No. 12-1057

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The government explicitly conceded below that the question presented is an "important statutory . . . issu[e]," that its resolution "will have broad impact on litigation under the False Claims Act," C.A. U.S. Br. ix, and that deciding the issue now will "materially advance th[is] litigation" in particular. U.S. Mem. Supp. Mot. to Certify 2 (S.D. Ohio Dkt. #732). The government also repeatedly acknowledged that "appellate courts are split on this issue" and have "reached opposite conclusions" regarding the correct interpretation of Section 4(f)(1) of the 2009 Amendments, Pub. L. No. 111-21, 123 Stat. 1617, 1625 (2009). C.A. U.S. Br. 24 (capitalization omitted); *see also* C.A. U.S. Mot. to Publish 2-3 (issue "has been the subject of conflicting decisions by other Circuits"). Indeed, the government and relators, citing the split, persuaded the Sixth Circuit to publish its opinion to provide guidance to other courts. *See* C.A. U.S. Mot. to Publish 2; *id.* at 1 ("relators concur" in motion).

Now, however, faced with the prospect of review by this Court and a ruling wiping out its win below, the government has abruptly changed its story. In this Court, it trivializes the issue that it had earlier heralded as "important" and "hav[ing] broad impact," dismissing the question as one of "diminishing significance." U.S. Opp. 21. And while still conceding the circuit split, the government insists that it does not justify review, on the invented basis that other circuits' discussions of the issue were simply too concise. *Id.* at 20-21. In staking these remarkable positions, the government does not even acknowledge,

much less attempt to distinguish, its contrary arguments below.

The government instead devotes nearly its entire submission to the merits. It spends less than three pages on the circuit conflict and the issue's significance, U.S. Opp. 20-22—the considerations *most* pertinent to certiorari—while devoting more than three-fourths of its argument to defending the decision below, *id.* at 10-19. Relators give the split and its significance even shorter shrift. Relators' Opp. 11-13, 29-30; *cf. id.* at 13-28 (merits). Respondents' merits arguments are uniformly unpersuasive. Indeed, the government concedes that its reading of the statute is *not* compelled by the plain text, thus acknowledging that Section 4(f)(1) is *at least* ambiguous. That alone is dispositive because three separate, well-settled interpretive principles require resolving that ambiguity in petitioners' favor.

More fundamentally, however, respondents' unavailing attempt to defend the decision below is beside the point. *Regardless* which reading of Section 4(f)(1) is correct, the direct and undisputed conflict among the courts of appeals necessitates this Court's intervention. That is especially true given the issue's practical importance for petitioners and countless other False Claims Act defendants now confronted with potentially devastating liability under a statutory amendment passed years, and sometimes decades, after the conduct at issue.

The petition should be granted.

I. THE SIXTH CIRCUIT'S DECISION DEEPENS AN ACKNOWLEDGED SPLIT ON AN IMPORTANT ISSUE.

A. The decision below undisputedly exacerbates an already deep and direct circuit split. The government concedes—as the court of appeals itself noted, Pet. App. 18a-19a—that the Sixth Circuit's holding here, although consistent with decisions of the Second and Seventh Circuits, conflicts with rulings of the Ninth and Eleventh Circuits. U.S. Opp. 10, 20; *cf.* Pet. 14-17. The Fifth Circuit has seemingly "taken both positions" in published opinions, Pet. App. 19a—and, in a recent unpublished opinion, has again rejected the Sixth Circuit's view. *See United States ex rel. Nunnally* v. *W. Calcasieu Cameron Hosp.*, 2013 WL 1749328, at *2 n.4 (5th Cir. Apr. 3, 2013) (per curiam).[1] But instead of supporting review to resolve this acknowledged conflict, as it has appropriately done in prior False Claims Act cases,[2] the government implausibly claims that the conflict is somehow still "premature." U.S. Opp. 20.

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[1] The government disputes (at 20 n.7) whether *Gonzalez* v. *Fresenius Medical Care North America*, 689 F.3d 470 (5th Cir. 2012), embraced petitioners' reading, but *Gonzalez* explicitly quoted and applied the pre-2009 statute, *id.* at 475; whether the result would be the same under new Section 3729(a)(1)(B) is irrelevant. *See also United States ex rel. Jamison* v. *McKesson Corp.*, 900 F. Supp. 2d 683, 695 n.5 (N.D. Miss. 2012) (construing *Gonzalez* as rejecting respondents' view).

