(1) and (2), 123 Stat. 1625) (emphasis omitted). The court acknowledged that Congress's use of different terms in adjoining sections of a statute raises a presumption that Congress intended the terms to have different meanings. *Id.* at 11a (citing *Rusello* v. *United States*, 464 U.S. 16, 23 (1983)). It found that presumption "undermined" here, however, because Subsections 4(f)(1) and 4(f)(2) of FERA "were drafted by different chambers of Congress at different times." *Ibid.* (citing, *inter alia*, *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)).

The court of appeals rejected petitioners' argument that the FCA's definition of "claim" as "any request or demand * * * for money or property," 31 U.S.C. 3729(b)(2)(A) (Supp. V 2011), governs the meaning of the term as it is used in the applicable effective-date provision, FERA § 4(f)(1), 123 Stat. 1625. See Pet. App. 13a-14a. The court noted that the "location of"

Fresenius Med. Care N. Am., 689 F.3d 470, 475 & n.4 (5th Cir. 2012); *United States ex rel. Yannacopoulous* v. *General Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011); *United States ex rel. Cafasso* v. *General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010); *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), rev'd and remanded on other grounds, 131 S. Ct. 1885 (2011); *Hopper* v. *Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009), cert. denied, 130 S. Ct. 3465 (2010)). The court found those decisions to be "of limited aid to [its] interpretation of the retroactivity language," however, because "the decisions resolve the issue without extended analysis." *Id.* at 19a.

Section 4(f), while not dispositive, "sheds light" on the propriety of applying that definition. *Id.* at 16a-17a n.6; see also *id.* at 13a. The statutory definition of "claim" applies "[f]or purposes of this section," 31 U.S.C. 3729(b) (Supp. V 2011), but FERA's effective date provision was not enacted as an amendment to Section 3729. See Pet. App. 16a-17a n.6. The court of appeals further observed that applying the statutory definition to the effective-date provision "makes little sense" and would result in "a somewhat nonsensical result," *id.* at 14a, because the effective-date provision does not refer to "claims" standing alone but to "claims *under the False Claims Act*," *id.* at 13a (quoting FERA § 4(f)(1), 123 Stat. 1625), and "a request for payment is never effectively made under the FCA," *id.* at 14a; see *id.* at 14a n.4 (substituting statutory definition of "claim" in effective-date provision to "demonstrate[] the misfit between the definition and its placement in § 4(f)(1)"). That outcome is avoided by giving "claim" its ordinary meaning as "a claim for relief or cause of action," *id.* at 14a, a construction that is supported by the fact that numerous FCA provisions use the term "claim" to refer to "a civil action or legal claim, and not a request for payment," *id.* at 16a (citing examples).

Finally, the court of appeals held that retroactive application of the amended liability provision does not violate either the Ex Post Facto Clause or the Due Process Clause. Pet. App. 22a-36a. The court found that there is no ex post facto violation because Congress's intent in enacting the liability provision was civil and non-punitive, *id.* at 23a-27a, and the provision has neither a punitive purpose nor effect, *id.* at 28a-35a. The court further concluded that, because retro-

active application of the liability provision furthered a rational legislative purpose—correcting what Congress viewed as an erroneous interpretation of the FCA—petitioners had failed to establish a violation of their rights under the Due Process Clause. *Id.* at 36a.

ARGUMENT

The court of appeals correctly held that 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011), the FCA's amended liability provision, applies to all FCA suits pending on or after June 7, 2008. Petitioners' alternative interpretation of the applicable effective-date provision in FERA makes little sense and would frustrate Congress's intent to nullify this Court's prior decision in this case. The court of appeals' decision does not conflict with any decision of this Court. Although two other courts of appeals have reached contrary results, they have done so in footnotes without any analysis of the issue. In addition, the question presented is one of diminishing significance, and it is unclear whether the circuit split ever will mature. Further review is not warranted.

1. The court of appeals correctly determined that, under Section 4(f)(1) of FERA, the amended liability standard in 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011) is applicable to this suit, in which the relators' claims for relief under the FCA were pending in court on June 7, 2008.

