

No. 07-214

In the Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
ROGER L. SANDERS AND ROGER L. THACKER

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

PAUL D. CLEMENT
*Solicitor General
Counsel of Record*

JEFFREY S. BUCHOLTZ
*Acting Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTION PRESENTED

Whether respondents' claims under 31 U.S.C. 3729(a)(2) and (3) against subcontractors on a federal project should have been allowed to go to the jury even though respondents did not introduce into evidence invoices submitted by the prime contractors to the federal government.

In the Supreme Court of the United States

No. 07-214

ALLISON ENGINE COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
ROGER L. SANDERS AND ROGER L. THACKER

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

INTEREST OF THE UNITED STATES

This case involves a *qui tam* suit under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* At trial, respondents introduced evidence that subcontractors on a federal project had submitted false claims to the prime contractors, but respondents did not seek to prove that the false claims were resubmitted to a federal officer or employee. The question presented is whether the subcontractors may be held liable under 31 U.S.C.

3729(a)(2) or (3) absent proof that false claims were “presented” to the federal government. Because the FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and because the government receives the bulk of any award obtained through a *qui tam* action, the United States has a substantial interest in the proper construction of the Act.

STATEMENT

1. Enacted in 1863, the FCA “has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees.” S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (*1986 Senate Report*). In its current form, the Act imposes civil liability for a variety of deceptive practices involving government funds and property. See 31 U.S.C. 3729(a)(1)-(7). Inter alia, the Act renders liable any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval,” 31 U.S.C. 3729(a)(1); any person who “knowingly, makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government,” 31 U.S.C. 3729(a)(2); and any person who “conspires to defraud the Government by getting a false or fraudulent claim allowed or paid,” 31 U.S.C. 3729(a)(3). As a result of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2(7), 100

Stat. 3154, the FCA defines the term “claim” to include, under specified circumstances, requests for money submitted to federal “contractor[s], grantee[s], or other recipient[s]” of federal funds. 31 U.S.C. 3729(c).

A person who violates the FCA is liable to the United States government for civil penalties plus three times the amount of the government’s damages. 31 U.S.C. 3729(a). Suits to collect the civil penalties and statutory damages may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

2. This case arises from prime contracts awarded by the Navy to Bath Iron Works (Bath) and Ingalls Shipbuilding, Inc. (Ingalls), to build more than 50 new guided-missile destroyers for a price of approximately \$1 billion per ship. Bath and Ingalls, in turn, awarded subcontracts to petitioner Allison Engine Co., Inc. (Allison) to provide “Gen-Sets,” the generators that provide electrical power for the destroyers. Petitioners General Tool Company (GTC) and Southern Ohio Fabricators, Inc. (SOFCO) were subcontractors under Allison. Each individual Gen-Set costs \$3 million, and each destroyer requires three Gen-Sets. See Pet. App. 2a; C.A. App. 279, 286, 317.

Respondents Roger Sanders and Roger Thacker brought a *qui tam* action against the subcontractors, alleging violations of 31 U.S.C. 3729(a)(1), (2), and (3).

The prime contractors were not named as defendants. Respondents alleged that the subcontractors had delivered Gen-Sets that did not conform to numerous quality provisions in the relevant contracts, but that the subcontractors had nevertheless made demands for payment for the Gen-Sets and had falsely certified that the Gen-Sets had been built in conformance with all contract provisions. See Pet. App. 3a-5a; J.A. 24a-27a. The government declined to intervene to take over the suit.¹

The case was tried before a jury. Respondents introduced evidence that Allison had presented claims for payment to the prime contractors, and that subcontractors GTS and SOFCO had presented claims to Allison. Respondents also introduced evidence that funds obtained from the government were used to pay the subcontractors. Respondents did not, however, introduce into evidence the invoices presented by the prime contractors to the Government. See Pet. App. 4a-5a; C.A. App. 331-334, 638, 655, 837, 914, 966.

At the close of respondents' case, petitioners moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). Petitioners argued that respondents' evidentiary showing was inadequate because it did not include proof that false claims were pre-

¹ Respondents also filed a second *qui tam* suit against the same defendants, alleging that petitioners had violated the FCA by failing to disclose required cost information when providing the Navy with an Engineering Change Proposal for a redesign of the Gen-Sets. See Pet. App. 3a-4a, 25a, 27a-28a. The district court granted summary judgment for petitioners in that action, and the court of appeals affirmed. See *id.* at 25a-33a. Respondents have not sought review of that ruling in this Court.

sented to the government. See Pet. App. 40a-41a. The district court granted petitioners' motion. *Id.* at 38a-61a. Relying substantially on *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (*Totten*), cert. denied, 544 U.S. 1032 (2005), the court concluded that, in the absence of proof that false claims were presented to the federal government, respondents' evidence was legally insufficient. Pet. App. 60a; see *id.* at 5a.

