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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.[1] An important function of the Chamber is to represent the interests of its members by participating as an *amicus curiae* in cases involving issues of national concern to American business, including cases raising significant questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.[2]

The FCA is often cited as the Federal Government's primary tool for combating fraud against the United States. However, the FCA is also highly susceptible to abuse.

Defendants found liable under the statute are subject to mandatory treble damages, mandatory civil penalties as great as $11,000 per "false" claim, and mandatory attorney's fees and costs. 31 U.S.C.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a blanket consent to the filing of *amicus* briefs. The federal and private respondents' written consents to the filing of this brief have been filed with the Clerk. Counsel of record for petitioners and respondents received notice of the Chamber's intent to file this brief more than ten days before the due date.

[2] Unless otherwise noted, all references to the FCA are to the currently codified version.

§§ 3729(a)(1), 3730(d); 28 C.F.R. § 85.3(a)(9). The decision whether to seek these potentially ruinous financial penalties is most often made, not by attorneys from the Department of Justice or other Executive Branch agencies, but by private bounty hunters acting as *qui tam* relators seeking as much as 30 percent of any recovery. 31 U.S.C. § 3730(d)(2). As this Court has recognized, "*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Relators are therefore "less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Id.*

The Chamber has a significant interest in the issues presented by this case. Many Chamber members are potentially subject to the terms of the FCA because they do business with the Government directly or with government contractors and subcontractors. Therefore, as it has done at the petition stage in previous FCA cases presenting questions of national importance, the Chamber participates here to discuss additional reasons why this case warrants the Court's review. *See, e.g.*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (*Allison Engine I*); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007); *Hughes Aircraft*, 520 U.S. 939.

STATEMENT

In direct response to the Court's 2008 decision in this case, Congress eliminated the requirement that one attempting to impose liability under the FCA's false-statement provision—now codified as amended at 31 U.S.C. § 3729(a)(1)(B) (False-Statement Provision)—"must prove that the defendant *intended* that the false record or statement be material to the Government's decision to pay or approve the false claim." *Allison Engine I*, 553 U.S. at 665 (emphasis added). In its 2009 legislation rejecting this Court's unanimous decision, Congress instructed that the new False-Statement Provision would "take effect as if enacted on June 7, 2008"—i.e., two days before *Allison Engine I*—"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." Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(f)(1), 123 Stat. 1617, 1625 (emphasis added) (Section 4(f)(1)). Congress then provided that certain other amendments to the FCA would apply to "*cases* pending on the date of enactment." FERA § 4(f)(2) (emphasis added).

Relying heavily on FERA's limited legislative history, the United States Court of Appeals for the Sixth Circuit held that Section 4(f)(1)'s use of the word "claims" means "cases," such that the new False-Statement Provision governs this case. Pet. App. 10a-22a. The Sixth Circuit then held that applying the new False-Statement Provision to this case does not violate the Federal *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3. Pet. App. 22a-35a.

The petition for a writ of certiorari asks the Court to decide whether the Sixth Circuit correctly held that the FCA's newly amended False-Statement Provision applies to this case even though it has been pending for almost two decades and involves allegedly false payment claims dating back to the mid 1980s. That presents questions of statutory interpretation in this case that, depending on the answers, raise serious constitutional questions under the Federal *Ex Post Facto* Clause.

SUMMARY OF ARGUMENT

As explained in detail by the petition, and as acknowledged by the Sixth Circuit, the Government, and the relators in this case, there exists a well-entrenched circuit split on the meaning of Section 4(f)(1). That, alone, merits this Court's intervention. The Chamber endorses the petition's arguments and will not repeat them here. Instead, the Chamber wishes to emphasize two additional reasons why the Court should grant plenary review in this case.

First, this case presents statutory and constitutional issues that affect myriad FCA cases implicating billions of dollars of potential liability. Available evidence suggests that more than 1,000 ongoing FCA cases may be affected by the meaning of Section 4(f)(1), which, in turn, controls the meaning of one of the FCA's key liability provisions. Defendants, relators, and the Government alike have a significant interest in knowing which version of the statute governs any given case.