FERA Section 4(f)(1) makes the amended liability provision applicable "to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after" June 7, 2008. § 4(f)(1), 123 Stat. 1625. The term "claim" is often used as shorthand to denote a claim for relief asserted before a court or other adjudicative body. See, *e.g., United States* v. *Tohono*

O'Odham Nation, 131 S. Ct. 1723, 1727 (2011) ("[Under 28 U.S.C. 1500, t]he CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents."). Congress regularly uses the term in that sense, see, *e.g.*, 28 U.S.C. 2244(d)(2), and the term is used in that manner in several FCA provisions, see, *e.g.*, 31 U.S.C. 3730(c)(5), (d)(1), (2) and (4); 31 U.S.C. 3730(e)(4) (Supp. V 2011); 31 U.S.C. 3731(c) (Supp. V 2011); 31 U.S.C. 3732(b); Pet. App. 16a. If Section 4(f)(1) uses "claim" in that sense, Section 3729(a)(1)(B) clearly applies to this case, since respondents' requests for relief against petitioners under the FCA were pending in this Court on June 7, 2008.

The term "claim" can also be used to refer more broadly to requests or assertions made outside the context of adjudicative proceedings. For purposes of 31 U.S.C. 3729 (Supp. V 2011), for example, the FCA defines "claim" to mean "any request or demand * * * for money or property" presented to the United States government or to a contractor who would make payment on behalf of the government. 31 U.S.C. 3729(b)(2)(A) (Supp. V 2011); see pp. 4-5 & n.2, *supra*. If Section 4(f)(1) uses "claim" in that sense, then the amended liability provision does not apply in this case because petitioners made their request for payment for their work on the generator sets "in the late 1980s and early 1990s," and those requests were no longer pending on June 7, 2008. See Pet. App. 43a.

Standing alone, the term "claim" is susceptible to either of those interpretations. The context in which the term appears in FERA Section 4(f)(1), however, makes clear that only the former reading is plausible. FERA's effective-date provision does not refer simply

to "claims" that were pending on or after June 7, 2008. Rather, it makes the amended liability provision applicable "to all claims *under the False Claims Act* * * * that are pending on or after that date." FERA § 4(f)(1), 123 Stat. 1625 (emphasis added). A request for payment submitted to a government officer or contractor cannot reasonably be described as a claim "under the False Claims Act." See Pet. App. 14a ("a request for payment is never effectively made under the FCA"). "Instead, the FCA (and its liability standards) only apply after an allegedly fraudulent request for payment is made and a civil action pursuant to the FCA is filed." *Ibid*. The court of appeals' construction of FERA's effective-date provision is thus the only one that gives effect to all the words in the applicable statutory provision. See *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

The fact that the FCA defines "claim" to encompass specified requests for payment does not alter that contextual analysis. By its terms, the FCA definition of "claim" applies "[f]or purposes of this section," *i.e.*, Section 3729 of Title 31 of the United States Code. See 31 U.S.C. 3729(b) (Supp. V 2011). Section 4(f)(1) of FERA does not appear in 31 U.S.C. 3729, and the statutory definition of "claim" accordingly does not apply. See *Levin* v. *United States*, 133 S. Ct. 1224, 1231-1232 (2013) (finding it "not difficult" to conclude that Congress's qualification of operative clause with "[f]or purposes of this section" limited operation of clause to that section). And, as explained above (see p. 11, *supra*), several FCA provisions use the term "claim" to refer to requests for relief premised on allegations that the FCA has been violated. The phrase "claims under the False Claims Act" in

FERA's effective-date provision therefore cannot mean "claims within the meaning of the False Claims Act," since there is no single understanding of the word "claim" that applies throughout the FCA.[5]

Construing FERA's effective-date provision to refer to demands for payment, rather than to claims for relief under the FCA, would also subvert Congress's purposes in amending the FCA's liability provisions and giving those amendments retroactive effect. Congress enacted Section 3729(a)(1)(B) "to clarify and correct" what it understood to be this Court's "erroneous interpretations of the law" in *Allison Engine*. See Senate Report 10-12. That intent is expressed not only in the legislative history, but also in the text of FERA itself: Section 4 is entitled "CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW." 123 Stat. 1621.