3. The court of appeals reversed in relevant part. Pet. App. 1a-37a. The court of appeals did not dispute the district court's conclusion that liability under 31 U.S.C. 3729(a)(1) requires proof that false claims were presented to the United States. The court of appeals held, however, that the district court had erred in granting judgment as a matter of law with respect to respondents' allegations under Section 3729(a)(2) and (3). The court explained that "[o]nly subsection (a)(1) of [Section 3729(a)] makes any mention of presenting a claim to the government or Armed Forces. Subsections (a)(2) and (a)(3), which are separate bases for liability, contain no such presentment language." Pet. App. 7a. The court further observed that Section 3729(c)'s definition of "claim" reinforces the conclusion that presentment to the United States is not an invariable requirement for liability under the FCA. *Id.* at 7a-8a. The court of appeals also explained that its construction of Section 3729(a)(2) and (3) was "solidifie[d]" by the legislative history of the 1986 FCA amendments, *id.* at 8a-9a, and accorded with this Court's consistently broad construction of the FCA as encompassing all fraudulent schemes to obtain federal money or property, see *id.* at 15a-16a.

The court of appeals further held that respondents had “presented sufficient proof to avoid judgment as a matter of law” under a correct understanding of 31 U.S.C. 3729(a)(2) and (3). Pet. App. 24a. The court explained that “all of the money paid to Allison, GTC, and SOFCO came from the United States government,” and that respondents had “put forth evidence of knowledge on the part of the contractors that the Gen-Sets did not conform to Navy regulations and that the invoices were paid using government funds.” *Ibid.*

Judge Batchelder dissented from the court of appeals’ holding that respondents’ allegations under 31 U.S.C. 3729(a)(2) and (3) should have been allowed to go to the jury. Pet. App. 33a-37a.

SUMMARY OF ARGUMENT

A. Section 3729(a)(2) of Title 31, which prohibits the making or use of “a false record or statement to get a false or fraudulent claim paid or approved by the Government,” does not require proof that a false claim was presented to a federal official. In common parlance, bills or expenses are naturally said to be “paid by” the person who absorbs the relevant costs, even if some other person is responsible for the mechanics of transferring funds. Other FCA provisions, as well as the legislative history of the 1986 amendments to the Act, confirm that natural reading of the Section 3729(a)(2)’s text.

B. The FCA’s civil-conspiracy provision, 31 U.S.C. 3729(a)(3), does not require an agreement to present false claims to a federal official. By its plain terms, Section 3729(a)(3) prohibits any conspiracy having a particular objective (“to defraud the Government”) and a particular agreed-upon means (“by getting a false or fraudulent claim allowed or paid”). Respondents’ theory in

this case—*i.e.*, that petitioners agreed to submit claims for payment that concealed defects in Gen-Sets manufactured for installation on Navy destroyers—is covered by Section 3729(a)(3)’s text and is consistent with this Court’s interpretations of other conspiracy provisions.

C. Acceptance of petitioners’ theory would disserve the purposes of the FCA by making a defendant’s liability turn on bookkeeping idiosyncrasies rather than on the substance and ultimate effect of the defendant’s fraud. No one would doubt the application of the FCA to a contractor who defrauded the government by installing substandard Gen-Sets on Navy destroyers. The public fisc is no less endangered if the same result is achieved by a subcontractor intent on deceiving both the prime contractor and the Navy. And given the ubiquity of subcontracting in government contracting, and the frequent use of intermediaries in federal grant programs, it would make no sense to limit liability in the way petitioners propose. Even without engrafting a requirement that false claims be presented to a federal official, Section 3729(a)(2) and (3) can sensibly be read as limited to frauds that endanger the federal fisc. As the instant case demonstrates, a prime contractor’s invoices to the federal government need not always be introduced into evidence in order to prove that a subcontractor’s fraud injured the United States.

ARGUMENT

The court of appeals correctly held that respondents’ claims under 31 U.S.C. 3729(a)(2) and (3) should have been allowed to go to the jury. Respondents have alleged that petitioners knowingly delivered defective

Gen-Sets for installation in Navy destroyers; that petitioners sought to obtain full payment for the defective Gen-Sets by falsely certifying that the equipment complied with all contractual and regulatory requirements; and that the prime contractors paid for the Gen-Sets using funds acquired for that purpose from the federal government. If the evidence supporting those allegations is credited by a jury, it will establish that the United States was deprived of the benefit of its bargain when the Navy received destroyers containing Gen-Sets of lower quality than those for which the government had contracted and paid. The impact on the public fisc is indistinguishable from an effort by the general contractors themselves to supply substandard Gen-Sets, and there is no reason to treat the two situations differently simply because the subcontractors here allegedly duped both the prime contractors and the Navy. Petitioners' parsimonious reading of Section 3729(a)(2) and (3), under which liability for fraudulent conduct would turn on the nuances of the government's bookkeeping practices rather than on the ultimate impact of the fraud upon the United States, is unsupported by the statutory text and would disserve the broad remedial purposes of the FCA, which "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (*Neifert-White*).

A. Section 3729(a)(2) of Title 31 Does Not Require Proof That A False Claim Was "Presented" Directly To The Federal Government

Section 3729(a)(2) of Title 31 imposes FCA liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a

false or fraudulent claim paid or approved by the Government.” 31 U.S.C. 3729(a)(2). Petitioners contend that, “for a claim to be ‘paid or approved by the Government,’ it first must be submitted to the government.” Pet. Br. 13; see *id.* at 13-29. That argument lacks merit. Petitioners’ alleged false claims were “paid * * * by” the United States because the United States was the source of the funds. Petitioners, moreover, received those funds through prime contractors for work performed under subcontracts in fulfillment of procurement contracts with the United States. Petitioners’ alleged misconduct thus squarely implicates the FCA’s core purpose of preventing fraud in procurement for the national defense.

