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., and
TRINITY HIGHWAY PRODUCTS, L.L.C.,

Defendants-Appellants.

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

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

LINDA E. KELLY
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 Tenth Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 637-3060
Counsel for Amicus Curiae *National Association of Manufacturers*

NEAL KUMAR KATYAL
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Amici Curiae

March 28, 2016

[Additional Counsel On Inside Cover]

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 682-1168
Counsel for Amicus Curiae *American Tort Reform Association*

CERTIFICATE OF INTERESTED PERSONS

No. 15-41172, ***United States ex rel. Harman v. Trinity Industries, Inc., et al.***

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. The undersigned counsel of record also certifies that *Amici* adopt Defendants-Appellants' Certificate of Interested Persons and supplement it as follows:

Amici Curiae	***Amici Curiae*****'s Counsel**
National Association of Manufacturers Chamber of Commerce of the United States of America American Tort Reform Association	Neal Kumar Katyal Frederick Liu Daniel J.T. Schuker HOGAN LOVELLS US LLP Linda E. Kelly MANUFACTURERS' CENTER FOR LEGAL ACTION Kate Comerford Todd Steven P. Lehotsky U.S. CHAMBER LITIGATION CENTER H. Sherman Joyce Lauren Sheets Jarrell AMERICAN TORT REFORM ASSOCIATION

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST[*]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing approximately 14,000

[*] All parties have consented to the filing of this *amicus* brief. No person other than the *amici*, their members, or their counsel authored this brief or contributed money intended for the funding of this brief.

small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. NAM has appeared before the federal courts as *amicus curiae* in many prior False Claims Act (FCA) cases. *See, e.g.*, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, *cert. granted*, No. 15-7 (U.S. Dec. 4, 2015); *AT&T, Inc. v. United States ex rel. Heath*, *petition for cert. filed*, No. 15-363 (U.S. Sept. 21, 2015); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015).

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than 3 million businesses and organizations of every size, in every industry, sector, and geographic region of the country—making it the principal voice of American business. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus

regularly files *amicus* briefs in cases raising issues of concern to the Nation's business community, including many FCA cases. *See, e.g.*, *Escobar*, No. 15-7 (U.S.); *AT&T*, No. 15-363 (U.S.); *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby, petition for cert. filed*, No. 15-513 (U.S. Oct. 20, 2015); *Carter*, 135 S. Ct. 1970; *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457 (5th Cir. 2015).

The American Tort Reform Association (ATRA) is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus* briefs in cases before federal and state courts that have addressed important liability issues, including under the FCA. *See, e.g.*, *Escobar*, No. 15-7 (U.S.); *Rigsby*, No. 15-513 (U.S.); *In re Deepwater Horizon*, 793 F.3d 479 (5th Cir. 2015).

Amici have a substantial interest in the outcome of this case. Many American manufacturers and other businesses, including defendant-appellant and NAM member Trinity Industries, Inc., contract directly or indirectly with the Federal Government for the provision of goods and services. These businesses are subject to the FCA, 31 U.S.C. §§ 3729-3733, as interpreted and applied by the federal courts. Inconsistent or unpredictable applications of the FCA impose

significant financial and reputational costs on American businesses and create an atmosphere of regulatory uncertainty.

SUMMARY OF ARGUMENT

The False Claims Act (FCA) penalizes fraud perpetrated against the Federal Government. It is neither an all-purpose tool for the plaintiffs' bar to wield in litigation, nor a special contrivance for them to relitigate the Government's regulatory decisions.

The district court in this case tried to refashion the FCA for a use far beyond its statutory scope. The court entered a $663 million judgment against Trinity for defrauding the Federal Government—even though the Government has examined the relator's allegations and determined that Trinity's ET-Plus product has consistently complied with the applicable federal requirements.

If allowed to stand, the decision below would produce deep regulatory uncertainty for manufacturers and other businesses that contract directly or indirectly with the Federal Government. Under the district court's ruling, a company could receive authoritative assurances from the Federal Government—such as the assurances Trinity received here—that its product complies with federal regulations, and yet be found in violation of the FCA and subjected to hundreds of millions of dollars in treble damages and penalties.