[2] *See*, *e.g.*, U.S. Br. 7, *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396 (2010) (No. 08-304) (May 20, 2009); U.S. Br. 7, *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828) (May 26, 1999).

The sole basis for that puzzling assertion is the government's claim that the five other circuits to decide the issue in published opinions did not engage in sufficient "meaningful analysis"—which the government evidently gleans from the length of those courts' analyses and the fact that most of them appeared in footnotes. U.S. Opp. 20-21; *see also* Relators' Opp. 11-13. That contrived exception to this Court's Rule 10 is baseless. Respondents offer no authority for their notion that a court's analysis must be lengthy to be "meaningful," or that its rigor depends on whether it appears in the body of the opinion or in a footnote. The thoroughness of a court's consideration and the space it consumes are not equivalent; a judicial opinion is hardly inferior because it distills the key points succinctly. And one would be ill-advised to write off judicial pronouncements appearing in footnotes as *ipso facto* insignificant. *See*, *e.g.*, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

More importantly, the government's novel length-equals-depth theory is irrelevant. Six circuits have passed on the question presented in binding precedent. Whether their discussions are long or short, and whether they appear in the page's margins or main text, their conclusions are the law of their respective circuits. That reality is not lost on courts bound to obey them. *See*, *e.g.*, *Klusmeier* v. *Bell Constructors, Inc.*, 469 F. App'x 718, 720 n.3 (11th Cir. 2012) (following *Hopper* v. *Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009)); *United States ex rel. St. Joseph's Hosp., Inc.* v. *United Distribs., Inc.*, __ F. Supp. 2d __, 2013 WL 142700, at *5-6 & n.8 (S.D. Ga. Jan. 11, 2013) (same); *United States ex rel. Bibby* v. *Wells Fargo Bank, N.A.*, __ F. Supp. 2d __, 2012 WL 5866137, at *4 (N.D. Ga. Nov.

19, 2012) (same); *United States ex rel. Cullins* v. *Astra, Inc.*, 2010 WL 625279, at *2 n.2 (S.D. Fla. Feb. 17, 2010) (same).

The bottom line is that the law in the lower courts is not uniform. How the circuits reached their conflicting conclusions is, for present purposes, immaterial. There is nothing to be gained, and much to be lost, by withholding review to allow further intercircuit "debate." Relators' Opp. 11.

B. Unable to dispute the circuit split, the government disowns its admission below that the question presented is "important" and will have "broad impact," C.A. U.S. Br. ix—now contending for the first time that any "significance" is "diminishing." U.S. Opp. 21. No explanation is offered for this sudden, self-serving about-face, though the government's motivation is apparent: It is content with the ruling below, but fears it will not survive scrutiny in this Court. In any event, whatever its reasons, the government's revised position is wrong. The question presented has immense practical consequences, already has arisen in numerous cases, and likely will arise in many more to come, especially if the decision below stands. Pet. 28-31.

The government does not attempt to prove otherwise. It offers only conjecture that the issue often will not be "outcome-determinative" going forward. U.S. Opp. 21. Its speculation is unfounded. There are many situations in which the difference in standards between new Section 3729(a)(1)(B) and its predecessor, 31 U.S.C. § 3729(a)(2) (2008), may be dispositive. Whether the relator must prove that the defendant acted with "the *purpose* of getting a false or fraudulent claim 'paid or approved by the Government,'" *Allison Engine Co.* v. *United States ex rel.*

Sanders (*Allison Engine I*), 553 U.S. 662, 668-69 (2008) (emphasis added) (citation omitted), or merely that the false statement is "material," 31 U.S.C. § 3729(a)(1)(B) (2011), likely will be critical in cases where the United States disburses another entity's funds, *cf. United States ex rel. DRC, Inc.* v. *Custer Battles, LLC*, 562 F.3d 295, 302-04 (4th Cir. 2009), or where a non-governmental entity administers federal funds, *cf. United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488, 490-91 (D.C. Cir. 2004) (Roberts, J.). Indeed, it may be pivotal whenever a defendant in a chain of subcontractors requests payment from another private contractor further up the chain, with no intention to defraud the United States (or even knowledge that the funds are federal). *Cf. United States ex rel. Putnam* v. *E. Idaho Reg'l Med. Ctr.*, 696 F. Supp. 2d 1190, 1206 (D. Idaho 2010); Tr. of Oral Arg. 33, *Allison Engine I*, 553 U.S. 662 (No. 07-214). Moreover, the government's attempt to diminish the differences between the old and new statutes is flatly at odds with the central premise of its argument on the merits: that Congress amended the False Claims Act precisely to *change* the law. U.S. Opp. 4-5, 10-11, 13-14, 18.