Congress amended the liability provision at issue here to eliminate the language that the Court in *Alli-*

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[5] Use of the FCA definition of "claim" to construe FERA's effective-date provision would create a further anomaly. In order to apply that approach to determine whether "claims" were pending on or after June 7, 2008, it would be necessary to determine *which* FCA definition of "claim"—the pre-FERA definition codified at 31 U.S.C. 3729(c) (2006), or new 31 U.S.C. 3729(b)(2)(A) (Supp. V 2011) as added by FERA—should be plugged into FERA Section 4(f)(1). But because the new definition of "claim" is part of the FERA liability provisions, whose applicability to particular cases is governed by Section 4(f)(1), the choice between the two possible definitions would itself depend on whether "claims" were pending on or after June 7, 2008. To be sure, the pre- and post-FERA definitions are sufficiently similar that this anomaly is unlikely to cause significant practical difficulties. Nevertheless, petitioners' approach would introduce into the application of Section 4(f)(1) a circularity that Congress is unlikely to have intended.

son Engine had invoked in support of its decision. 31 U.S.C. 3729(a)(1)(B) and (b)(4) (Supp. V 2011). It made that amendment applicable "to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after" June 7, 2008. FERA § 4(f)(1), 123 Stat. 1625. The only reasonable inference is that Congress selected a date two days before this Court's earlier decision in this case to override that decision and to ensure that the amended liability standard would apply to all pending FCA suits, including (and particularly) this one. The court of appeals' decision not only gives sensible meaning to all the terms in FERA's effective-date provision, it also advances Congress's manifest purpose in making Section 3729(a)(1)(B) retroactive.

2. Petitioners offer no response to these points. They do not address the court of appeals' observation that the term "claims" in FERA's effective-date provision cannot sensibly be read to refer to requests for payment "because a request for payment is never effectively made under the FCA." Pet. App. 14a. Nor do petitioners explain why Congress would have made Section 3729(a)(1)(B) applicable to claims pending on or after June 7, 2008, if not to ensure that courts apply the amended liability standard to this case and to other FCA suits pending as of that date. Instead, petitioners rely on canons of statutory construction that the court of appeals properly recognized either as inapposite or as simply establishing rebuttable presumptions, which the court found were overcome by context, competing interpretive canons, and the purpose of FERA.

a. Petitioners' principal argument is that the decision below violates the canon that Congress's use of

different terms in two subsections of FERA's effective-date provisions indicates that the terms have different meanings. Pet. 20-22; see *Rusello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted) (brackets in original). Noting that a second effective–date provision in FERA makes various other FCA amendments applicable "to cases pending on the date of enactment," § 4(f)(2), 123 Stat. 1625, petitioners contend that the reference to *cases* in that provision demonstrates that Congress could not have intended the word "claims" to mean "cases" in Section 4(f)(1), Pet. 21. That argument is mistaken.

"[T]he interpretive guide" that Congress intended different meanings when it uses different language in different portions of a statute "is 'no more than [a] rul[e] of thumb' that can tip the scales when a statute could be read in multiple ways." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992)) (brackets in original). As the court of appeals observed, however, the two retroactive effective-date provisions "were drafted by different chambers of Congress at different times." Pet. App. 11a. "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997). The interpretive guide

on which petitioners rely is thus of limited utility here. And because petitioners' interpretation "yields a somewhat nonsensical result," Pet. App. 14a, and ignores qualifying statutory language, pp. 11-12, *supra*, the court of appeals correctly concluded that "the presumption of uniform usage has been rebutted," Pet. App. 15a.

