No.

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

PETITION FOR A WRIT OF CERTIORARI

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
JEFFREY A. MILLER
MARY C. HENKEL
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner Allison Engine Company, Inc.
[Additional Counsel Listed On Inside Cover]

GREGORY A. HARRISON
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner Southern Ohio Fabricators, Inc.

WILLIAM A. POSEY
KEATING, MUETHING & KLEKAMP, PLL
1800 PROVIDENT TOWER
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner General Tool Company

QUESTION PRESENTED

In *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662 (2008), this Court held that Section 3729(a)(2) of the False Claims Act, 31 U.S.C. § 3729(a)(2) (2008), requires a plaintiff to prove that the defendant made or used a false statement with the purpose of getting a false claim paid by the government. In 2009, Congress amended the Act to overrule this Court's decision, and provided that the amended provision, new Section 3729(a)(1)(B), shall "apply to all *claims* under the False Claims Act . . . that are pending on or after" June 7, 2008. Pub. L. No. 111-21, § 4(f)(1), 123 Stat. 1617, 1625 (2009) (emphasis added). Directly contrary to decisions of the Ninth and Eleventh Circuits, but consistent with two other circuits, the Sixth Circuit held that new Section 3729(a)(1)(B) applies retroactively to any False Claims Act *case* pending on or after June 7, 2008, regardless of when the allegedly false claims for payment were made.

The question presented is whether Section 3729(a)(1)(B) of the False Claims Act applies retroactively to cases pending on or after June 7, 2008, where no allegedly false claim for payment was pending on or after that date.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Additionally, General Motors Corporation was a defendant in the district court, but the case against it was stayed due to pending bankruptcy proceedings. General Motors was named in the court of appeals' caption, but it did not participate in the appeal and is not a petitioner in this Court.

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

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATIVE HISTORY

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The court of appeals originally filed its opinion on November 2, 2012. On November 29, 2012, the court of appeals granted the motion of the United States to publish its opinion. The court of appeals' published opinion (Pet. App. 1a), filed on January 9, 2013, is reported at 703 F.3d 930. The court of appeals' order denying rehearing and rehearing en banc is unreported. Pet. App. 57a. The relevant order of the district court is reported at 667 F. Supp. 2d 747. Pet. App. 37a.

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on December 5, 2012, Pet. App. 57a, and filed its judgment on January 9, 2013, *id.* at 59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(f) of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1625, provides:

> (f) EFFECTIVE DATE AND APPLICATION.– The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that–

> (1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall 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; and
>
> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

All other pertinent constitutional and statutory provisions are reproduced in the Petition Appendix at 61a.[1]

STATEMENT

The Sixth Circuit's decision in this case deepened a direct and acknowledged circuit split on a question that the United States itself has described as an "important statutory . . . issu[e] that will have broad impact on litigation under the False Claims Act." C.A. U.S. Br. ix. The split concerns the retroactive effect of a statutory amendment enacted to overrule this Court's decision in *Allison Engine Co.* v. *United States ex rel. Sanders* (*Allison Engine I*), 553 U.S. 662 (2008). In *Allison Engine I*, this Court unanimously rejected the government's effort to expand the then-existing provisions of the False Claims Act to reach fraud against federally funded private contractors. In response, Congress replaced one of the

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[1] Citations of the False Claims Act herein refer to the 2008 edition of the United States Code except where otherwise noted.

provisions at issue in *Allison Engine I*, 31 U.S.C. § 3729(a)(2), with a new provision, Section 3729(a)(1)(B), that omits the key language this Court had construed. *See* Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (2009). As a result of this amendment, the False Claims Act indisputably applies, on a prospective basis, to a range of fraud against federally funded private entities not reached by the version of the statute before this Court in *Allison Engine I*.

Not content with this *prospective* application of the amended False Claims Act, however, the United States argued in this case, and the Sixth Circuit held, that new Section 3729(a)(1)(B) applies *retroactively* to all cases that were pending on or after June 7, 2008—two days before this Court's decision in *Allison Engine I*. As the Sixth Circuit itself recognized, and as other courts and the government have acknowledged, this holding exacerbated an existing circuit split regarding the retroactive effect of new Section 3729(a)(1)(B). Congress provided that Section 3729(a)(1)(B) shall "apply to all *claims* under the False Claims Act . . . that are pending on or after [June 7, 2008]." Pub. L. No. 111-21, § 4(f)(1) (emphasis added). The Ninth and Eleventh Circuits have held that "claims" in Section 4(f)(1) refers to a request for payment or approval—the type of "claim" that, if false or fraudulent, can give rise to False Claims Act liability. The Second and Seventh Circuits have held just the opposite—that "claims" means *cases*, *i.e.*, civil actions. The Fifth Circuit appears to have adopted both views. In the decision below, the Sixth Circuit joined the Second and Seventh Circuits by holding that Section 3729(a)(1)(B) applies to any civil action pending on or after June 7,

2008, even where all of the allegedly false claims for payment were made prior to that date.

The Sixth Circuit's holding—like those of the Second and Seventh Circuits—means that the newly amended, and expanded, liability provisions of the False Claims Act can be applied to conduct that took place years, if not decades, before the Act was amended in 2009. Here, for example, petitioners are confronted with the prospect of onerous treble damages and civil penalties based on claims for payment that they submitted to private parties in the 1980s and early 1990s. The retroactive application of the False Claims Act to such decades-old conduct contradicts settled doctrines of statutory interpretation and fundamental principles of fairness. This Court's review is warranted to resolve the entrenched division of authority on this issue and to correct the Sixth Circuit's deeply flawed reading of the False Claims Act amendments.

1. The False Claims Act, 31 U.S.C. § 3729 *et seq.*, was enacted during the Civil War "to prevent and punish frauds upon the Government." Cong. Globe, 37th Cong., 3d Sess. 952 (1863); *see also Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000); *United States* v. *Bornstein*, 423 U.S. 303, 309 & n.5 (1976). As relevant here, the Act grants the federal government a cause of action against a person who "knowingly presents" to the government a "false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). At the time of the alleged acts at issue here, the False Claims Act also provided a cause of action against a 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 Govern-

ment," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." *Id.* § 3729(a)(2)-(3). A "claim" for purposes of these provisions is defined as a request or demand for money or property made to the government or, in certain circumstances, a recipient of government funds. *Id.* § 3729(c); *see also* 31 U.S.C. § 3729(b)(2) (2011).

A False Claims Act suit may be initiated either by the federal government itself, or by a private individual, called a "relator," who brings a *qui tam* action in the government's name and who receives a portion of any recovery. *See* 31 U.S.C. § 3730(b)(1). Such *qui tam* actions are filed under seal and served on the government, which may then elect to intervene and pursue the action itself, or instead to allow the relator to proceed on his own. *See id.* § 3730(b)(2); *see also Stevens*, 529 U.S. at 769-70. In either event, a defendant found liable under the False Claims Act is subject to treble damages, plus civil penalties of between $5,500 and $11,000 per violation. *See* 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9).

2. Petitioners Allison Engine Company, Inc., General Tool Company, and Southern Ohio Fabricators, Inc., served as subcontractors on the construction of a fleet of guided-missile destroyers for the United States Navy. *Allison Engine I*, 553 U.S. at 665-66. In 1985, the Navy contracted with two private shipyards, Bath Iron Works and Ingalls Shipbuilding, to build the fleet. *Ibid.* The shipyards subcontracted with Allison Engine to build "generator sets" to provide electricity for the destroyers. *Id.* at 665-65. Allison Engine then subcontracted with General Tool to perform part of that work, and Gen-

eral Tool in turn subcontracted part of its responsibilities to Southern Ohio Fabricators. *Id.* at 666.

In 1995, respondents Sanders and Thacker, former employees of General Tool, filed a *qui tam* suit against petitioners under the False Claims Act. *See Allison Engine I*, 553 U.S. at 666-67.[2] Their complaint alleged that in the late 1980s and early 1990s, petitioners violated 31 U.S.C. § 3729(a)(1)-(3) by submitting invoices for payment knowing that the work had not been performed in compliance with the contract's requirements. *Ibid.*; *see* Pet. App. 43a. The United States declined to intervene, and the case was tried to a jury. *United States ex rel. Sanders* v. *Allison Engine Co.*, 471 F.3d 610, 613 (6th Cir. 2006). At the close of respondents' proof, the district court granted petitioners' motion for judgment as a matter of law, holding that respondents were required, but failed, to prove that false claims for payment had been submitted to the government. *See Allison Engine I*, 553 U.S. at 667; *see also* Pet. App. 4a. The Sixth Circuit reversed in relevant part, holding that although proof that a false claim was presented to the government is required under Section 3729(a)(1), such proof is not required under Section 3729(a)(2) or (a)(3). *See Allison Engine*, 471 F.3d at 613-23.[3]

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[2] General Motors Corporation also was a defendant in the district court, but the case against it was stayed due to pending bankruptcy proceedings. Pet. App. 38a.

[3] Respondents also asserted claims under the Truth in Negotiations Act, 10 U.S.C. § 2306a. The Sixth Circuit affirmed the district court's grant of summary judgment for petitioners on those claims, *see Allison Engine*, 471 F.3d at 623-26, which are no longer at issue.

3. On June 9, 2008, this Court unanimously rejected the Sixth Circuit's expansive reading of the False Claims Act, and held that the Act does not reach alleged fraud against federally funded private parties where the conduct does not have the purpose of inducing the federal government itself to pay a false claim. *Allison Engine I*, 553 U.S. at 673. The Court explained that the plain language of Section 3729(a)(2)—which required that a defendant make or use a false statement "*to get*" a false claim "paid or approved *by the Government*"—made clear that a defendant "must have the *purpose* of getting a false or fraudulent claim paid or approved by the Government." *Id.* at 668-69 (emphases added; internal quotation marks omitted). Although Section 3729(a)(2) did not require proof that the false statement itself was submitted to the government, it did require that the defendant "intend that the Government itself pay the claim." *Id.* at 669. Likewise, the Court held, Section 3729(a)(3)'s prohibition on "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid" required proof that a defendant "agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim." *Id.* at 672-73.

This Court accordingly vacated the Sixth Circuit's decision and remanded the case for further proceedings. *See* 553 U.S. at 673. The court of appeals then remanded the case to the district court in February 2009, which requested briefing on the effect of this Court's decision. Pet. App. 5a, 39a.

4. On May 20, 2009, while this case was on remand in the district court, Congress amended the False Claims Act in the Fraud Enforcement and Re-

covery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617 (the "2009 Amendments"). Among other changes, the 2009 Amendments replaced Section 3729(a)(2) with a new provision that omits the key language this Court construed in *Allison Engine I*—*i.e.*, "to get" a false claim paid "by the Government"—and that instead requires proof only that a defendant "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* § 4(a)(1), *codified at* 31 U.S.C. § 3729(a)(1)(B) (2011).[4] The 2009 Amendments similarly revised what had been Section 3729(a)(3), the conspiracy provision, to remove the text interpreted in *Allison Engine I*, replacing it with a prohibition on "conspir[ing] to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)." *Id.*, *codified at* 31 U.S.C. § 3729(a)(1)(C) (2011). Congress also amended Section 3729's definition of "claim"; as before, however, the term encompasses a request or demand for money or property from the government or certain recipients of government funds. *Id.* § 4(a)(2), *codified at* 31 U.S.C. § 3729(b)(2) (2011).

The 2009 Amendments include a provision prescribing effective dates for the various amendments. Pub. L. No. 111-21, § 4(f). Section 4(f) provides that "[t]he amendments made by [Section 4] shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment," with two exceptions. *Ibid.* First, Section 4(f)(1) states that new Section 3729(a)(1)(B) "shall take effect as if enacted on June 7, 2008"—two days before

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[4] The 2009 Amendments also reorganized Section 3729. The seven categories of violations previously enumerated in Section 3729(a)(1)-(7) (2008) are now contained, as modified, in Section 3729(a)(1)(A)-(G) (2011).

this Court's decision in *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." *Id.* § 4(f)(1), *codified at* 31 U.S.C. § 3729 note (2011) (emphasis added). Second, Section 4(f)(2) provides that amendments to three other sections of the False Claims Act—Sections 3731(b), 3732, and 3733—"shall apply to *cases* pending on the date of enactment." *Id.* § 4(f)(2), *codified at* 31 U.S.C. § 3729 note (2011) (emphasis added).

5. After additional briefing on the effect of the 2009 Amendments, the district court held that new Section 3729(a)(1)(B) does not apply retroactively to petitioners in this case. Pet. App. 41a-56a. The presumption against retroactivity, the court reasoned, prohibits applying Section 3729(a)(1)(B) to conduct occurring before its enactment "absent a clear indication from Congress that it intended such a result." *Id.* at 41a (citing *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001)). Section 4(f)(1), the court concluded, contains no such clear indication that new Section 3729(a)(1)(B) applies retroactively to this case. *Id.* at 42a-44a. The court explained that, based on a "plain reading" of Section 4(f)(1), new Section 3729(a)(1)(B) applies only to "claims" pending on or after June 7, 2008. *Id.* at 43a. The word "claims" cannot mean False Claims Act "cases" because Congress used that term in the very next subsection—Section 4(f)(2)—to prescribe the effective date of other amendments. *Id.* at 44a. The term therefore must refer to an allegedly false request for payment or approval—which is the way "claim" is defined in Section 3729 itself—and petitioners indisputably had no claims for payment pending on or after June 7, 2008. *Ibid.*

The district court further held that applying new Section 3729(a)(1)(B) to petitioners would violate the *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3. Pet. App. 44a-55a. Based on Congress's intent in enacting Section 3729(a)(1)(B), the severe sanctions it imposes on defendants (including treble damages and substantial statutory penalties), and other factors prescribed by this Court, *see Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the district court held that the provision "is punitive in purpose and effect," and therefore cannot constitutionally be applied to petitioners based on conduct that occurred before the provision's enactment. Pet. App. 55a.

6. The United States thereafter intervened in the case solely to appeal the district court's decision regarding the retroactivity of new Section 3729(a)(1)(B). *See* Pet. App. 9a; Order at 2-3 (S.D. Ohio Dkt. #737). Along with respondents Sanders and Thacker, the government sought permission to appeal that decision immediately under 28 U.S.C. § 1292(b). Pet. App. 9a. The district court and the Sixth Circuit granted permission to appeal, *ibid.*; Order at 3-5 (S.D. Ohio Dkt. #737), and the Sixth Circuit reversed, initially in an unpublished opinion, Pet. App. 3a.

The Sixth Circuit acknowledged that under this Court's precedents, courts must presume that "the use of different terminology in adjoining sections" indicates that "Congress utilized the specific terms intentionally." Pet. App. 11a. And it recognized that, "[u]nder this logic, the meaning of 'claim' is distinct from the meaning of 'case'" because Section 4(f)(1) uses the term "claims" while Section 4(f)(2) refers to "cases." *Ibid*. The Sixth Circuit nevertheless concluded that "'claim' in § 4(f)(1) refers to a civil action

or case." *Id.* at 22a. Relying on the legislative history of the 2009 Amendments, the court dismissed Congress's use of different language as inadvertent. *Id.* at 11a-12a. The "general presumption that Congress deliberately chose the difference" in language was overcome, it reasoned, "[b]ecause the two provisions governing exceptions to the general effective date of [the 2009 Amendments] were not drafted simultaneously." *Id.* at 12a. The provision that "ultimately became" Section 4(f)(1) originated in the Senate, and the House added Section 4(f)(2) two months later in an amendment to which the Senate agreed. *Id.* at 11a-12a. The Sixth Circuit also declined to apply the presumption against retroactivity, reasoning that it applies only where a statute "is silent on its retrospective effect," and is inapplicable where, as here, "the only question is the scope of the retrospective effect intended." *Id.* at 21a-22a n.11.