Second, this case presents an opportunity for the Court to provide much-needed guidance to lower courts on the FCA's punitive nature. Lower courts reviewing the constitutionality of retroactive amend-

ments to the FCA have struggled to interpret this Court's previous statements on that subject. The absence of clear guidance from this Court has become increasingly problematic as States continue to enact retroactive statutes modeled after the FCA. Because the federal constitutional prohibition against *ex post facto* laws applies with equal force against the States, *see* U.S. Const. art. I, § 10, cl. 1 (State *Ex Post Facto* Clause), the answer to the *ex post facto* issue in this case would provide critical guidance to state and federal courts asked to review the constitutionality of retroactive statutes modeled after the FCA.

Accordingly, the Court should grant the petition for a writ of certiorari and resolve the important questions raised by this case.

ARGUMENT

I. THE MEANING OF FERA'S EFFECTIVE-DATE LANGUAGE IMPACTS A CRITICAL COMPONENT OF THE FCA IMPLICATED IN NUMEROUS CASES INVOLVING BILLIONS OF DOLLARS OF POTENTIAL LIABILITY

Whether Section 4(f)(1) applies is a critical question in a large number of cases that are still wending their way through litigation. It alters a critical element—scienter—of one of the FCA's most-used liability provisions. The current uncertainty about Section 4(f)(1)'s meaning causes significant practical difficulties in litigating those cases.

The FCA's False-Statement Provision has rightly been characterized as one of the statute's "key liability provisions." 1 John T. Boese, *Civil False Claims & Qui Tam Actions* § 1.09[A] (4th ed. 2013) (*Civil*

False Claims). Given the paperwork requirements associated with government contracts and participation in any federal program, relators and the Government rarely omit allegations of liability under the FCA's False-Statement Provision.

And the amendments effected by Section 4(f)(1) alter a core element of that key provision—scienter. Under the new False-Statement Provision, relators and the Government are relieved of having to prove that the defendant actually intended a false statement to influence the Government's decision to pay a claim. Therefore, "[m]uch of practical consequence rides" on the meaning of Section 4(f)(1). Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 Ind. L.J. 257, 257 (2011) (emphasis omitted).

The correct meaning of Section 4(f)(1) impacts a large number of cases nationwide, making the question's resolution "highly consequential." *Id.* at 269. Because most FCA cases are filed under seal and remain that way for several years, it is impossible to quantify exactly how many ongoing FCA cases were pending on June 7, 2008, or have been filed since then based on alleged conduct predating FERA's enactment. However, available evidence suggests that there are more than 1,000 such cases. *See id.* ("[A]s of September 30, 2009, there was a backlog of nearly 1000 FCA cases under investigation. Many of these are likely to involve claims against subcontractors, grantees, or other intermediaries, so the scope of subcontractor liability [under the False-Statement Provision] is a pressing concern."); Carrie Johnson, *A Backlog of Cases Alleging Fraud: Whistle-Blower Suits Languish at Justice*, Wash. Post, July 2, 2008,

at A1 (reporting that "[m]ore than 900 [FCA] cases alleging . . . billions of dollars [of potential liability] are languishing in a backlog that has built up over the past decade because the Justice Department cannot keep pace with the surge in charges brought by whistle-blowers").

The widespread disagreement of authority over the meaning of Section 4(f)(1) also causes significant practical difficulties that confront relators, the Government, and defendants alike.[3] Parties and their counsel can usually depend on knowing what statutory language governs their case. That is currently impossible in a large cross-section of FCA cases, where counsel simply do not know what elements must be established in order to prove a violation of the False-Statement Provision. That, in turn, negatively affects all stages of litigation—motions-to-dismiss practice, responsive pleading, discovery, dispositive-motions practice following discovery, trial, post-trial motions practice, and appeal.