In any event, construing the term "claims" in Section 4(f)(1) of FERA to refer to requests for relief in court does not render that term synonymous with the term "cases" in Section 4(f)(2). The term "claim" in this context is properly understood to refer to a particular count or cause of action, and a single "case" may include many such "claims." See *United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 387-388 (3d Cir. 1999) (Alito, J.) (noting "the elementary point that a qui tam 'action' may contain multiple claims"), cert. denied, 529 U.S. 1018 (2000). The FCA authorizes state-law claims to be adjudicated together with FCA counts if they "arise[] from the same transaction or occurrence." 31 U.S.C. 3732(b); cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) (explaining that in some circumstances, "the relationship between [a federal] claim and [a] state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"). The amended liability provisions enacted in FERA clearly were intended to govern only counts or causes of action that are premised on the FCA, even though particular suits might include other counts as well. The effective-date provision's reference to "claims under the False Claims Act" expressed that intent more precisely than would the phrase "cases under the False Claims Act."

b. Petitioners argue (Pet. 23-27) that the court of appeals' decision violates the presumption against retroactivity and the canon of constitutional avoidance. Those arguments lack merit.

i. Under the presumption against retroactivity, "[i]f a statutory provision 'would operate retroactively' as applied to cases pending at the time the provision was enacted, then 'our traditional presumption teaches that [the statute] does not govern absent clear congressional intent favoring such a result.'" *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576 (2008) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994)). Congress unambiguously indicated its intent to legislate retroactively by enacting a statute in 2009 and making one of its provisions "take effect as if enacted on June 7, 2008" and "apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date." FERA § 4(f)(1), 123 Stat. 1625. Even if the term "claims" in Section 4(f)(1) were construed to mean "requests for payment," FERA's amended liability provisions would still apply to a set of cases in which the primary conduct that is alleged to be unlawful (*e.g.*, the presentation of a false or fraudulent claim, or the use of a false statement in support of such a claim) occurred before FERA was enacted.

Petitioners contend that the presumption against retroactivity "still applies * * * to discern the statute's *scope*." Pet. 25. If the term "claims" in Section 4(f)(1) is construed to refer to requests for payment, rather than to requests for relief in court, the amended FCA liability provisions will apply retroactively to *fewer* cases. In petitioners' view, the presumption against retroactivity requires the Court to

adopt the reading of the effective-date provision that will reduce the number of retroactive applications. Pet. 25-26.

This Court has explained that "in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh*, 521 U.S. at 326; see *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006). The presumption against retroactivity cannot properly be used to construe legislation in a manner that produces a nonsensical result and ignores critical qualifying language. See *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (rejecting reliance on canon of construction that "would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote"). As explained above, the phrase "claims under the False Claims Act" is incoherent if the word "claims" is read to mean "requests for payment." Moreover, Congress enacted FERA to correct what it viewed as an error in this Court's prior decision in this very case, and it made the relevant amendment operative two days before this Court issued its decision. In light of Section 4(f)(1)'s text and history, there can be no doubt that Congress intended 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011) to provide the rule of decision in this suit.

ii. Petitioners also briefly urge the Court to adopt their construction of the effective-date provision to avoid what they contend is a serious constitutional question: whether retroactive application of Section 3729(a)(1)(B) to them violates the Ex Post Facto Clause. Pet. 26-27. But the doctrine of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Petitioners' con-

struction of FERA's effective-date provision is not plausible, and petitioners may not rely on the canon to rewrite the statute. See *id*. at 382 ("The canon [of constitutional avoidance] is * * * a means of giving effect to congressional intent, not of subverting it.").

As explained above, moreover, FERA's amended liability provisions indisputably have retroactive application to certain cases, namely those in which the alleged unlawful conduct occurred before FERA was enacted, but the pertinent request for payment was pending on June 7, 2008. Petitioners do not suggest that any meaningful constitutional difference exists between those retroactive applications and the one at issue here. Petitioners' construction of Section 4(f)(1) would provide a non-constitutional ground for deciding *this case*, but it would not alleviate what petitioners perceive to be the constitutional flaw in the statute. Petitioners do not seek review in this Court of the constitutional issue, see Pet. i, and they cannot present that issue indirectly by urging a construction of FERA's effective-date provision contrary to the plain language and purpose of the statute on the ground that it will "avoid" a constitutional issue, see *Clark*, 543 U.S. at 381 ("The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means.").[6]

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[6] Amicus Chamber of Commerce asks this Court to resolve whether retroactive application of the amended liability provision would violate the Ex Post Facto Clause. Br. 8-14. But this Court "do[es] not ordinarily address issues raised only by *amici*," *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991), and there is no circuit split on this issue, as amicus acknowledges, Br. 8.

c. Petitioners contend (Pet. 14-20) that this Court's review is necessary to resolve a circuit split on the question whether Section 3729(a)(1)(B) applies to FCA suits pending as of June 7, 2008. But because the court of appeals in this case is the only appellate court to have engaged in any meaningful analysis of that issue, review by this Court would be premature. The question presented is of diminishing importance, moreover, and it is unclear whether the circuit split ever will mature.