The Sixth Circuit acknowledged that other courts disagreed with its statutory construction and that "the courts to address the issue directly are almost evenly split." Pet. App. 18a. The Ninth and Eleventh Circuits, it noted, "have found that 'claim' in § 4(f)(1) . . . means a demand for payment." *Id.* at 19a. The Second and Seventh Circuits, in contrast, "have found that § 4(f)(1) makes the amendments to the former § 3729(a)(2) retroactive to [False Claims Act] civil actions pending on June 7, 2008." *Id.* at 18a. The Sixth Circuit ultimately concluded that the Second and Seventh Circuits had reached the correct result.[5]

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[5] The Sixth Circuit also held that applying new Section 3729(a)(1)(B) retroactively to petitioners would not violate the *Ex Post Facto* Clause. Pet. App. 22a-36a.

The United States, conceding that "the issue [the Sixth Circuit] decided here has been the subject of conflicting decisions by other Circuits" and that the Sixth Circuit's opinion deepened that conflict, urged the court to publish its opinion. C.A. U.S. Mot. to Publish 2-3. The court agreed and reissued its opinion as a published, precedential ruling. Pet. App. 1a n.*. The court of appeals denied petitioners' petition for rehearing or rehearing en banc. *Id.* at 57a-58a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because—as both the Sixth Circuit and the United States acknowledge—the decision below deepens an existing circuit split regarding the retroactive effect of new Section 3729(a)(1)(B). The Ninth and Eleventh Circuits each have held, consistent with well-settled principles of statutory interpretation, that "claims" in Section 4(f)(1) of the 2009 Amendments refers to requests for payment, not civil actions, and that Section 3729(a)(1)(B) therefore applies only to requests for payment that were pending on or after June 7, 2008. *See United States ex rel. Cafasso* v. *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *Hopper* v. *Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009). The Second, Seventh, and now Sixth Circuits have adopted the opposite view, holding that "claims" in Section 4(f)(1) means "cases," and that Section 3729(a)(1)(B) therefore applies to *any* lawsuit pending on or after June 7, 2008—regardless of whether a request for payment was made on or after that date. *See* Pet. App. 10a-22a; *United States ex rel. Yannacopoulos* v. *Gen. 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 on other*

grounds, 131 S. Ct. 1885 (2011). The Fifth Circuit appears to have adopted both of these conflicting views. *Compare United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010), *with Gonzalez* v. *Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 & n.4 (5th Cir. 2012); *see also* Pet. App. 19a. That division of authority on a basic question about the scope of the False Claims Act is a compelling reason, standing alone, to grant review.

In addition, the Sixth Circuit's interpretation of Section 4(f)(1) is fundamentally flawed and disregards both settled canons of statutory construction and basic principles of fairness. For example, the Sixth Circuit's statutory interpretation is impossible to reconcile with this Court's frequently reaffirmed holding that Congress's choice of different language in neighboring statutory provisions is presumed to be deliberate. *See*, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The decision below also disregards the presumption against retroactivity and the canon of constitutional avoidance, both of which require resolving any ambiguity in Section 4(f)(1) against applying new Section 3729(a)(1)(B) retroactively to petitioners. By abandoning these deeply rooted interpretive principles in search of what it thought Congress intended, the Sixth Circuit ironically made it more difficult for Congress to express its intentions clearly and unequivocally in the future.

Finally, the importance of the question presented is beyond dispute. The decision below would subject defendants in scores of False Claims Act cases to massive potential liability for alleged conduct that occurred years or even decades ago. Indeed, the issue has arisen in dozens of cases already, and will continue to sow uncertainty among litigants and

lower courts alike until this Court intervenes to provide authoritative guidance. This case—which was the impetus for the False Claims Act amendments at issue—is the ideal vehicle for doing so.

I. THE DECISION BELOW DEEPENS A SPLIT REGARDING THE RETROACTIVE APPLICATION OF NEW SECTION 3729(a)(1)(B).

As both the Sixth Circuit and the United States have acknowledged, the courts of appeals were divided even before the decision below regarding the retroactive application of newly added Section 3729(a)(1)(B). The Sixth Circuit's decision deepens that split.

A. Two circuits have held that new Section 3729(a)(1)(B) applies to conduct predating the 2009 Amendments only if the allegedly *false claim for payment* was pending on or after June 7, 2008—and thus does not apply retroactively across the board to all False Claims Act cases pending on or after that date.

In *Hopper*, the Eleventh Circuit held that new Section 3729(a)(1)(B) did not apply in a case that was pending on June 7, 2008. 588 F.3d at 1327 n.3. The court reasoned that "the word 'claim' in section 4(f) . . . mean[s] 'any request or demand . . . for money or property,' as defined by 31 U.S.C. § 3729(b)(2)(A) (as amended May 2009)." *Ibid.* (second omission in original). In light of that definition, the court concluded that Section 3729(a)(1)(B) "d[id] not apply retroactively to this case" because, "[w]hile this *case* was pending on and after June 7, 2008, the relators do not allege that any *claims*, as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008." *Ibid.*

The Ninth Circuit expressly adopted the Eleventh Circuit's analysis and conclusion in *Cafasso*, 637 F.3d at 1051 n.1. Although that False Claims Act case had been pending since 2006, *see United States ex rel. Cafasso* v. *Gen. Dynamics C4 Sys., Inc.*, 2009 WL 1457036, at *6 (D. Ariz. May 21, 2009), the court held that the amendments in Section 4 of the 2009 Amendments "do not apply retroactively to this case" and therefore applied the unamended version of Section 3729(a)(2) to the conduct at issue. 637 F.3d at 1051 n.1, 1057.

B. In contrast, three other circuits—including the Sixth Circuit here—have reached the opposite conclusion, holding that Section 3729(a)(1)(B) applies retroactively to any False Claims Act *lawsuit* that was pending on or after June 7, 2008, regardless of when the requests for payment at issue were made.

Prior to the decision below, the Second and Seventh Circuits had each concluded that "claims" in Section 4(f)(1) means *cases*, not requests for payment. In *Schindler Elevator*, the Second Circuit held that "current § 3729(a)(1)(B)" applied because the relator's False Claims Act suit "was filed in March 2005, and was pending as of June 7, 2008." 601 F.3d at 113, *rev'd on other grounds*, 131 S. Ct. 1885.[6]

The Seventh Circuit reached the same conclusion in *Yannacopoulos*, 652 F.3d at 822 n.2. The court

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[6] Even after this Court's decision reversing the Second Circuit's judgment in *Schindler* on other grounds, district courts in the Circuit have continued to rely on its holding regarding the retroactive effect of Section 3729(a)(1)(B). *See United States ex rel. Moore* v. *Cmty. Health Servs., Inc.*, 2012 WL 1069474, at *4 (D. Conn. Mar. 29, 2012); *United States ex rel. Feldman* v. *City of New York*, 808 F. Supp. 2d 641, 656 n.7 (S.D.N.Y. 2011).

stated that, although Congress made the 2009 Amendments "generally applicable only to conduct occurring on or after May 20, 2009," the "one exception is the amendment to section 3729(a)(1)(B), which applies to *cases*, such as this, that were pending on or after June 7, 2008." *Ibid.* (emphasis added).

The Sixth Circuit adopted the same view in the decision below. Pet. App. 10a-22a. The court acknowledged that Congress's use of "claims" in Section 4(f)(1) and "cases" in Section 4(f)(2) triggered the "the general presumption that Congress deliberately chose the difference" in language and "utilized the specific terms intentionally." *Id.* at 11a-12a. But it concluded that "the strength of the structural argument" was "reduce[d]" because Sections 4(f)(1) and 4(f)(2) "were not drafted simultaneously." *Id.* at 22a. The court also declined to apply the presumption against retroactivity because "the only question is the scope of the retrospective effect intended," not whether Section 4(f)(1) applies retroactively at all. *Id.* at 21a-22a n.11. Based on this reasoning, the court "conclude[d] that 'claim' in § 4(f)(1) refers to a civil action or case," not a request for payment, and that Section 3729(a)(1)(B) therefore applies retroactively to this case even though the last of petitioners' claims for payment had been paid in the early 1990s.

C. As the Sixth Circuit recognized, the Fifth Circuit "appears to have taken both positions" on the retroactive scope of Section 3729(a)(1)(B). Pet. App. 19a. In *Steury*, the Fifth Circuit held that Section 3729(a)(1)(B) applied because the relator's "complaint was pending on June 7, 2008"—without regard to whether any requests for payment were pending on or after that date. 625 F.3d at 267 n.1. Two years

later, however, the Fifth Circuit affirmed a district court ruling that expressly adopted the opposite view, and it therefore applied the pre-2009 version of Section 3729(a)(2) to a suit that had been pending since 2006. *See Gonzalez*, 689 F.3d at 475 & n.4; *see also United States ex rel. Gonzalez* v. *Fresenius Med. Care N. Am.*, 748 F. Supp. 2d 95, 106-08 (W.D. Tex. 2010).[7] Courts in the Fifth Circuit are thus uncertain which approach to follow. *See United States ex rel. Jamison* v. *McKesson Corp.*, __ F. Supp. 2d __, 2012 WL 4499136, at *10 n.5 (N.D. Miss. Sept. 28, 2012) ("[U]nder *Steury*, the Court should consider the amended . . . language [of Section 3729(a)(1)(B)], but pursuant to *Gonzalez*, the Court should not.").

D. The circuit split concerning the question presented is not only indisputable, but indeed undisputed. The Sixth Circuit itself acknowledged the conflict that its holding cemented, explaining that "the courts to address the issue directly are almost evenly split," and describing the conflicting holdings of the Second, Fifth, Seventh, Ninth, and Eleventh Circuits. Pet. App. 18a-19a. Other courts of appeals and district courts have also recognized the split. *See*, *e.g.*, *United States ex rel. Loughren* v. *Unum*

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[7] The Fifth Circuit's description of the district court's decision in *Gonzalez* appears to contain an inadvertent error. The district court reasoned that new Section 3729(a)(1)(B) did not apply because "[t]he claims for payment by Fresenius and Chavez," *i.e.*, the *defendants*, "that are at issue in this case . . . certainly were not pending on June 7, 2008," even though the relator's False Claims Act suit was pending on that date. 748 F. Supp. 2d at 107-08. The Fifth Circuit, however, inaccurately described the district court's decision as "conclud[ing] that" new Section 3729(a)(1)(B) did not apply "because *Relator's* 'claims' were not pending on June 7, 2008." 689 F.3d at 475 n.4 (emphasis added).

Grp., 613 F.3d 300, 306 n.7 (1st Cir. 2010) (noting "disagreement among our sister circuits as to whether Congress intended the amended section 3729(a)(2) to be applied retroactively to *actions*, like this one, pending as of June 7, 2008, or rather to pending 'claim[s]' as defined by 31 U.S.C. § 3729(b)(2)(A)") (citation omitted); *United States* v. *R.J. Zavoral & Sons, Inc.*, 2012 WL 3871344, at *5 (D. Minn. Sept. 6, 2012) (same).

The United States also conceded the existence of this split in the proceedings below, both before and after the Sixth Circuit issued its decision. In its opening and reply briefs, the government acknowledged that "appellate courts are split on" the retroactive effect of Section 3729(a)(1)(B) and have "reached opposite conclusions" regarding the meaning of "claims" in Section 4(f)(1) of the 2009 Amendments. C.A. U.S. Br. 24 (capitalization omitted); *see id.* at 25-26 (describing conflicting decisions); *see also* C.A. U.S. Reply 14-16 (same). The government reiterated that admission in a subsequent letter discussing recent decisions addressing the issue. *See* C.A. U.S. Rule 28(j) Ltr. 1-2 (May 23, 2012). And, after the Sixth Circuit initially issued an unpublished opinion in this case, the government moved, successfully, to have the opinion published on the ground that "the issue [the Sixth Circuit] decided here has been the subject of conflicting decisions by other Circuits," and that "the [Sixth Circuit's] opinion here creates a conflict of authority between this circuit and others." C.A. U.S. Mot. to Publish 2-3.

There is no realistic prospect that this undisputed and entrenched split will resolve itself. To the contrary, until this Court intervenes to provide definitive guidance, the division will only deepen and in-

tensify. As the Sixth Circuit itself noted, many district courts in other circuits have addressed the question presented, and, like the courts of appeals, have reached conflicting conclusions. *See* Pet. App. 18a & nn.8-9 (citing illustrative recent rulings from courts within the First, Third, Eighth, and Tenth Circuits). The conflict thus is very likely to expand as other circuits confront the issue. And whichever side of the split they join, the division will not disappear, but will grow deeper.

These conflicting decisions foster uncertainty and unfairness. As long as the courts of appeals remain divided, False Claims Act defendants will be subject to drastically different liability standards depending on the circuit in which they are sued. In the Second, Sixth, and Seventh Circuits, defendants sued on the basis of false claims made prior to June 7, 2008, are subject to the amended liability standards of Section 3729(a)(1)(B), which significantly expanded the circumstances in which the False Claims Act reaches fraud against federally funded private entities. In the Ninth and Eleventh Circuits, in contrast, such suits are governed by Section 3729(a)(2), which, as construed by this Court in *Allison Engine I*, has a much narrower reach. The choice between these conflicting legal standards will often be outcome-dispositive; a suit that could survive a motion to dismiss under the 2009 Amendments because the defendant allegedly defrauded a recipient of federal funds may well be foreclosed under the prior law due to the absence of colorable allegations that the defendant acted with "the purpose of getting a false or fraudulent claim paid or approved by the Government." *Allison Engine I*, 553 U.S. at 668-69 (internal quotation marks omitted). This disparity cannot be permitted to persist. A defendant's liability should

not depend on the fortuity of the circuit in which it was sued.

II. THE DECISION BELOW CONTRADICTS SETTLED PRINCIPLES OF STATUTORY INTERPRETATION.

The Sixth Circuit's decision also warrants this Court's review because it contravenes several fundamental principles of statutory interpretation deeply rooted in this Court's case law. Contrary to this Court's precedents, the court of appeals disregarded clear evidence in the text and structure of the 2009 Amendments demonstrating that Section 3729(a)(1)(B) does not apply retroactively to every False Claims Act *case* pending on or after June 7, 2008, but only to requests for payment pending on or after that date. It also failed to apply either the presumption against retroactivity or the canon of constitutional avoidance, both of which require resolving any ambiguity to prevent retroactive application of the 2009 Amendments to petitioners. If allowed to stand, the Sixth Circuit's rejection of these settled interpretive principles will frustrate Congress's efforts to express its intentions clearly and unequivocally in the future.

A. The Sixth Circuit's holding that "claims" in Section 4(f)(1) of the 2009 Amendments means *cases* contravenes one of the most basic principles of statutory interpretation: Where Congress uses different language in two statutory provisions—particularly where the provisions are otherwise similar, adjacent, or both—courts presume that Congress acted "intentionally and purposely." *Russello*, 464 U.S. at 23 (internal quotation marks omitted). Courts, in other words, should "not presume to ascribe [such] difference[s] to . . . simple mistake[s] in draftsmanship." *Ibid.* Time and again, this Court has reiterated and

applied that rule. *See*, *e.g.*, *ibid.*; *Corley* v. *United States*, 556 U.S. 303, 315-16 (2009); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 454 (2002); *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). Indeed, it did so in its prior decision *in this case*. *See Allison Engine I*, 553 U.S. at 671 ("'[W]hen 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.'") (quoting *Barnhart*, 534 U.S. at 452; alteration in original).

