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
Civil Action No. 2:12-CV-0089

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, SUPPORTING REVERSAL

Richard A. Samp
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

March 28, 2016

CERTIFICATE OF INTERESTED PERSONS

No. 15-41172

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

Plaintiff/Relator-Appellee,

v.

TRINITY INDUSTRIES, INC.; TRINITY HIGHWAY PRODUCTS, LLC,

Defendants-Appellants.

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Defendants-Appellants, except for the following listed persons and entities. These representations are made in order that the judges of this Court may evaluate possible disqualification.

1. The Washington Legal Foundation (WLF), a proposed *amicus curiae*. WLF is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

2. Richard A. Samp and Cory L. Andrews are counsel for WLF in this matter:

Richard A. Samp
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302

/s/ Richard A. Samp
Richard A. Samp
Counsel for amicus curiae

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. RELATOR FAILED TO ESTABLISH THAT ANY FALSE RECORD OR STATEMENT BY TRINITY WAS "MATERIAL" TO FHWA's DECISION TO REIMBURSE STATE DOTs 10

A. The District Court Improperly Discounted Statements by Senior Government Officials that Trinity's Allegedly False Statements Did Not Affect Their Determination that the ET-Plus Was Eligible for Federal Reimbursement 10

B. Harman's Allegation That Trinity Continues to Defraud FHWA Is Insufficient to Establish Materiality 16

C. Serious Constitutional Issues Would Be Implicated Were the FCA Interpreted as Permitting Relators to Assert Standing on the Basis of Injuries Whose Existence Is Denied by Federal Officials 20

II. RELATOR FAILED TO DEMONSTRATE THAT ANY OF THE CLAIMS PAID BY THE FEDERAL GOVERNMENT WERE "FALSE OR FRAUDULENT" 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Allison Engine Co. v. United States ex rel. Wilson,
559 U.S. 280 (2008) 1
Astra USA Inc. v. Santa Clara County,
131 S. Ct. 110 (2011) 18
Buckman Co. v. Plaintiffs' Legal Committee,
531 U.S. 341 (2001)) 7, 17
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trade Council, 485 U.S. 568 (1988) 25
Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010) 1
In re: Trinity Industries, Inc.,
No. 14-41067 (5th Cir., Oct. 10, 2014) 13
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 22
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 22
United States v. Southland Mgmt. Corp.,
326 F.3d 669 (5th Cir. 2003) 13
United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.,
764 F.3d 699 (7th Cir. 2014) 28
United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.,
543 F.3d 1211 (10th Cir. 2008) 28
United States ex rel. Marshall v. Woodward, Inc.,
812 F.3d 556 (7th Cir. 2015) 14, 15, 16
United States ex rel. Spicer v. Westbrook,
751 F.3d 354, 365-66 (5th Cir. 2014) 26, 27, 29
United States ex rel. Steury v. Cardinal Health, Inc.,
625 F.3d 262 (5th Cir. 2010) ["*Steury I*"] 26, 28
United States ex rel. Steury v. Cardinal Health, Inc.,
735 F.3d 202 (5th Cir. 2013) 28

Page(s)

United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.,
125 F.3d 899 (5th Cir. 1998) 26
United States ex rel. Wall v. Circle C Construction,
___ F.3d ___, 2016 WL 423750 (6th Cir., Feb. 4, 2016) 24
United States ex rel. Willard v. Human Health Plan of Texas,
336 F.3d 375 (5th Cir. 2003) 23
Universal Health Services, Inc. v. United States ex rel. Escobar,
cert. granted, 136 U.S. 582 (2015) 1
Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 8, 21, 22, 27
Whitmore v. Arkansas,
495 U.S. 149 (1990) 21

Statutes, Regulations, and Constitutional Provisions:

U.S. Const., art. III, § 2 . . . . . 20, 21, 22

False Claims Act (FCA),
31 U.S.C. § 3729 *et seq* . . . . . *passim*
31 U.S.C. § 3729(a)(1)(B) 5, 6, 10, 25, 27
31 U.S.C. § 3730(b)(1) 22
31 U.S.C. § 3729(b)(4) 10, 16
31 U.S.C. § 3730(b)(4) & (c)(2)(A) 20

Rev. Stat. § 3490 (1874) 27

Rev. Stat. § 5438 (1874) 27

Pub. L. No. 97-258, § 3729, 96 Stat. 877, 978 27

23 C.F.R. § 630.112(c) 28

49 C.F.R. Part 29 19

Page(s)

