No. 02-1411

In the Supreme Court of the United States

THE BOEING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. BRETT ROBY

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a contract clause releasing petitioner from liability for "loss of or damage to property of the Government * * * [that] results from any defects or deficiencies in the supplies," 48 C.F.R. 52.246-24(a), precludes the government from recovering damages under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*

2. Whether the damages awarded pursuant to the court of appeals' decision exceed the relief to which the government is entitled under the FCA and the parties' settlement agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 302 F.3d 637. The opinions of the district court (Pet. App. 27a-64a, 65a-96a) are reported at 79 F. Supp. 2d 877 and 73 F. Supp. 2d 897.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2002. A petition for rehearing was denied on January 24, 2003 (Pet. App. 103a). The petition for a writ of certiorari was filed on March 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits "[a]ny person" from "knowingly present[ing], or caus[ing] 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." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). The Act defines "claim" to include "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." 31 U.S.C. 3729(c). At the time of the events that gave rise to this suit, a person who violated the FCA was "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." 31 U.S.C. 3729(a).[1]

Suits to collect the statutory damages and penalties 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). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31

[1] After the events that gave rise to this suit, the civil penalty range under the FCA was adjusted upward to a minimum penalty of $5500 and a maximum penalty of $11,000, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. See 64 Fed. Reg. 47,104 (1999).

U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages and civil penalties, that recovery is divided between the government and the relator. 31 U.S.C. 3730(d).

2. In 1985 and 1989, petitioner Boeing Company contracted with the Department of Defense (DOD) to remanufacture existing Chinook CH-47 helicopters for the United States Army. Pet. App. 2a. The contract required petitioner to ensure the ultimate quality of all the parts used for the remanufacture. *Ibid.* The contract also included a provision known as a High Value Items Clause (HVIC). *Id.* at 1a, 6a-7a. Since 1984, the HVIC has been included in certain military procurement contracts (generally contracts for items whose costs exceed $100,000 per unit) pursuant to the Federal Acquisition Regulation (FAR). See *id.* at 6a. The HVIC represents "the Government's assumption of the risk that a high-value item * * * may be lost or damaged after acceptance as a result of a defect or deficiency in the item." *Id.* at 6a-7a; see 48 C.F.R. 46.803(b) ("In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items."). Pursuant to FAR Section 52.246-24(a), such contracts include the following provision: "[N]otwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government * * * that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." 48 C.F.R 52.246-24(a).

One of the helicopters remanufactured by petitioner (Aircraft 89-0165) crashed in Saudi Arabia in 1991

during Operation Desert Shield, due to the failure of a flight-critical transmission gear, after flying approximately one fourth of its warrantied flight time. Pet. App. 2a. Fortunately, no soldiers were killed in the crash, but the helicopter and its contents were completely destroyed, with a loss to the government of at least $10 million. *Ibid.* The government subsequently purchased a replacement helicopter at a cost of nearly $13 million. *Ibid.*

3. In May 1995, respondent Brett Roby, an employee of the subcontractor that had supplied the defective transmission gears, filed a *qui tam* action under the FCA, alleging that petitioner and its subcontractor had made false statements about the manufacture and sale of the gears. Pet. App. 2a-3a. Roby alleged that petitioner's claim for payment had falsely represented that the helicopters conformed to all specified contractual requirements. *Id.* at 28a-30a. Roby further alleged that petitioner had installed the defective gears without adequate inspection, knowing that the transmission gears were prone to certain grinding cracks and breakage. See *id.* at 30a. The United States subsequently intervened to take over the conduct of the litigation. *Id.* at 3a.

In its answer, petitioner denied the allegations and contended that the HVIC barred a damages award under the FCA. Pet App. 3a. Petitioner also argued that the damages sought by the government constituted "consequential damages," and that such damages are not available under the FCA. *Ibid.* Petitioner contended that the government's recovery, if any, was limited to "the price of a fully-conforming transmission gear." *Id.* at 15a, 61a.