In all but one of the six cases cited by petitioners, the other courts of appeals that have addressed the question presented decided that issue in footnotes without offering any substantive analysis. The Seventh, Second, and Fifth Circuits have reached the same conclusion as the Sixth Circuit in this case, holding that the phrase "claims under the False Claims Act" in FERA's effective-date provision refers to plaintiffs' claims for relief rather than to contractors' demands for payment. See *United States ex rel. Yannacopoulos* v. *General Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011); *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), rev'd and remanded on other grounds, 131 S. Ct. 1885 (2011); *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010).[7]

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[7] Petitioners contend that the Fifth Circuit later reversed itself. Pet. 13, 16-17 (discussing *Gonzalez* v. *Fresenius Med. Care N. Am.*, 689 F.3d 470 (5th Cir. 2012)). That is incorrect. In *Gonzalez*, the Fifth Circuit explained in a footnote that the district court had held that the amended liability provision did not apply. *Id.* at 475 n4. But the court affirmed the judgment in favor of the defendants on the ground that the relators had failed to establish that the defendants had used a false record, a requirement common to both

By contrast, the Eleventh Circuit stated without explanation that the term "claim" in FERA Section 4(f)(1) has the meaning set out in the FCA definition, see Section 3729(b)(2)(A). *Hopper* v. *Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009), cert. denied, 130 S. Ct. 3465 (2010). And the Ninth Circuit followed the Eleventh without comment. *United States ex rel. Cafasso* v. *General Dynamics C4 Sys. Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011). Accordingly, while two circuits have applied FERA's amendments differently than the Sixth Circuit in this case, those courts of appeals offered no analysis of that disagreement that could inform this Court's consideration of the question presented.

It is unclear, moreover, whether the circuit split will ever mature. The issue is of diminishing significance, since even under petitioners' view of FERA Section 4(f)(1), the FCA's amended liability provisions apply to all suits in which the pertinent requests for payment were pending on or after June 7, 2008. Petitioners speculate that "thousands" of cases could be affected. Pet. 30. But the choice between the two readings of Section 4(f)(1) will be outcome-determinative only when (1) the pertinent request for payment was acted on before June 7, 2008, but the FCA suit was pending on or after that date, *and* (2) the defendant's conduct is covered by the amended liability provisions but not by the prior version of the statute as construed by this Court in *Allison Engine*. Petitioners offer no reason to believe that such cases will be numerous.

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the pre- and post-amendment liability standards. *Id.* at 476; see 31 U.S.C. 3729(a)(1)(B) (Supp. V 2011); 31 U.S.C. 3729(a)(2) (2006).

Many courts of appeals have found it unnecessary to decide how FERA Section 4(f)(1) is best interpreted because the outcome of the cases before them would be the same under either the FCA's amended liability provisions or the pre-amendment statute. See, *e.g., United States* v. *Hawley*, 619 F.3d 886, 894-895 (8th Cir. 2010); *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1167 n.3 (10th Cir. 2010); *United States ex rel. Loughren* v. *Unum Group*, 613 F.3d 300, 306 n.7 (1st Cir. 2010); *United States ex rel. Owens* v. *First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 n.* (4th Cir. 2010); see also, *e.g.*, *United States ex rel. Bender* v. *North Am. Telecomms., Inc.*, No. 10-7176, 2013 WL 597657, at *2 (D.C. Cir. Jan. 25, 2013) (unpublished). Indeed, because this case is currently in an interlocutory posture, it is unclear whether the retroactive application of Section 3729(a)(1)(B) will ultimately affect the outcome here. For that reason as well, this Court's review is not warranted. See *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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