No. 15-41172

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, EX REL. JOSHUA HARMAN,
Plaintiff-Appellee,

v.

TRINITY INDUSTRIES, INC.; TRINITY HIGHWAY PRODUCTS, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas, Marshall Division

BRIEF FOR *AMICI CURIAE* TEXAS, ALABAMA, ARKANSAS, COLORADO, INDIANA, LOUISIANA, NEVADA, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WISCONSIN, IN SUPPORT OF DEFENDANTS-APPELLANTS IN SUPPORT OF REVERSAL

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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.

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This case involves the misuse of the False Claims Act to secure a competitive advantage without any corresponding benefit to the United States or to the public. Companies owned by relator Joshua Harman formerly competed with Trinity in the manufacture and sale of highway safety devices, including guardrail end terminals. *See, e.g.*, ROA.205. Harman filed suit under the False Claims Act, 31 U.S.C. §§ 3729–3732, alleging that Trinity made a false statement or engaged in a fraudulent course of conduct when it failed to disclose modifications to the ET-Plus device to the Federal Highway Administration (FHWA) but continued to certify that modified ET-Plus units were compliant with National Cooperative Highway Research Program (NCHRP) Report 350 and approved for use and reimbursement by the FHWA. ROA.202–03. Not only did the United States decline to intervene in the case, the FHWA issued a memorandum before trial stating: "The Trinity ET-Plus with 4-inch guide channels became eligible for Federal reimbursement under FHWA letter CC-94 on September 2, 2005. . . . An unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today." U.S. Dep't of Transp., Fed. Highway Admin., Memorandum (June 17, 2014) 2, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/memo_etplus_wbeam.pdf ("FHWA Memorandum").

In spite of the federal government's official statement, the district court entered judgment, ROA.13327, on a jury verdict that Trinity violated the False Claims Act, by certifying that Trinity's ET-Plus guardrail end terminals were

compliant with NCHRP Report 350 and approved for use by the Federal Highway Administration (FHWA). The district court denied Trinity's motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), ROA.13285, and its motion for new trial under Fed. R. Civ. P. 59, ROA.13544.

By entering judgment against Trinity when the federal government determined that it had not been defrauded, the district court permitted the relator to commandeer the False Claims Act for his personal advantage. That outcome violates the letter and spirit of the False Claims Act, which Congress enacted to protect the government—and through it, the public—from fraud, not to give individuals the power contest the policy judgment of federal agencies in court.

The district court's judgment also raises a serious constitutional question. The False Claims Act already tests constitutional norms by allowing parties who have suffered no concrete personal injury to pursue claims to vindicate an injury to the United States. As applied by the district court, the False Claims Act goes even further to permit a party with no Article III standing to pursue a claim based on an injury to the federal government when the government denies that it has suffered a concrete injury. This Court should reject that interpretation of the Act to avoid the resulting constitutional difficulty.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The amici States have a vital interest in maintaining safe and efficient roads. Together, the amici States contain more than ten thousand miles of interstate highways and one million miles of public roads.[1] Like other States, amici receive a substantial amount of funding from the federal government, through the Federal Highway Administration, to maintain and develop their highways. Congress recently enacted the Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015), "the first long-term comprehensive surface transportation legislation since . . . 2005."[2] The FAST Act authorizes more than $300 billion in funding over a five-year period, including more than $225 billion in contract authority to the Federal Highway Administration. *See, e.g.*, U.S. Dep't of Transp., Fed. Highway Admin., P.L. 114-94: Fixing America's Surface Transportation (FAST) Act: Key Highway Provisions 4, https://www.fhwa.dot.gov/fastact/fast_act_overview_20160310.pdf.

The States have a particular interest in a consistent and reliable regulatory process for federally funded transportation projects. To be used in federal-aid

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[1] *See, e.g.*, U.S. Dep't of Transp., Fed. Highway Admin., Highway Statistics 2014, Table HM-20 (Oct. 2015), *at* https://www.fhwa.dot.gov/policyinformation/statistics/2014/hm20.cfm.

[2] Am. Ass'n of State Highway and Transp. Officials, AASHTO Summary of the New Surface Transportation Bill 1 (Dec. 16, 2015), http://fast.transportation.org/Documents/AASHTO%20Summary%20of%20FAST%20Act%202015-12-16%20FINAL%20v4.pdf.

highway projects, materials must be crash-tested and accepted by the FHWA. *See, e.g.*, FHWA Memorandum (June 17, 2014) at 1 ("The FHWA reimbursement eligibility process provides a consistent process that establishes a tested hardware's eligibility for reimbursement under the Federal-aid highway program on a national level."). States and their contractors therefore rely on the FHWA's judgment to determine which products are appropriate to use in federal-aid highway projects. The FHWA's approval of ET-Plus, for example, has led to the installation of thousands of ET-Plus units on federal-aid highways within the amici States.

