No. 15-41172

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, EX REL., JOSHUA HARMAN,

Plaintiff/Relator – Appellee,

v.

TRINITY INDUSTRIES, INC.; TRINITY HIGHWAY PRODUCTS, L.L.C.,

Defendants – Appellants.

On Appeal from the United States District Court for the Eastern District of Texas, Marshall Division, Case No. 2:12-CV-00089

BRIEF FOR FORMER U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

Amici curiae are the following former senior Justice Department officials who played leading roles in the enforcement of the False Claims Act ("FCA" or "the Act") on behalf of the United States:

- Jeffrey Bucholtz served as Deputy Assistant Attorney General, Principal Deputy Assistant Attorney General, and Acting Assistant Attorney General for the Civil Division under President George W. Bush.
- Laurence Freedman served as an Assistant Director of the Civil Fraud Section of the Civil Division under Presidents Bill Clinton and George W. Bush.
- Stuart Gerson served as Assistant Attorney General for the Civil Division under President George H.W. Bush and Acting Attorney General during the first months of the Administration of President Bill Clinton.
- David Ogden served as Assistant Attorney General for the Civil Division under President Bill Clinton and as Deputy Attorney General under President Barack Obama.
- Ethan Posner served as Deputy Associate Attorney General under President Bill Clinton.

Since serving in those roles, in their private practices *amici* have represented defendants in False Claims Act matters, including in *qui tam* actions. Based on their experience, *amici* appreciate that *qui tam* actions under the FCA often serve an indispensable role in protecting the integrity of federal programs and protecting the Treasury from fraudulent claims. But that same experience has also given them an

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

appreciation that the Act can be employed abusively to the detriment of the government, the public interest, and private parties.

Amici believe that this case illustrates such abuse. Here, the district court erred by sending relator's claim on behalf of the United States to a jury despite a formal decision from the relevant federal agency concluding, after a thorough investigation of relator's claims, that the product in question has been fully eligible for federal reimbursement at all relevant times. The government got what it bargained and paid for, and thus not one penny of the gratuitous resulting record-setting judgment furthers the False Claims Act's purpose.

Not only does the judgment below fail to satisfy the Act's intended purpose to protect the United States, not the relator, it affirmatively *undermines* that purpose by ignoring the official judgment of the expert agency with authority delegated by Congress to implement the relevant regulations and by ignoring the position of DOJ, the official representative of the government in federal court. Imposing massive penalties on a company that provided products valued and specified by the federal program in question frustrates the goals of that program. It is diametrically at odds with the theory of allowing relators to pursue genuine cases of fraud *on behalf of* the United States.

The FCA is a potent and valuable weapon. Directed toward its intended purpose, it is an essential complement to the federal government's enforcement ef-

forts. When it is diverted from that purpose, however, its improper application threatens crippling damage not just to defendants unjustly saddled with penalties, treble damages, and the stigma associated with having been determined a "defrauder of the United States," but also to the United States itself.

This *qui-tam*-gone-wrong epitomizes the risks of a misreading of the False Claims Act. The non-authoritative view of a relator about what matters to the federal government has supplanted the reasoned view of the very governmental body the Act seeks to protect. The resulting judgment undermines the United States' interests instead of protecting them. *Amici* therefore urge this Court to vindicate the proper administration of the Act, and therefore to reverse the judgment below and render judgment for the defendants.

STATEMENT

The Federal Highway Administration ("FHWA") is the federal agency tasked with assisting the States in the development and maintenance of the National Highway System.[2] Implementing this mandate, FHWA has promulgated guidelines to ensure that proposed highway projects are planned and constructed "in a manner that is conducive to safety, durability, and economy of maintenance," 23 U.S.C. § 109(a).

The relator in this False Claims Act case alleges that Trinity falsely certified that its ET-Plus guardrail system complied with certain FHWA guidelines. After learning of relator's allegation in this case, FHWA itself investigated Trinity's allegedly false certifications extensively and on multiple occasions; it rejected relator's claim every time. Those rejections culminated in a formal, authoritative determination by the expert agency that "[a]n unbroken chain of eligibility for Federal-aid reimbursement [for the ET-Plus system] has existed since September 2, 2005

[2] *See* 23 U.S.C. § 101(b)(1) ("Congress declares that it is in the national interest to accelerate the construction of Federal-aid highway systems, including the Dwight D. Eisenhower National System of Interstate and Defense, because many of the highways (or portions of the highways) are inadequate to meet the needs of local and interstate commerce for the national and civil defense."); 23 U.S.C. § 101(b)(3)(H) ("[T]he Secretary should take appropriate actions to preserve and enhance the Interstate System to meet the needs of the 21st Century."); 23 U.S.C. § 145(a) ("The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.").