That approach massively distorts the FCA. The FCA targets knowingly "false" or "fraudulent" schemes to obtain money from the Government. And a claim of regulatory compliance cannot be knowingly "false" or "fraudulent" where the Government itself has decided and repeatedly announced that the company's product (or service) is in compliance with the applicable federal requirements. The district court's contrary decision creates an unstable, unpredictable regulatory environment in which manufacturers and other businesses cannot rely on even express statements by the Federal Government.

The district court nevertheless permitted this case to go to the jury—even though the Federal Highway Administration (FHWA) confirmed that Trinity's product had always been in compliance with the requirements for reimbursement. The district court might have questioned the FHWA's conclusion that Trinity's ET-Plus was in compliance. But that was indeed what the FHWA decided. And the FCA is not an instrument for a trial court to dissect the Federal Government's regulatory decisions. Given the Government's unambiguous assurances of uninterrupted compliance, Trinity could not have made a "false" or "fraudulent" claim for government funds.

If the district court's judgment is affirmed, the FCA would be transformed into a supercharged Administrative Procedure Act, replete with treble damages and attorneys' fees, thereby strengthening incentives for the relators' bar to bring

meritless lawsuits. Companies like Trinity would face a bewildering dilemma: the Federal Government could repeatedly declare their unwavering regulatory compliance, and yet a federal district court entertaining a private suit could turn around and hold them liable for regulatory violations—wielding the hammer of treble damages. That, too, would create crippling regulatory uncertainty for manufacturers and other businesses in the United States. The FCA was not enacted to subject American companies to a catch-22. This Court should reverse the district court's judgment and restore the proper reach of the FCA.

ARGUMENT

I. THE DECISION BELOW DISTORTS THE FALSE CLAIMS ACT AND NULLIFIES EVEN EXPRESS, AUTHORITATIVE ASSURANCES OF COMPLIANCE FROM THE GOVERNMENT

The False Claims Act, not surprisingly, carries out the promise of its title. It penalizes *false* claims for government funds. To fall within the Act's ambit, the contested claims for payment must indeed be false. The Federal Government has every reason to speak up when it believes a claim has been falsely made against its own treasury. And the Government speaks volumes when it repudiates the very basis of a private party's FCA suit. Where, as here, the Government expressly disagrees that a claim is false, that determination should be given due weight.

That simple point is crucial to the proper resolution of FCA allegations against businesses such as Trinity. In this case, the Government scrutinized the

substance of the relator's allegations—and it squarely disagreed. At each stage of its review, under an array of intricate technical standards, the Government concluded that Trinity's ET-Plus had remained in compliance all along. Accordingly, Trinity could not have made a knowingly "false" or "fraudulent" claim for reimbursement. That should have been enough for the district court to dispose of the case as a matter of law.

A. The FCA Targets Only Knowingly "False" Or "Fraudulent" Claims For Payment From The Federal Government, And Any False Statements Must Be Material To Such A Scheme

The FCA's text, history, and purpose and this Court's precedent all confirm the legally cognizable meaning of "false claim." The decision below sharply departed from that settled understanding.

1. The FCA's Text, History, and Purpose

The FCA imposes civil liability on "any person" that (A) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or (B) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B). A "claim" may be "any request or demand, whether under a contract or otherwise, for money or property" to either a federal official or a recipient of federal funds. *Id.* § 3729(b)(2)(A). And for a false statement to be "material" to a false claim, it must "hav[e] a natural tendency to influence, or be

capable of influencing, the payment or receipt of money or property." *Id.* § 3729(b)(4).

The FCA does not specifically define the terms "false" or "fraudulent." Common usage, though, indicates that "false" means untrue or erroneous. *See, e.g.*, *Black's Law Dictionary* 718 (10th ed. 2014); 5 *The Oxford English Dictionary* 697-98 (2d ed. 1989) (citing sources dating from the 12th century). "Fraudulent," meanwhile, connotes dishonesty and deception. *See* 6 *Oxford*, *supra*, at 153 (citing sources dating from the 15th century); *see also Black's*, *supra*, at 775 (defining "fraud"). Put simply, a claim for payment from the Government is "false" or "fraudulent" under the FCA if it is untrue or deceptive.