Miscellaneous:

H.R. Rep. No. 97-651 (1982) 27

Report 350, National Cooperative Highway Research Program . . 3, 5, 9, 10, 28, 29

FHWA 1997 Policy Memorandum 9, 10

Federal Rule Civil Procedure 50(b) 5, 13

Federal Rule Civil Procedure 59 5

INTERESTS OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases concerning the proper scope and application of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*. *See, e.g., Universal Health Services, Inc. v. United States ex rel. Escobar, cert. granted,* 136 U.S. 582 (2015); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 128 U.S. 2123 (2008).

WLF does not condone fraud against the United States, however it may occur. WLF is concerned, however, that excessive FCA liability in recent decades has spawned abusive litigation against businesses, both large and small, to the detriment of free enterprise, employees, shareholders, and consumers. The judgment below, by imposing an unprecedented $663 million in liability on defendants in a case where the government has repeatedly insisted that it was never

---

[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties in the case have consented to the filing of this brief.

defrauded, threatens to further exacerbate the proliferation of abusive litigation under the FCA. Under such circumstances, where the government is entirely satisfied that it received the full benefit of its bargain, opportunistic relators should not be permitted to obtain enormous treble-damage windfalls under the FCA's *qui tam* provisions.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Appellants. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Appellant Trinity Highway Products, LLC, a subsidiary of Appellant Trinity Industries, Inc. (collectively, "Trinity), is the manufacturer of a highway guardrail "end terminal" system known as "ET-Plus." The ET-Plus is designed to absorb energy when a car crashes into a highway guardrail, thereby helping to reduce the risk of injury. On January 18, 2000, the ET-Plus was accepted by the Federal Highway Administration (FHWA) for use on the National Highway System. For the past 16 years, FHWA has not wavered from its determination that the ET-Plus is eligible for federal-aid reimbursement.

In 2005, Trinity modified the ET-Plus. The modified version was successfully crash-tested in May 2005, but only a portion of the changes were

explicitly called to FHWA's attention when Trinity reported the results of the crash tests to FHWA. In particular, Trinity did not expressly report that it had reduced the width of the ET-Plus guide channels from 5" to 4". After reviewing the crash test results, FHWA wrote to Trinity on September 2, 2005 and stated that Trinity's product continued to be eligible for federal-aid reimbursement.

Relator Joshua Harman (the manufacturer of a rival "end terminal" system) became aware of the details of the 2005 changes in the course of patent infringement litigation between himself and Trinity. He brought his information to the attention of FHWA and charged that Trinity was defrauding the United States by certifying that the ET-Plus was compliant with Report 350 of the National Cooperative Highway Research Program (NCHRP) when, in fact, the product being marketed was materially different from (and less safe than) the ET-Plus system that had been reviewed by FHWA.

FHWA fully investigated and rejected Harman's claims. A June 17, 2014 memorandum from the Director of FHWA's Office of Safety Technologies stated that FHWA's September 2, 2005 letter to Trinity "is still in effect and the ET-Plus w-beam guardrail end terminal became eligible on that date and continues to be eligible for Federal-aid reimbursement." The memorandum concluded that the ET-Plus with the 4" guide channels was, in fact, successfully crash tested in May 2005

and "became eligible for Federal reimbursement" on September 2, 2005. The Director concluded, "An unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today."

The U.S. Department of Justice supported FHWA's determination. Harman in March 2014 sought the deposition testimony of three FHWA employees, in an effort to demonstrate that Trinity was continuing to defraud FHWA and thus that any FHWA expressions of continued support for the ET-Plus should not be accepted as authoritative. In a June 17, 2014 email to all counsel in this case that also attached FHWA's June 17 memorandum, DOJ rejected the deposition request. DOJ asserted that FHWA's conclusion that the ET-Plus continued to be eligible for federal-aid reimbursement "obviate[d] the need for any sworn testimony from any government employee." Despite having been fully briefed by Harman regarding his allegations against Trinity, the federal government to this day continues to reimburse state DOTs for ET-Plus systems installed on federal highways. FHWA reviewed post-trial crash testing and confirmed that the ET-Plus with 4" guide channels presents no safety concerns.