Applying that well-settled principle, the word "claims" in Section 4(f)(1) cannot mean "cases" because Congress used *that* term in the very next subsection. Section 4(f)(2) provides that certain amendments to other provisions of the False Claims Act "shall apply to *cases* pending on the date of enactment." Pub. L. No. 111-21, § 4(f)(2), 123 Stat. 1617, 1625 (emphasis added). Had Congress intended Section 4(f)(1) similarly to apply where False Claims Act *cases* were pending on the effective date, it presumably would have used the term "cases," just as it did in Section 4(f)(2). *See Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2472 (2010) (refusing to interpret "projected" in a Bankruptcy Code provision to mean "multiplied" where other Code provisions used the latter term). That Congress did not do so—but instead used "claims" in Section 4(f)(1) and "cases" in 4(f)(2)—is powerful evidence that "claims" cannot mean lawsuits. Congress, after all, is presumed to be aware of this Court's precedents when it enacts legislation. *See Ryan* v. *Gonzales*, 133 S. Ct. 696, 703 (2013). And it plainly *was* aware of *Allison Engine I*,

which applied this same principle. *See* 553 U.S. at 671.

To be sure, as the Sixth Circuit observed, Pet. App. 11a, the presumption that different text conveys different meanings can be rebutted, *if* there is compelling evidence that Congress nonetheless intentionally used different language to convey identical meanings. *Cf. Sebelius* v. *Auburn Reg. Med. Ctr.*, 133 S. Ct. 817, 825-26 (2013). But there is no reason, let alone a compelling one, why Congress would have done so here.

The Sixth Circuit, in fact, identified no such reason. To the contrary, it effectively presumed that the difference in language was accidental—exactly what *Russello* forbids, *see* 464 U.S. at 23. The court speculated that the different language was merely a by-product of the fact that Sections 4(f)(1) and 4(f)(2), while enacted together, "were not *drafted* simultaneously," but had been "drafted by different chambers of Congress at different times." Pet. App. 11a-12a (emphasis added). No holding of this Court supports that made-to-order exception to the *Russello* principle; aside from a law-review article, the only authority the Sixth Circuit offered was dictum in *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997). Nor would such a rule make sense. The final text of Section 4(f), including *both* subsections, was passed in identical form—as the Constitution requires, U.S. Const. art. I, § 7, cls. 2-3—by *both* chambers. The meaning of the federal statute that Congress enacted—one that imposes treble damages and substantial fines, no less—cannot depend on whether the first draft was written by two Members of Congress instead of one.

B. The Sixth Circuit's strained attempt to explain away Congress's choice of different terms in

Sections 4(f)(1) and 4(f)(2) is all the more perplexing because a much more plausible interpretation, which did not require equating "claims" with "cases," was readily available: The word "claims" in Section 4(f)(1) refers to requests for payment. It is *that* kind of claim, after all, with which the False *Claims* Act generally, and Section 3729(a)(1)(B) in particular, are primarily concerned.

Moreover, Congress codified that very definition of "claim" elsewhere in the *same section* of the 2009 Amendments. Pub. L. No. 111-21, § 4(a)(2), *codified at* 31 U.S.C. § 3729(b)(2) (2011). Section 4(a)(2) amended Section 3729's existing definition of "claim." *Ibid.* Under both the old and new definitions, "claim" refers to requests for payment, not civil actions. *See* 31 U.S.C. § 3729(c) (2008); 31 U.S.C. § 3729(b)(2) (2011). The Sixth Circuit dismissed this definition of "claim" on the ground that other False Claims Act provisions use the term to refer to "a civil action or legal claim." Pet. App. 15a-16a. But Section 3729(b)(2)'s definition is indisputably informative in interpreting Section 4(f)(1). After all, it is a subsection of Section 3729—subsection (a)(1)(B)—whose retroactive effect is prescribed by Section 4(f)(1). As the Sixth Circuit itself acknowledged, "[a]lthough not codified in § 3729, it is clear that the retroactivity language in § 4(f) is vital to proper application of the amended [False Claims Act], and it is just as clear that § 4(f)(1)'s language specifically refers to § 3729." Pet. App. 16a-17a n.6. It thus makes perfect sense to refer to the definition of "claim" that Congress established to govern Section 3729(a)(1)(B) in construing the term "claims" in Section 4(f)(1).

C. Even if the Sixth Circuit's interpretation were plausible, it assuredly is not *compelled* by the stat-

ute's text. As other courts have acknowledged, the term "claims" in Section 4(f)(1) is, at minimum, ambiguous. *See*, *e.g.*, *United States ex rel. Vigil* v. *Nelnet, Inc.*, 639 F.3d 791, 796 n.4 (8th Cir. 2011). The fact that two other courts of appeals have rejected the Sixth Circuit's reading itself demonstrates that it does not follow inexorably from the text of Section 4(f)(1). *See Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495 (1996) (contrary views of courts of appeals "demonstrate[d]" that provision was "not entirely clear"). Nor did the Sixth Circuit pretend otherwise; its reliance on legislative history (Pet. App. 11a-12a) to reject the interpretation that otherwise would be compelled by the statutory text and structure shows that it did not believe the plain language provided a clear answer. *See Boyle* v. *United States*, 556 U.S. 938, 950-51 (2009); *see also Milner* v. *Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011) (Court will not "allo[w] ambiguous legislative history to muddy clear statutory language"). The fact that Section 4(f)(1) is, at minimum, ambiguous is critical because, for at least two reasons, such an ambiguity must be resolved against applying Section 3729(a)(1)(B) retroactively to petitioners.

First, the longstanding "presumption against retroactive legislation" requires interpreting Section 4(f)(1) not to make new Section 3729(a)(1)(B) applicable to claims for payment that petitioners submitted years before that section was enacted. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265, 280 (1994). That presumption—"deeply rooted in [this Court's] jurisprudence"—requires resolving any doubt as to whether a statute applies to particular events before its enactment *against* such retroactive application. *See ibid.* If a law "would have retroactive effect" when applied to a party—*i.e.*, if it "would impair

rights a party possessed when he acted," would "increase a party's liability for past conduct," or would "impose new duties with respect to transactions already completed"—then it cannot be construed to apply to that party unless the statute's express "'language requires this result.'" *Id.* at 264, 280 (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *see also Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); *St. Cyr*, 533 U.S. at 315-17; *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946-51 (1997). Because Congress did not state clearly that Section 4(f)(1) applies to all lawsuits pending on or after June 7, 2008, regardless of when the claims for payment were made, the narrower construction controls.

The Sixth Circuit brushed aside the presumption against retroactivity in a footnote, deeming it irrelevant because Section 4(f)(1) expressly provides for *some* retroactive effect, and "the only question is the scope of the retrospective effect intended." Pet. App. 21a-22a n.11. But that is not how this Court applies other, similar presumptions. The Court does not discard the presumption against extraterritoriality or the presumption against preemption, for example, simply because a statutory provision speaks to those issues; it still applies those presumptions to discern the statute's *scope*. *See Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455-56 (2007) (presumption against extraterritoriality "is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application," but "remains instructive in determining the *extent* of the statutory exception") (alterations in original; internal quotation marks omitted); *Lohr*, 518 U.S. at 495 (presumption

against preemption relevant to "*scope*," not merely existence, of preemption).

The same is true of the presumption against retroactivity. As this Court explained in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the *Landgraf* retroactivity analysis focuses on the *specific party and conduct* before the Court. The Court first "ask[s] whether applying the statute *to the person objecting* would have a retroactive consequence in the disfavored sense." *Id.* at 37 (emphasis added). And "[i]f the answer is yes," the Court "then appl[ies] the presumption against retroactivity by construing the statute as *inapplicable to the event or act in question* owing to the absence of a clear indication from Congress that it intended such a result." *Id.* at 37-38 (emphasis added; alterations and internal quotation marks omitted). In other words, unless Congress has clearly indicated that a statutory provision applies retroactively to the *particular* fact pattern that is before the court, the provision does not apply retroactively to that set of facts.

Second, construing Section 4(f)(1) not to extend Section 3729(a)(1)(B) to petitioners is necessary to avoid the serious constitutional question whether retroactive application of the False Claims Act—which this Court has described as "essentially punitive in nature," *Stevens*, 529 U.S. at 784—violates the *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3. *See St. Cyr*, 533 U.S. at 299-300; *see also Stevens*, 529 U.S. at 787. At least three courts, including the district court below, have held that applying new Section 3729(a)(1)(B) to defendants based on acts before the enactment of the 2009 Amendments would be unconstitutional. *See* Pet. App. 44a-55a; *United States ex rel. Baker* v. *Cmty. Health Sys., Inc.*, 709 F.

Supp. 2d 1084, 1108-12 (D.N.M. 2012); *United States* v. *Hawley*, 812 F. Supp. 2d 949, 958-62 (N.D. Iowa 2011). The Sixth Circuit's reading, at minimum, raises a "substantial constitutional questio[n]," which it was "obligated" to avoid. *St. Cyr*, 533 U.S. at 300.[8]

D. At bottom, the decision below rests on the unjustified assumption that Congress did not know what it was doing in drafting Section 4(f)(1). The Sixth Circuit's decision requires assuming that Congress employed critical statutory terms haphazardly, enacted one part of Section 4 without paying any attention to the rest, and disregarded deeply rooted interpretive principles that it is presumed to know. This Court's precedents, and the respect due to a coordinate branch of government, require courts to assume just the opposite: that Congress, cognizant of the text it enacted and what that text means in light of this Court's teachings, chose that text purposefully to convey its exact intended meaning. *Cf. Allison*

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[8] Indeed, applying new Section 3729(a)(1)(B) to petitioners would in fact violate the *Ex Post Facto* Clause because doing so would impose punishment retroactively. *See Smith* v. *Doe*, 538 U.S. 84, 92 (2003). As the district court explained in detail, the legislative history of the 2009 Amendments demonstrates that Congress's intention then—as when it first enacted the False Claims Act in 1863, *see Stevens*, 529 U.S. at 781—was to *punish* persons deemed to have defrauded the government. *See* Pet. App. 46a-49a. Moreover, as the district court's extensive analysis demonstrates, the False Claims Act is so punitive in purpose and effect under the multifactor test set forth in *Mendoza-Martinez*, 372 U.S. at 168-69—especially given its imposition of treble damages—that it cannot be deemed civil. *See* Pet. App. 50a-56a.

Engine I, 553 U.S. at 670 ("precision" "[i]n statutory drafting" is not merely "important," but "*expected*") (emphasis added).

The Sixth Circuit's decision not only conflicts with this Court's longstanding approach to statutory interpretation, but also disables Congress from articulating its intentions in the future. "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 490 U.S. 545, 556 (1989), *superseded by statute*, 28 U.S.C. § 1367. Refusing to take Congress at its word and abandoning well-settled interpretive principles on which it is entitled to rely deprive Congress of that essential guidance, making it impossible for Congress to predict how courts will construe its enactments in the future.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING A QUESTION OF EXCEPTIONAL IMPORTANCE TO FALSE CLAIMS ACT LITIGANTS.

There can be no serious dispute about the significance of the question presented. The stakes here are much the same, in fact, as in *Allison Engine I*: The ultimate issue now, as then, is what standard plaintiffs must satisfy to establish liability based on a defendant's alleged use of false statements to secure payment of a false claim under the False Claims Act, *see* 553 U.S. at 665—an issue that affects countless government subcontractors, grantees, and other entities that receive funds "used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. § 3729(b)(2)(A)(ii) (2011). Congress itself deemed that question salient enough to pass

legislation changing the law in light of this Court's interpretation. And the government can hardly deny the urgent need for this Court's definitive guidance—having argued below that the retroactive effect of Section 3729(a)(1)(B) presents an "important statutory . . . issu[e] that will have broad impact on litigation under the False Claims Act," C.A. U.S. Br. ix, and having successfully urged the Sixth Circuit to publish its opinion to offer guidance to other courts.

The practical consequences of that now-precedential decision are far-reaching. If the broad retroactive application of the 2009 Amendments by the Sixth Circuit—as well as the Second and Seventh Circuits—stands, defendants in numerous False Claims Act cases will unexpectedly face massive potential liability, including automatic treble damages and substantial mandatory civil penalties, *see* 31 U.S.C. § 3729(a)(1) (2011), for conduct that occurred years or even decades before Section 3729(a)(1)(B) was enacted. The sums involved are staggering. Since 2009 alone, the total value of False Claims Act judgments and settlements has exceeded $13.5 billion.[9] And whether or not defendants ultimately are held liable under new Section 3729(a)(1)(B), they will bear substantial burdens of defending against allegations that are colorable under the amended statute but that are legally baseless under the statute this Court interpreted in *Allison Engine I*.

Nor is the retroactive effect of new Section 3729(a)(1)(B) an isolated issue confined to a small number of cases. Quite the contrary, it already has

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[9] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics–Overview: October 1, 1987-September 30, 2012 (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

arisen in dozens of cases across the country. *See* Pet. App. 18a & nn.8-9 (collecting cases); C.A. Appellee Br. 30-31 & nn.24-25 (same); C.A. Appellee Rule 28(j) Ltr. 1-2 (May 16, 2012) (same). And it likely will arise in many more. Under the Sixth Circuit's interpretation, new Section 3729(a)(1)(B) applies to *any* suit pending on or after June 7, 2008—of which there are thousands.[10] Although some of those cases may involve allegedly false claims for payment that were submitted or pending after June 2008, many others do not. Indeed, as a result of the False Claims Act's liberal limitations period—which gives plaintiffs at least six years to sue, and in some cases ten, *see* 31 U.S.C. § 3731(b)—combined with the notoriously long life-cycle of False Claims Act litigation,[11] many cases swept in by the Sixth Circuit's misreading of Section 4(f)(1) may involve requests for payment made years before Section 3729(a)(1)(B) was enacted. This case is a perfect illustration. The allegedly false claims at issue were submitted and paid "in the late 1980s and early 1990s," and the case has been pending since 1995. Pet. App. 43a. But the question presented is also implicated in False Claims Act cases filed *after* the enactment of the 2009 Amendments. In *every* False Claims Act case that involves even a single request for payment submitted before June 2008, the question presented in this case represents a threshold legal issue: Will the defendant's conduct

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[10] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics–Overview, *supra* (noting that several hundred False Claims Act cases are filed each year).

[11] *See* Aaron S. Kesselheim et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 New Eng. J. Med. 1832, 1834 (2010) (study reporting average length of 4.9 years in sample of False Claims Act suits).

be governed by the version of Section 3729(a)(2) in force when its claims were submitted, or by the amended and expanded liability provisions of new Section 3729(a)(1)(B)?

This case provides the perfect opportunity for the Court to bring much-needed clarity to this issue. The question was briefed extensively below and passed upon in lengthy analyses by the district court and the court of appeals. *See* Pet. App. 10a-22a, 41a-44a. The Sixth Circuit's opinion, in fact, is the most extensive of any court of appeals' opinion to decide the issue. *See* Pet. App. 17a-19a; C.A. U.S. Mot. to Publish 3. The question presented is also critical to the outcome of this litigation. If petitioners' reading is correct, the case likely will come to an end because, as the district court found in directing a verdict for petitioners, there is no evidence that a false claim for payment was ever submitted to the government in this case, *Allison Engine I*, 553 U.S. at 667, and, petitioners submit, there is likewise no evidence that petitioners acted with "the purpose of getting a false or fraudulent claim paid or approved by the Government," *id.* at 668-69. But if the court of appeals' construction is upheld, the case may well have to proceed back to trial. This profoundly consequential—and widely disputed—question of statutory interpretation warrants authoritative resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
JEFFREY A. MILLER
MARY C. HENKEL
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR
& PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

GREGORY A. HARRISON
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner Southern Ohio Fabricators, Inc.