The words "false" and "fraudulent" are interlinked with the conduct at the core of the FCA—the knowing submission of wrongful claims to payment owed by the Government. 31 U.S.C. § 3729(a)(1)(A). The FCA also prohibits knowingly making an untrue statement to induce the wrongful payment of federal funds. *Id.* § 3729(a)(1)(B). The central action is requesting or demanding money that the Government would not rightfully choose to pay if it understood that the entity was actually defrauding the Government.

For a century and a half, the FCA has targeted fraud committed against government programs. Adopted in 1863, it was "signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense

contracts." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (quoting S. Rep. No. 99-345, at 8 (1986)); *see also United States v. McNinch*, 356 U.S. 595, 599 (1958) ("Congress wanted to stop this plundering of the public treasury."); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001) (en banc); Cong. Globe, 37th Cong., 3d Sess. 952-58 (1863). Since then, Congress has made clear time and again that the FCA's unremitting focus is safeguarding the public fisc. *See, e.g.*, S. Rep. No. 99-345, at 4 ("[T]his statute has been used more than any other in *defending the Federal treasury* against unscrupulous contractors and grantees." (emphasis added)); S. Rep. No. 111-10, at 10 (2009) ("[The FCA] is an extraordinary civil enforcement tool used to *recover funds lost* to fraud and abuse." (emphasis added)).

In its modern incarnation, the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money" through government programs—namely, "false claims." S. Rep. No. 99-345, at 9. That is consistent with the long-recognized meaning of a "false claim." *See, e.g.*, *A New Law Dictionary and Glossary* 468 (Alexander M. Burrill ed., 1850) (defining a "false claim" as "where a man claimed more than his due, and was amerced and punished for the same"). To make a false claim, an entity knowingly requests money or

another benefit that the Government does not rightfully owe. That lack of a rightful entitlement to government funds is what makes a claim "false."

What is more, an entity held liable under the FCA must have made the false claim or statement "knowingly." 31 U.S.C. § 3729(a)(1)(A)-(B). The FCA's definition of "knowingly" is satisfied by "actual knowledge," "deliberate ignorance," or "reckless disregard." *Id*. § 3729(b)(1)(A)(i)-(iii). That is as far as the scienter requirement goes. Although businesses working with the Government must "make a limited inquiry to ensure the claims they submit are accurate," Congress was clear and "firm in its intention that the act *not* punish honest mistakes or incorrect claims submitted through mere negligence." S. Rep. No. 99-345, at 7 (emphasis added).

But even a knowingly false statement, without more, does not trigger FCA liability. The FCA expressly requires a false statement to be "material" to a false claim. 31 U.S.C. § 3729(a)(1)(B). The false statement must somehow "influence" the wrongful disbursement of government funds. *Id*. § 3729(b)(4).

2. This Court's Precedent

This Court has aptly concluded that "[i]t is only those claims for money or property to which a defendant is *not entitled* that are 'false' for purposes of the False Claims Act." *United States v. Southland Mgmt. Corp*., 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc) (emphasis added); *see also United States ex rel. Rigsby v.*

State Farm Fire & Cas. Co., 794 F.3d 457, 477 (5th Cir. 2015), *petition for cert. filed on other grounds*, No. 15-513 (U.S. Oct. 21, 2015); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268-69 (5th Cir. 2010); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 260 (5th Cir. 2007). False claims must be "[calculated to] caus[e] the United States to pay out money it is not obligated to pay." *Southland*, 326 F.3d at 675 (alterations in original) (quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)).

This Court has thus explained that "[t]here is no liability under this Act for a false statement unless it is used to get [a] false claim paid." *Southland*, 326 F.3d at 675. For FCA liability to attach, there must actually have been some kind of fraud: the Government must have been misled into paying for something that it would not have paid for otherwise.