Trial Proceedings. Harman filed suit against Trinity under the False Claims Act in March 2012 in the Eastern District of Texas, Marshall Division. His theory

at trial was that Trinity had violated 31 U.S.C. § 3729(a)(1)(B), which subjects to FCA liability anyone who "knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim." Harman alleged that Trinity's "false record(s) or statement(s)" consisted of certifications that the ET-Plus complies with NCHRP Report 350. He alleged that the "false or fraudulent claim[s]" were claims paid by the federal government for ET-Plus systems because (according to Harman) the systems Trinity sold were not eligible for reimbursement.

Following a trial, the jury awarded $175 million in damages against Trinity. The trial judge entered judgment against Trinity for $663 million ($525 million in treble damages and a $138 million civil penalty). The judge also denied Trinity's motions for judgment as a matter of law (Rule 50(b)) and for a new trial (Rule 59).

The judge rejected Trinity's Rule 50(b) assertion that any false record or statement was not "material" to the payment of federal claims in light of FHWA's conclusion (in its June 17, 2014 memorandum) that "[a]n unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005." The judge discounted that conclusion because, he ruled, FHWA reached its conclusion based on "incomplete, misleading, and even false information" from Trinity. Slip op. at 31. He ruled that when a conclusion by the federal government

that it has not been defrauded is itself the product of a contractor's fraud, that conclusion does not preclude FCA liability because that "would effectively turn the FCA on its head." *Id.* at 36.

SUMMARY OF ARGUMENT

In order to establish an FCA violation, Harman was required to demonstrate that Trinity: (1) "knowingly" (2) made a "false record or statement" that was (3) "material" (4) to a "false or fraudulent claim" paid by the federal government. 31 U.S.C. § 3729(a)(1)(B). WLF agrees with Trinity that Harman demonstrated none of those four elements of his cause of action and thus that the judgment must be reversed. This brief focuses on two of those elements: (1) Harman's failure to demonstrate that any false record or statement by Trinity was *material* to FHWA's decision to reimburse state DOTs for installing ET-Plus systems on federal highways; and (2) Harman's failure to demonstrate that any of the claims paid by the federal government were "false or fraudulent."

First, the June 17, 2014 FHWA memorandum and the June 17, 2014 DOJ email establish that Trinity's allegedly false statements were not "material" to the federal government's decision to reimburse state DOTs. Those documents were prepared after federal officials sat down with Harman, heard the entire litany of fraud allegations against Trinity, and investigated those allegations. Despite those

allegations, federal officials concluded not only that the ET-Plus system being marketed by Trinity was eligible for federal reimbursement but also that it had been continuously eligible throughout the years at issue in this lawsuit. In other words, because federal officials determined that they had properly provided reimbursement (and would continue to do so) despite their knowledge of Harman's allegations that Trinity knowingly made false statements to its customers, any such statements were not "material" to the federal government's decision to provide reimbursement.

Harman should not be permitted to manufacture materiality by speculating that federal officials might have arrived at a different conclusion had Trinity not continued to deceive them. That argument has no logical stopping point. If we accept Harman's theory, no decision by Executive Branch officials can ever be accepted at face value, because an FCA relator can always assert that administrators' umpteenth rejection of fraud allegations was itself the product of continued deception by the alleged perpetrator of the fraud. The U.S. Supreme Court has repeatedly cautioned against permitting litigants to second-guess federal agency decisionmaking based on fraud-on-the-agency allegations. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348-51 (2001). Permitting such claims creates a serious danger of undermining the ability of

federal officials to carry out their job functions—as evidenced by Harman's demand that multiple FHWA officials submit to depositions to explain their continued support of Trinity's right to reimbursement.

Indeed, in light of FHWA's adherence to its position that any allegedly false statements were not material to its determination to reimburse the costs of installing ET-Plus systems on federal highways, Harman's Article III standing to maintain this lawsuit is subject to serious question. Harman does not assert, of course, that he personally suffered an injury in fact as a result of Trinity's alleged FCA violations. Rather, he asserts that *the federal government* has been injured and that the False Claims Act "effect[s] a partial assignment of the Government's damages claim" to him. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). But when, as here, senior government officials have declared unequivocally that the federal government has not been injured, there is no injury claim to be assigned. Serious constitutional issues would be implicated if the FCA were interpreted as permitting a plaintiff to assert standing based on an injury claim allegedly assigned to him by an individual/entity who denies that it was injured.