The legal uncertainty that currently surrounds the meaning of Section 4(f)(1) also impedes good-

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[3] As the petition notes (at 12, 18), the Government conceded the existence of a circuit split in successfully moving the Sixth Circuit to publish its opinion. The Government has recognized the circuit split in other appeals as well, going so far as to explain that the retroactivity question "raises an issue of considerable significance to the United States." U.S. Mot. for Leave to Participate at Oral Arg. as *Amicus Curiae* 2-3, *United States ex rel. Bender v. N. Am. Telecomms., Inc.*, No. 10-7176 (D.C. Cir. Sept. 20, 2012). *But see United States ex rel. Bender v. N. Am. Telecomms., Inc.*, No. 10-7176, 2013 WL 597657, at *2 (D.C. Cir. Jan. 25, 2013) (declining to decide retroactivity issue after affirming district court's decision on other grounds).

faith settlement negotiations. For example, it is common in FCA cases for the Government to engage in negotiations with a defendant prior to a case's unsealing. The question at issue here adds an unnecessary level of legal uncertainty to the negotiation process.

Without timely intervention by this Court, scores of FCA cases will move forward using an incorrect legal standard for establishing scienter. As a result, extraordinary amounts of resources and valuable time will be wasted if this Court postpones review. *See, e.g.*, *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1277 (D.C. Cir. 2010) (noting the "essential role that proof of scienter plays under the FCA," reversing jury verdict rendered in favor of Government following four-week trial because jury was improperly instructed regarding the scienter element, and remanding for new trial).

II. RESOLUTION OF THE *EX POST FACTO* ISSUE WOULD PROVIDE MUCH-NEEDED GUIDANCE TO FEDERAL AND STATE COURTS

A. Lower Courts Have Struggled to Interpret This Court's Statements Regarding the FCA's Punitive Nature

Although the Sixth Circuit appears to be the first federal appellate court to have decided whether the Federal *Ex Post Facto* Clause precludes retroactive application of the new False-Statement Provision, several federal district courts have issued published opinions reaching conflicting answers on that important question. *Compare, e.g.*, *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 709 F. Supp. 2d 1084, 1112 (D.N.M. 2012) (finding retroactive appli-

cation of new False-Statement Provision would violate the Federal *Ex Post Facto* Clause); *United States v. Hawley*, 812 F. Supp. 2d 949, 962 (N.D. Iowa 2011) (same); *and United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) (decision below finding same), *with United States ex rel. Drake v. NSI, Inc.*, 736 F. Supp. 2d 489, 502 (D. Conn. 2010) (contra).

The source of this disagreement can largely be traced to language contained in two of this Court's decisions. As the Sixth Circuit explained (Pet. App. 30a, 34a-35a), this Court has made various statements regarding the punitive nature of the FCA during the past few years, albeit never in the context of an *ex post facto* challenge such as this one. *Compare Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (Scalia, J.) (citing the fact that the 1986 version of the FCA "impose[d] damages that are essentially punitive in nature," as evidence that the FCA liability provision's use of the word "person" does not include States or state agencies), *with Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (Souter, J.) (explaining, in a case involving the 1986 version of the FCA, that "treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives," such that it "does not follow that the punitive feature has the force to show congressional intent to repeal implicitly the existing definition of ['person'], which included municipalities").

Citing the Court's later statements in *Chandler*, the Sixth Circuit concluded that this Court "*seemed to soften* its position with its finding that the FCA's

treble damages provision actually possesses a compensatory side." Pet. App. 34a (emphasis added). That "softening" interpretation ultimately served as the linchpin of the Sixth Circuit's *ex post facto* analysis. Specifically, the Sixth Circuit found that "some aspects of the FCA weigh in favor of finding a punitive purpose or effect, while others weigh in favor of finding a civil purpose or effect." Pet. App. 35a. "However," the Sixth Circuit explained, "the fact that the FCA may have a deterrent effect is generally not enough alone to render a sanction punitive, *and with* Chandler*, the Supreme Court appears to have softened its view of the role of the treble damages available under the FCA.*" *Id.* (emphasis added).