If private companies and individuals can use the False Claims Act to override the FHWA's judgment, States and their contractors cannot rely on the federal government's approval of products necessary for highway construction and safety. The potential consequences extend far beyond this case. The United States road and highway construction industry comprises thousands of businesses.[3] If the False Claims Act permits those companies to invoke the United States' enforcement authority to attack competitors notwithstanding federal regulatory approval, potential contractors face a powerful disincentive to enter the market for federal-aid highway projects, likely increasing costs to the States and to the federal government with no corresponding benefit to the

[3] *See, e.g.*, IBISWorld, Road & Highway Construction in the U.S.: Market Research Report (Feb. 2016), http://www.ibisworld.com/industry/default.aspx?indid=1920 (reporting 13,910 businesses in the U.S. road and highway construction industry).

public. And if the judgment below stands, States face a risk that their own qui tam statutes may be used by private parties to undermine state regulatory policies.

ARGUMENT

I. The District Court's Judgment Conflicts With The Purpose Of The False Claims Act.

The False Claims Act exists to protect the public fisc from fraudulent claims. It provides, in relevant part:

> any person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> . . .
>
> is 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. Congress originally enacted the statute "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Nat. Res. v. United States ex rel. Stevens,* 529 U.S. 765, 781 (2000) (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)); *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008) (explaining that the Act targets those who "knowingly or recklessly cheated the government"). True to that original purpose, Congress

amended the Act in 1986 to "enhance the Government's ability to recover losses sustained as a result of fraud." S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

The False Claims Act uses the term "defraud" in the ordinary sense of "relating to the fraudulent causing of pecuniary or property loss," consistent with the statute's focus on "the wrongful obtaining of money and other property of the Government." *United States v. Cohn*, 270 U.S. 339, 346–47 (1926). The remedial provisions of the Act serve a specific purpose: "to provide for restitution to the government of money taken from it by fraud." *Bornstein*, 423 U.S. at 314 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551–52 (1943)). The False Claims Act therefore does not impose liability when the United States has approved the expenditure of federal funds, and there is no basis to award damages when the government gets the benefit of its bargain. *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) (explaining that the Act is "aimed at protecting the financial resources of the government"); *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012) ("The government got what it paid for and there are no damages."); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674–75 (5th Cir. 2003) (en banc) ("[A] 'false claim' is a claim for more than one is due.").

In this case, the FHWA has made clear that the United States got what it paid for. If the FHWA believed that Trinity had made false claims, it could have withdrawn its acceptance of the ET-Plus device. *See, e.g.*, Fed. Highway

Admin., Background and Guidance on Requesting Federal Highway Administration Acceptance of Highway Safety Features, at http://www.fhwa.dot.gov/legsregs/directives/policy/ra.htm ("Any deliberate misrepresentation or withholding of the conditions of FHWA's acceptance of a feature by the supplier of a feature will be cause for withdrawal of acceptance."). Instead, it confirmed before trial that the ET-Plus device is, and has always been, eligible for federal reimbursement.

The relator's disagreement with that conclusion does not support liability under the False Claims Act, even if Trinity failed to comply with a federal regulation. Congress did not intend the Act to punish regulatory violations, let alone permit qui tam relators to challenge government policies in court. *See, e.g.*, *Rostholder*, 745 F.3d at 702 ("Were we to accept relator's theory of liability based merely on a regulatory violation, we would sanction use of the FCA as a sweeping mechanism to promote regulatory compliance, rather than a set of statutes aimed at protecting the financial resources of the government from the consequences of fraudulent conduct."); *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532 (6th Cir. 2012) ("The False Claims Act is not a vehicle to police technical compliance with complex federal regulations."); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011) ("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." (quoting *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1222 (10th Cir. 2008))); *United*

States ex rel. Vigil v. Nelnet, Inc., 639 F.3d 791, 795 (8th Cir. 2011) ("The FCA is not concerned with regulatory noncompliance."); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe."); *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) ("[The False Claims Act] does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("Mere regulatory violations do not give rise to a viable FCA violation.").

As this case demonstrates, Congress's assignment of federal enforcement power to private individuals creates an inherent risk of abuse. The Supreme Court has noted that "qui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Congress intended the False Claims Act to harness relators' self-interest for the benefit of the public. As one member of Congress explained, the qui tam provisions of the Act reflect "the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue.'" Cong.

Globe, 37th Cong., 3d Sess. 955–56 (1863), *quoted in United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 293 (5th Cir. 1999). Congress accepted the risk of delegating enforcement authority—and the name of the United States—to private relators because it presumed that their private interests would align with the public's interest in preventing the loss of public money and property, resulting in "one of the least expensive and most effective means *of preventing frauds on the Treasury*." *Hess*, 317 U.S. at 541 n.5 (emphasis added).