The district court declined to apply this Court's en banc decision in *Southland*, on the ground that Trinity's case was factually distinguishable. ROA.13287 (concluding that "*Southland* dealt with very different facts" and that "the holdings of both the majority and concurrence in *Southland* cannot support" Trinity's arguments); ROA.13312-20. The lower court did not assert, nor could it, that *Southland* was not good law. Instead it cited a panel decision from this Circuit stating the following elements for proving FCA liability: "(1) whether 'there was a

false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim).'" *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008)). But nothing in that test disturbs the well-established meaning of "false claim" in *Southland*. *See Longhi*, 575 F.3d at 472 ("[The defendant company] blatantly deceived the [government entities] and received funds that it was not entitled to.") It is simply a restatement of some of the major statutory requirements. A court still must assess the key threshold question whether a payment request to the Federal Government was indeed false or fraudulent.

This Court recognized as much in a pretrial mandamus ruling in this very case. ROA 7967-68 (citing *Southland*, 326 F.3d at 676-77, and similar rules in *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 83 (7th Cir. 2011); *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1328-29 (11th Cir. 2009); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219 (10th Cir. 2008); and *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003)). A "false claim" under the FCA is a claim for government funds to which a defendant is not entitled. *Southland*, 326 F.3d at 674-75. As this Court has made clear, if the defendant was "entitled to receive the . . . payments,"

then the "claims therefore cannot be false under the False Claims Act as a matter of law." *Id*. at 677. Nothing since *Southland* disturbs that critical holding. The lower court misconstrued the very essence of what constitutes a viable claim under the FCA.

B. Because The Federal Government Has Authoritatively Confirmed The ET-Plus's "Unbroken" Compliance, Trinity's Claims Cannot Be Knowingly "False" Or "Fraudulent" Under The FCA

The district court lost sight of the FCA's unifying principle: penalizing fraud against government programs. A claimant cannot be liable for defrauding the Federal Government when the Federal Government has closely examined the claims at issue and authoritatively determined that the product in question has always been in compliance. That is exactly what the responsible federal agency found here.

On June 17, 2014, shortly before the first trial, the FHWA issued a memorandum confirming that Trinity's ET-Plus had never lost its eligibility for federal reimbursement. ROA.4305-06. The agency delineated the sequence of events that provided the basis for its conclusion:

- First, on September 2, 2005, FHWA issued an eligibility letter for Trinity's ET-Plus. ROA.4305-06. An eligibility letter "establishes a tested hardware's eligibility for reimbursement under the Federal-aid highway program." ROA.4305. Substantively, an eligibility letter "confirm[s] that

roadside safety hardware was crash tested to the relevant standards, that those crash test results were presented to FHWA, and that FHWA confirmed that the device met the relevant crash test standards." ROA.4305.

- Second, the FHWA fully investigated the relator's allegations. On February 14, 2012, Trinity informed the FHWA that the dimensional change identified in the relator's allegations was "a design detail inadvertently omitted from the documentation submitted to FHWA." ROA.4305. Accordingly, "based upon all of the information available to the agency (including a reexamination of the documentation from the ET-Plus crash tests), FHWA validated that the ET-Plus with the [reduced] 4 inch guide channels was crash tested in May 2005." ROA.4305-06. In late 2012 and early 2013, FHWA relayed its findings to several state departments of transportation as well as the standard-setting American Association of State Highway and Transportation Officials (AASHTO). ROA.4306.
- Third and last, the FHWA found that Trinity's eligibility had never lapsed. "The Trinity ET-Plus with [reduced] 4-inch guide channels," the agency confirmed, "became eligible for Federal reimbursement . . . on September 2, 2005." ROA.4306. That letter "is still in effect." ROA.4305. Agency "[s]taff confirmed the reimbursement eligibility of the device at heights from 27¾ to 31 inches," the latter of which is the raised height of the guardrail

> system. ROA.4306. In the end, the FHWA's conclusion was unequivocal: "An *unbroken chain of eligibility* for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today." ROA.4306 (emphasis added).