Only this Court can clarify whether it has, in fact, "softened its view" regarding the punitive nature of the FCA.

B. States Continue To Enact Retroactive Statutes Modeled After the FCA, Raising Serious *Ex Post Facto* Issues

The Court's resolution of the *ex post facto* issue in this case would be beneficial at the state level as well. At least 31 States have enacted false-claims statutes modeled after, or similar to, the FCA.[4] Since

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[4] *See* **California**, Cal. Gov't Code §§ 12650-12656; **Colorado**, Colo. Rev. Stat. §§ 25.5-4-303.5 to 25.5-4-310; **Connecticut**, Conn. Gen. Stat. §§ 17b-301 to 17b-301p; **Delaware**, Del. Code Ann. tit. 6, §§ 1201-1211; **Florida**, Fla. Stat. §§ 68.081-68.09; **Georgia**, Ga. Code Ann. §§ 49-4-168 to 49-4-168.6; **Hawaii**, Haw. Rev. Stat. §§ 661-21 to 661-29; **Illinois**, 740 Ill. Comp. Stat. 175/1 to 175/8; **Indiana**, Ind. Code §§ 5-11-5.5-1 to 5-11-5.5-18; **Iowa**, Iowa Code §§ 685.1-685.7; **Kansas**, Kan. Stat. Ann. §§ 75-7501 to 75-7511; **Louisiana**, La. Rev. Stat. (continued)

2006, Congress has formally encouraged States to enact such legislation, using a Medicaid-based financial incentive. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031(a), 120 Stat. 4, 72 (2006) (codified at 42 U.S.C. § 1396h).

However, in order to obtain the financial incentive, States must convince federal officials that their state statutes contain provisions that are "at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described in" the FCA. 42 U.S.C. § 1396h(b)(2). State officials must also demonstrate that their false-claims statutes contain a "civil penalty that is not less than the amount of the civil penalty authorized under" the FCA. § 1396h(b)(4). In response, many States have enacted FCA-like statutes or altered their preexisting statutes to more closely mirror the FCA. *See*

Ann. §§ 46:437-46:440; **Maryland**, Md. Code Ann., Health-Gen., §§ 2-601 to 2-611; **Massachusetts**, Mass. Gen. Laws ch. 12, §§ 5A-5O; **Michigan**, Mich. Comp. Laws §§ 400.601-400.615; **Minnesota**, Minn. Stat. §§ 15C-.01 to 15C.16; **Montana**, Mont. Code Ann. §§ 17-8-401 to 17-8-413; **Nevada**, Nev. Rev. Stat. §§ 357.010-357.250; **New Hampshire**, N.H. Rev. Stat. Ann. §§ 167:61-b to 167:61-e; **New Jersey**, N.J. Stat. Ann. §§ 2A:32C-1 to 2A:32C-17; **New Mexico**, N.M. Stat. Ann. §§ 44-9-1 to 44-9-14; **New York**, N.Y. State Fin. Law §§ 187-194; **North Carolina**, N.C. Gen. Stat. §§ 1-605 to 1-618; **Oklahoma**, Okla. Stat. tit. 63, §§ 5053.1-5053.7; **Rhode Island**, R.I. Gen. Laws §§ 9-1.1-1 to 9-1.1-8; **Tennessee**, Tenn. Code Ann. §§ 71-5-181 to 71-5-185; **Texas**, Tex. Hum. Res. Code Ann. §§ 36.001-36.132; **Utah**, Utah Code Ann. §§ 26-20-1 to 26-20-15; **Virginia**, Va. Code Ann. §§ 8.01-216.1 to 8.01-216.19; **Washington**, Wash. Rev. Code §§ 74.66.005-74.66.130; **Wisconsin**, Wis. Stat. § 20.931; *see also* 2 *Civil False Claims* app. I (reproducing copies of the foregoing statutes).

generally Pamela H. Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1535 (2010) ("Whereas in 2004, nineteen [S]tates had civil or criminal False Claims Acts and of those only thirteen had statutes with *qui tam* provisions, by January 1, 2009, twenty-three [S]tates and the District of Columbia had civil or criminal False Claims Acts and all twenty-four jurisdictions had statutes with *qui tam* provisions.").