Second, Harman has failed to demonstrate that any of the claims paid by the federal government were "false or fraudulent." *At most*, Harman demonstrated that

Trinity's conduct implicated two agency guidance provisions: (1) a NCHRP Report 350 provision, which states that at least some (but not all) changes in a previously evaluated roadside safety device trigger a retesting requirement; and (2) FHWA's 1997 Policy Memorandum, which states that FHWA has "the right to modify or remove its acceptance" if it determines that "the device being marketed is *significantly different* from the version that was crash tested" (emphasis added). But as this Court has repeatedly emphasized, the False Claims Act is designed to root out *actual fraud*, not to police compliance with every contractual or regulatory provision. For that reason, any regulatory violations do not create "false or fraudulent" claims in the absence of evidence that FHWA deemed compliance a prerequisite to payment of claims.

No such indication exists in this case. Indeed, while a federal regulation states explicitly that reimbursement is unauthorized if certain specified requirements are not satisfied, compliance with Report 350 and the 1997 Policy Memorandum are not among those specified requirements.

ARGUMENT

I. RELATOR FAILED TO ESTABLISH THAT ANY FALSE RECORD OR STATEMENT BY TRINITY WAS "MATERIAL" TO FHWA's DECISION TO REIMBURSE STATE DOTs

The district court ruled that Trinity violated 31 U.S.C. § 3729(a)(1)(B), which subjects to FCA liability anyone who "knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim." Reversal is mandated because there is no evidence that any false statements by Trinity were "material."[2] That is, despite being informed repeatedly by Relator Joshua Harman of the basis for his claim that Trinity deceived FHWA and others regarding the ET-Plus system it was marketing, federal officials have been unwavering in their assertion that the ET-Plus is, and has always been, eligible for federal reimbursement.

A. The District Court Improperly Discounted Statements by Senior Government Officials that Trinity's Allegedly False Statements Did Not Affect Their Determination that the ET-Plus Was Eligible for Federal Reimbursement

Trinity's allegedly false statements are not actionable unless they qualify as "material"—that is, "capable of influencing" the federal government's decision to

[2] The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing" the government's payment decision. 31 U.S.C. § 3729(b)(4).

reimburse the cost of installing ET-Plus systems on federal highways.

The unrebutted evidence at trial demonstrated that the allegedly false statements were not deemed material by government officials. On numerous occasions, Harman has shared with federal officials his contention that Trinity has spoken falsely about ET-Plus changes that it adopted in 2005. The proof is in the pudding: despite their full knowledge of Harman's allegations, senior government officials continue to declare that the ET-Plus is eligible for federal reimbursement and has been continuously eligible since 2005.

As noted above, the absence of materiality is demonstrated both by the June 17, 2014 FHWA memorandum and the June 17, 2014 DOJ email. The memorandum could not have been clearer; it concluded (after a full review of Harman's allegations, including allegations that Trinity had issued false statements) that "[a]n unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET-Plus continues to be eligible today." In other words, Harman's allegations were insufficient to cause FHWA to change its determination that the costs of installing ET-Plus systems on federal highways had been, and continue to be, properly reimbursed.

The June 17, 2014 DOJ email—which forwarded the FHWA memorandum to counsel for all the parties—reinforces that conclusion. When FHWA continued

to approve reimbursement for installation of the ET-Plus even after Harman had laid out to FHWA officials the full litany of his fraud allegations, Harman sought to depose three FHWA officials in connection with this lawsuit—presumably in an effort to demonstrate that FHWA did not understand the full scope of Trinity's alleged fraud. The June 17, 2014 DOJ email denied the deposition request. DOJ asserted that FHWA's conclusion that the ET-Plus continued to be eligible for federal-aid reimbursement "obviate[d] the need for any sworn testimony from any government employee." In other words, as far as DOJ and DOT officials were concerned, the FHWA's statements not only reaffirmed the eligibility of the ET-Plus, but also conclusively rejected Harman's fraud allegations.