Ruling on the parties' cross-motions for summary judgment, the district court held that the HVIC "can-

not be construed to preclude or limit liability damages for violations of the [FCA]." Pet. App. 91a; see *id.* at 3a, 90a-95a. The court also found that the damages sought by the government were potentially within the scope of relief available under the FCA. See *id.* at 53a-63a. Shortly before trial, the parties settled the majority of the outstanding claims. *Id.* at 3a. Under the settlement, petitioner agreed that it would, *inter alia*, make an immediate payment to the United States of $25 million. *Ibid.* That amount did not resolve the government's FCA claim arising out of the crash of Aircraft 89-0165. *Ibid.* Rather, the parties agreed that the disposition of that claim would turn on the resolution of two questions, which the district court certified for interlocutory appeal:

> 1. Whether the Government can recover damages under the FCA for loss of a helicopter resulting from the failure of a defective flight-critical component part; and
>
> 2. Whether the HVIC contained in FAR § 52.246-24 and incorporated in the * * * contract operates as a defense to damages sought under the FCA for the loss of or damage to a helicopter resulting from the failure of a defective component part.

Id. at 4a (brackets omitted). The parties agreed that petitioner would be liable for an additional payment of $15 million if the court of appeals resolved the certified questions in the government's favor. See *id.* at 3a.

4. The court of appeals granted leave to appeal. See Pet. App. 4a. After considering the certified questions, it affirmed the judgment of the district court. *Id.* at 1a-26a.

a. The court of appeals held that the HVIC did not affect petitioner's FCA liability. Pet. App. 5a-14a. The court explained that "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, * * * the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." *Id.* at 10a. Particularly in light of Congress's specific focus on "larger-dollar cases aris[ing] out of Department of Defense contracts" when Congress amended the FCA in 1986, the court found it "incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision." *Id.* at 13a (citation omitted).

b. The court of appeals held that the government was entitled under the FCA to recover damages for the loss of the helicopter and was not limited to damages equaling the value of the defective gear. Pet. App. 14a-19a. The court observed that FCA remedies are calculated with the goal of "afford[ing] the government complete indemnity for the injuries done it." *Id.* at 14a (citation omitted). The court explained that

> [petitioner] billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight. Because the Speco gear was defective, Aircraft 89-0165 was defective, making [petitioner's] entire claim for payment false for the purposes of the FCA.

Id. at 15a (citation omitted).

The court of appeals rejected petitioner's characterization of the requested relief as "consequential dam-

ages." Pet. App. 18a. The court explained that, under established FCA principles, "the Government's damages equal the difference between the market value of Aircraft 89-0165 as received (zero) and as promised." *Ibid.* The court declined "to estimate the market value of a remanufactured helicopter," but instead simply "answer[ed] the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part." *Ibid.*

c. Judge Boggs dissented. Pet. App. 20a-26a. Judge Boggs would have held that, by including the HVIC in the relevant procurement contract, "the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 14-22) that the HVIC precludes the government from invoking the remedies available under the FCA. The court of appeals correctly rejected that argument.

a. Under the FCA, petitioner's knowing submission of a false claim for payment rendered it "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." 31 U.S.C. 3729(a). That remedial provision "was chosen [by Congress] to make sure that the government would be made com-

pletely whole." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943).

As the court of appeals recognized, "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, * * * the HVIC does not provide a defense to damages sought under the FCA." Pet. App. 10a. The HVIC implements the federal policy that "[i]n contracts requiring delivery of high-value items, the Government will relieve contractors of *contractual* liability for loss of or damage to those items." 48 C.F.R. 46.803(b) (emphasis added). The terms of the HVIC are drawn from FAR Section 52.246-24(a), which provides (with respect to high-value items) that, "*notwithstanding any other provision of this contract*, the Contractor shall not be liable for loss of or damage to property of the Government" under specified circumstances. 48 C.F.R. 52.246-24(a) (emphasis added). If the HVIC were intended to preclude liability under sources of law other than the contract itself, the italicized language would presumably have read, "notwithstanding any other provision of law."