Despite its own failure of proof, the government faults petitioners for offering insufficient evidence of existing cases where the issue is implicated. U.S. Opp. 21. But it does not address the dozens of cases cited in petitioners' prior briefing where the issue has arisen. *See* Pet. 29-30.[3] Moreover, as *amicus*

[3] Relators mention these cases, conceding that in some the issue *was* outcome-determinative. Relators' Opp. 29-30. They assert that they "have reviewed" the rest and that the question presented was not dispositive, but they provide no explanation and do not identify any particular cases. *Ibid.*

Chamber of Commerce explains (at 6), it is impossible for *private* parties like petitioners to prove precisely how many cases are affected because *qui tam* actions are filed under seal. *See* 31 U.S.C. § 3730(b)(2). Only the *government* has all the information. *See ibid.* Yet it does not even estimate the number of cases affected, much less offer proof.

The government also speculates that the issue's importance is declining because it affects only requests for payment that were not pending on or after June 7, 2008. U.S. Opp. 21. But the government fails to grapple with the Act's lengthy limitations period—which permits suits six years after the underlying conduct (in some cases *ten*), 31 U.S.C. § 3731(b)—or the typical years-long lifespan of False Claims Act suits, which together provide ample reason to expect that cases implicating the question presented will continue to arise with frequency. Pet. 30. Indeed, courts have held that the False Claims Act limitations period may be tolled while the Nation is "at war," 18 U.S.C. § 3287, broadly defined. *See*, *e.g.*, *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 177-81 (4th Cir. 2013); *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 600-08 (S.D. Tex. 2012). Even without "wartime" tolling, however, such cases still could be filed until *2018*—which means that, without authoritative guidance from this Court, lower courts will be grappling with the question presented for years to come.

* * *

The government's admissions below that the question presented is important and the subject of a deep and growing split were correct. Neither the government nor relators offer any reason to reject that view now.

II. RESPONDENTS' MERITS ARGUMENTS ARE UNAVAILING.

Instead of addressing in any depth the circuit split and the practical importance of the question presented—on which each spends only a handful of pages, U.S. Opp. 20-22; Relators' Opp. 11-13, 29—respondents devote nearly their entire arguments to the underlying merits. U.S. Opp. 10-19; Relators' Opp. 13-28. That allocation of space is telling, demonstrating by respondents' own measure that the real issue here is not whether the question presented warrants review, but how that question should be resolved in the event review is granted.

Respondents' merits arguments are especially unavailing because they are incorrect. The government concedes that the plain text of Section 4(f)(1) does not compel its reading of the statute: "Standing alone," it admits, "the term 'claim' is susceptible to either" petitioners' reading, under which "claim" means request for payment, or to the Sixth Circuit's reading, which equates "claim" with "'civil action or case.'" U.S. Opp. 7, 11 (citation omitted). That admission that the critical statutory term is at least ambiguous ends the analysis because, as petitioners explained, three interpretive principles deeply rooted in this Court's precedents require resolving that ambiguity in petitioners' favor. The presumption that Congress's choice of different words in adjacent provisions is intentional, *see Russello* v. *United States*, 464 U.S. 16, 23 (1983), the presumption against retroactivity, *see Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265, 280 (1994), and the canon of constitutional avoidance, *see INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001), all require reading "claim" in Section 4(f)(1) to mean request for payment, and bar application of

Section 3729(a)(1)(B) to petitioners. Respondents fail to refute any of these principles. Pet. 20-27.