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner Allison Engine Company, Inc.

WILLIAM A. POSEY
KEATING, MUETHING &
KLEKAMP, PLL
1800 PROVIDENT TOWER
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner General Tool Company

February 22, 2013

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER L. SANDERS and ROGER L. THACKER (10-3821); UNITED STATES OF AMERICA (10-3818) *Plaintiffs-Appellants* *v.* ALLISON ENGINE COMPANY, INC., GENERAL TOOL CO., SOUTHERN OHIO FABRICATORS, INC., GENERAL MOTORS CORPORATION, *Defendants-Appellees.*	Nos. 10-3818/3821

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
Nos. 1:99-cv-923; 1:95-cv-970—Thomas M. Rose,
District Judge.

Argued: June 5, 2012

Decided and Filed: November 2, 2012*

* This decision was originally issued as an "unpublished decision" filed on November 2, 2012. The court has now designated the opinion as one recommended for full-text publication.

Before: BATCHELDER, Chief Judge; GIBBONS and COOK, Circuit Judges.

COUNSEL

ARGUED: Thomas M. Bondy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant in 10-3818. James B. Helmer, Jr., HELMER, MARTINS, RICE & POPHAM, CO., L.P.A., Cincinnati, Ohio, for Appellants in 10-3821. Glenn V. Whitaker, VORYS, SATER, SEYMOUR & PEASE, LLP, Cincinnati, Ohio, for Appellees in 10-3818 and 10-3821. **ON BRIEF:** Douglas N. Letter, Irene M. Solet, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant in 10-3818. James B. Helmer, Jr., Paul B. Martins, Robert M. Rice, Erin M. Campbell, HELMER, MARTINS, RICE & POPHAM, CO., L.P.A., Cincinnati, Ohio, for Appellants in 10-3821. Glenn V. Whitaker, Victor A. Walton, Jr., Michael J. Bronson, Mary C. Henkel, VORYS, SATER, SEYMOUR & PEASE, LLP, Cincinnati, Ohio, Gregory a. Harrison, DINSMORE & SHOHL, L.L.P., Cincinnati, Ohio, William A. Posey, KEATING, MUETHING & KLEKAMP, PLL, Cincinnati, Ohio, for Appellees in 10-3818 and 10-3821.

OPINION

JULIA SMITH GIBBONS, CIRCUIT JUDGE. This case arises out of a *qui tam* action pursuant to the False Claims Act ("FCA"). Following this panel's prior decision in this case—finding that liability under the FCA did not require presentment of a false claim to the government—the defendant contractors

and subcontractors appealed to the Supreme Court. The Supreme Court reversed, finding that 31 U.S.C. § 3729(a)(2) liability required presentment of the claim to the government. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668-69 (2008). In May 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which amended several anti-fraud statutes, including the FCA. Congress specifically amended the liability standards then set forth in § 3729(a)(2) of the FCA in order to remove the presentment requirement imposed by the Supreme Court's decision. It also included specific retroactivity language in § 4(f)(1) of FERA indicating that the changes to § 3729(a)(2), now codified at § 3729(a)(1)(B), "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." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, §4(f)(1), 123 Stat. 1617, 1625 (emphasis added). After FERA was passed, the defendants in this case filed a motion to preclude retroactive application of the amended provisions in § 3729, which the district court granted, finding that the retroactive language in FERA did not apply to this action, because no *claim* was pending in June 2008 and further that retroactive application of the amendments was prohibited under the *Ex Post Facto* Clause. The question of retroactive application of the amendments to § 3729(a)(2) was then certified for interlocutory appeal. For the reasons that follow, we reverse the district court's order precluding retroactive application of 31 U.S.C. § 3729(a)(1)(B) and remand for further proceedings.

I.

In 1995, Roger L. Sanders and Roger L. Thacker, relators, brought a *qui tam* action pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq*., alleging that several defendant subcontractors engaged in fraud in connection with the construction of generator sets used in United States Navy Arleigh-Burke-class Guided Missile Destroyers. *Allison Engine Co.*, 553 U.S. at 665-67. The case was then consolidated with a separate FCA suit brought by the relators regarding the same alleged fraudulent conduct. The first action, referred to as the "Quality Case," alleged that the defendants submitted claims for payment related to the construction of the generator sets despite knowing that the generator sets failed to conform to contract specifications and Navy regulations. The second action, referred to as the "Pricing Case," involved allegations that the defendants withheld cost and pricing data during their negotiations with the government's agent in violation of the Truth in Negotiations Act and the FCA. Only the Quality Case is at issue in this appeal. The Quality Case was tried before a jury, and at the close of the relators' case, the defendants filed a motion for judgment as a matter of law on the grounds that the relators failed to produce evidence of a false claim presented to the Navy—and that without proof of presentment no reasonable jury could find a violation of the FCA. *Id.* at 667. The district court granted the motion on the grounds that proof of a false claim presented to the government was required to find a violation under § 3729 of the FCA. *United States ex rel. Sanders v. Allison Engine Co.*, No. 1:95-CV-970, 2005 WL 713569, at *10-12 (S.D. Ohio, Mar. 11, 2005).

On appeal, this court held that there was no presentment requirement for liability to attach under § 3729(a)(2) or (3) and reversed the district court's grant of judgment as a matter of law in the Quality Case. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 613 (6th Cir. 2006). The defendants appealed the decision to the Supreme Court, which vacated this court's decision and remanded. *Allison Engine Co.*, 553 U.S. at 673.

The Supreme Court found that for § 3729(a)(2) liability to attach, "a defendant must intend that the Government itself pay the claim. *Id.* at 669. The Court noted that this intent requirement did not mean that "proof that the defendant caused a false record or statement to be presented or submitted to the Government" was required; rather, liability could be established if it was proven that the "defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.'" *Id.* at 671.

On February 27, 2009, we remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion. On May 20, 2009, Congress passed FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009), which amended portions of the FCA and other anti-fraud statutes. Included among the amendments was a change to the standard of liability imposed under the FCA. Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621-25. Section 4 of FERA is titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law." *Id.* Although the FCA previously imposed liability for "knowingly mak[ing] . . . 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), the amended

liability standard imposes liability for "knowingly mak[ing] . . . a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B) (2012). This section of FERA was intended to "clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co.* . . . ." S. Rep. No. 111-10, at 10.

Section 4 of FERA provides that the FCA amendments apply to conduct occurring on or after the date of enactment (May 20, 2009).[1] FERA § 4(f). FERA contains, however, two exceptions where a different effective date applies to the FCA amendments. Pursuant to §4(f)(1), the amended liability provision "shall take effect as if enacted on June 7, 2008,[2] and apply to all *claims* under the False Claims Act . . . that are pending on or after that date." FERA

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[1] In its entirety section 4(f) of FERA provides:

(f) Effective Date and Application.-- The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that—

> (1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall 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; and
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> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1625 (2009).

[2] June 7, 2008, is two days prior to the Supreme Court's decision in *Allison Engine Co.*

§ 4(f)(1) (emphasis added). Under the second exception, provisions governing how new allegations filed by the United States as intervenor relate back to the date of the relator's complaint as well as other amendments to various provisions of the FCA, "apply to cases pending on the date of enactment." FERA § 4(f)(2) (emphasis added).

On July 21, 2009, the defendants filed a motion to preclude the retroactive application of the amended FCA liability standard set forth in 31 U.S.C. § 3729(a)(1)(B) or, in the alternative, to declare unconstitutional FERA § 4(f). The defendants noted that in contrast to the majority of FCA amendments, which apply prospectively, FERA's expansion of liability under § 3729(a)(1) was made retroactive to two days before the Supreme Court's decision in *Allison Engine* and suggested that Congress intended to overturn the decision and to create liability for conduct not forbidden under the prior version of the FCA. The defendants argued that the *Ex Post Facto* Clause and their Fifth Amendment due process rights would be violated by retroactive application of § 3729(a)(1)(B).

The relators filed a memorandum in opposition to defendants' motion to preclude and argued that the retroactive application of 31 U.S.C. § 3729(a)(1)(B) would not violate the *Ex Post Facto* Clause. The United States filed a statement of interest in response to the motion to preclude and made three primary arguments: (1) the district court should observe the principle of constitutional avoidance and avoid reaching the constitutional challenges raised by defendants by finding that the amended liability provision would not change the outcome of the case, (2) application of the new liability provision

would not affect the defendants' expectations and would not be retroactive in the relevant sense because the Supreme Court's *Allison Engine* decision did not exist when the defendants acted, and (3) application of § 3729(a)(1)(B) would not violate the *Ex Post Facto* Clause or the Due Process Clause because the FCA is a remedial statute and because the congressional decision to make amendments to the FCA liability standard served a rational purpose.

On October 27, 2009, the district court granted the defendant's motion to preclude retroactive application. *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009). The district court found that the plain language of § 4(f)(1) of FERA ("the retroactivity clause") prevented retroactive application of 31 U.S.C. § 3729(a)(1)(B) because "a plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.'" *Id.* at 752. The district court noted that the legislative history supported this reading because the "Senate Report's explanation of FERA's amendments to the FCA uses 'claims' to refer to a defendant's request for payment and 'cases' when discussing civil actions for FCA violations." *Id.* (citing S. Rep. No. 111-10 (2009)). Further, the court found that, read as a whole, § 4(f) of FERA further buttressed the conclusion that Congress did not intend "claims" in § 4(f)(1) to mean "cases" because § 4(f)(2) specifically states that "'section 3731(b) of title 31, as amended . . . shall apply to cases pending on the date of enactment.'" *Id.* The district court found that Congress's specific use of "cases" in the subsection directly following § 4(f)(1) indicated that Congress could have used the term but chose not to do so in § 4(f)(1). *Id.* The district court further found that even if the retroactivity

clause meant that the amended liability provision applied to the case pending before it, that application would violate the *Ex Post Facto* Clause because Congress intended to impose punishment when it amended the FCA. *Id.* at 752-56. The district court found especially persuasive the comments by FERA sponsors who referred to the need to "punish" those who defraud the government and the fact that the Supreme Court has found that the FCA treble damages multiplier is "essentially punitive in nature." *Id*. at 754-55. Finally, the district court found that even if Congress had not intended for the FCA to punish violators, the FERA amendment altering the liability standard would still be unconstitutional because it is "punitive in purpose or effect." *Id.* at 756-58.

Following the district court's decision, the United States filed a motion to intervene. The United States and the relators also filed a motion to certify the district court's entry and order precluding retroactive application for interlocutory appeal. The district court granted the motion and amended its prior entry and order to certify the decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This court granted the petitions for interlocutory appeal, finding that the order certified for interlocutory appeal presented "a controlling question of law . . . because which version of the statute applies will determine the standard of liability."

II.

On interlocutory appeal, our review is limited to "consider[ing] only pure questions of law." *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285 (6th Cir. 2010). Statutory interpretation and challenges to the constitutionality of a statute present questions of

law subject to *de novo* review. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004).

III.

We must determine whether the new § 3729(a)(1)(B) applies to all civil actions under the FCA that were pending on June 7, 2008, including this case. If "claim" in § 4(f)(1) means a request or demand for payment, then § 3729(a)(1)(B) would not apply retroactively to this case because there were no claims pending in 2008 because the claims relevant to the generator sets were made and paid in the 1980s and 1990s. However, if "claim" means a civil action or case, then § 3729(a)(2) would apply because this case was pending in June 2008.

A.

"The language of the statute itself is the starting point in statutory interpretation." *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460, 462 (6th Cir. 2010). Focusing on the text of FERA § 4(f), it is clear that Congress made two exceptions to the general rule that the amendments to the FCA "shall apply to conduct on or after the date of enactment"—May 20, 2009. FERA § 4(f). Under the first exception, the amendments to the pre-FERA version of § 3729(a)(2) are to "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 [June 7, 2008]." FERA § 4(f)(1) (emphasis added). Pursuant to the second exception, the amendments to § 3731(b) "Intervention by the Government," § 3733 "Civil Investigative Demands," and § 3732 "False Claims Jurisdiction" are to "apply to *cases pending* on the date of enactment." FERA § 4(f)(2) (emphasis added). Thus, in adjoining provisions which specify the two exceptions to the general rule that the amendments apply pro-

spectively, Congress referred to "claims" in defining one exception and "cases" in defining the second.

The Supreme Court has instructed that where a statute includes "particular language in one section . . . but omits it in another section of the same Act," it leads to the general presumption that the "disparate inclusion or exclusion" was done "intentionally and purposely." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, the use of different terminology in adjoining sections suggests that Congress utilized the specific terms intentionally. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006); *Kosak v. United States*, 465 U.S. 848, 862 (1984) (Stevens, J., dissenting) ("Absent persuasive evidence to the contrary, we should assume that when Congress uses different language in a series of similar provisions, it intends to express a different intention."). Under this logic, the meaning of "claim" is distinct from the meaning of "case"—and the former should not be conflated with the latter.

The strength of this argument is undermined, however, by the fact that § 4(f)(1) and § 4(f)(2) were drafted by different chambers of Congress at different times. *See* Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 Ind. L.J. 257, 298, 300 (2011); *cf. Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative 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."). What ultimately became FERA § 4(f)(1) originated in the Senate version of

FERA from March 2009. S. 386, 111th Cong. § 4(b) (as reported in Senate, March 5, 2009). Section 4(f)(2) originated in an amendment to FERA made by the House on May 6, 2009, which was then accepted by the Senate. S. 386, 111th Cong. § 4(f) (House engrossed amendment, May 6, 2009); S. 386, 111th Cong. (as accepted by Senate, May 14, 2009). Because the two provisions governing exceptions to the general effective date of FERA's amendments to the FCA were not drafted simultaneously, the inference that a difference in language signifies a different intention on the part of Congress is weak, despite the general presumption that Congress deliberately chose the difference.

The general presumption that "identical words used in different parts of the same act are intended to have the same meaning," *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), is "not rigid" and will "yield[] whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* Further, the Supreme Court has given "a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that Congress did not intend the language to be used uniformly." *Smith v. City of Jackson*, 544 U.S. 228, 260-61 (2005) (O'Connor, J., concurring in the judgment) (listing cases); *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-97 (2004). Thus, there is "no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) (internal quotation marks omitted).

In both the prior version of the FCA and the version amended by FERA, Section 3729 of the FCA contains a definition of "claim." As amended by FERA, "claim" is defined as "any request or demand, whether under contract or otherwise, for money or property and whether or not the United States has title to the money or property . . . ." 31 U.S.C. § 3729(b)(2)(A) (2012). The definition of "claim" is found within the "Definitions" subsection of § 3729. That subsection specifically prefaces the definitions with "For purposes of this section." *Id.* § 3729(b).

The district court found that this definition and the absence of a definition for "case" in FERA and the FCA led to the conclusion that "a plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.'" *Sanders*, 667 F. Supp. 2d at 752. The defendants agree, pointing out that the technical definition of "claim" should be applied to the reference to "claims" in § 4(f)(1) because it is necessary to read the language in context. The defendants point out that §4(f)(1) operates solely to define the retroactive application of the new § 3729(a)(1)(B). Thus, the two portions of the statutes (§ 3729 of the FCA and § 4(f)(1) of FERA) must necessarily be read in conjunction and in defendants' view it is appropriate to utilize the specific definition of "claim" provided in § 3729(b)(2)(A).