The agency's confirmation of "unbroken" eligibility vitiates the relator's FCA claims against Trinity. The FHWA is the agency that determines whether Trinity's product is eligible for federal reimbursement. At the very least, it must be better positioned than the relator in this case, Trinity's business competitor, to make such an assessment. *See* ROA.5500-01. Both the safety status of the ET-Plus and the product's eligibility for federal reimbursement are questions squarely within the FHWA's core responsibilities. The FHWA "supports State and local governments in the design, construction, and maintenance of the Nation's highway system." Fed. Highway Admin., U.S. Dep't of Transp., *About: Who We Are*, https://goo.gl/Z7Mtf8 (last modified Sept. 17, 2012). The memorandum confirming Trinity's eligibility originated from the agency's Office of Safety—"the lead safety champions within the FHWA." Fed. Highway Admin., U.S. Dep't of Transp., *About: Mission of the Office of Safety*, http://goo.gl/m8M2Fe (last modified Sept. 17, 2015). And it was signed by the Director of the Office of Safety Technologies, the agency unit "responsible for highway designs and technologies that improve safety performance." *Id.* No other part of the

Government would be better positioned to evaluate the technical safety standards and reimbursement eligibility of the ET-Plus.

This Court has already recognized the significance of the FHWA's position in this case. When this Court denied Trinity's mandamus petition on the eve of the second trial, the panel underscored the importance of the agency's confirmatory memorandum: "On its face, FHWA's *authoritative* June 17, 2014 letter seems 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 claims." ROA.7967 (emphasis added). Even though this Court was "not prepared to make the findings required to compel certification for interlocutory review by mandamus, a course that seems prudent," it called attention to the "strong argument . . . that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government." ROA.7967-68 (citing *Southland* and similar precedents from the Seventh, Eighth, Tenth, and Eleventh Circuits). Notwithstanding the district court's eventual order denying Trinity's motion for judgment as a matter of law, the dynamics have not changed: the Government's confirmation of the ET-Plus's compliance remains "authoritative."

After the trial, the FHWA conducted further testing with other organizations and reaffirmed its conclusions. In March 2015, a joint task force of the FHWA and AASHTO found "no evidence" to support the relator's allegation that there were "multiple versions . . . on our nation's roadways" of the four-inch ET-Plus with varying dimensions. ROA.11447. And in February and March 2015, the FHWA, the Southwest Research Institute (an FHWA-accredited testing lab), and engineering expert H. Clay Gabler each independently concluded from the crash-test results that the ET-Plus had indeed satisfied the FHWA's crash-test standards, contained in National Cooperative Highway Research Program (NCHRP) Report 350. ROA.11483 (concluding, for the 27¾-inch-high guardrails, that "all 4 tests passed the NCHRP Report 350 criteria"); ROA.11823 (concluding, for the 31-inch-high guardrails, that "all 4 tests passed the NCHRP Report 350 criteria"). Although the jury could not have considered these dimensional and crash-test studies when it rendered its verdict in October 2014, the district court could and should have considered those studies in the context of Trinity's motion for a new trial. And the studies weigh on the legal issues now before this Court because they reinforce that the Federal Government has not wavered from its conclusion that the ET-Plus has always been eligible for reimbursement. Indeed, the Government still provides reimbursement for the ET-Plus today. *See* Appellants' Br. 12.

The inexorable inference from the Government's confirmation of the "unbroken" eligibility of Trinity's ET-Plus is much like this Court's finding in *Southland*: "The undisputed conduct and exchanges by and between the parties during this entire period demonstrates . . . that all parties regarded them as entitled to be paid." 326 F.3d at 677. If anything, the Government's clear declarations here exceed the quantum of confirmation that this Court has found sufficient elsewhere. *See, e.g.*, *United States ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138 (5th Cir. 2013) (per curiam) (unpublished) ("How could such 'fraud' be material to payment if the defrauded party knows about it and remains satisfied with the work? It appears beyond doubt that [the federal agency] was not defrauded . . . .").