There is nothing anomalous about a contractual provision that limits the relief available under the contract but does not affect the remedies provided by federal statutes, especially anti-fraud statutes. As the court of appeals explained, "the Government's assumption of the risk that a high-value item such as Aircraft 89-0165 may be lost or damaged after acceptance as a result of a defect or deficiency in the item * * * does not necessarily imply that the Government has self-insured for the damages that result from violations of federal law." Pet. App. 6a-7a. The distinction between contractual and statutory remedies makes particular sense with respect to the FCA, which requires proof that the de-

fendant *knowingly* submitted a false claim to the United States. The government should not be presumed to have agreed to act as a self-insurer for a private party's fraud absent very clear contractual language to that effect. Construing the HVIC in the manner that petitioner advocates would also undermine Congress's efforts, in amending the FCA in 1985 and 1986, to combat fraud in military contracting.[2] See *id.* at 13a ("Given Congress's explicit recognition while amending the FCA that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts, it [would be] incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision.") (citation and internal quotation marks omitted).

b. Petitioner contends (Pet. 15-19) that the court of appeals' holding conflicts with the decisions of the Eighth and Fourth Circuits in *United States* v. *United*

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[2] In 1985, Congress mandated the award of treble (rather than double) damages in any FCA case involving "a false claim related to a contract with the Department of Defense." See Defense Procurement Improvement Act of 1985, Pub. L. No. 99-145, Tit. IX, § 931(b), 99 Stat. 699; 31 U.S.C. 3729 note. The following year, Congress enacted the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which substantially revised the Act "[i]n order to make the statute a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *Inter alia*, the 1986 amendments provided for treble damages in the full range of FCA cases and increased the civil penalties to be awarded for violations; clarified the Act's scienter requirement and its definition of "claim"; expanded the rights of *qui tam* relators and allowed them to recover a somewhat greater share of any monetary award; and enhanced the government's ability to conduct investigations prior to the filing of FCA suits. See H.R. Rep. No. 660, 99th Cong., 2d Sess. 17 (1986); *Cook County* v. *United States ex rel. Chandler*, 123 S. Ct. 1239, 1248 (2003).

States Cartridge Co., 198 F.2d 456 (8th Cir. 1952), cert. denied, 345 U.S. 910 (1953), and *United States* v. *Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001). That claim is incorrect. As the court of appeals in the instant case explained (Pet. App. 10a-13a), those decisions turned on distinctive circumstances not present in this litigation.

United States Cartridge involved a statute that authorized the Secretary of War to build government-owned and government-supervised munitions factories to support the United States' military operations during World War II. Pursuant to that grant of authority, the government contracted with United States Cartridge Co. to build a munitions factory and to produce ammunition. See 198 F.2d at 458. The contract included provisions that insulated the company from liability except in cases involving breaches committed personally by corporate officers or by persons having supervisory authority over the plant as a whole. See *id.* at 461.

The government sued the company under the FCA, alleging that the defendant had presented false claims for payment as a result of its "failure * * * to maintain a proper system of inspection and to produce the quality of ammunition called for by the contract." *United States Cartridge*, 198 F.2d at 458. In holding that the contract precluded the imposition of liability under the FCA, see *id.* at 464-465, the court of appeals emphasized that the contract at issue was a "product of its time and environment," *id.* at 463. The court explained that the company's employees were working on "a Government plant on Government machines, making Government ammunition out of Government raw materials, under Government supervision, and were paid out of Government funds." *Ibid.* The relationship between

the company and the government therefore was not a "conventional relationship," but "an unusual arrangement made to meet a crisis." *Id.* at 464. The court noted that, but for the unconventional character of that relationship, "the Government's argument [in support of FCA liability] might perhaps be unanswerable." *Ibid.*

United States Cartridge and this case involve different procurement contracts entered into more than 40 years apart. The fact that one of those contracts was construed to limit the contractor's FCA liability, and the other to leave that liability unaffected, is scarcely sufficient to establish a circuit conflict. Unlike the United States Cartridge Co., petitioner does not operate a government-owned, government-built, and government-controlled facility. Rather, petitioner itself was responsible for ensuring "the quality of all * * * parts used for the remanufacture [of the helicopters], including those items purchased from its chosen subcontractors." Pet. App. 2a. The court of appeals in this case correctly concluded that those factual differences "suggest that the limitation of liability in *United States Cartridge Co*. allocated risks in a way much more favorable to the defendant than does the HVIC." *Id.* at 12a.