1. Petitioners’ alleged conduct falls squarely within the ordinary meaning of Section 3729(a)(2)

As a matter of ordinary English usage, a bill or other obligation would commonly be described as “paid by” the person whose money is used for payment, even if some other person performs the mechanical act of transferring the funds to their recipient. For example, “[w]hen a student says his college living expenses are ‘paid by’ his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses.” *Totten*, 380 F.3d at 506 (Garland, J., dissenting). That use of the phrase “paid by” is particularly natural if the ultimate source of the funds directs that all or part of the money be used for a specifically defined purpose. Thus, if a man gives his daughter \$100 and asks her to use a portion of the money to fill the family car with gasoline, the bill for the gas would readily be described as being “paid by” the

father, even though the daughter effects the physical transfer of funds to the service station operator.

To be sure, the verb “pay” and its variants can *sometimes* refer to the mechanics of disbursing funds rather than to the incidence of a transaction’s ultimate financial impact. Thus, if a mother and son are watching television when a pizza delivery arrives, the mother might hand her son cash and ask him to go to the door to “pay for” the pizza. In that scenario, the son would “pay for” the pizza in the sense of handing money to the delivery person, while the mother would “pay for” the pizza in the sense of absorbing its cost.

It would be inconsistent with the tenor of this Court’s FCA precedents, however, to infer that Congress in drafting Section 3729(a)(2) used the phrase “paid * * * by the Government” *solely* to describe the logistics of transferring funds, without reference to the ultimate economic consequences of a defendant’s fraudulent conduct.² The Court in *Neifert-White* stated that the FCA “was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.” 390 U.S. at 232. The Court further explained

² Even as a matter of common parlance, the statement that a bill was “paid” by a particular person would typically be understood, unless the context clearly indicated that a different meaning was intended, to refer to the *source* of the relevant funds rather than to the mechanics of payment. A restaurant guest who helpfully takes his friend’s money to the cashier in order to complete the transaction, and later claims to have “paid the check,” can expect to acquire a reputation for ingratitude. Similarly, if a father tells his son, “You’re paying for your own clothes from now on,” and the son replies, “I’ll be glad to do that as soon as you give me the money,” the father is unlikely to regard the answer as constructive.

that, “[i]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.” *Ibid.* With specific regard to the administration of federal funding programs by non-federal intermediaries, the Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (*Marcus*), explained that funds provided to States under various aid programs “are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution.” *Id.* at 544 (footnote omitted). Petitioners’ contention that Section 3729(a)(2) should be construed by reference to the mechanics of fund distribution, rather than to the ultimate impact of their alleged fraudulent conduct, is at odds with the Court’s established approach to the interpretation of the FCA.

In the instant case, the invoices that petitioners submitted for the Gen-Sets were “paid * * * by” the government. Although the payments that petitioners received under the subcontracts traveled through intermediaries, the federal government was the ultimate source of the funds. Those payments were made pursuant to government contracts that obligated the prime contractors to build destroyers containing Gen-Sets that conformed to precise contractual requirements. In order to discharge their own contractual obligations, the prime contractors were therefore required to use a portion of the funds that they received from the government either

to manufacture, or to acquire from another source, Gen-Sets meeting the Navy's specifications. The purpose of the overall undertaking, moreover, was to produce destroyers equipped with Gen-Sets for use by the Navy rather than by any private party. Thus, the funds that the prime contractors transmitted for production of the Gen-Sets were acquired from the government originally, and they were forwarded to the subcontractors to achieve a governmental objective. The court of appeals' conclusion that the subcontractors' claims were "paid * * * by" the United States therefore accords with ordinary English usage.

2. Petitioners' presentment theory cannot be squared with related statutory provisions

Under established principles of construction, any ambiguity in Section 3729(a)(2) standing alone should be resolved by considering that provision in light of its larger statutory context. As this Court has instructed, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Thus, "[i]n expounding a statute, [the Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998) (quoting *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)). Petitioners' reading of Section 3729(a) is at odds with this Court's repeated admonitions that the FCA should be construed in a manner that ensures comprehensive protection against attempts to defraud the

United States. See pp. 10-11, *supra*; pp. 25-27, *infra*. More specifically, two other provisions within Section 3729 itself reinforce the conclusion that a subcontractor's claim may be "paid" by the United States within the meaning of Section 3729(a)(2) even if it is not directly presented to any federal official.

a. Petitioners' presentment theory is inconsistent with the FCA's definition of "claim"

As amended in 1986, the FCA contains the following definition of "claim":

For purposes of [31 U.S.C. 3729], "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.

31 U.S.C. 3729(c). The House Report accompanying the 1986 amendments explained that "claims or false statements made to a party other than the Government are covered by this term if payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 660, 99th Cong., 2d Sess. 21 (1986) (*1986 House Report*). The Senate Report accompanying the 1986 amendments similarly explained that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *1986 Senate Report* 10. The Senate Report thus made clear that the new definition of "claim" was intended to overrule certain cases "which

ha[d] limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds.” *Id.* at 22; see *id.* at 15 (similar); see generally *id.* at 21-22 (discussing cases).³ Two related aspects of that definition are particularly relevant here.