The FCA's scienter requirement poses a further hurdle to the relator's claims. The FCA covers only claims that a defendant *knows* to be false. The Government approved the ET-Plus for federal reimbursement. And the Government's continued assurances to Trinity, after an investigation of the relator's claims, carry significant weight. Especially given the web of technical requirements involved here, companies (like Trinity) should be able to rely on an agency's assessment (like the FHWA's) that a product (like the ET-Plus) complied with federal standards (like NCHRP Report 350). If a business such as Trinity has received authoritative assurances of compliance from the Government, it has not

acted in "deliberate ignorance" or "reckless disregard" of the applicable requirements. *Accord United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999) (finding no FCA liability where a defendant relies in good faith on an objectively reasonable interpretation of a statute, regulation, or contractual provision).

The Government's position in this particular case belies a more fundamental legal principle at stake here: the limited bounds of claims brought by *qui tam* relators under the FCA. It has been established for centuries that *qui tam* actions are supposed to be brought to advance the interests of the sovereign in contesting fraud perpetrated against the public fisc. *See, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774-75 (2000); *Riley*, 252 F.3d at 752; 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 1.01[A], at 1-10 (4th ed. 2014) (explaining that, when *qui tam* actions arose in 13th-century England, private parties could access the royal courts "only by alleging the king's interest"); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 463 n.2 (2007) (noting that *qui tam* is an abbreviation for a Latin phrase meaning "who pursues this action on our Lord the King's behalf as well as his own"). Thus, although private relators may initiate FCA cases in the interests of the United States, by longstanding tradition (if not constitutional compulsion) the Government has the opportunity to weigh in on any FCA *qui tam* case. Accordingly, the FCA

empowers the Attorney General to investigate alleged violations, 31 U.S.C. § 3730(a), and in *qui tam* cases to "elect to intervene and proceed with the action," *id*. § 3730(b)(2). And when an individual undertakes an FCA *qui tam* action "in the name of the Government," *id*. § 3730(b)(1), but without any governmental support, the individual may not proceed if the suit fails to serve the Government's interests under the FCA—in preventing fraud against the Government.

The Department of Justice has remained studiously absent from this case. Notwithstanding the relator's allegations, it has neither filed its own suit nor intervened in his action. ROA.13328. Indeed, a Department of Justice official stated in an email to counsel for both parties that the FHWA's confirmatory memorandum "addresses all of the issues raised by the parties in their respective requests for information." ROA.4308. And that official reiterated the FHWA's position that the memorandum "should obviate the need for any sworn testimony from any government employees." ROA.4308.

The Government, time and again, has declined to pursue an FCA claim against Trinity. And it has authoritatively declared that Trinity's product always had and has never lost its entitlement to reimbursement. It is incredible that the district court allowed this case to proceed to trial and final judgment. A company should not be liable for a fraud that the Government—the nominal plaintiff and alleged victim—has determined was never committed.

II. THE DECISION BELOW CREATES VAST REGULATORY UNCERTAINTY FOR MANUFACTURERS AND OTHER BUSINESSES

The FCA plays an important role in identifying fraud against the Federal Government. But meritless *qui tam* actions based on precariously overbroad readings of the FCA do not serve that purpose. Unwarranted suits impose significant financial costs on manufacturers and other businesses and subject them to serious reputational harm as well.

This case is particularly illustrative of the devastating consequences for businesses within the Fifth Circuit and around the nation. After investigating the relator's claims, the Government gave Trinity clear and authoritative assurances that the ET-Plus fully complies with federal safety standards and remains eligible for federal reimbursement. Yet Trinity now finds itself liable for $663 million in damages and penalties—the largest FCA judgment in the law's century-and-a-half-long history. Appellants' Br. 3. America's businesses should be able to rely on such unequivocal government assurances without having to fear a colossal FCA judgment. The decision below produces severe uncertainty for companies that contract in any capacity with the Federal Government. And the shockwaves extend even farther: the FCA exposure under this decision could reach any company that makes or sells a product that might eventually be sold to the Federal Government, or to some other entity that might seek federal reimbursement.