The relators and the United States also argue that reading the statutory language in context is necessary, but they reach the opposite conclusion, arguing that the reference to "claims" in § 4(f)(1) is in the context of the phrase "claims *under the False Claims Act*." FERA §4(f)(1) (emphasis added). According to the United States, substituting the tech-

nical definition of "claim" into the phrase "claims under the False Claims Act" makes little sense because a request for payment is never effectively made under the FCA.[3] 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. Moreover, if the specific definition of "claim" in § 3729 is applied to the use of the word in § 4(f)(1) of FERA, the substitution yields a somewhat nonsensical result.[4]

The relators further argue that the word "claim" should be given its natural or ordinary meaning—here they argue the ordinary meaning of "claim" suggests a claim for relief or cause of action, citing Black's Law Dictionary and the use of the term in the Federal Rules of Civil Procedure. Although statu-

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[3] The United States notes that the only situation under the FCA that might implicate a request for payment would be after a successful *qui tam* suit is brought and the government receives monetary penalties and damages. (United States Appellant's Br. at 18-19.) The government would then be required to pay the relator his or her statutory share of the award, although the relator would still not need to submit a request for payment. 31 U.S.C. § 3730(d).

[4] Inserting the definition of "claim" from § 3729 into § 4(f)(1) would result in the following: subparagraph (B) of section 3729(a)(1) of title 31 . . . as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all *request[s] or demand[s], whether under contract or otherwise, for money or property* . . . under the False Claims Act . . . that are pending on or after that date. *See* FERA § 4(f)(1); 31 U.S.C. § 3729(b)(2)(A) (2012) (emphasis added to inserted definitional language). This insertion, which juxtaposes the definition normally given to a request to the government for payment with the language "under the False Claims Act," a statutory remedy pursued after an allegedly false claim is made, demonstrates the misfit between the definition and its placement in § 4(f)(1).

tory language is generally to be given its natural or ordinary meaning, when a term is given a statutory definition or used as a term of art, that definition "control[s] the meaning of statutory words . . . in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). However, as noted above, there is no irrebuttable presumption of uniform usage. *See Gen. Dynamics*, 540 U.S. at 595-97. As a result, a court should not presume that a term defined by statute carries the same meaning every time it is used in a statute. *Envtl. Def.*, 549 U.S. at 574 ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."). Thus, "[c]ontext counts." *Id.* at 576.

Considering all the arguments, we conclude that it is not appropriate to import the technical definition of "claim" into § 4(f)(1) of FERA and that the retroactivity clause embodies the situation where the presumption of uniform usage has been rebutted and the natural or ordinary meaning of claim should be used for purposes of interpreting § 4(f)(1).[5]

The conclusion that the specific definition of "claim" from § 3729(b) should not be imported into § 4(f)(1) also derives support from the use of the term "claim" in other sections of the FCA and the location

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[5] Indeed, a recent article on this question of statutory interpretation has proposed this same conclusion: "[t]he fact that section 4(f)(1) embeds *claims* in the phrase 'claims [] under the False Claims Act,' coupled with the frequent use of *claims* as a synonym for *cases*, both in FERA and in general legal usage, reveals that claims is not being used in a technical way in the retroactivity clause." Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009,* 86 Ind. L.J. 257, 289 (2011) (emphases added).

of the retroactivity language at issue in the amended version of the FCA. Although the FCA often uses the term "action" to refer to a *qui tam* case or a civil action brought by the United States under the FCA, the statute also contains references to "claim/s" that clearly refer to and invoke the same concept of a civil action or legal claim, and not a request for payment. For example, § 3730(c)(5) states that the government "may elect to pursue its *claim* through any alternate remedy available . . . ." *Id.* (emphasis added). Section 3730 covers "Civil actions for false claims" and it is clear in context that the use of the word "claim" in subsection (c)(5) refers to the government's case against a violator of § 3729. Section 3731 also provides that when the government intervenes in a case, it may "file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the *claims* in which the Government is intervening." 31 U.S.C. § 3731(c) (2012) (emphasis added). As a final example, § 3732(b), entitled "*Claims* under state law," specifically grants district courts jurisdiction over any action brought under state law for the recovery of state or local government funds if the action arises from the same transaction as an action under § 3730 of the FCA. *Id.* (emphasis added). This use of the word "claims" in a generic sense to refer to "case" or "civil action" in other parts of the statute cautions against assuming that Congress meant a technical definition to apply when it used the term in § 4(f)(1).[6]

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[6] The location of the retroactivity language in the FCA also sheds light on the propriety of relying on the technical definition. Section 4(f) of FERA is not codified in the text of § 3729, and is instead in the historical and statutory notes accompanying the section. *See* 31 U.S.C. § 3729 note ("Effective and Ap-

[Footnote continued on next page]

B.

Although this Circuit has not yet definitively addressed the issue,[7] several courts have now addressed the question of whether the retroactivity language in FERA § 4(f)(1) applies to civil actions pending as of June 7, 2008. The parties both point to the decisions of other courts to support their interpretations of § 4(f)(1).

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plicability Provisions"). The United States argues that this counsels against crediting the argument that the definitions in § 3729, which specifically apply for "purposes of this section," should be used to define terms used in § 4(f) or in the note to § 3729. (United States's Appellant's Br. at 20.) While this argument may be technically correct, it might elevate form over substance or relevant context. Although not codified in § 3729, it is clear that the retroactivity language in § 4(f) is vital to proper application of the amended FCA, and it is just as clear that § 4(f)(1)'s language specifically refers to § 3729.

[7] We have noted that "[i]t is unsettled . . . whether the retroactive effect mandated by Congress [in FERA § 4(f)] applies to 'claims' in the sense of demands made via litigation or 'claims' as defined by the FCA." *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 509 n.2 (6th Cir. 2010). *SNAPP*, however, did not decide the issue and instead presumed that the pre-FERA statutory language governed because the reasoning in the case was unaffected by the differing liability standards. *Id.* Similarly, in *United States v. United Techs. Corp.*, 626 F.3d 313, 321 (6th Cir. 2010), this court noted the amendments to the FCA liability standard set forth in § 3729(a)(2) were made retroactive to "claims pending in June 2008," but found that it "need not decide" which standard of liability under § 3729(a)(2) applied to the defendant (who had a civil action under the FCA pending as of June 2008 but did not have a "claim" as defined by the FCA pending) because the government could satisfy either.

Thus far, the courts to address the issue directly are almost evenly split into those that conclude that "claims" refers to a claim for payment (this is referred to as the "majority view" by district courts in some opinions because somewhat more district courts have adopted this interpretation)[8] and those that conclude "claims" refers to cases.[9] The Second and Seventh Circuits have found that § 4(f)(1) makes the amendments to the former § 3729(a)(2) retroactive to FCA civil actions pending on June 7, 2008. *See United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011) (noting, arguably in dicta, that new § 3729(a)(1)(B) applies to cases pending on or after June 7, 2008); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (applying new

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[8] *See, e.g., Foglia v. Renal Ventures Mgmt.*, LLC, 830 F. Supp. 2d 8, 15-16 (D.N.J. 2011) (finding that § 3729(a)(1)(B) applies retroactively in place of unamended § 3792(a)(2) only when a defendant's false claims for payment were pending on or after June 7, 2008); *United States v. Edelstein*, No. 3:07-52, 2011 WL 4565860, at *8-9 (E.D. Ky. Sept. 29, 2011) (concluding that amendments to § 3729(a)(2) are inapplicable to case before it because they apply only to claims for money or payment that were pending on June 7, 2008); *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 315 n.1 (D. Mass. 2011) (noting that courts have "almost uniformly interpreted 'claims' to mean claims for reimbursement" and declining to depart from the "majority view" (internal quotation marks omitted)).

[9] *See, e.g., United States ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, L.L.C.*, No. 09-4039-KES, 2012 WL 602315, at *3 (D.S.D. Feb. 23, 2012) (applying § 3729(a)(1)(B) to *qui tam* suit brought in April 2009 (pre-FERA amendments)); *United States v. Phung*, No. CIV-09-772-L, 2011 WL 3584812, at *2 n.5 (W.D. Okla. Aug. 15, 2011) (applying amended version of § 3729(a)(2) to conduct that occurred in 2006 and 2007).

§ 3729(a)(1)(B) to case filed in 2005 and pending as of June 2008), *rev'd on other grounds*, 131 S. Ct. 1885 (2011). In contrast, the Ninth and Eleventh Circuits have found that "claim" in § 4(f)(1) of FERA means a demand for payment. *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011) (noting simply that "[t]hese amendments do not apply retroactively to this case" and citing *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009)); *Hopper*, 588 F.3d at 1327 n.3 (applying definition of claim from § 3729(b)(2)(A) to retroactivity language in § 4(f)(1) of FERA and finding that although case was pending in June 2008, no claims were pending as of that date). The Fifth Circuit appears to have taken both positions. Compare *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010) (concluding that the current § 3729(a)(1)(B) applies to complaint pending on June 7, 2008), *with Gonzalez v. Fresenius Med. Care N. Am.*, Nos. 10-50413, 10-51171, 2012 WL 3065314, at *3 & n.4 (5th Cir. July 30, 2012) (noting that the district court concluded that FERA's retroactivity provision did not apply because no "claims" were pending on June 7, 2008, and applying pre-amendment version of § 3729(a)). Unfortunately, the decisions resolve the issue without extended analysis. As a result, the available authority is of limited aid to our interpretation of the retroactivity language.

C.

The district court found that the Senate Report on FERA used "claims" to refer to a request for payment submitted by a defendant to the government and used "cases" to refer to civil actions for FCA violations. The district court concluded that this fur-

ther supported its conclusion that "claims" as used in § 4(f)(1) does not refer to civil actions. The United States argues that the Senate Report is inconsistent in its use of the word "claim," using it to refer to alleged violations of the FCA in other portions of the report.

Overall, the Senate Report accompanying FERA uses the word "claim" to mean a request or demand for payment in its description of the amendments to the FCA. S. Rep. 111-10, at 10-12 (repeatedly referring to "false claim/s"). The Senate Report refers to "FCA cases" when it describes how "defendants across the country have cited *Allison Engine* in seeking dismissal of certain FCA cases." *Id.* at 11-12. However, in two instances the Senate Report also uses the term "claim" to mean a FCA *case*. *Id.* at 10, 14 n.10 (explaining that the presentment requirement from *Allison Engine* created a subcontractor loophole which "creates a new element in a *FCA claim* and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute" and noting in a footnote that this court dismissed "a *claim* for false statements made by importers" (emphases added)). Thus, in the two contexts where reference is made to a lawsuit brought pursuant to the FCA, the Senate Report adopts inconsistent terminology and uses both "FCA claim" and "FCA case."[10] The district court opinion thus

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10 The Congressional Budget Office ("CBO") cost estimate for Senate Bill 386 (FERA) included in the Senate Report also refers to the ability of private individuals "to file *claims* against federal contractors" under the FCA, S. Rep. 111-10, at 16-17 (emphasis added), but we have not considered references to "claim" meaning "case" made by the CBO in the above discus-

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overstates to some degree the extent to which the Senate Report supports its conclusion.

D.

In summary, we recognize that the strongest argument in favor of reading "claims" in § 4(f)(1) to mean a demand for payment is the structure of FERA itself. Congress used the word "cases" in § 4(f)(2) and gave the word "claims" a statutory definition for the purposes of § 3729.[11] However, using

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sion as such references were not made by the drafters of the bill.

[11] The defendants argue that the presumption against retroactivity further counsels in favor of adopting the district court's interpretation of the statute (finding that § 3729(a)(1)(B) only applies to claims for payment pending on or after June 7, 2008) because it is the narrower construction. (Appellees' Br. at 27-30.) When considering whether a statute should be applied retroactively a court must first determine whether Congress "directed with the requisite clarity that the law be applied retrospectively." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). "If the court finds that Congress clearly intended for the law to be applied retroactively, the analysis ends and the law may be applied as Congress clearly intended." *Mossaad v. Gonzales*, 244 F. App'x 701, 704 (6th Cir. 2007). If the statute is silent on its retrospective effect, then a court must ask whether application of the statute to the objecting party "would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (internal quotation marks omitted). "If such rights are affected, then courts must apply a presumption against retroactivity." *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573, 584 (6th Cir. 2009). Here, because Congress provided express language indicating that § 3729(a)(1)(B) was to apply retroactively, the parties do not dispute that Congress intended the amendments to the liability standard to have retroactive effect, and the only question is the scope of the retro-

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the technical definition in context ("claims under the False Claims Act") provides a strained reading, and therefore it is not appropriate to import the statutory definition of "claim"—which applies for purposes of § 3729—into § 4(f). The fact that the two parts of § 4(f)'s exceptions to the effective date of FERA's amendments to the FCA were not drafted simultaneously reduces the strength of the structural argument. The use of "claims" elsewhere in the statute when the clear meaning is "cases" buttresses our conclusion. Consulting precedent and legislative history failed to further illuminate our analysis. Accordingly, we conclude that "claim" in § 4(f)(1) refers to a civil action or case. As a result, we must next consider whether retroactively applying § 3729(a)(1)(B)'s liability standard to cases pending on June 7, 2008, would violate the *Ex Post Facto* Clause.

IV.

"The Ex Post Facto Clause prohibits Congress from passing any law that (1) retroactively imposes punishment for an act that was not punishable when committed, (2) retroactively increases the punishment for a crime after its commission, or (3) deprives one charged with a crime of a defense that was available at the time the crime was committed."

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spective effect intended, the application of the presumption against retroactivity is not implicated. Although the defendants' approach to statutory interpretation has been advocated before, *see In re TMI*, 89 F.3d 1106, 1119 (3d Cir. 1996) (Sarokin, J., dissenting), we have not found any binding authority indicating the presumption against retroactivity should be used as a canon of construction when a statute is ambiguous as to the scope of retroactivity.

United States v. Coleman, 675 F.3d 615, 619 (6th Cir. 2012); *see* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). The *Ex Post Facto* Clause is only implicated by criminal statutes or acts intended to punish. *See Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999).

To determine if a "law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause," we must first "ascertain whether the legislature meant the statute to establish civil proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted). If we find "the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* However, if the intent was to enact a civil and nonpunitive regulatory scheme, we "must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation and editorial marks omitted). Deference is accorded to the legislature's stated intent such that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)); Smith, 538 U.S. at 92.

A. Whether the Intent Was to Impose Punishment

When assessing whether a statutory scheme is civil or criminal, we consider the statute's text and structure. *Smith*, 538 U.S. at 92. The manner of codification and the enforcement procedures established by a statutory scheme are also probative of legislative intent, although the location and labels of a statutory provision are not dispositive factors. *Id.* at 94.