. . . ." ROA.4306. Recognizing that FHWA's considered conclusion resolved "*all of the issues* raised," DOJ explained that FHWA's decision made it unnecessary for the government to provide testimony in this case. ROA.4308 (emphasis added).

This Court's eve-of-trial mandamus order also recognized that FHWA's "authoritative" decision "seem[ed] to compel the conclusion that FHWA, after due consideration of all the facts, found the defendant's product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement of claims." *In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014). In fact, this Court warned that FHWA's decision allowed such a "strong argument . . . that defendant's actions were neither material nor were any false claims based on false certification presented to the government" that this case might call for pretrial mandamus relief on the merits—an unheard of remedy. *Id.*

Despite these clear signals from this Court and the United States itself—through both its agency (FHWA) and its official representative in federal court (DOJ)—that there *was no fraud* upon the United States, the district court allowed relator to present his dispute with FHWA to a jury. The result was a record-breaking judgment—$663 million—for a "fraud" against the United States that the United States itself believes never occurred.

Because this case epitomizes the destructive potential of a *qui tam* action untethered to the FCA's purposes, it must be reversed.

ARGUMENT

I. The purpose of the False Claims Act is to protect the United States from fraud.

The False Claims Act is a Civil War-era statute designed to protect the United States government from fraudulent claims. *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The 1863 version of the Act allowed private citizens to file suit on behalf of the United States against those submitting fraudulent claims, promising them one-half of the total penalty that the defendant eventually paid. *Id.*

"The chief purpose of [these *qui tam* provisions] was to provide for restitution to the government of money taken from it by fraud." *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943); *see also Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 553 U.S. 662, 669 (2008) (citing *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). The statute proved "overly generous" and prone to abuse, however, attracting "parasitic exploitation of the public coffers, as exemplified by the notorious plaintiff who copied the information on which his *qui tam* suit was based from the government's own criminal indictment." *Quinn*, 14 F.3d at 649 (citing *Hess*, 317 U.S. at 537). Congress amended the Act in 1986 and in 2009 to ensure that it fully protected federal funds while prohibiting such parasitic actions.

Courts recognize that the FCA is not "a general enforcement device for federal statutes, regulations, and contracts." *U.S. ex. rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (internal quotation marks omitted); *see also, e.g.*, *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (FCA was not "designed for use as a blunt instrument to enforce compliance with all . . . regulations"); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996); *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 712 (7th Cir. 2015). Instead, the FCA reserves liability for *false claims* that are *material* to an agency's payment decision. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring); 31 U.S.C. § 3729(a)(1)(B).

Thus, the FCA is broad but not unlimited. It must not be allowed to "expand . . . beyond its intended role of combating fraud against the *Government*." *Allison Engine Co.*, 553 U.S. at 669 (internal quotation marks omitted). In the absence of materiality, there can be no fraud, and given the government's stated recognition of the propriety of the claims for payment, the judgment of the district court cannot be sustained.

II. The Act precludes *qui tam* liability where, as here, the agency with authority over the reimbursement decisions investigates and formally determines that reimbursement was wholly appropriate.

FHWA is both the federal agency that was supposedly defrauded by Trinity's certifications of regulatory compliance and the federal agency tasked by Con-

gress with administering the allegedly violated regulations. *See* 23 U.S.C. § 109(a); 49 U.S.C. § 104(c); 23 C.F.R. §§ 625.3(a), 625.3(c), 625.4. The agency's determination regarding the applicability and proper interpretation of the regulations it administers is authoritative.