Indeed, a panel of this Court has offered a similar interpretation of the June 17, 2014 FHWA memorandum. When the district court in 2014 (following FHWA's issuance of its memorandum) denied Trinity's motion for judgment as a matter of law and persisted with plans to conduct a second trial, Trinity sought a writ of mandamus from this Court. Trinity argued that the FHWA memorandum demonstrated as a matter of law that FHWA did not consider any false statements by Trinity to be material to its reimbursement decision. Although the panel denied the mandamus petition "in light of the extraordinary nature of the relief sought," it nonetheless felt "compelled to note . . . that this is a close case" given the evident

absence of materiality. *In re Trinity Industries, Inc.*, No. 14-41067 (5th Cir., Oct. 10, 2014), Slip op. at 1. The panel explained:

> This court is concerned that the trial court, despite numerous timely filings and motions by the defendant, has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law. 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 to be sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims. While we are not prepared to make the findings required to compel certification for interlocutory review by mandamus, a course that seems prudent, *a strong argument can be made that the defendant's actions were neither material* nor were any false claims based on false certifications presented to the government. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 676-77 (5th Cir. 2003) (holding that no false claims had been filed based in-part on the agency's awareness of the regulatory noncompliance and continued adherence to the contract).

Id. at 1-2 (emphasis added).

The district judge's post-trial efforts to explain away the significance of the June 17, 2014 FHWA memorandum are unavailing. In his order denying Trinity's renewed Rule 50(b) motion for judgment as a matter of law, the district judge stated that the memorandum "was based on incomplete, misleading, and even false information" and asserted that FHWA had arrived at its reimburseability determination based *solely* on representations made to it by Trinity. Slip op. 31-32. That assertion is a patent misreading of the FHWA memorandum, which stated

explicitly that its determination was based on review of "all" available evidence. That evidence included far more than representations submitted by Trinity. In particular, it included an independent evaluation of the extensive information submitted by Harman, including his 109-page PowerPoint presentation, his complaint in this case, and his *Touhy* request, as well as all documents from Trinity's 2005 submission to FHWA.

The Seventh Circuit recently concluded, in a case highly analogous to Harman's, that an FCA relator cannot establish materiality when senior government officials determine that the allegedly false statements were not a factor in the federal government's decision to pay a claim. The relators in *United States ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556 (7th Cir. 2015), alleged that a military contractor falsely certified that helicopter engine parts complied with applicable contract specifications. In reviewing the district court's grant of summary judgment, the appeals court accepted as true the relators' allegations that the certification was false. It nonetheless affirmed on the ground that the relators failed to establish materiality—the government "thoroughly investigated" the allegedly false statements and determined that they were not of sufficient importance to warrant denial of payment. 812 F.3d at 563-64. The appeals court rejected the relators' claim that a false statement on a certification of compliance

was, by definition, "material," explaining: "Following plaintiffs' logic, any false statement contained in a certificate, no matter how inconsequential, would be material. This would nullify the materiality requirement and make even 'minor technical violations' material." *Id.* at 563.

The Seventh Circuit emphasized that the materiality question should "focus on whether the false statement itself, rather than the certificate or document containing the statement, is capable of influencing the government decision." *Ibid.* After a thorough review, government investigators concluded that the allegedly false statement—that the defense contractor's "Grade A joint" had been regularly inspected by x-ray— did not compromise the overall quality of the helicopter parts supplied by the contractor and thus did not warrant denial of payment. *Ibid.* In light of "the government's actual conduct"—including the fact that "[t]o this day, the government continues to pay for and use" the defense contractor's helicopter parts—the Seventh Circuit determined as a matter of law that the allegedly false statements were not "material." *Ibid.*

Similarly, senior FHWA officials have determined, following a thorough review of Harman's allegations, that the ET-Plus system remained reimburseable at all times—despite their complete awareness that Trinity in 2005 did not disclose all changes in the ET-Plus and that FHWA did not become fully aware of those

changes until 2012. Moreover, the government *to this day* continues to reimburse the costs of installing ET-Plus systems on federal highways. Under those circumstances, the Seventh Circuit's *Marshall* decision dictates a finding as a matter of law that any false statements/omissions by Trinity were not material.

B. Harman's Allegation That Trinity Continues to Defraud FHWA Is Insufficient to Establish Materiality

Despite the finding of senior FHWA and DOJ officials that Harman's "false record or statement" claims are insufficiently material to warrant revoking the ET-Plus reimburseability determination, Harman asserts that the federal courts ought to be permitted to second-guess that determination because it was the product of continued fraud by Trinity. Nothing in the language or structure of the FCA supports such an interpretation. We know that the false statements alleged by Harman are not "capable of influencing" the government's payment decision, 31 U.S.C. § 3729(b)(4), because senior government officials have said precisely that.