First, in defining the term “claim” to include requests for payment submitted to federal “contractor[s],

³ As petitioners point out (Br. 26), the bill discussed in the Senate and House Reports did not contain the provision that ultimately added the phrase “by the Government” to 31 U.S.C. 3729(a)(2). That phrase first appeared in a substitute version of the House bill that was offered during debate in the House. See 132 Cong. Rec. 22,330 (1986) (H.R. 4827, 99th Cong., 2d Sess. § 2(3) (1986)); *id.* at 22,336 (statement of Rep. Glickman) (explaining principal differences in substitute bill but not mentioning this change); *id.* at 22,345 (statement of Rep. Glickman). There was no mention of this particular provision in the brief debate in the House or in the brief discussion that followed in the Senate. See *id.* at 28,580-28,581 (statements of Sens. Grassley, Hatch, and Thurmond). Because the definition of “claim” discussed in the Committee Reports was retained in the enacted law—and because there was no discussion of the insertion of the phrase “by the Government” in Section 3729(a)(2), much less any suggestion that it was intended to undo what Congress sought to accomplish with Section 3729(c)—there is no reason to doubt that the reports accurately reflect Congress’s intent in adopting the new definition of “claim.” Rather, the phrase “by the Government” should be construed in a manner that *harmonizes* Section 3729(a)(2) and (c). That is best accomplished by reading the phrase as simply conforming Section 3729(a)(2) to Section 3729(c), by confirming that a false claim submitted to a federal contractor or grantee is actionable only if it is potentially payable (either directly or ultimately) by the government, *i.e.*, “if payment thereon would ultimately result in a loss to the United States.” *1986 House Report 21; 1986 Senate Report 10*; see pp. 29-30, *infra*. Under this reading, an effort to defraud a grantee or contractor does not violate Section 3729(a)(2) unless it has the potential either to increase the amount of government funds expended or to diminish the quality of goods or services that the government ultimately receives.

grantee[s], or other recipient[s],” Congress presumably intended to accomplish something of substance. Petitioners read Section 3729(c) as simply “mak[ing] clear that a request for payment submitted to and paid by a federally funded private entity is not excluded from the scope of the FCA, if—as required by Section 3729(a)(2)—a claim is thereafter submitted to the government for reimbursement or approval.” Pet. Br. 24. Congress’s inclusive definition of the term “claim” would be superfluous, however, if liability under the various provisions of 31 U.S.C. 3729(a) ultimately depended on proof that some *other* request for payment was eventually presented to a federal officer or employee. Even if Section 3729(c) had not been added to the statute, the sequence of events hypothesized by petitioners, in which a fraudulent request for payment directed to a federal grantee leads the grantee to submit its own request for reimbursement to the federal government, would be covered by Section 3729(a)(1). See 31 U.S.C. 3729(a)(1) (imposing liability on any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval”) (emphasis added). Petitioners’ exegesis of Section 3729(c) thus gives no operative effect to Congress’s determination that, under specified circumstances, a request for payment directed to a federal contractor or grantee should *itself* be treated as an FCA “claim.”

Second, petitioners’ construction of Section 3729(c) suffers from an additional, related flaw. Section 3729(c) states that a request for money or property submitted to a federal contractor, etc., will constitute a “claim” *either* “if the United States Government provides any portion of the money or property which is requested or de-

manded, *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.” 31 U.S.C. 3729(c) (emphasis added). Congress’s use of the disjunctive demonstrates that the circumstances in which the government “provides [a] portion of the money or property which is requested or demanded” are not limited to those in which the government will later “reimburse [the] contractor, grantee, or other recipient” for money that the contractor, etc., has already paid out. The most obvious circumstance in which the first condition will be satisfied even though the second is not is one in which a third party requests money or property that the government has *previously* provided to a contractor or grantee. Petitioners’ construction of Section 3729(c), which accords operative effect to the definition of “claim” only when the contractor or grantee submits an after-the fact request for reimbursement, effectively negates Congress’s determination that a request directed to a federal contractor, etc., will be treated as an FCA “claim” in either of two distinct circumstances.

The District of Columbia Circuit in *Totten* suggested that, because Section 3729(c) refers in the present tense to situations in which the federal government “provides any portion of the money or property which is requested or demanded,” it does not literally encompass situations in which the government has *already* provided money to a contractor or grantee before that entity receives a request for payment from a third party. See 380 F.3d at 493. That analysis attaches greater weight to Congress’s use of the present tense than the language of Section 3729(c) will reasonably bear. As a practical matter, the federal government will rarely if ever “provide[]” money to a contractor or grantee at precisely the

same time that the same money “is requested or demanded” *from* the contractor or grantee by a third party. Thus, even though the verbs “provides” and “is” are both in the present tense, Congress surely anticipated that the government’s provision of funds and the third party’s request or demand for them would occur at different times.