A. The Decision Below Deepens Businesses' Regulatory Insecurity Because, Even With Authoritative Government Assurances, They May Still Face Massive FCA Penalties

It is one thing for a *qui tam* relator to continue pursuing an FCA action despite the Government's decision not to become involved. *See Stevens*, 529 U.S. at 778; *Riley*, 252 F.3d at 753. It is something else when the Government has affirmatively and authoritatively contradicted the very basis of the relator's suit—and the relator has pressed onward despite the Government's declared interests to the contrary. Yet that is what the district court allowed to happen in this case. This development is even more troubling because the FCA's regime of treble penalties and damages is "essentially punitive in nature." *Stevens*, 529 U.S. at 784. This was the largest, and perhaps also the most punitive, FCA judgment in history—and it proceeded without the Government's approval. Indeed, the court rendered the massive judgment over direct refutations of the relator's allegations from the FHWA.

The gargantuan scale of the $663 million judgment is all the more remarkable because the Government refused to participate at all in the relator's suit. Notwithstanding the Government's absence, the district court allocated $464 million as the Government's share of the judgment. ROA.13328. Consider, by contrast, that between fiscal years 1987 and 2014 the Government recovered a *total* of $1.01 billion in settlements and judgments across all the FCA *qui tam* actions in

which it declined to intervene. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview*, https://goo.gl/jVXD0R (last modified Nov. 23, 2015). If allowed to stand, this immense judgment would be a striking outlier in the history of FCA suits lacking governmental endorsement.

The decision below looms large over the broader American business community for another reason: the district court's logic is not confined to companies that contract directly with the Government. Trinity itself did not request federal reimbursement. Trinity manufactured and sold the ET-Plus to private contractors and other customers; those customers could then resell the ET-Plus to state departments of transportation; and finally those state authorities could seek federal reimbursement for the costs associated with installing compliant products such as the ET-Plus on federal highways. Appellants' Br. 8-9; ROA.13288-89. That attenuated link to the federal fisc makes this enormous FCA judgment disquieting to businesses across the country.

The regulatory uncertainty engendered by this decision could have a far-reaching economic impact. In 2014, the Federal Government spent $447.5 billion on its prime contracts. Nat'l Contract Mgmt. Ass'n & Bloomberg Gov't, *Annual Review of Government Contracting, 2015 Edition* 4-5 (2015), http://goo.gl/q6L622. During that fiscal year, the Department of Justice recovered $5.8 billion in settlements and judgments in FCA cases. *Fraud Statistics*, *supra*. Given the

tremendous sums at stake, cutting across industries in the Nation's economy, the threshold for liability should be exceptionally clear. The district court's ruling, however, ominously muddied the waters.

B. The Decision Below Opens A Backdoor For Relitigating The Federal Government's Regulatory Choices

The district court's decision would subject manufacturers and other businesses to dizzying regulatory uncertainty in their dealings with the Government. Before this case, a company might reasonably have surmised that it could rely on authoritative declarations of compliance from the Government. After all, if the Government has provided such assurances, the company would seemingly not have to worry that it would be held liable under the FCA—in the Government's name—for defrauding the Government. Under the district court's ruling, that company would be perilously mistaken. Even unqualified confirmation from the responsible agency would not suffice.

Evaluating the safety of products like the ET-Plus involves complex technical determinations requiring specialized expertise. That is why the FHWA's Office of Safety and other independent entities are charged with handling such decisions. Businesses such as Trinity should be able to rely on those determinations.

To be sure, the Government could have moved to dismiss the action over the relator's objections, after the relator received notice and a hearing on the motion,

31 U.S.C. § 3730(c)(2)(A), or it could have settled this case over the relator's objections, after the relator received notice and a hearing on the settlement, *id.* § 3730(c)(2)(B). But in practice it is quite unusual for the Government to exercise that power. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice To Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264 (2008). In any event, those are not the only ways that the Government may signal to a court that a relator's case lacks merit.

The great preponderance of *qui tam* actions brought under the FCA are without merit. One empirical study found that 73% of all cases, and fully 92% of the cases in which the Federal Government declined to intervene, were dismissed with no recovery. Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 974-75 (2007) (examining data from 1987 to 2004). Just 6% of the cases lacking governmental intervention resulted in a settlement or judgment in the relator's favor. *Id.* And hundreds more FCA *qui tam* actions are filed every single year—at a rising pace. The Department of Justice tallied 714 new matters in 2014, up from 365 in 2007. *Fraud Statistics*, *supra*.