Moreover, Harman's argument has no logical stopping point. If we accept Harman's interpretation of the FCA, no decision by Executive Branch officials can ever be accepted at face value. If—in response to an FCA relator's assertion that a senior government official's ruling against the relator was the product of the contractor's fraud—the government undertakes a second review and again rejects

the relator's position, nothing prevents the relator from challenging the second review on identical grounds. And so on.

The U.S. Supreme Court has repeatedly cautioned against permitting litigants to second-guess federal agency decisionmaking based on fraud-on-the-agency allegations. In *Buckman Co.*, the Court barred private litigants from challenging a manufacturer's right to market a medical device by asserting that the manufacturer had obtained federal marketing authority by defrauding the Food and Drug Administration. The Court explained that:

> [T]he conflict [between the FDA's own efforts to police fraud and suits by private litigants alleging fraud against the FDA] stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims.

Buckman, 531 U.S. at 348. *See also, id.* at 354 (Stevens, J., concurring in judgment) (private suits alleging that FDA product approval decision were procured by fraud are unauthorized unless FDA later determines that fraud occurred).

Similarly, the Court held that private "340B entities" (health care facilities granted special status under federal law because they provide services to low-income individuals) are barred from suing drug companies that allegedly defrauded

the federal government by overcharging the 340B entities—allegedly in violation of pricing agreements entered into between drug companies and the federal government. *Astra USA Inc. v. Santa Clara County*, 131 S. Ct. 110 (2011). The Court concluded that federal common law provided no private right of action to 340B entities to police fraud against the federal government, in substantial part because such suits would interfere with the ability of federal officials to administer federal health programs in the manner they deemed most appropriate:

> Far from assisting HHS, suits by 340B entities would undermine the agency's efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis. Recognizing the County's right to proceed in court could spawn a multitude of dispersed and uncoordinated lawsuits by 340B entities. With HHS unable to control the rein, the risk of conflicting adjudications would be substantial.

Id., 131 S. Ct. at 120.

Similar considerations counsel against permitting Harman to second-guess the considered judgment of senior government officials that allegedly false statements by Trinity were not material to their determination that the costs of installing ET-Plus systems were eligible for federal reimbursement. Federal officials examining misconduct allegations against a contractor have numerous enforcement options available to them, ranging from deeming any misconduct immaterial to filing their own FCA suit. Other options include filing a breach of

contract action, or taking no remedial action while debarring the contractor from future participation in Department of Transportation programs. *See* 49 C.F.R. Part 29. Permitting a relator to proceed with an FCA suit despite an FHWA determination that any false statements by a contractor were not material would interfere with FHWA's authority to adopt the most appropriate response to fraud allegations.

Permitting such interference has easily foreseeable adverse consequences for federal transportation policy. For example, Trinity's ability to continue to produce guardrail "end terminal" systems will be called into serious question if the judgment below is affirmed. Because Trinity is one of the largest producers of such systems, any decision by Trinity to cease production would produce substantial disruptions in the market—with likely adverse effects on safety and increased expenditures by both federal and state governments.

Moreover, authorizing FCA relators to second-guess a non-materiality determination by federal government officials will inevitably embroil those officials in the underlying litigation and force them to devote their limited resources to responding to the litigants' concerns. For example, after he became dissatisfied with the federal government's response to his fraud allegations, Harman sought to depose three FHWA officials, presumably in an effort to try to

demonstrate that Trinity was continuing to defraud FHWA. Nothing in the text of the FCA suggests that Congress authorized such disruptions.[3]

C. Serious Constitutional Issues Would Be Implicated Were the FCA Interpreted as Permitting Relators to Assert Standing on the Basis of Injuries Whose Existence Is Denied by Federal Officials

The district court's dramatically expanded interpretation of the FCA is particularly troubling because it calls into question the statute's constitutionality as applied to this case. Article III, § 2 of the Constitution limits federal court jurisdiction to the claims of those who can demonstrate injury in fact that is directly traceable to the defendant's alleged misconduct.