Because relators are subject to little oversight, particularly when the United States does not participate in litigation, courts must enforce statutory limits to ensure that the Act is applied to further Congress's purpose of preventing fraud against the government. Litigants who wield the federal enforcement power are typically subject to safeguards against the temptation "to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client." *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 805 (1987). For example, a personal financial interest prohibits an executive branch officer or employee from pursuing a claim against a private entity such as Trinity. 18 U.S.C. § 208. Not so with qui tam relators, who are neither motivated by the public interest nor bound to pursue it.

The potential for abuse of federal enforcement power is highest when a qui tam relator's interest does not align with the interest of the United States. That is the case here. The federal agency responsible for approving highway

safety devices has determined that the ET-Plus device meets federal standards and qualifies for reimbursement. The relator's claim rests on the contrary premise that the ET-Plus device falls short of federal standards. By submitting that dispute to a jury, then refusing to enter judgment for Trinity, the district court sanctioned the relator's misuse of the False Claims Act to overturn the United States' own regulatory judgment. Congress did not delegate the federal government's enforcement authority to enable individuals to oppose the United States.

When a qui tam relator takes a position contrary to the federal government, pursuit of its claim no longer serves Congress's purpose. For that reason, a federal agency's determination that an alleged false statement did not fraudulently deprive the United States of money or property should preclude liability under the False Claims Act.

II. The District Court's Application Of The False Claims Act Raises Serious Constitutional Questions.

The dispute between the relator and the federal government in this case raises a serious constitutional question about the False Claims Act, at least as applied to cases involving a similar conflict of opinion. If the relator's standing to sue depends on an injury to the United States, but the United States disclaims any injury, it would seem to follow that the relator lacks standing. The Court need not resolve that constitutional question here, but it should avoid it by interpreting the False Claims Act in a manner consistent with the purpose of the statute.

Qui tam relators suffer no personal injury sufficient to give them standing in their own right. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court recognized that "[a] *qui tam* relator has suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." 529 U.S. at 773. That would ordinarily deprive the qui tam relator of standing, and the federal court of jurisdiction, for lack of a justiciable case or controversy. As this Court has recognized, "An uninterested third party ordinarily cannot seek relief for the United States' injuries suffered at the hands of another." *Foulds*, 171 F.3d at 282.

The Supreme Court nevertheless held, in *Stevens*, that a qui tam relator has standing because "the assignee of a claim has standing to assert the injury in fact suffered by the assignor," and the False Claims Act "effect[s] a partial assignment of the Government's damages claim." 529 U.S. at 773. Thus if a qui tam relator has standing, it must be because the United States has suffered an injury. *See id.* at 774; *see also* Charles Alan Wright, et al., Federal Practice and Procedure § 3531.13 (3d ed.) (contending that qui tam statues "enable a private party to invoke the standing of the government to collect a civil penalty").

That logic no longer holds when the United States—the putative assignor of the fraud claim—determines that it has not been defrauded. The False

Claims Act permits any person to bring a civil action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). When the United States disclaims any injury, the relator can no longer purport to bring his claim "for the United States Government." In that case, the relator is left to bring a civil action only "for the person," but the relator has no standing in his own right because he has suffered no injury in fact. *Cf. Allen v. Wright*, 468 U.S. 737, 754 (1984). The assignment theory cannot explain how a private relator can satisfy Article III when the government expressly denies that it has suffered any loss of money or property.

The FHWA's official position in this case severs the link between the relator's claim and the United States' interest. Even if qui tam relators have standing when the United States declines to intervene, *cf. Foulds*, 171 F.3d at 294 (holding that the Eleventh Amendment bars suits against States under the False Claims Act when the federal government declines to intervene), the necessary elements of Article III standing disappear when the United States expressly disclaims any injury. If a qui tam relator's Article III standing depends on "the concrete adversarial relationship between the defendant and the United States created by the defendant's alleged invasion of the United States' legal interests," Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 383 (1989), the qui tam relator must lack standing when no such adversarial relationship exists. To the extent the Act purports to grant

private relators a cause of action on behalf of the United States in those circumstances, it raises a serious question under Article III. At the very least, the district court should have interpreted the statute to avoid that question.

The unusual circumstances of this case do not necessarily cast doubt on the False Claims Act's facial validity—the question is not whether "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it." *Hess*, 317 U.S. at 542. But the relator's fundamental disagreement with the United States does raise a serious question about the Act's validity when it is applied contrary to the expressed interest of the federal government. The question is whether the federal executive has the power to determine for itself whether a burden has been fraudulently imposed upon the United States the first place. This Court should avoid that question by adhering to the letter and spirit of the False Claims Act and extending liability no further than necessary to prevent fraud on the United States.

Conclusion

The Court should reverse the judgment of the district court.

Respectfully submitted.

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Certificate of Service

On March 28, 2016, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 3195 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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