Petitioner's reliance (Pet. 17-18) on *Bankers Insurance* is also misplaced. In *Bankers Insurance*, the court of appeals held that an arbitration clause in an insurance company's contract with the government was properly construed to encompass FCA claims. 245 F.3d at 324. The court emphasized, however, that because the contract provided for *nonbinding* arbitration, its enforcement could at worst delay the Attorney General's pursuit of FCA remedies on behalf of the United States. *Id.* at 322; see Pet. App. 13a. Here, by

contrast, "[petitioner's] interpretation of the HVIC would absolutely foreclose the Government from recouping anything more than a $10,000 civil penalty for damages sustained because of a false claim for a high-value item, when the damages sustained could be far greater than the general $100,000 threshold for such items." *Ibid.* Nothing in *Bankers Insurance* suggests that the HVIC should be construed to effect that untoward result.

c. The policy concerns identified by petitioner provide no basis for this Court's review. Petitioner contends (Pet. 20) that the court of appeals' decision "immediately shifts billions of dollars of risk from the government to private industry," and that "it would be manifestly unfair to allow the government to reap such a windfall at contractors' expense." Petitioner wholly fails, however, to demonstrate the existence of a prior understanding that the HVIC operates to limit a contractor's liability for damages under the FCA. Nor does petitioner explain how the recovery of compensatory damages from a party who knowingly defrauded the government is either unfair or a windfall.

Petitioner also suggests (Pet. 21) that the court of appeals' decision will ultimately disserve the government's interests because companies may now "abandon government contracting" or "raise contract prices to cover the risks" of potential FCA liability. It is highly unlikely, however, that private firms will abandon lucrative defense contracts with the government merely because the HVIC will not insulate them from liability for knowing fraud. Nor is it clear why the government should be concerned if those who would knowingly defraud the United States decide to abandon government contracting. In any event, the task of assessing the risks that petitioner describes, and of weighing

those risks against the danger of increased fraud that might result from the unavailability of FCA remedies in this setting, is entrusted to Congress and the Executive Branch.

2. Petitioner contends (Pet. 22-30) that, even if the HVIC does not altogether bar a damages award under the FCA, the damages authorized by the court of appeals in this case exceed those to which the government is entitled. That claim lacks merit and, in any event, does not warrant this Court's review.

a. In the district court, petitioner contended that under the FCA, "its liability at most was limited to 'the price of a fully-conforming transmission gear,'" Pet. App. 15a (quoting *id.* at 61a), without regard to the value of the helicopter that was destroyed as a direct result of the defective part. The court of appeals correctly rejected that argument. The court explained that because petitioner had "billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts," the failure of a "flight critical" component rendered the aircraft as a whole defective, "making [petitioner's] entire claim for payment false for the purposes of the FCA." *Id.* at 15a. The government obviously would not be made whole if damages in a case like this one were limited to the cost of the particular component that rendered a much larger item worthless. Although the government through the HVIC has accepted the risk of loss stemming from purely contractual violations in the production of high-value items, it has not relinquished its rights under the FCA and is therefore entitled to the full range of remedies deemed necessary by Congress to ensure complete recovery. See pp. 7-9, *supra*.

b. In the court of appeals and in this Court, petitioner has advanced the less extreme argument that the

government's damages in an FCA case may not exceed "the amount of the claim [for payment], which in this case would be the approximately $4.1 million value of [petitioner's] contract to remanufacture Aircraft 89-0165." Pet. App. 15a; see Pet. 24-25.[3] That contention does not warrant this Court's review, however, because it has no bearing on the proper disposition of the case. So long as the FCA damages in this suit are appropriately measured by reference to the value of the remanufactured helicopter, rather than to the value of the defective gear, the government is entitled under the parties' settlement agreement to recover a predetermined sum, regardless of the precise method that would be used to assess the value of the helicopter if no such agreement existed.

The court of appeals agreed to review two certified questions, one of which was "[w]hether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part." Pet. App. 4a. The parties agreed that, if the court of appeals resolved the two certified questions in the government's favor, petitioner would pay the government an additional $15 million. *Id.* at 3a-4a. Although the court of appeals discussed the legal principles governing computation of FCA damages generally, see *id.* at 16a, it neither "presume[d] to estimate the market value of a remanufactured helicopter," *id.* at 18a, nor remanded the case to the district court for calculation of damages in

[3] Because the defendant in an FCA case is liable for "3 times the amount of damages which the Government sustains," 31 U.S.C. 3729(a), the maximum FCA award in this case under that method of computation would be approximately $12.3 million plus civil penalties.

accordance with the analysis set forth in the court of appeals' opinion. Rather, having rejected petitioner's contention that the government's damages were limited to the value of the defective *gear*, the court simply "answer[ed] the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part." *Ibid.*