Harman does not assert that he suffered any personal injury as a result of Trinity's alleged violation of the FCA; rather, he is suing as the assignee of injuries allegedly suffered by the federal government. But no assignment can occur when, as here, the federal government contends that it has suffered no proprietary injury. Accordingly, Harman's asserted interpretation of the FCA—that FCA relators may second-guess government non-materiality determinations—would extend the scope

---

[3] The FCA authorizes the federal government to take over prosecution of a lawsuit brought by a *qui tam* relator and subsequently dismiss the action. *See* 31 U.S.C. §§ 3730(b)(4) & (c)(2)(A). But nothing in the FCA suggests that when (as here) the federal government elects not to take over the action, a federal court is free to re-examine non-materiality determinations by senior government officials—thereby inevitably embroiling them in the very litigation that the government determined it would stay out of.

of the FCA beyond the scope of Article III. To avoid this serious constitutional issue, the Court should apply the doctrine of constitutional avoidance to interpret the FCA as urged by Trinity: allegedly false statements cannot be deemed "material" for FCA purposes when senior Executive Branch officials determine that the statements have no impact on government payment decisions.

Article III, § 2 of the Constitution extends the judicial power of the United States to only "Cases" and "Controversies." U.S. Const. art. III, § 2. Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A plaintiff in federal court must meet three requirements to satisfy Article III standing: injury in fact, causation, and redressability. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000).

For purposes of establishing its own standing, the United States can assert two types of injury to itself arising from violations of the FCA. First, it can assert "an injury to its sovereignty arising from violation of its laws." *Ibid.* Second, it can assert "the proprietary injury arising from the alleged fraud"; *e.g.*, it paid more for goods or services than it would have paid in the absence of the alleged fraud. *Ibid.*

The FCA includes a unique *qui tam* provision that authorizes private persons

to bring a civil action for FCA violations "in the name of the Government." 31 U.S.C. § 3730(b)(1). The Supreme Court held in *Vermont Agency* that such persons possess Article III standing to file suit in federal court to redress proprietary injuries to the United States. 529 U.S. at 773. The Court explained that "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of *the government's damages claim*." *Ibid* (emphasis added).

Vermont Agency did not construe the FCA as assigning the right to seek redress for injury to the government's sovereign interests, nor did the Court suggest that such an assignment would even be permissible.[4] Rather, by cabining the scope of the FCA's assignment to a partial interest in the government's "damages" claim, the Court necessarily held that the FCA assigns no more than the right to seek redress for injury to the government's proprietary interests.

---

[4] The government's sovereign interest in enforcing its laws is incapable of being assigned because that interest is, by definition, the "undifferentiated public interest" in enforcement of the laws, which the Supreme Court has rejected as a basis for private party standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998) ("In requesting [civil penalties payable to the Treasury], respondent seeks not remediation of its own injury ... but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the statute] .... This does not suffice [to establish standing].") (quoting *Lujan*, 504 U.S. at 577)).

Accordingly, Harman possesses Article III standing if, but only if, Trinity's allegedly false statements caused the federal government to suffer a proprietary injury. *See U.S. ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (in FCA suits, "the government must suffer an injury in fact for there to be standing"). Yet, as a result of the June 17, 2014 FHWA memorandum, we know that the federal government has concluded that it suffered *no* proprietary injury. FHWA determined, after thoroughly reviewing Harman's fraud allegations, that all ET-Plus systems installed since 2005 had been properly reimbursed—thereby precluding any possibility that the federal government had suffered any proprietary injury when it paid for those systems. Accordingly, Harman has suffered no injury in fact, because his sole basis for claiming injury derives from an alleged assignment from a party that has determined that it suffered no proprietary injury.

The absence of any government proprietary injury—measured by the difference in value (if any) between what it paid and the value of installed ET-Plus systems—is perhaps best illustrated by: (1) the government's determination that it will continue to provide reimbursement for new ET-Plus installations; and (2) the absence of any effort to remove or seek repayment for previously installed ET-Plus systems on the basis of alleged deficiencies. When the government continues to

use purchased goods without complaint regarding the quality of those goods, federal courts have routinely concluded that the government has suffered no proprietary injury.

For example, the Sixth Circuit recently concluded that even though federal officials alleged that an electrical contractor providing services to the federal government had fraudulently misrepresented the wage scales of its employees, the government suffered *no* proprietary injury (for FCA purposes) apart from the underpayment to employees, in the absence of proof that the electrical work was substandard. *United States ex rel. Wall v. Circle C Construction, LLC*, ___ F.3d ___, 2016 WL 423750 (6th Cir., Feb. 4, 2016). The government contended that its injury was the full price it paid for electrical work at newly constructed government warehouses. The Sixth Circuit disagreed, responding, "The problem with that theory is that, in all of these warehouses, the government turns on the lights every day. . . . The damages the government seeks to recover here are fairyland rather than actual." *Id*. at *1-*2.