Consistent with an intent to establish a civil proceeding, the text of the FCA contains multiple references to "civil actions" and refers to liability for violations of § 3729 as "civil penalt[ies]." *See* §§ 3729(a), 3730(a), (b). The FCA is codified within title 31 of the United States Code, which is a civil, not criminal, title. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (finding state intent to create civil proceeding evidenced by inclusion of statutory provision in question within the probate code instead of the criminal code). By labeling actions brought pursuant to the FCA "civil actions," Congress has thus expressed a preference for "one label or the other." *Ward*, 448 U.S. at 248-49 (finding it significant that Congress "labeled the sanction authorized [in the statutory provision at issue] a 'civil penalty'" and finding additional significance in label given criminal penalties set forth in preceding subsection). Further, Congress provided that in an action brought under § 3730 of the FCA by the United States, the government shall be held to the burden of proof common in civil litigation by requiring that it "prove all the essential elements of the cause of action . . . by a preponderance of the evidence," 31 U.S.C. § 3731(d) (2012), and also provided that FCA actions should be initiated by "[a] summons as required by the Federal Rules of Civil Procedure . . . ." *Id.* § 3732(a). The Senate Committee on the Judiciary report from the 1986 amendments to the FCA also contains evidence that supports the conclusion that members of Congress have consistently viewed the FCA as providing for civil proceedings. The Senate Report noted that the FCA is a "civil remedy designed to make the Government whole for fraud losses," that the False Claims Reform Act was intended to "clarif[y] the burden of proof in civil false claims actions," and that current construc-

tions of the FCA requiring the government to prove that a defendant had the specific intent to submit the false claim in question imposed a "standard . . . inappropriate in a civil remedy and . . . prohibit[ed] the filing of many civil actions to recover taxpayer funds lost to fraud." S. Rep. No. 99-345, at 2, 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5271-72.

Against this evidence, the defendants emphasize the statements made by the original FCA sponsor and sponsors of the FCA amendments. The defendants argue that the statements reference an intent to punish and demonstrate that Congress did not intend to establish civil proceedings by passing and amending the FCA. The FCA was enacted in 1863, and its original sponsor has been quoted as stating that the purpose of the law was to punish and prevent fraud. *See United States v. Bornstein*, 423 U.S. 303, 309 n.5 (1976). In 2009, when the FERA amendments to the FCA were being considered, FERA's sponsors—senators Patrick Leahy and Chuck Grassley—made several statements that indicated that the FERA amendments would punish those who commit fraud against the government. The district court relied on many of these statements in concluding that FERA was intended to punish, *Sanders*, 667 F. Supp. 2d at 754-55, and the defendants argue that these statements "provide clear proof that Congress intended the FCA to impose punishment." However, many of these statements refer to combating fraud and to the FERA amendments *generally*. Because FERA included amendments to several criminal statutes as well as the FCA, *see* FERA § 2 (amending the false statements in mortgage applications statute (18 U.S.C. § 1014), the major fraud against the government statute (18 U.S.C. § 1031), the federal securities fraud statute (18 U.S.C.

§ 1348), and the federal money laundering statute (18 U.S.C. §§ 1956, 1957)), statements referencing punishing those engaging in fraud may easily be ascribed to the desire to punish under the criminal statutes amended by FERA.[12] For example, the district court stated that Senator Leahy "indicated that passage of the FERA would help law enforcement 'track down and *punish*' people." *Sanders*, 667 F. Supp. 2d at 754 (quoting 155 Cong. Rec. S4409 (daily ed. Apr. 20, 2009)). However, reading the statement in context reveals that Senator Leahy actually stated that as the economic crisis in 2008 worsened he had "called upon Federal law enforcement to track down and punish those who were responsible for the corporate and mortgage frauds that helped make the economic downturn far worse." 155 Cong. Rec. S4408-02 (daily ed. Apr. 20, 2009) (statement of Sen. Leahy). This reference to punishing those responsible does not specifically refer to utilizing the FCA to effect punishment. And given the other anti-fraud statutes amended by FERA, which specifically involved mortgages and federal securities laws, the reference to punishment may more naturally be read as describing those criminal statutes instead of the FCA. Similarly, Senator Leahy's remark that without the FERA amendments Congress would be letting "fraud go[] unprosecuted and unpunished"

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[12] This is also true of statements by Senate Majority Leader Harry Reid in support of FERA cited by the defendants. (Appellees' Br. at 43.) Senator Reid referred to the need to punish those "responsible for the mortgage and corporate frauds," but he did not use the word "punish" when specifically referring to the strengthening amendments to the FCA, and referred to the FCA as "one of the most important civil tools . . . for rooting out fraud in Government." 155 Cong. Rec. S4725-07 (daily ed. Apr. 27, 2009).

is not specific to the FCA, and in context, Senator Leahy was referring to "[s]trengthening criminal *and civil* fraud enforcement." 155 Cong. Rec. S4604-04, 2009 WL 1098184, at *S4630 (daily ed. Apr. 23, 2009) (statement of Sen. Leahy) (emphasis added).

There is, however, a statement by Senator Grassley that does refer to the use of the FERA amendments to close legal loopholes created in the FCA, "thus ensuring that no fraud can go unpunished by simply navigating through the legal loopholes." 155 Cong. Rec. S4735-02 (daily ed. Apr. 27, 2009) (statement of Sen. Grassley). Further, during a 2002 hearing before the Senate Judiciary Committee, Senator Grassley asked then Attorney General John Ashcroft to confirm that he would "continue using the [FCA] to punish wrongdoing to the fullest extent of the law." 2002 WL 1722725 (F.D.C.H. July 25, 2002).

On balance, the sponsor and legislator statements do not indicate a clear intent to use the FCA to punish. While Senator Grassley appears to have referred to punishment in conjunction with references to the FCA, reading other statements in context suggests that any reference to punishment was not specifically made in reference to FERA's amendments to the FCA, particularly in light of the fact that FERA's other amendments were to criminal fraud statutes. Although we acknowledge that sponsors' statements may be relevant in interpreting statutes, the above statements, relied upon by the district court, are insufficient to outweigh the indicators of legislative intent that the text of the statute and the committee reports provide—indicators that suggest Congress intended to implement civil proceedings for combating fraud and not to impose punishment.

B. Punitive in Purpose or Effect

Because we find that the Congress did not intend to impose punishment when it enacted the FCA and the FCA amendments, we must turn to the second step in the *Ex Post Facto* analysis and determine whether the statutory scheme is "so punitive either in purpose or effect as to negate [Congress's] intention to deem it civil." *Hendricks*, 521 U.S. at 361 (internal quotation marks omitted). "[O]nly the clearest proof will suffice to . . . transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (internal quotation marks omitted). In order to determine if the effects of the FCA are punitive in purpose or effect, we may consult as useful guideposts the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), although the factors are not exhaustive or dispositive of the inquiry. *Smith*, 538 U.S. at 97. The *Mendoza-Martinez* factors are:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment–retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

372 U.S. at 168-69.

The parties acknowledge that the *Mendoza-Martinez* factors do not uniformly weigh in favor of finding that the statute is or is not punitive in pur-

pose or effect. We agree, but find that on balance the factors weigh in favor of finding a civil purpose or effect.

The first *Mendoza-Martinez* factor clearly favors the conclusion that the FCA has a civil purpose or effect. The sanctions under the FCA do not involve an affirmative disability or restraint because they do not involve a "sanction approaching the infamous punishment of imprisonment." *Cutshall*, 193 F.3d at 474 (internal quotation marks omitted); *see Hudson*, 522 U.S. at 104 (prohibiting petitioners from further participation in banking industry does not approach imprisonment). The defendants acknowledge that this factor does not support a finding of a punitive effect.

Under the second factor, we ask whether, from a historical perspective, the sanction has been viewed as punishment. Here, the sanction at issue is a monetary penalty.[13] *See* 31 U.S.C. § 3729(a) (2012)

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[13] The defendants argue that an analysis of this factor requires focusing more specifically on whether FCA sanctions have been regarded as punitive and not on the historical view of money penalties generally. (Appellees' Br. at 49-50.) Our review of cases applying the *Mendoza-Martinez* factors suggests that the analysis under this factor is often conducted at a fairly high level of generality, suggesting that the historical view of monetary penalties generally is appropriately considered at this point in the analysis. *See Smith*, 538 U.S. at 97-98 (comparing Alaska sex offender registration law's sanction (dissemination of information) to colonial punishments); *Hudson*, 522 U.S. at 104 (analyzing money penalties and occupational debarment sanctions imposed by the Office of the Comptroller of Currency by examining long held views of money penalties and debarment generally); *Cutshall*, 193 F.3d 475 (comparing Tennessee sex offender registration law's sanction (dissemination of information) to incarceration, incapacitation, and rehabilitation).

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(providing for civil penalty of at least $5000 and not more than $10,000, adjusted for inflation, plus treble damages). A monetary penalty "is a sanction which has been recognized as enforcible by civil proceedings since the original revenue law of 1789" and has not "historically been viewed as punishment." *Hudson*, 522 U.S. at 104 (internal quotation and editorial marks omitted).

Moving to the third factor, a violation of the FCA contains an element of *scienter*[14] because it is premised on knowing conduct. 31 U.S.C. § 3729(a)(1), (b)(1). The United States argues that although liability under the FCA is premised on knowing conduct, it "falls short of the specific intent required for most crimes." (United States Reply Br. at 22.) The United States points out that "knowing" is defined broadly in the current § 3729(b)(1) as having actual knowledge, acting in deliberate ignorance of the truth or falsity of information, and acting in reckless disregard of the truth or falsity of information, and

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However, to the extent that cases addressing the FCA's sanctions specifically should be considered, the Supreme Court has found that the FCA (before treble damages) was "remedial rather than punitive." *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (citing *Bornstein*, 423 U.S. at 315). Further, the Supreme Court's view of treble damages under the FCA appears to have evolved somewhat, with the Court recently finding that such damages have compensatory aspects. *Compare Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003), *with Stevens*, 529 U.S. at 784 (2000) (finding such sanctions essentially punitive).

14 "The term scienter means knowingly and is used to signify a defendant's guilty knowledge." *Cutshall*, 1903 F.3d at 475 (internal quotation marks omitted).

requires no specific intent to defraud. *Id.* § 3729(b)(1)(A)(i)-(iii), (B). Although the pre-FERA version of the FCA did not include a lowered intent standard (it did not premise liability on reckless conduct), the current version of the FCA can be violated upon either a finding of *scienter* ("knowingly") or recklessness. Because the current act can be violated by a lower *mens rea* than knowingly, see 31 U.S.C. § 3729(b)(1); *Cutshall*, 193 F.3d at 475, this factor does not weigh in favor of finding that the effect of the act is to punish.

The FCA does have some deterrent effects. *See United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir. 2002) ("The FCA has since become the primary means by which the Government combats and deters fraud."); *Bornstein*, 423 U.S. at 309 (noting principal goal of FCA when enacted was to stop massive frauds perpetrated by government contractors during Civil War). However, a deterrent purpose may serve both civil and criminal goals, and the mere presence of a deterrent purpose is not enough to render sanctions criminal. *See Hudson*, 522 U.S. at 105 (analyzing whether a sanction is criminal such that it would prevent trial under the Double Jeopardy Clause, and finding fact that sanction's deterrent purpose was insufficient to render it criminal because deterrence may support both civil and criminal goals); *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007). Thus, while the presence of deterrent effects might weigh in favor of finding a punitive effect, this factor is not dispositive.

The behavior which the FCA targets—the submission of a false claim to the government—is also a crime. 18 U.S.C. § 287. Thus, the fact that the FCA applies to behavior that is already criminal supports

the conclusion that its effect is punitive, *see Mendoza-Martinez*, 372 U.S. at 168, although the impact of this factor on the analysis is potentially weakened by the fact that the FCA as amended by FERA appears to cover more conduct than that proscribed by the criminal statute.[15]

Another factor to consider in the analysis of whether the FCA sanctions are punitive in effect is whether the sanction may serve an alternative purpose. *Mendoza-Martinez*, 372 U.S. at 168-69. The Supreme Court has found "compensatory traits" in the FCA damages multiplier such that the treble

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[15] The Supreme Court has noted that the reasoning behind this conclusion—that if the targeted behavior is already a crime it supports a finding of a punitive purpose or effect—is somewhat weakened by the fact that Congress may impose both a criminal and civil sanction regarding the same act or omission. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). In *89 Firearms*, the Court noted that the forfeiture provision in question covered a broader range of conduct than a related criminal provision, which meant that the forfeiture provision was not limited solely to criminal conduct and was therefore not "co-extensive with the criminal penalty." *Id.* at 366. The overlap that did exist did not convince the Court that the forfeiture proceedings in question could not reasonably be viewed as civil proceedings. *Id.* The criminal statute regarding false, fictitious or fraudulent claims against the government provides: "[w]hoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title." 18 U.S.C. § 287. This statute appears to proscribe less behavior than the amended version of § 3729; however, it is unclear that this difference in overlap is significant enough to suggest giving less weight to this factor in the analysis.

damages available under the FCA "have a compensatory side, serving remedial purposes in addition to punitive objectives." *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003). The Court reached this conclusion based on several "facts about the FCA," including the facts that "some liability beyond the amount of the fraud is usually necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims," the FCA contains a *qui tam* feature which means that "as much as 30 percent of the Government's recovery" may be diverted to the relator and thus the "remaining double damages . . . provide elements of make-whole recovery beyond mere recoupment of the fraud," and the FCA does not provide for pre-judgment interest or consequential damages that often accompany recovery for fraud. *Id.* at 130-31 (internal quotation marks omitted). Given the Supreme Court's analysis of the FCA's treble damages provision, an alternative purpose may be assigned—that of compensating, or making whole, the government for its losses suffered due to fraud—and this factor weighs in favor of finding a civil purpose or effect.

Finally, despite the fact that an alternative purpose may be assigned to the FCA sanctions, if the treble damages available under the FCA appear excessive in relation to the alternative purpose assigned, that would weigh in favor of finding a punitive purpose or effect. *See Mendoza-Martinez*, 372 U.S. at 169. Sanctions available under the FCA consist of "a civil penalty of not less than $5,000 and not more than $10,000 [adjusted for inflation], plus 3 times the amount of damages which the Government sustains . . . ." 31 U.S.C. § 3729(a)(1) (2012). The district court found that because the treble damages

available under the FCA may lead to situations where the amount recoverable by the United States far exceeds the actual monetary loss sustained directly in the fraudulent scheme the sanctions under the FCA, especially the treble damages provision, appear excessive in relation to the alternative purpose of compensating the government and weigh in favor of finding a punitive effect.

The Supreme Court has found that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). The Supreme Court has also found the treble damages provision of the FCA to be "essentially punitive in nature." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Viewed alone, this precedent suggests that the availability of treble damages supports a finding that the sanction is excessive in relation to the alternative purpose assigned (that of compensating the government for its losses). However, in *Chandler*, the Court seemed to soften its position with its finding that the FCA's treble damages provision actually possesses a compensatory side. *Chandler*, 538 U.S. at 130-32. In *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401, 405-06 (2003), the Supreme Court cited both Stevens's and Chandler's characterizations of the treble damages provision in the FCA, which suggests that the Court does not view the characterization of the treble damages provision set forth in *Stevens* as exclusively authoritative. *See id.* (explaining that the Court has "placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive."). Despite the fact that the treble damages

provision of the FCA—dependent on the specific facts of a case—may allow for situations where the sanctions may appear excessive in relation to the alternative purpose assigned, *Chandler* suggests that this factor would at best only weakly favor a finding of punitive effect.

Overall, an analysis of the *Mendoza-Martinez* factors indicates 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. As the Supreme Court has noted, no one factor is dispositive in the analysis. *Smith*, 538 U.S. at 97. Here, the strongest factors in favor of finding a punitive effect are that the behavior punished by the FCA is already a crime, the deterrent function of the FCA, and the availability of treble damages. However, 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 treble damages under the FCA. Given that "only the clearest proof" suffices to establish that a statute is punitive in purpose or effect at this stage of the analysis, *id.* at 92, we conclude that viewed as a whole, the *Mendoza-Martinez* factors fail to demonstrate a sufficiently punitive purpose or effect to "transform what has been denominated a civil penalty into a criminal penalty." *Id.* We therefore conclude that the retroactive application of the FCA does not violate the *Ex Post Facto* Clause's prohibition on retroactive punishments.