Even if the court of appeals had concluded that the government's damages were limited to the amount ($4.1 million) that petitioner charged for delivery of the remanufactured helicopter, its answer to the first certified question would have been the same. The settlement agreement specifically provided that petitioner would be deemed the prevailing party if the court of appeals held

> that the United States cannot recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part, or that the United States cannot recover damages under the False Claims Act flowing from [petitioner's] claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, contract value or price, or some other measure) rather than just the value of the defective gear.*

Settlement Agreement para. 2(h)(i) (emphasis added). As the italicized language makes clear, the parties agreed that petitioner would *not* be deemed to have prevailed on the first certified question if the court of appeals held that FCA damages were properly computed by reference to the value of the helicopter rather than to the value of the defective gear, regardless of the

precise measure used to determine the helicopter's value. Thus, even if the court of appeals had held that the government's damages were limited to the "contract value or price" of the helicopter (*ibid.*), in accordance with petitioner's current theory, petitioner would not have prevailed on the first certified question under the plain terms of the parties' agreement. And once the certified questions were answered in the government's favor, the consequence of the parties' agreement was that petitioner was obligated to pay the government $15 million—regardless of what damages award might otherwise have been calculated on the basis of the court of appeals' analysis.[4]

c. In any event, petitioner is incorrect in advocating a categorical rule that damages under the FCA can

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[4] Petitioner states (Pet. 25) that the value of a remanufactured aircraft is "possibly as much as $13 million." Petitioner contends (Pet. 30) on that basis that, under the FCA's treble damages provision as construed by the court of appeals, "a supplier that submitted a claim for $4 million to the government for retrofitting an existing aircraft could be found liable for nearly $40 million [*i.e.*, $13 million times three] in damages." The court's decision cannot possibly have that effect in *this* case, however, since petitioner's liability to the government for FCA damages related to Aircraft 89-0165 is limited to $15 million under the terms of the parties' settlement. That sum is somewhat greater than three times the amount of petitioner's claim for payment (see note 3, *supra*), but it is significantly less than the damages that might have been awarded if the case had been remanded for application of the court of appeals' analytic framework to the facts of this case. That disparity simply shows that a broad range of plausible FCA awards continued to exist even after the court of appeals resolved the certified questions. The agreement between the parties that petitioner would pay the government $15 million if the certified questions were answered in the government's favor reflects the parties' decision to compromise rather than litigate within that range.

never exceed the amount of the false claim. As the court of appeals recognized, that argument "conflates market value and contract price." Pet. App. 18a. The court's statement that "the Government's damages equal the difference between the market value of Aircraft 89-1065 as received (zero) and as promised," *ibid.*, is consistent with this Court's decisions. Compare *United States* v. *Bornstein*, 423 U.S. 303, 316 n.13 (1976) (explaining that, under the FCA, "[t]he Government's actual damages are equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality"). To the extent that the value of the item purchased by the government exceeds the contract price, nothing in the FCA suggests that the government should be deprived of the benefit of its favorable bargain in calculating damages.

d. Petitioner contends (Pet. 22, 24-25) that the court of appeals' ruling conflicts with the decision in *United States* v. *Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). In *Aerodex*, a supplier of aircraft engine bearings was held liable under the FCA for double the price of all mislabeled bearings it had sold to the government, but not for certain "consequential damages"—namely, the costs incurred by the government in removing and replacing the bearings, which had been installed in aircraft engines by the time the fraud was discovered. *Id.* at 1010-1011.

As the court of appeals in the instant case recognized, however, petitioner "billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts." Pet. App. 15a. The remanufactured helicopters under petitioner's contracts are therefore analogous to the bearings in *Aerodex*, for which damages were assessed. Petitioner relies on the

Aerodex court's statement that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." Pet. 22 (quoting *Aerodex*, 469 F.2d at 1011). That statement is best understood, however, as describing the appropriate measure of damages *in that case*, not as establishing a categorical rule. Cf. *Aerodex*, 469 F.2d at 1011 ("*In a case of this kind*, damages under the False Claims Act must be measured by the amount wrongfully paid to satisfy the false claim.") (emphasis added). In any event, because the parties agreed that the government would receive a predetermined sum if the certified questions were resolved in its favor (see pp. 13-16, *supra*), this case is an unsuitable vehicle for deciding what measure of damages would otherwise apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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