Because Section 3729(c)’s separate reference to situations in which the government “will reimburse [the] contractor, grantee, or other recipient” encompasses situations in which the government furnishes money *after* the contractor or grantee has paid the third party, the first “if” clause is naturally construed to cover instances in which the government’s provision of funds occurs *before* the third-party request (and, but certainly not only, in the rare instance described above of simultaneous payment and request). The word “provides” in the first “if” clause in Section 3729(c) may also be intended to capture situations in which the United States provides (or has an arrangement to provide) money to the contractor or grantee on an ongoing or as-needed basis or in a series of progress payments that supply the funds out of which the claim is to be paid. That interpretation of Section 3729(c) would cover this case as well.

b. Petitioners’ contention that Section 3729(a)(2) imposes an implicit presentment requirement is inconsistent with Section 3729(a)(1)

The core of petitioners’ argument is that a requirement of presentment to the United States is *implicit* in Section 3729(a)(2)’s requirement that the relevant false claim be “paid or approved by the Government.” In addition to the fact that petitioners’ construction of Section 3729(a)(2) does not accord with common usage and de-

prives Section 3729(c) of operative effect, petitioners' reading is further undermined by Section 3729(a)(1), which *expressly* requires proof that a false or fraudulent claim was "presented" to a federal officer or employee. "When '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.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); see *Russello*, 464 U.S. at 23 ("We refrain from concluding * * * that the differing language in two subsections has the same meaning in each."). Because Congress explicitly required proof of presentment under Section 3729(a)(1), but declined to do so in the subsection that immediately follows, the Court should not lightly find the same requirement to be implicit in Section 3729(a)(2)'s significantly different language.

Petitioners contend (Br. 25-26) that, under the court of appeals' construction of the relevant provisions, all conduct covered by Section 3729(a)(1) will be covered by Section 3729(a)(2) as well, thereby "effectively render[ing] Section 3729(a)(1) dead letter." That is incorrect. Although Section 3729(a)(1) requires presentment of a false claim to the government and Section 3729(a)(2) does not, Section 3729(a)(2) requires use of a "false record or statement." Under Section 3729(a)(1), by contrast, a claim may be "false or fraudulent" if it requests federal funds to which the claimant is not entitled, even if the claim does not contain any express representation that is false. A person who knowingly presents such a claim to a federal officer or employee therefore may incur liability under Section 3729(a)(1), even though he does not use any "false record or statement"

and therefore avoids any violation of Section 3729(a)(2).⁴ Adding a presentment requirement to Section 3729(a)(2) is thus unnecessary to ensure that each of the two statutory subsections covers some conduct that the other does not.⁵

⁴ In a series of so-called “implied certification” cases, courts of appeals have held that the act of tendering an invoice for payment under a federal program constitutes an implicit representation that the claimant is entitled to the requested funds. The courts have further held that, if the defendant is aware that he is not entitled to the money (*i.e.*, that the implicit representation is false), he may be held liable under Section 3729(a)(1) for knowingly presenting a “false or fraudulent” claim. See, *e.g.*, *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 413-416 (6th Cir. 2002); *United States ex rel. Siewick v. Jamieson Sci. & Eng’g, Inc.*, 214 F.3d 1372, 1374-1376 (D.C. Cir. 2000); *Shaw v. AAA Eng’g & Drafting, Inc.*, 213 F.3d 519, 531-532 (10th Cir. 2000). But see *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999) (reserving the question whether FCA liability can be premised on “implied certifications”). The Tenth Circuit has further explained that, when FCA liability is premised on a false “implied certification,” a defendant may be liable under Section 3729(a)(1) even though his conduct does not violate Section 3729(a)(2). See *Shaw*, 213 F.3d at 531-532.

⁵ The court of appeals concluded that Section 3729(a)(2), unlike Section 3729(a)(1), “contains its own more burdensome requirement—the claim must actually have been paid.” Pet. App. 12a. As petitioners explain (Br. 24-25), that holding is erroneous. Section 3729(a)(2)’s reference to the use of false records or statements “to get a false or fraudulent claim paid or approved by the Government” encompasses all cases where false records or statements are used for the *purpose* of eliciting payment. As with other FCA provisions, a defendant’s liability under Section 3729(a)(2) does not depend on whether his misconduct achieves the desired result. Compare, *e.g.*, *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 & n.5 (1956); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

Far from providing a basis for reversing the Sixth Circuit’s judgment, however, the recognition that Section 3729(a)(2) does not require actual payment suggests that the evidence in this case was sufficient to go to

3. *Petitioners' reliance on current Section 3729(a)(2)'s statutory antecedents is misplaced*

As petitioners explain, the original FCA imposed liability on any person

*who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, * * * knowing such claim to be false, fictitious, or fraudulent; * * * [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry.*

the jury even under petitioners' proposed construction of Section 3729(a)(2). If petitioners' alleged misrepresentations as to the Gen-Sets' quality had gone undetected, the natural consequence of those false statements was that the prime contractors would (unknowingly) submit false claims to the Navy, and that the Navy would pay those claims. And because petitioners' alleged fraudulent scheme would have unraveled if the Navy had discovered the defects in the Gen-Sets and refused to pay the prime contractors, the jury could fairly have inferred that petitioners *intended* to set in motion a chain of events culminating in payment by the government. Although the evidence introduced at trial did not describe in any detail the process by which government payments were actually elicited, it provided a sound basis for inferring that petitioners acted with the *purpose* of getting the claims paid. Under petitioners' own construction of Section 3729(a)(2), the evidence was therefore sufficient to create a jury question as to petitioners' liability under that Section.

False Claims Act, ch. 67, § 1, 12 Stat. 696-697 (emphasis added).