V.

"The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification suffi-

cient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (internal quotation marks omitted). Both prospective and retroactive aspects of legislation must meet the test of due process, "[b]ut that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). The defendants argue that FERA § 4(f) "does not rationally further a legitimate legislative purpose and deprives Defendants of the fair notice and repose guaranteed by the Due Process Clause . . . ." (Appellees' Br. at 53-54.) To support their position, the defendants cite *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996), where the Supreme Court found that a 500 to 1 ratio of punitive to compensatory damages awarded in a state civil fraud action was grossly excessive in violation of the Due Process Clause. But *Gore* does not indicate that the treble damages under the FCA that might attach to conduct reached by a retroactive application of § 3729(a)(1)(B) would implicate the same due process concerns. Further, a rational legislative purpose may be identified here, where Congress made clear that it sought to correct what it viewed as an erroneous interpretation of the FCA and passed the amendment "to reflect the original intent of the law." FERA § 4.

VI.

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA ex rel. **ROGER L. SANDERS, et al.,** **Relators,** **v.** **ALLISON ENGINE COMPANY, INC., et al.,** **Defendants.**	**Case No. 1:95-cv-970 (Consolidated with Case No. 1:99-cv-923)** **Judge Thomas M. Rose**

ENTRY AND ORDER GRANTING DEFENDANTS' MOTION TO PRECLUDE RETROACTIVE APPLICATION OF 31 U.S.C. § 3279(a)(1)(B) OR TO DECLARE UNCONSTITUTIONAL FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009, PUB. L. NO. 111-21, § 4(f) (Doc. #716) AND LIFTING THE STAY OF BRIEFING ON THE ISSUE OF WHETHER THE RECORD ON THE QUALITY CASE SHOULD BE REOPENEDD AND WHAT SHOULD BE DONE IF THE RECORD IS NOT REOPENED

This is a *qui tam* action brought pursuant to the False Claims Act ("FCA") by Relators Roger L. Sanders and Roger L. Thacker against Defendants General Motors Corp. ("GM"), *Allison Engine Co.*, Inc.,

Southern Ohio Fabricators and General Tool Co. The case against GM has been stayed due to GM's bankruptcy.

This case is the consolidation of two FCA suits alleging fraud in the negotiation and execution of subcontracts relating to the construction of United States Navy Arleigh Burke-class Guided Missile Destroyers. The first action, referred to by the parties as the "Quality Case," alleges that the Defendants submitted claims for payment despite knowing that the Generator Sets that they made for the Destroyers did not conform to contract specifications or Navy regulations. The second action, referred to by the parties as the "Pricing Case," alleges that the subcontractors withheld cost or pricing data during negotiations with the government's agent in violation of the Truth In Negotiations Act ("TINA") and the FCA.

This Court granted summary judgment to the Defendants on the Pricing Case. The Relators presented their Quality Case to a jury in January, February and March of 2005. At the close of Relator's case, this Court granted Defendants' Motion for Judgment As a Matter of Law on the grounds that the lack of evidence of any false claim presented to the government meant that no reasonable jury could find a violation of the FCA.

The Relators then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed this Court's grant of summary judgment on the Pricing Claim and reversed this Court's decision on the Quality Claim. *United States ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610 (6th Cir. 2006).

The Defendants then appealed the Sixth Circuit's decision on the Quality Case to the United States

Supreme Court. The grant of summary judgment on the Pricing Case has not been appealed.

The Supreme Court vacated the Sixth Circuit's decision and remanded the case "for further proceedings consistent with this opinion." *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123, 2131 (2008). In doing so, the Supreme Court held:

> Contrary to the decision of the Court of Appeals below, we hold that it is insufficient for a plaintiff asserting a [31 U.S.C] § 3729(a)(2) claim to show merely that "[t]he false statement's use . . . result[ed] in obtaining or getting payment or approval of the claim," or that "government money was used to pay the false or fraudulent claim." Instead, a plaintiff asserting a § 3729(a)(2) claim 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. Similarly, a plaintiff asserting a claim under § 3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end.

Id. at 2126 (quoting *United States ex rel. Sanders*, 471 F.3d at 621).

The Supreme Court opinion was issued on June 9, 2008. On March 9, 2009, the Sixth Circuit remanded the case to this Court. (Doc. #709.) On April 24, 2009, this Court conducted a status conference. As a result of the status conference, a trial date of May 3, 2010, was set and a briefing scheduled on whether the record on the Quality Case should be reopened and what should be done if the record is not reopened. The Defendants filed their Memorandum on May 26, 2009. (Doc. #710.) Further briefing on

the issue was then stayed (doc. #713) due to the passage and signing into law of the Fraud Enforcement and Recovery Act of 2009 ("FERA").

FERA was signed into law on May 20, 2009. Among other things, FERA includes amendments to the FCA. Prior to these amendments, any person was liable under 31 U.S.C. § 3729(a)(2) 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." This subsection of the FCA was amended by the FERA to provide that 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" is liable. 31 U.S.C. § 3729(a)(1)(B). Thus, the FERA amendments to the FCA eliminate the "to get" language and eliminate the words "paid or approved by the Government."

Although enacted on May 20, 2009, the FERA includes a retroactivity clause which provides that the amendments to the FCA identified above "shall take effect on the date of enactment and shall apply to conduct on or after the date of enactment, except that" the amendments identified above "shall 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" (the "retroactivity clause").

On July 21, 2009, the Defendants, sans GM, filed their Motion To Preclude Retroactive Application of 31 U.S.C. § 3729(a)(1)(B) or Alternatively To Declare FERA Unconstitutional. (Doc. #716.) The Government has filed a Statement of Interest (doc. #718) and the Relators have responded in opposition (doc. #719). The Defendants have Replied. (Doc. #726.)

Thus, the Defendants' Motion To Preclude Retroactive Application of 31 U.S.C. § 3729(a)(1)(B) or, Alternatively To Declare FERA Unconstitutional is fully briefed and ripe for decision.

The Defendants now argue that a reading of the plain language indicates that the amendments identified above do not apply to this case and that application of the retroactivity clause to them would violate the Ex Post Facto Clause and the Due Process Clause of the U.S. Constitution. Both the Government and the Relators argue otherwise.

Defendants' arguments regarding a reading of the plain language of the amendments and regarding violation of the *Ex Post Facto* Clause have merit and will be further addressed. Defendants' Due Process Clause argument need not be and is not addressed herein.

The Plain Language

The Defendants argue that the plain language of the retroactivity clause does not make the amendments to the FCA retroactive to their case. However, Congress may enact laws with retrospective effect so long as the laws are within constitutional limits. *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Bowen v. Georgetown Hospital*, 488 U.S. 204, 208 (1988)).

A statute may not be applied retroactively absent a clear indication from Congress that it intended such a result. *Id.* When reading the plain language, statutory definitions normally control the meaning of statutory words. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). Finally, statutory language has meaning only in context. *Graham County*

Soil & Water Conservation District v. United States, 545 U.S. 409, 415 (2005).

The standard for finding such a clear indication is a demanding one. *Id.* The retroactivity language must be so clear that it can sustain only one interpretation. *Id.*

The analysis turns then to the FCA retroactivity clause placed in FERA by Congress. The retroactivity language that is relevant here is found in section 4(f)(1) of FERA which provides that:

> The Amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that – (1) subparagraph (B) of section 3927(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall 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 than date. . .

Pub. L. No. 111-21, section 4(f).

Subparagraph (B) of section 3927(a)(1) of title 31 is one of the FCA provisions which was changed by FERA and now provides that 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 is liable under the FCA. Thus, Subparagraph (B) of section 3927(a)(1) of title 31 purportedly takes effect on all FCA claims pending on or after June 7, 2008.

The Supreme Court issued its order in this case on June 9, 2008. Thus, this case was pending on June 7, 2008, the retroactivity date provided in FERA. However, the retroactivity date in FERA ap-

plies to "claims" pending on June 7, 2008. So the issue becomes whether Congress intended the retroactivity language to apply to "cases" pending on June 7, 2009, or to "claims" pending on June 7, 2009.

The Relators argue that the retroactivity language applies to "cases" pending and the Defendants argue that the retroactivity language only applies, if it is constitutionally firm, to "claims" pending on June 7, 2009. While the Defendants arguably had a "case" pending on June 7, 2008, the Defendants argue that they had no "claims" pending on June 7, 2008 and there is no evidence otherwise. This "case" claiming violation of the FCA has been pending since 1995, but the "claims" upon which this "case" is based were paid in the late 1980s and early 1990s and were no longer pending on June 7, 2008.

A "claim" is defined in the amendments to the FCA set forth in the FERA as "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property . . . ." 31 U.S.C. § 3729(b)(2)(A). Neither the amendments to the FCA set forth in the FERA nor the prior FCA include a definition of "case." Thus, a plain reading of the retroactivity language reveals that the relevant change is applicable to "claims" and not to "cases." The new FCA retroactivity clause is not applicable to the Defendants in this case.

This conclusion is supported by the FERA's legislative history. *United States v. Science Applications International Corp.*, No. 04-1543(RWR), 2009 WL 2929250 at *14 (D.D.C. Sept. 14, 2009). The Senate Report's explanation of FERA's amendments to the FCA uses "claims" to refer to a defendant's request for payment and "cases" when discussing civil ac-

tions for FCA violations. *Science Applications*, 2009 WL 2929250 at *14; *see* S. Rep. No. 111-10 (2009).

The text of FERA section 4(f) also supports the conclusion that Congress did not intend "claims" in subsection 4(f)(1) to mean "cases." *See Science Applications*, 2009 WL 2929250 at *14. Subsection 4(f)(2) immediately following subsection 4(f)(1) reads, "section 3731(b) of title 31, as amended . . . shall apply to cases pending on the date of enactment." Pub. L. No. 111-21, section 4(f)(2). "Surely, had Congress intended the retroactivity of subsection 4(f)(1) to be measured by 'cases,' it would have said so as it did in subsection 4(f)(2). *Id.*

Therefore, the clear indication from Congress is that the revised language at issue here is applicable to "claims" pending on June 7, 2008, and not to "cases" pending on June 7, 2008. Since the Defendants in this case had no "claims" pending on June 7, 2008, the retroactivity clause does not apply to them. Thus, the prior version of the FCA applies.

The Ex Post Facto Clause

Even if the retroactivity clause enacted as part FERA was to be found by a reading of its plain language to apply to the "claims" pending in this case, application of this retroactivity language to these Defendants would violate the Ex Post Facto Clause of the U.S. Constitution. The Relators specifically argue that Congress disagreed with the Supreme Court's interpretation of the FCA provisions initially at issue in this case and amended the FCA to make its intent clear.

Congress is, of course, free to enact new legislation that changes the way its previous legislation has been interpreted by the Supreme Court. *Pearson v.*

Callahan, 129 S. Ct. 808, 816-17 (2009). However, there are some limitations on what Congress may do, particularly retroactively.

For example, the Ex Post Facto Clause of the U.S. Constitution forbids the making of Ex Post Facto laws. U.S. CONST. Art. I, § 9, cl. 3. Using the Ex Post Facto Clause, the framers of the U.S. Constitution "sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

"An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810). Said another way, Ex Post Facto laws are laws which impose punishment for past acts. *De Veau v. Braisted,* 363 U.S. 144, 160 (1960).

An ex post facto law may inflict penalties on a person or it may inflict pecuniary penalties. *Id.* Traditionally, criminal statutes have been examined for violation of the Ex Post Facto Clause. However, civil statutes may also violate the Ex Post Facto Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 281 (1994); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 9717-2 (2d Cir. 1985) (the punitive nature of the treble damages provision in the Trademark Counterfeiting Act of 1984 could implicate ex post facto concerns).

The threshold question in an ex-post-facto analysis is whether the legislature intended to impose punishment when it enacted the law. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the legislature intended to impose punishment, the inquiry ends and the law violates the Ex Post Facto Clause. *Id*. However, if the legislature's intention was to enact a civil and

nonpunitive regulatory scheme, a court must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

The Intention of Congress

The first question in the ex-post-facto analysis of this case is whether Congress intended to impose punishment when it enacted the FCA. If so, retroactive application of the amendments to the FCA violates the Ex Post Facto Clause because retroactive application of the amendments to the FCA would impose punishment for acts that were not punishable prior to enactment of the amendments.

The FCA is codified under a civil title of the United States Code and not under a criminal title. The amendments to the FCA found in FERA provide for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person. Pub. L. No. 111-21, section 4(a)(1)(a)(1)(G) (emphasis added).

The Senate Committee on the Judiciary, when reporting on the False Claims Amendment Act of 1986 upon passage out of committee, said, "[t]he purpose of S. 1562, the False Claims Reforms Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 1986 U.S.C.C.A.N. 6266. This Senate Committee also said that FCA proceedings are "civil and remedial in nature and are brought to recover compensating damages . . . ." 1986 U.S.C.C.A.N. 5296.

This would seem to indicate that Congress did not intend for FCA sanctions to be punitive. However, individual Senators thought otherwise about the FCA.

According to its sponsor, the FCA was adopted "for the purpose of **punishing** and preventing . . . frauds." *United States v. Bornstein*, 423 U.S. 303, n.5 (1976) (citing Cong. Globe, 37th Cong., 3d Sess., 952, remarks of Senator Howard) (emphasis added). Further, statements made by Senators debating the FERA, which includes amendments to the FCA, indicate that they intend for the FCA to be **punitive**.

On April 20, 2009, FERA co-sponsor Senator Patrick Leahy indicated that passage of the FERA would help law enforcement "track down and **punish**" people. 155 Cong. Rec. S4409 (daily ed. Apr. 20, 2009) ("As the economic crisis worsened last fall, I called upon Federal law enforcement to track down and **punish** those who were responsible for the corporate and mortgage frauds that helped make the economic downturn far worse than anyone predicted. This year, as Congress reconvened, I joined with Senator Grassley to draft and introduce [FERA], the legislation we consider today, which will provide the new tools and resources needed by law enforcement to carry out this effort.") (emphasis added). On April 23, 2009, Senator Leahy again indicated that his amendments were meant to **punish**. Congressional Record: April 23, 2009 (Senate) at S4630 ("If fraud goes unprosecuted and **unpunished**, then victims across America lose money.") (emphasis added). On April 27, 2009, Senator Charles Grassley, author of the modern FCA, argued that the FCA amendments he sponsored would ensure **punishment**. 155 Cong. Rec. S4737 (daily ed. Apr. 27, 2009) ("This legislation

fixes this, thus ensuring that no fraud can go **unpunished** by simply navigating through the legal loopholes.") (emphasis added). On April 27, 2009, Senate Majority Leader Harry Reid added his voice to the call for **punishment**. 155 Cong. Rec. S4725-S4726 (daily ed. Apr. 27, 2009) ("[FERA] provides critical funding and new tools to let law enforcement prosecute and **punish** those responsible for the mortgage and corporate frauds that have hurt countless hard-working Americans and led to the worst financial crisis in decades.") (emphasis added).