Whatever the complexities of the underlying issues, FHWA's decision resolved them. As this Court has recognized, "whether a [False Claims Act] claim is valid depends on the . . . regulation . . . or statute that supposedly warrants it." *Southland Mgmt. Corp.*, 326 F.3d at 674. Relator's claim here is premised on Trinity's alleged *deviation* from FHWA regulations, a false certification of compliance with those regulations, and a resulting depletion of the public fisc when the federal government based a reimbursement decision on that false certification and paid money it should not have paid. But liability cannot attach to defendant's allegedly false certification unless that certification was "material to the [agency's] payment decision." *Id.* at 679 (Jones, J., concurring).

Materiality is absent here as a matter of law. FHWA investigated the matter for itself; it had full knowledge of the alleged deviations, and concluded that they were *irrelevant* to the reimbursement analysis. FHWA was likewise fully aware of relator's allegations that Trinity did not disclose certain modifications to the ET-Plus, and that the ET-Plus was performing poorly as a result. After thoroughly investigating those allegations, FHWA formally reaffirmed that the ET-Plus guard-

rail system in question was eligible for federal funding continuously throughout the relevant time period.

In FCA cases, such government conduct demonstrates a lack of materiality as to the representations at issue. *See U.S. ex rel. Am. Sys. Consulting, Inc. v. ManTech Advanced Sys. Int'l*, 600 F. App'x 969, 976 (6th Cir. 2015) ("Statements by the actual decision-makers may be (and often are) the best available evidence of whether alleged misrepresentations had an objective, natural tendency to affect a reasonable government decision-maker, especially if they are consistent with a rational decision-making process and a common sense reading of the record as a whole."). That is why DOJ routinely presents evidence regarding government conduct to prove materiality.[3] This Court repeatedly has held that, where the federal government knows of the alleged false representations and continues to approve the payment of federal funds, there can be no materially false claims as a

[3] *See, e.g.*, *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 50 (D.D.C. 2008) ("Here, the government has presented evidence—which SAIC fails to rebut—that SAIC's no-OCI certifications constituted 'information critical to the [government's] decision to pay.'"); *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 182 (D. Mass. 2004) (noting that "[t]he government argues that the falsity of claims was material because, once [the agency] learned of the prohibited investments, it suspended the Project"); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999) (holding that because relator "has not offered any evidence tending to show that the omission of a total protein test at the plasma intake stage (before pooling) was material to the United States' buying decision" and because "the Department of Justice has conspicuously declined to adopt Luckey's position or to prosecute this claim on its own behalf[,] . . . the federal government is 100% satisfied with the . . . products it receives from [defendant]," and "the omitted facts were [not] material").

matter of law. In *U.S. ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, for example, the Court held that, as a matter of law, inaccurate certifications cannot be material where the government is aware of the underlying facts but still pays the claim, asking "[h]ow could such 'fraud' be material to payment if the defrauded party knows about it and remains satisfied with the work?" 548 F. App'x 135, 138 (5th Cir. 2013). *See also, e.g.*, *U.S. ex rel. Stebner v. Stewart & Stevenson Servs., Inc.*, 305 F. Supp. 2d 694, 698 (S.D. Tex. 2004) ("FCA liability does not exist if the alleged fraudulent act had no bearing on the Government's payment decision."), *aff'd*, 144 F. App'x 389 (5th Cir. 2005); *Southland Mgmt. Corp.*, 326 F.3d at 679-81 (Jones, J., concurring) (explaining that there was no materiality because the government was aware of the allegedly false statements and continued to pay).[4]

To state the obvious, this would be a different case if the federal government had been demonstrably and actually defrauded into making a particular determination about the validity of past payments. *But see* Appellants' Br. 28-31. Here, though, FHWA was *fully aware* of relator's claims, investigated them, and formally concluded that "[a]n unbroken chain of eligibility for Federal-aid reimbursement

[4] As this Court's Mandamus Order recognized, other Circuit Courts apply the same rule. *See In re Trinity Indus., Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014) (citing *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 831 (7th Cir. 2011); *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003); *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219 (10th Cir. 2008); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1328-29 (11th Cir. 2009)).

has existed since September 2, 2005 and the ET-Plus continues to be eligible today." ROA.4306. Therefore, liability should have been foreclosed.

Moreover, FHWA's decision is augmented by DOJ's own statement that the agency's determination "addresses all issues raised" by relator. In March 2014, the relator sent a "*Touhy* request" to FHWA,[5] summarizing his allegations in detail, claiming that several FHWA employees possessed information relevant to his claim, and requesting their deposition testimony. ROA.5037-5041 (DX-46). Trinity opposed relator's request, but indicated that if that request were nonetheless to be granted, Trinity would request the same opportunity.