Although petitioners assert (Br. 21) that the provision quoted above “unambiguously required the submission of a claim to the government,” that assertion reflects a misreading of the FCA’s original text. Rather, as the italicized language quoted above makes clear, the original FCA imposed liability upon any person who “ma[d]e or cause[d] to be made” a false claim “upon or against the Government of the United States.” The “mak[ing]” of a false claim “upon or against” the federal government, moreover, was expressly identified as a ground for liability separate and distinct from the “present[ment]” of such a claim to a United States government official. Thus, the statute’s further prohibition of the use of a false bill, etc., to obtain “the approval or payment of such claim,” is properly understood to refer to a false claim “upon or against” the federal government that was *either* “ma[d]e or cause[d] to be made” *or* “presented” to a federal official. Although the original FCA did not define the circumstances under which a covered false claim could be “made” upon or against the United States without being “presented” directly to a federal officer, that version of the statute clearly did not require presentment in all circumstances.

In enacting the 1986 FCA amendments, including the new definition of “claim” contained in Section 3729(c), Congress did not perceive pre-existing law to make presentment of a claim to the United States an invariable requirement for liability under the Act. Rather, the *1986 Senate Report* discussed competing lines of judicial decisions applying the FCA to various federal grant programs, and it described new Section 3729(c) (Section 3729(d) in the version of the bill discussed in the report)

as “clarif[ying]” rather than changing the applicable law. *1986 Senate Report* 21; see *id.* at 21-22; *Totten*, 380 F.3d at 508 (Garland, J., dissenting).

B. The Court of Appeals Correctly Held That Respondents’ Conspiracy Claims Under 31 U.S.C. 3729(a)(3) Should Have Been Allowed to Go To The Jury

Section 3729(a)(3) of Title 31 imposes liability upon any person who “conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.” Petitioners contend (Br. 29-32) that the evidence presented at trial was insufficient to support a verdict for respondents under Section 3729(a)(3) because that evidence did not show a conspiracy to submit false claims *to the government*. That argument lacks merit.

1. Petitioners contend (Br. 30) that because Section 3729(a)(3) refers specifically to conspiracies to defraud “the Government,” the statutory text “clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself.” That contention is incorrect because the facts of the instant case fall squarely within the text of Section 3729(a)(3). Respondents alleged, and presented evidence sufficient to go to the jury, that petitioners submitted claims for payment while knowingly concealing defects in Gen-Sets that were manufactured for installation on Navy destroyers. Although petitioners submitted those claims to the government contractors responsible for the general contract rather than directly to federal contracting officials themselves, it was an essential feature of the alleged fraudulent scheme that the Navy be kept unaware of the defects in equipment for which the United States had contracted and paid. If proved to a jury’s satisfaction, those allegations would establish both that

petitioners “conspire[d] to defraud the Government” and that they agreed to achieve the desired objective “by getting a false or fraudulent claim allowed or paid.” The text of Section 3729(a)(3) requires no more than that.

Petitioners’ reliance (see Br. 15-16, 31) on *Tanner v. United States*, 483 U.S. 107 (1987), is misplaced. The Court in *Tanner* construed 18 U.S.C. 371, which makes it a federal crime to “conspire either to commit any offense against the United States, or to defraud the United States.” See 483 U.S. at 128. The Court *agreed* with the government that “under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud.” *Id.* at 129. The Court further agreed that “[a] method that makes use[] of innocent individuals or businesses to reach and defraud the United States is not for that reason beyond the scope of § 371.” *Ibid.* The government also argued, however, that because a particular private corporation received money from the United States and functioned as an intermediary in the performance of federal functions, an agreement to defraud the corporation was itself a conspiracy “to defraud the United States” within the meaning of Section 371. *Id.* at 130. The Court rejected that contention, explaining that coverage of frauds directed against a private corporation had “not even an arguable basis in the plain language of § 371.” *Id.* at 131.

In the instant case, respondents’ conspiracy allegations are premised on the theory that the Court in *Tanner* accepted, not the theory it found wanting. Respondents do not contend that either of the prime contractors or any other private actor *is* “the Government” within the meaning of 31 U.S.C. 3729(a)(3), or that a conspiracy to defraud such private entities is itself covered by the FCA. Rather, respondents alleged, and have presented

evidence sufficient to sustain a jury verdict, that petitioners submitted false claims to private actors *as a means of defrauding the United States*.

2. Relying in part on *Beck v. Prupis*, 529 U.S. 494, 505-506 (2000), petitioners argue (Br. 29-30) that presentment of a false claim to the federal government is essential to liability under 31 U.S.C. 3729(a)(1) and (2); that Section 3729(a)(3) is limited to conspiracies to perform acts that would themselves violate Section 3729(a)(1) or (2); and that Section 3729(a)(3) therefore requires an agreement to present false claims to a federal official. As we explain above (see pp. 8-22, *supra*), the initial premise of petitioners' argument is incorrect, since Section 3729(a)(2) requires *payment or approval by*, not *presentment to*, the United States. Moreover, petitioners' approach would make little practical sense. From the standpoint of protecting the public fisc, there is little difference between a conspiracy to defraud the government by keeping both the general contractors and the Navy in the dark, and a conspiracy to defraud the Navy that included the general contractors. But under petitioners' theory, only the latter would involve an agreement to present false claims to federal officials, and thus only the latter would be covered.