Given the volume of such cases, the Government merely declines to intervene in the overwhelming majority of them. The Department of Justice

becomes involved in approximately 20% of FCA *qui tam* actions, while the remaining 80% yield no governmental intervention. *See* Stuart F. Delery, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), https://goo.gl/IH4KXR ("For every ten cases filed by relators, the government ultimately intervenes in only two."); U.S. Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits* 2 (2012), https://goo.gl/bPOQ6E (estimating an intervention rate below 25%). Even when a *qui tam* suit is meritless and the Government refuses to intervene, however, mounting a legal defense is no small matter. It "requires a tremendous expenditure of time and energy," results in businesses "having their reputations tarnished," and may strongly incentivize settlement despite "what such a settlement may suggest to those unfamiliar with modern-day litigation." Todd J. Canni, *Who's Making False Claims, the* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11-12 & n.66 (2007).

The relatively rare incidence of intervention is the product of deliberate government decisions, not mere happenstance. *See* Delery, *supra* ("[A]ll too often DOJ attorneys dedicate significant time and effort investigating allegations that are too broadly pled or that are based on faulty information."). And the fact that a relator chooses to proceed despite the Government's abstention may simply

manifest the relator's access to resources. *See* Benjamin C. Mizer, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the 16th Pharmaceutical Compliance Congress and Best Practices Forum (Oct. 22, 2015), https://goo.gl/4asWmq ("[A]n increased number of relators and their counsel are willing to litigate their cases once the department has declined to intervene. This reflects the fact that the relators' bar is increasingly well-funded and able to take on complex litigation, even when the government declines to take the case forward."). Where the Department of Justice has declined to intervene and the federal agency that is the alleged victim has repeatedly and clearly rebuffed any allegation of improper payment, the case should be closed quickly without the Government having to shout "halt!"

Effectively, the district court's ruling would turn the FCA into a supercharged Administrative Procedure Act, in which the plaintiffs' bar could subvert an agency's approval of a company's product just by alleging "fraud." But there is a large body of administrative law that already serves the function of allowing judicial review of agency action. *See* 5 U.S.C. §§ 701-706; *see also, e.g.*, *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988) (noting the Administrative Procedure Act's "central purpose of providing a broad spectrum of judicial review of agency action"); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (calling these judicial review provisions "comprehensive"). The FCA plays a decidedly different

role. *See Steury*, 625 F.3d at 268 ("The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts." (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997))).

To justify this end-run around the accepted channels for judicial review, the decision below conjures up strange legal fictions. Can the Government be "defrauded" as a matter of law when the Government expressly and authoritatively confirms that it has not been defrauded? Can a claim upon the Government be "false" when the Government says it is true? The answers should be obvious. But the district court's metaphysical gymnastics obfuscate what is otherwise straightforward. Surely Congress did not intend for FCA judgments to be made through the looking glass. Rather, it set out clear statutory requirements in the FCA to effectuate the law's purpose.

The FCA offers a tool for targeting fraud perpetrated against the Government—from spurious defense contracts with the Union Army during the Civil War to phony claims today for reimbursement of healthcare services that were never rendered. The decision below instead used the FCA to Monday-morning-quarterback thoroughly considered governmental decisions for nothing but the profit of a relator and his attorneys. This Court has not interpreted the FCA

to permit such a result before, and it should not do so now. This Court should not allow the FCA to become so twisted from its statutory frame.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment regarding Trinity's liability under the FCA.

Respectfully submitted,

/s/ Neal Kumar Katyal

NEAL KUMAR KATYAL
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Amici Curiae

LINDA E. KELLY
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 Tenth Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 637-3060
Counsel for Amicus Curiae *National Association of Manufacturers*

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 682-1168
Counsel for Amicus Curiae *American Tort Reform Association*

March 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF on March 28, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

Counsel for Amici Curiae

March 28, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,209 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point type.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

Counsel for Amici Curiae

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