Senator Leahy has also praised the **punitive** use of and effect of the FCA. 2008 WL 511861 (F.D.C.H. Feb. 27, 2008) ("Today again in the midst of war and facing reports of billions lost to fraud and waste in Iraq and Afghanistan, we are considering important new improvements to the [FCA] - not only to **punish** and deter those who seek to defraud our nation, but also to recover billions in taxpayer dollars stolen from the public trust . . . [The FCA] has been used to **punish** contractors selling defective body armor to our police . . . to **punish** health care and drug companies for defrauding billions from Medicaid and Medicare . . . .") (emphasis added).

These declarations of legislative intent regarding FERA, including the FCA amendments, are consistent with Congress's previous view that the FCA is intended to be **punitive**. For example, when Attorney General John Ashcroft appeared before Congress in 2002, Senator Grassley demanded that Ashcroft pledge to continue to use the FCA to **punish** wrongdoing. 2002 WL 1722725 (F.D.C.H.) (July 25, 2002) ("[The FCA] is the government's most potent weapon in war on fraud and abuse, and I would appreciate your assurances here today, hence my first

question, that you would intend to continue using the [FCA] to **punish** wrongdoing to the fullest extent of the law . . . I think your letter said that, but I still would like to ask you.") (emphasis added). Then Attorney General Ashcroft responded, "Yes sir, the letter reflects the commitment of the Department." *Id.* Current Attorney General and then Deputy Attorney General Eric Holder stated: "Those amendments [to the 1986 FCA] have made the [FCA] our most powerful and effective tool in rooting out and **punishing** fraud in government programs." Remarks of Eric H. Holder, Deputy Attorney General, announcement of Criminal Pleas and Civil Settlements, *United States v. Fresenius* (National Medical Care), Boston, Massachusetts, January 19, 2000 (http://www.usdoj.gov/archive/dag/speeches/2000/nmichaelhealthremarks.htm) (emphasis added).

The Relators have identified Government Reports indicating that the FCA is remedial in nature. However, these "reports" are not persuasive because they do not include actual quotes of Congressmen and because a statute may be both punitive and remedial. *See United States v. Halper*, 490 U.S. 435, 447 (1989)

In addition to the repeated and clear manifestations of Congressional intent regarding the punitive purpose of the FCA and the FERA amendments, Courts have consistently recognized that the FCA punishes those who violate it, with particular attention being paid to the FCA's treble damages clause. The Supreme Court has found that FCA's damages multiplier has a compensatory function as well as a punitive one. *Cook County, Ill. v. U.S. ex rel. Chan-*

dler, 538 U.S. 119, 130 (2003).[1] The Supreme Court has also recognized that the treble damages found in the FCA are "essentially punitive in nature." *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 405 (2003); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000);[2] *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943). "The very idea of treble damages reveals an intent to **punish** past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (emphasis added).

In addition to the Supreme Court, Circuit and District Courts have also recognized the punitive nature of FCA damages. *See i.e. United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428, 445 (6th Cir. 2005), *cert. denied*, 546 U.S. 1063 (2005); *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641(6th Cir. 2002), *cert. denied*, 539 U.S. 969 (2003); *United States v. Bank of Farmington*, 166 F.3d 853, 857 (7th Cir. 1999); *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008); *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006); *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir.

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[1] The Relators assert that, in *Chandler*, the Supreme Court explains why the FCA remains a remedial statute following the 1986 amendments thereto. While this may or may not be accurate, the *Chandler* Court nevertheless found that the FCA's treble damages provision has a punitive function.

[2] The Relators assert that the *Stevens* Court was not undertaking a detailed analysis of the FCA for Constitutional purposes as it did in *Marcus*. However, both the *Marcus* and *Stevens* Courts indicate that the FCA has punitive aspects.

1988); *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75, 87 (D.D.C. 2007); *U.S. ex rel. Bane v. Breathe Easy Pulmonary Services, Inc.*, No. 8:06-CV-40-T-24MAP, 2007 WL 4885468 at *7 (M.D. Fla. Nov. 30, 2007); *United States ex rel. Brinlee v. AECOM Government Services, Inc.*, No. 2:04 CV 310, 2007 WL 496623 at *4 (W.D. La. Feb. 8, 2007); *United States ex rel. Oliver v. The Parsons Corp.*, 498 F. Supp.2d 1260, 1289 n.30 (C.D. Cal. 2006).

Thus, Congress intended to impose punishment when it enacted the FCA and the amendments thereto. The Supreme Courts and lower courts have also regularly determined that the FCA imposes punishment. In addition, the Relators have presented no cases suggesting that retroactive application of the amendments to the FCA, particularly with the treble damages provision, would be Constitutional. Therefore, retroactive application of the amendments to the FCA violates the Ex Post Facto Clause because retroactive application of the amendments to the FCA would impose punishment for acts that were not punishable prior to enactment of the amendments.

Punitive In Purpose or Effect

However, even if Congress had not clearly intended for the FCA to punish those who violate it, the FERA amendments to the FCA would still be unconstitutional pursuant to the Ex Post Facto Clause. The FERA amendments would be unconstitutional because retroactive legislation must clear a second hurdle, a hurdle that is not cleared by the FERA amendments to the FCA.

If the intent of the legislation was to enact a regulatory scheme that is civil and nonpunitive, a court

must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." *Smith*, 538 U.S. at 92 (Kansas, 521 U.S. at 361, quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). When conducting this examination, only the "clearest proof" will be enough to override legislative intent and transform a civil remedy into a criminal penalty. *Id.*

When examining the effects of the FCA statutory scheme, courts use the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Id.* at 97. The seven factors are: (1)whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether the sanction comes into play only on a finding of scienter; (4) whether operation of the sanction will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assigned to the sanction; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. *Kennedy*, 372 U.S. at 168-69. While these factors are not exhaustive nor dispositive, they provide a framework for the analysis. *Smith*, 538 U.S. at 97.

1. Affirmative Disability or Restraint?

An affirmative disability or restraint is normally understood to be a sanction approaching imprisonment. *Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (citing *Herbert v. Billy*, 160 F.3d 1131, 1137 (6th Cir. 1998)), *cert. denied*, 529 U.S. 1053 (2000). Sanctions provided under the civil FCA,

which is at issue here, do not approach imprisonment. This factor weighs in favor of a finding of civil purpose or effect.

2. Historically Regarded As Punishment?

As determined above, FCA sanctions have historically been regarded, at least in part, as punitive. This factor weighs in favor of a finding that the FCA sanctions are punitive in nature and effect.

3. Scienter Required?

An FCA violation requires scienter. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996) (citing *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) ("For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud."), *cert. denied*, 516 U.S. 1043 (1996)), cert. denied, 519 U.S. 865 (1996); *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008). This factor weighs in favor of a finding that the FCA sanctions are punitive in nature and effect.

4. Punishment-Retribution and Deterrence Promoted?

Sanctions provided in the civil version of the FCA are intended to deter conduct. *United States ex rel. Roby*, 302 F.3d at 645. However, the fact that deterrence is one purpose of FCA sanctions does not render FCA sanctions punitive for purposes of Ex-Post-Facto-Clause analysis. *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 287 (2008). Yet, FCA sanctions also, as set forth above, have a strong punitive purpose and deterrence is one purpose of punishment. Therefore,

this factor weighs in favor of a finding that the FCA sanctions are punitive in nature and effect.

5. Behavior Already a Crime?

The submission of false claims to the Government has been a crime since the inception of the FCA. However, in 1982 Congress separated the criminal version of the FCA from the civil version. *United States ex rel. Sikkenga v. Regence Bulecross Blueshield of Utah*, 472 F.3d 702, 734 (10th Cir. 2006). But courts continue to look to caselaw interpreting the civil version of the FCA to construe the criminal version of the FCA. *See United States v. McBride*, 362 F.3d 360, 371 (6th Cir. 2004). Further, the same conduct may be punishable under both the criminal and civil versions of the FCA. Yet, because behavior proscribed by the civil version of the FCA may also be sanctioned as a crime under the criminal version of the FCA, this factor weighs in favor of a finding of civil purpose or effect for the civil version of the FCA.

6. Alternative Purpose Assigned?

In this case, there is an alternative purpose assigned. The Supreme Court has found that FCA's damages multiplier has both a compensatory function as well as a punitive one. *Cook County, Ill.*, 538 U.S. at 130. Thus, a purpose of the FCA's sanctions alternative to being punitive is to compensate for loss. Therefore, this factor weighs in favor of a finding of civil purpose or effect for the civil version of the FCA.

7. Excessive In Relation To Alternative Purpose?

The alternative purpose identified for the FCA is to compensate for loss. However, the sanctions recoverable under the FCA can far exceed those neces-

sary to compensate the Government for fraud. More specifically, the FCA provides for a "civil penalty of not less than $5,000 and not more than $10,000 . . . plus three times the amount of damages which the Government sustains . . . ." 31 U.S.C. § 3729(a)(1)(G); *see e.g. Halper*, 490 U.S. at 499 (penalties of $130,000 for an actual loss of $585 bore "no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as punishment in the plain meaning of the word . . ."). Since the sanctions recoverable under the FCA can far exceed those necessary to compensate the Government for its loss, this factor weighs in of a finding that the FCA sanctions, particularly the treble damages provision, are punitive in nature and effect.

In sum, four of the seven *Kennedy* factors weigh in favor of finding that the civil FCA sanctions are punitive in nature and effect. Further, the "alternative purpose assigned" factor, which weighs in favor of a finding of civil purpose or effect, is more than overcome by the determination under the "excessive in relation to alternative purpose" factor that the sanctions recoverable can far exceed the sanctions necessary to compensate the Government for its loss. Finally, the Relators agree that the FCA's treble damages provision has some punitive aspects. (Relator's Mem. In Opp'n pp. 15, 26 (doc. #719)). As a result, the civil version of the FCA is punitive in purpose and effect.

CONCLUSION

The FCA as amended by FERA may not be applied to the Defendants in this case. A plain reading of the retroactivity clause results in the conclusion that the FCA as amended by FERA does not apply to this case. Also, retroactive application of the new

FCA language to these Defendants violates the Ex Post Facto Clause. Retroactive application violates the Ex Post Facto Clause because Congress intended for the FCA to be punitive and because FCA sanctions are punitive in purpose and effect.

The Relators have requested oral argument on this Motion. This Court has been fully informed by and has not imposed page limits on the Briefs. There is, therefore, no need for oral argument.

Briefing on the issue of "whether the record on the Quality Case should be reopened and what should be done if the record is not reopened" had been stayed pending this decision. That stay is now lifted and the Relators have until not later than twenty-one (21) days following entry of this Order to respond to the Memorandum that the Defendants have already filed on this issue. A reply may be then filed by the Defendants in accordance with Local Rule 7.2(a)(2).

DONE and **ORDERED** in Dayton, Ohio this Twenty-Seventh day of October, 2008.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

APPENDIX C

Nos. 10-3818/3821

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 05, 2012
DEBORAH S. HUNT, Clerk

ROGER L. SANDERS; ROGER L. THACKER, Plaintiffs-Appellants, UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ALLISON ENGINE COMPANY, INC., ET AL., Defendants-Appellees.	)	ORDER

BEFORE: BATCHELDER, Chief Judge; GIBBONS and COOK, Circuit Judges,

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges* of this court, and no judge of this court having requested a vote on the suggestion for

* Judges Cole and Clay recused themselves from participation in this ruling.

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 10-3818/3821

FILED
Jan 09, 2013
DEBORAH S. HUNT, Clerk

ROGER L. SANDERS; and ROGER L. THACKER (10-3821); UNITED STATES OF AMERICA (10-3818),

Plaintiffs - Appellants,

v.

ALLISON ENGINE COMPANY, INC., GENERAL TOOL CO.; SOUTHERN OHIO FABRICATORS., INC.; GENERAL MOTORS CORPORATION,

Defendants - Appellees.

Before: BATCHELDER, Chief Judge; GIBBONS and COOK, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for fur-

ther proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/
Deborah S. Hunt, Clerk

APPENDIX E

U.S. Constitution, article I, § 9, clause 3 provides:

No Bill of Attainder or *Ex Post Facto* Law shall be passed.

31 U.S.C. § 3729 (2008) provides:

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

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

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

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

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

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

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person

did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730 (2008) provides:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the

Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact

or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses

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[1] So in original. Probably should be "General".

which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, admin-

istrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had

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[2] So in original. Probably should be "General".

but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3731 (2008) provides:

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Fed-

eral Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732 (2008) provides:

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, provides in relevant part:

* * *

SEC. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

(a) CLARIFICATION OF THE FALSE CLAIMS ACT.—Section 3729 of title 31, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

"(a) LIABILITY FOR CERTAIN ACTS.—

"(1) IN GENERAL.—Subject to paragraph (2), any person who—

"(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

"(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

"(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

"(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

"(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the

receipt without completely knowing that the information on the receipt is true;

"(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

"(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

"(2) REDUCED DAMAGES.—If the court finds that—

"(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

"(B) such person fully cooperated with any Government investigation of such violation; and

"(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

"(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.";

(2) by striking subsections (b) and (c) and inserting the following:

"(b) DEFINITIONS.—For purposes of this section—

"(1) the terms 'knowing' and 'knowingly'—

"(A) mean that a person, with respect to information—

"(i) has actual knowledge of the information;

"(ii) acts in deliberate ignorance of the truth or falsity of the information; or

"(iii) acts in reckless disregard of the truth or falsity of the information; and

"(B) require no proof of specific intent to defraud;

"(2) the term 'claim'—

"(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

"(i) is presented to an officer, employee, or agent of the United States; or

"(ii) 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—

"(I) provides or has provided any portion of the money or property requested or demanded; or

"(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

"(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

"(3) the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

"(4) the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.";

(3) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively; and

(4) in subsection (c), as redesignated, by striking "subparagraphs (A) through (C) of subsection (a)" and inserting "subsection (a) (2)".

(b) INTERVENTION BY THE GOVERNMENT.—Section 3731(b) of title 31, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d);

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting the new subsection (c):

"(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.".

(c) CIVIL INVESTIGATIVE DEMANDS.—Section 3733 of title 31, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A)—

(I) by inserting ", or a designee (for purposes of this section)," after "Whenever the Attorney General"; and

(II) by striking "the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law," and inserting "the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b),"; and

(ii) in the matter following subparagraph (D)—

(I) by striking "may not delegate" and inserting "may delegate"; and

(II) by adding at the end the following: "Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation."; and

(B) in paragraph (2) (G), by striking the second sentence;

(2) in subsection (i) (2)—

(A) in subparagraph (B), by striking ", who is authorized for such use under regulations which the Attorney General shall issue"; and

(B) in subparagraph (C), by striking "Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities."; and (3) in subsection (l)—

(A) in paragraph (6), by striking "and" after the semicolon;

(B) in paragraph (7), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(8) the term 'official use' means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the coun-

sel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.".

(d) RELIEF FROM RETALIATORY ACTIONS.—Section 3730(h) of title 31, United States Code, is amended to read as follows:

"(h) RELIEF FROM RETALIATORY ACTIONS.—

"(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

"(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.".

(e) FALSE CLAIMS JURISDICTION.—Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.".

(f) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a) (1) of title 31, United States Code, as added by subsection (a) (1), shall 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; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

* * *

31 U.S.C. § 3729 (2011) provides:

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money

or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the

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1 So in original. Probably should read "Public Law 101-410".

amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly" —

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) 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—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730 (2011) provides:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—

The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any com-

plaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the

person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the

appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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[1] So in original. Probably should be "General".

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the de-

fendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor,

agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731 (2011) provides:

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of

> the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which

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[1] So in original. Probably should be preceded by "section".

involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732 (2011) provides:

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such govern-

ments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.