Petitioners' reliance on *Beck* also ignores critical textual differences between Section 3729(a)(3) and the RICO provision at issue in that case. *Beck* involved the civil conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which makes it unlawful "to conspire to violate any of the provisions of subsection (a), (b), or (c) of [Section 1962]." 18 U.S.C. 1962(d); see 529 U.S. at 497. Because Section 1962(d) by its terms requires a conspiracy "to violate" another provision of RICO, it is naturally

construed to require an agreement to commit a substantive RICO violation. By contrast, 31 U.S.C. 3729(a)(3) does not speak of an agreement to “violate” another provision of the FCA.

The Court in *Beck* observed that, “[b]y the time of RICO’s enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious.” 529 U.S. at 501. The text of the RICO civil-conspiracy provision does not suggest an intent to depart from that background rule, nor does it specify the *type* of tortious act that will give rise to civil liability. In concluding that a RICO civil-conspiracy plaintiff must show injury from “an act that is independently wrongful under RICO,” *id.* at 505-506, the Court thus drew on established background principles in the absence of more direct evidence of congressional intent. Section 3729(a)(3), by contrast, *does* specify the proscribed means of “defraud[ing] the Government”—*viz.*, “by getting a false or fraudulent claim allowed or paid.” There is consequently no need to examine common-law principles to determine what tortious acts a person must agree to perform in order to be subject to liability under Section 3729(a)(3).

C. A Categorical Requirement That A False Claim Be Presented To The Government Would Disserve The Purposes Of The FCA

1. Under petitioners’ theory, FCA liability for deceptive efforts to obtain federal money in the hands of a contractor or grantee would turn fortuitously on the *timing* of the wrongdoer’s fraudulent acts and on the particular payment and bookkeeping mechanisms that the federal government employs to fund and monitor the expenditures of its contractors and grantees. Suppose, for exam-

ple, that the federal government provides a block grant to a state agency for distribution to defined categories of economically disadvantaged persons, and that an individual fraudulently obtains funds from the state agency by misrepresenting his qualifications for payment. That sort of fraudulent diversion of federal money from its intended purpose squarely implicates the concerns of the FCA. See *Marcus*, 317 U.S. at 544 (explaining that funds provided as grants in aid to States “are as much in need of protection from fraudulent claims as any other federal money”); *1986 Senate Report* 10 (explaining that “a false claim * * * to a State under a program financed in part by the United States, is a false claim to the United States”). The request for payment submitted to the state agency, moreover, would fall squarely within the definition of “claim” contained in 31 U.S.C. 3729(c). See pp. 13-17, *supra*.

Petitioners contend that this is insufficient, and that the government (or a private relator) in this scenario must show in addition that a false claim was presented directly to the United States. Under the circumstances described above, the plaintiff in an FCA action could presumably identify a “claim” for payment presented to the federal government—*i.e.*, a request for federal funds submitted by the state agency under the relevant grant program. That claim would not be “false or fraudulent” (31 U.S.C. 3729(a)(1)), however, if it was submitted before the defendant’s deceptive conduct occurred. Nor could the defendant in that scenario, who acted after the state agency had received the federal funds, plausibly be said to “cause[]” (*ibid.*) the state agency’s claim to be presented. Under petitioners’ theory, the defendant could therefore escape FCA liability simply by committing his fraud *after* the state agency had presented its

own claim to the federal government. See *Totten*, 380 F.3d at 515 (Garland, J., dissenting).⁶

In many federal grant programs, the United States receives after-the-fact reports or performs after-the-fact audits that examine the manner in which federal funds have been spent during particular periods of time. Such procedures may trigger a reconciliation or adjustment of the final amounts the grantee may retain. See, e.g., *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414-415 (1993); *Bowen v. Massachusetts*, 487 U.S. 879, 883-884 (1988). Depending on the circumstances, such reports—or documents submitted by a grantee to the government in connection with such audits—might be treated as “false or fraudulent claim[s] for payment or approval,” 31 U.S.C. 3729(a)(1), or as “false record[s] or statement[s] to conceal, avoid, or decrease an obligation to pay or transmit money to the Government,” 31 U.S.C. 3729(a)(7). A person who fraudulently obtained money from the grantee might be held liable under the FCA on the theory that he “cause[d]” those false documents to be submitted. Construing Section 3729(a)(1) and/or (7) to cover documents submitted during such audits or similar reconciliation processes would mitigate the practical impact of petitioners’ proposed construction of Section 3729(a)(2) and (3).

In scenarios like the one described above, however, the essence of the defendant’s wrongful conduct is the

⁶ As noted, attaching dispositive significance to this fortuity cannot be squared with Section 3729(c), which expressly covers *both* the reimbursement scenario, in which the intermediary’s request for payment follows the fraudulent claim to the intermediary, *and* the scenario in which the grantee receives payment before fraudulent claims are made to the intermediary and federal funds are disbursed downstream.

use of fraudulent means to attempt to divert federal funds to other than their intended purpose in the first place. That wrongdoing is complete when the defendant submits his fraudulent request for payment to the state agency or similar grantee. The defendant's FCA liability should not depend on the fortuity (so far as the defendant is concerned) that a later federal audit or final report is or is not performed or submitted, or on whether the specific documents prepared in connection with that subsequent undertaking are held to fall within the terms of Section 3729(a)(1) or (7). See *Marcus*, 317 U.S. at 544 (explaining that, under the FCA, the extent of protection afforded to federal grant-in-aid monies is not "dependent upon the bookkeeping devices used for their distribution").⁷