Several States have made their false-claims statutes retroactive or have made retroactive amendments to them. For example, although New Mexico's FCA equivalent was first enacted in 2007, the state statute expressly permits actions based on conduct that occurred as much as 30 years before the statute's enactment. *See* N.M. Stat. Ann. § 44-9-12(A) ("A civil action pursuant to the [state statute] may be brought for conduct that occurred prior to [July 1, 2007], but not for conduct that occurred prior to July 1, 1987."). At least seven additional States have enacted similar legislation.[5]

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[5] *See* **Kansas**, Kan. Stat. Ann. § 75-7505(b) (expressly providing that a civil action under Kansas's FCA equivalent may be filed based on conduct predating the statute's 2009 enactment by as much as 10 years in certain cases); **Maryland**, Md. Code Ann., Health-Gen., § 2-609(b) (providing same where state statute was enacted in 2010); **Massachusetts**, Mass. Gen. Laws ch. 12, § 5K(1) (providing same where state statute was enacted in 2000); **Michigan**, Mich. Comp. Laws § 400.614(2) (providing same where state statute was enacted in 2009); **New York**, Act of Aug. 13, 2010, ch. 379, § 13, 2010 N.Y. Laws 1160, 1165 (making substantive amendments to New York's FCA equivalent, which was first enacted in 2007, and applying those

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As a result of the recent, rapid increase in state legislative activity in this area, state and federal courts are increasingly being called upon to evaluate the constitutionality of retroactive false-claims statutes and have looked to this Court's decisions for guidance, only to find no authority directly on point. *See, e.g.*, *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, --- P.3d ---, No. 31,421, 2012 WL 6934848, at *7 (N.M. Ct. App. Dec. 26, 2012) (rejecting Sixth Circuit's reading of *Chandler* and finding retroactive application of New Mexico's false-claims statute violates the State *Ex Post Facto* Clause and its New Mexico equivalent); *Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 235 (D. Mass. 2011) (analyzing *Stevens* and *Chandler* in finding retroactive application of Massachusetts's FCA equivalent violates the State *Ex Post Facto* Clause); *cf. State ex rel. Grupp v. DHL Express (USA), Inc.*, 970 N.E.2d 391, 397 (N.Y. 2012) (citing *Stevens* and explaining that the "imposition of civil penalties and treble damages" by New York's FCA equivalent "evinces a broader punitive goal of deterring fraudulent conduct against the State").

Furthermore, it is not uncommon for FCA suits to include assertions of liability under multiple different false-claims statutes. *See, e.g.*, *United States ex*

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amendments to "claims, records or statements made or used prior to, on or after April 1, 2007"); **Nevada**, Nev. Rev. Stat. § 357.170(1) (expressly providing that a civil action under Nevada's FCA equivalent may be filed based on conduct predating the statute's 2007 enactment by as much as 10 years in certain cases); **Utah**, Utah Code Ann. § 26-20-15(2) (providing same where state statute was enacted in 2007).

rel. King v. Solvay S.A., 823 F. Supp. 2d 472, 481 (S.D. Tex. 2011) (explaining relator's complaint alleged violations of the FCA and 23 different state false-claims statutes). Therefore, even those state and federal courts located in States without retroactive false-claims statutes will likely be called upon to address the nettlesome constitutional issues raised by the retroactive application of state statutes modeled after the FCA.

Accordingly, in addition to the pressing need for this Court to resolve the disagreement of authority over the meaning of Section 4(f)(1), this case provides the Court with an opportunity to provide much-needed guidance to federal and state courts on a constitutional question of significant practical importance throughout the United States.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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