In response, DOJ refused the discovery demand and instead provided FHWA's decision to relator's counsel. DOJ explained that the "memorandum issued by FHWA today . . . addresses all of the issues raised by the parties in their respective requests for information. [The Department of Transportation] believes that this should obviate the need for any sworn testimony from any government employees." ROA.4308. DOJ clearly believed that FHWA's determination that "[a]n unbroken chain of eligibility for Federal aid and reimbursement has existed

[5] *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (upholding the authority of agencies to promulgate regulations establishing conditions for the disclosure of information).

since September 2, 2005 and the ET-Plus continues to be eligible today" resolved this case.[6]

Thus, DOJ—the official representative of the United States in federal court—underscored the impact of FHWA's formal rejection of the core premise underlying relator's claim. FHWA's decision renders the alleged "false certification" here immaterial as a matter of law.

III. The district court did *not* protect the United States by allowing a *qui tam* relator to usurp the government's primary role in evaluating and adjudicating violations of its regulations.

The United States has established a body of administrative law authorizing federal agencies empowered by Congress to administer its various statutory schemes. *U.S. ex. rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011). When the district court disregarded FHWA's authoritative decision and sent relator's claim to the jury, the resulting judgment effectively rendered FHWA's official interpretation nugatory.

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[6] In theory, federal law allows DOJ to dismiss a misguided *qui tam* action like this one. 31 U.S.C. § 3730(c)(2)(A). But in practice, for various institutional reasons, DOJ limits itself to exercising that authority only on extremely rare occasions in extraordinary circumstances. *See, e.g.*, *U.S. ex rel. Sequoia Orange Co. v. Baird–Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) (DOJ dismissing *qui tam* action because Secretary of Agriculture had formally suspended the allegedly violated agency orders that formed the basis of relator's claims); *Berg v. Obama*, 656 F. Supp. 2d 107 (D.D.C. 2009) (DOJ dismissing false claim allegation based on challenge to President Obama's eligibility for office); *U.S. ex rel. Fay v. Northrop Grumman Corp.*, No. 06-cv-581, 2008 WL 877180 (D. Colo. Mar. 27, 2008) (DOJ dismissing *qui tam* action because of risk of disclosure of classified information). Dismissal, however, is not the only way that DOJ can speak—and as noted, DOJ spoke clearly here.

The Third Circuit has noted the "iron[y]" of allowing relators, "though they are ostensibly acting on behalf of the Government, to . . . short-circuit the very remedial process the Government has established to address non-compliance with those regulations." *Id.* Indeed, it directly undermines the United States' interests when its reimbursement decisions are voided on the basis of a private citizen's unauthoritative interpretation of its laws. *See U.S. ex rel. Conner*, 543 F.3d at 1222 ("It would . . . be curious to read the FCA, a statute intended to protect the government's fiscal interests, to undermine the government's own regulatory procedures."). A relator's disagreements with an agency cannot provide the basis for an FCA case. A *qui tam* action is supposed to be *on behalf of* the United States; it is not a vehicle for a private citizen whose standing derives from injury to the United States to ask a court to overrule the United States' determination that it suffered no injury. Instead, a relator's personal views must give way to the reasoned views of the federal agency endowed by Congress with delegated authority to interpret the laws and regulations in question. Otherwise, the *qui tam* action would threaten to cannibalize the rule of law principles it is supposed to protect.

Of course, *qui tam* relators can play an essential role by administering a potent remedy for false claims submitted to the United States. But that potent remedy is inappropriate when the United States has conclusively determined that any allegedly false statement was immaterial to its payment decision. This case is the

inverse of the situation in which a relator properly brings a claim—the United States *is* aware of the alleged false statement and affirmatively *rejects* the notion that it was material. This Court should reverse the judgment below.

CONCLUSION

Amici respectfully urge this Court to reverse the judgment of the district court and to render judgment for the defendants.

Dated: March 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 2016, an electronic copy of the foregoing Brief of *Amici Curiae* Former U.S. Department of Justice Officials was filed with the Clerk of Court of the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service on all parties will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *Amici*, their members or counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 3,269 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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