⁷ In the instant case, the contracts between the Navy and the prime contractors for production of the destroyers did not provide for full payment by the Navy in advance, but instead established a milestone payment schedule under which the prime contractor received periodic payments based on the extent of its progress towards completion of the ships. See C.A. App. 410-414. Although the prime contractors' invoices to the government were not introduced at trial, it therefore seems likely that some of those invoices were submitted *after* petitioners' alleged fraudulent claims for payment for the Gen-Sets. To the extent that the prime contractors' invoices included charges attributable to the acquisition and installation of Gen-Sets, those invoices (assuming the accuracy of respondents' allegations that the Gen-Sets did not conform to contractual requirements) would have constituted "false or fraudulent claim[s] for payment or approval" within the meaning of Section 3729(a)(1). Thus, even accepting petitioners' proposed interpretation of Section 3729(a)(2) and (3), respondents might have introduced the prime contractors' invoices into evidence, and might have argued that petitioners were liable under Section 3729(a)(1) for "caus[ing]" those false claims "to be presented" to federal officials. Introduction of the prime contractors' invoices, however, would have complicated for the jury what was already an arcane and difficult case, and it would have

2. Petitioners contend (Br. 32-36) that, if presentment of a false claim to the federal government is not a prerequisite to liability under Section 3729(a)(2) and (3), the FCA will encompass *all* acts of fraud directed at any entity that receives money from the United States, including acts that pose no realistic danger of injury to the federal government. That is incorrect. Engrafting a presentment requirement onto Section 3729(a)(2) and (3) is unnecessary to ensure that the FCA continues to function as a tool for combating fraud *against the United States*.

a. The FCA defines the term “claim” to include, under specified circumstances, a “request or demand * * * for money or property which is made to a [federal] contractor, grantee, or other recipient.” 31 U.S.C. 3729(c). That language is properly read to refer to payment requests submitted to a federal contractor, etc., *in its capacity as such*. Thus, if a particular contractor performs work both for the federal government and for private customers, a subcontractor’s request for payment on a private customer’s project would not be a “claim” within the meaning of Section 3729(c) because it would not be submitted to the prime contractor in its role as a federal contractor. For similar reasons, the request (if satisfied) would not be “paid or approved by the Government” within the meaning of Section 3729(a)(2).

That approach accords with the unquestioned understanding that the FCA is inapplicable to frauds directed

detracted from a proper focus on the alleged wrongful conduct *of the defendants*. Cf. *United States v. Bornstein*, 423 U.S. 303, 313 (1976) (explaining that, in computing the civil penalties to be imposed under the FCA, “the focus in each case [should] be upon the specific conduct of the person from whom the Government seeks to collect the statutory [penalties]”).

against individual federal employees. No FCA violation occurs if a federal employee, acting outside the scope of his federal duties, is the victim of a stock swindle or dishonest used-car salesman, even if the employee uses his federal salary to pay the fraudulent request. Although the employee is literally a “recipient” of federal funds (see 31 U.S.C. 3729(c)), the request for payment in that scenario is not an FCA “claim” because it is not submitted to the employee in his federal role. And for purposes of Section 3729(a)(1), the request for payment is not “present[ed] * * * to an officer or employee of the United States Government” because it is not presented to the federal employee in his capacity as such. Application of similar principles to efforts to deceive federal contractors will prevent the unwarranted extension of FCA liability to schemes that pose no meaningful danger of harm to the federal government, while ensuring that the statute encompasses sophisticated as well as more direct efforts to defraud the United States.⁸

⁸ Petitioners contend (Br. 35) that the Sixth Circuit’s decision “creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies.” That concern is considerably overstated. Although an FCA defendant is potentially liable for “3 times the amount of damages which *the Government* sustains,” 31 U.S.C. 3729(a) (emphasis added), injury to a private contractor is not itself remediable under the Act, even if the defendant’s liability arises from its misstatements to the contractor. Contrary to petitioners’ suggestion (Br. 35-36), moreover, the determination whether a particular request was “paid * * * by the Government” within the meaning of Section 3729(a)(2) does not turn, under our theory, on tracing the specific dollars used to pay the claim. Rather, the pertinent question is whether the contractor or grantee, in making the payment, was acting in furtherance of its responsibilities under the relevant federal program and receiving funds from the government to do so.

b. Addition of a presentment requirement is even more clearly unnecessary to prevent undue expansion of liability under Section 3729(a)(3). That provision covers conspiracies “*to defraud the Government* by getting a false or fraudulent claim allowed or paid.” 31 U.S.C. 3729(a)(3) (emphasis added). Because the italicized language confines Section 3729(a)(3)’s reach to conspiracies that endanger the federal fisc, there is no reason to engraft an atextual presentment requirement to achieve the same result.

c. Petitioners further contend (Br. 19 n.6) that, “[i]n cases where a false claim has never been submitted to the federal government for payment or approval, * * * it is doubtful whether the government itself has been injured by a defendant’s alleged fraud.” The facts alleged in this case convincingly refute that assertion. If (as respondents allege) petitioners knowingly concealed defects in Gen-Sets that cost \$3 million each, to be installed on Navy destroyers priced at \$1 billion apiece, the federal government was self-evidently injured by petitioners’ fraud. The absence from the record of the prime contractors’ invoices to the Navy does not call that obvious conclusion into doubt.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
*Acting Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys

JANUARY 2008