Respondents' primary response to *Russello* is that construing "claim" in Section 4(f)(1) to mean requests for payment reads the phrase "under the False Claims Act" out of the statute or yields absurd results. U.S. Opp. 12, 16, 18; Relators' Opp. 15-16, 22-23. That is incorrect. The phrase "under the False Claims Act" confirms that "claim" in Section 4(f)(1) carries its familiar False *Claims* Act meaning, *i.e.*, a request for payment. Indeed, it is common parlance to refer to requests for payment covered by the statute as "claims under the False Claims Act." *See* C.A. Appellee Br. 18-19 & n.14 (collecting cases). It is the Sixth Circuit's reading, in fact, that renders "under the False Claims Act" superfluous: Section 4(f)(1) prescribes only the effective date of new Section 3729(a)(1)(B) of the False Claims Act. Thus, the only "civil action[s] or case[s]" (Pet. App. 22a) to which Section 4(f)(1) will *ever* apply are False Claims Act cases. On the court of appeals' reading, "under the False Claims Act" adds nothing whatsoever.[4]

The government falls back on the Sixth Circuit's implausible theory that Congress's use of different words in Sections 4(f)(1) and 4(f)(2) reflects that they originated in different chambers. U.S. Opp. 15. But aside from the dictum in *Lindh* v. *Murphy*, 521 U.S.

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[4] The same defect dooms the interpretation of "claim" in Section 4(f)(1) that the government advances in this Court—*i.e.*, a "count or cause of action." U.S. Opp. 16. Because Section 4(f)(1) addresses the effective date of a provision creating a *False Claims Act* cause of action, the government's reading of "claim"—like that of the Sixth Circuit—renders "under the False Claims Act" surplusage.

320, 330 (1997), it musters no supporting authority for that illogical view.

Respondents likewise have no valid answer to the presumption against retroactivity or the canon of constitutional avoidance. The government does not deny that the presumption against retroactivity governs not merely *whether* a statute applies retroactively, but also to what *extent*. U.S. Opp. 17-18; *cf.* Pet. 25-26. It responds with the question-begging contention that declining to apply Section 3729(a)(1)(B) retroactively in this case would defeat Congress's intent—precisely what the presumption exists to help ascertain. The government offers the same circular response to constitutional avoidance. U.S. Opp. 18-19. Indeed, it seeks to sidestep altogether the issue whether its interpretation implicates a substantial *Ex Post Facto* Clause question. *Id.* at 19. Contrary to its assertion, the question presented plainly encompasses whether construing Section 4(f)(1) to make new Section 3729(a)(1)(B) retroactively applicable to petitioners would raise a grave (or fatal) constitutional doubt and whether, in accordance with this Court's precedents, the provision should be construed to avoid that serious constitutional issue.

III. RESPONDENTS' ASSERTED VEHICLE PROBLEMS ARE ILLUSORY.

Respondents' contentions that this case is a poor vehicle to resolve the question presented are equally makeweight. The government cites, for example, the case's interlocutory posture. U.S. Opp. 22. But the case is in the same posture as when this Court granted review in *Allison Engine I*. *Compare* 553 U.S. at 666-68, *with* Pet. App. 5a-10a.

The government and relators also claim it is "unclear" whether the question presented will affect the outcome of this case. U.S. Opp. 22; Relators' Opp. 29. That is belied by respondents' own assertions below. In seeking permission for an interlocutory appeal under 28 U.S.C. § 1292(b), the government and relators argued that the question presented is a "controlling questio[n] of law," and its resolution will "materially advance the litigation."[5] The Sixth Circuit agreed, recognizing that "'which version of the statute applies will determine the standard of liability.'" Pet. App. 9a.

Moreover, there is every reason to expect that the difference in legal standards will matter. At trial, relators conceded that they "didn't put on" any evidence pertaining to the Navy's payment decisions, Trial Tr. 41, Mar. 7, 2005 (S.D. Ohio Dkt. #676)—making it impossible for them to prove the "direct link between the false statement and the Government's decision to pay" that Section 3729(a)(2) requires, *Allison Engine I*, 553 U.S. at 672. In addition, there was no evidence that the allegedly false certificates of compliance were submitted to the Navy, and petitioners could hardly have "intend[ed] the Government to rely on" (*ibid.*) statements the government never *saw*. As the government admitted, resolution of the question presented thus may "avoid" the need for further trial proceedings altogether. U.S. Mem. Supp. Mot. to Certify 2 (S.D. Ohio Dkt. #732). At minimum, it will affect "what evi-

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[5] U.S. Mem. Supp. Mot. to Certify 2 (S.D. Ohio Dkt. #732); *see* Relators' Mem. Supp. Mot. to Certify 1-3 (S.D. Ohio Dkt. #733); Pet. 8-9, 17, *In re United States*, No. 10-303 (6th Cir. Feb. 25, 2010); Pet. 5-6, 19, *In re Sanders*, 10-304 (6th Cir. Mar. 1, 2010).

dence will be required of relators to prove their case" if retrial occurs. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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