Harman's alleged injury claims are similarly "fairyland" in nature. When, as here, federal officials have determined that they are satisfied that all claims were properly paid, the federal government has suffered no proprietary injury. Because Harman is an assignee and cannot (by definition) have suffered more injury than

his assignor, Harman has suffered no injury and thus lacks standing—regardless that he may disagree with the federal government's determination that it was not injured.

Permitting this FCA claim to go forward by accepting Harman's interpretation of "material" would call into question the FCA's constitutionality as applied to this case—because it would permit a relator to pursue an FCA claim despite lacking a plausible injury claim. Accordingly, the Court should apply the doctrine of constitutional avoidance to interpret the FCA as precluding a relator from second-guessing a determination by senior government officials that any alleged false statements were not material to the payment decision. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

II. RELATOR FAILED TO DEMONSTRATE THAT ANY OF THE CLAIMS PAID BY THE FEDERAL GOVERNMENT WERE "FALSE OR FRAUDULENT"

Harman also failed to demonstrate a second prerequisite of his FCA claim under 31 U.S.C. § 3729(a)(1)(B): that Trinity's conduct caused the federal government to pay a "false or fraudulent claim." Harman introduced no evidence that there was anything "false or fraudulent" about the reimbursement claims submitted to the federal government by state DOTs. Harman contends that the ET-

Plus systems for which state DOTs sought reimbursement did not comply with FHWA regulatory requirements. But even if the Court rejects Trinity's contrary good-faith reading of relevant agency guidance, any regulatory violations do not create a "false or fraudulent claim" in the absence of evidence that FHWA deemed full compliance an absolute prerequisite to payment of claims. *See United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365-66 (5th Cir. 2014) ("[A] false certification of compliance, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance.").

Harman's claim is based on a fundamental misunderstanding of the purposes of the FCA. The language and history of the FCA make clear that the statute was intended to root out *actual fraud* against the federal government, not to police compliance with every contractual or regulatory requirement imposed on a government contractor. *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) ("*Steury I*") ("The FCA is not a general enforcement device for federal statutes, regulations, and contracts."); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1998) ("[V]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA.").

The FCA "was enacted in 1863 with the principal goal of stopping the

massive frauds perpetrated by large private contractors during the Civil War." *Vermont Agency*, 529 U.S. at 765. As initially enacted in 1863 (and re-enacted in 1874) the FCA contained both civil and criminal aspects. The criminal portion provided for up to five years' imprisonment for, *inter alia*, presenting a claim upon the Government "knowing such claim to be false, fictitious, or fraudulent," or using false certificates for the purpose of obtaining payment of such a claim. Rev. Stat. § 5438 (1874). The civil portion directly referenced the criminal portion; it provided that anyone who violated § 5438 was subject to civil liability consisting of a $2,000 fine and double the amount of damages suffered by the Government. Rev. Stat. § 3490 (1874).[5]

In light of that history, the FCA's "false or fraudulent claim" requirement cannot plausibly be understood to encompass mere contractual or regulatory violations—at least in the absence of some advance indication that the federal government deems compliance with the relevant contractual or regulatory provisions to constitute a precondition for payment. *Spicer*, 751 F.3d at 365-66;

---

[5] The civil portion continued to define prohibited conduct by explicit reference to the 1874 criminal statute until 1982. Congress recodified the FCA in 1982. Pub. L. No. 97-258, § 3729, 96 Stat. 877, 978. The textual changes were minor, however, and the House Report explained that those minor changes were not intended to be substantive. H.R. Rep. No. 97-651, at 145 (1982). The FCA has been amended several more times since 1982, but the wording of what is currently 31 U.S.C. § 3729(a)(1)(B) has not undergone significant change.

United States ex rel. Steury v. Cardinal Health, Inc., 735 F.3d 202, 206 (5th Cir. 2013); *Willard*, 336 F.3d at 382-83; *Steury I*, 625 F.3d at 269-70; *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 710-11 (7th Cir. 2014); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008).

Harman's contrary contention incorrectly presumes that the federal government is unwilling to pay any claim unless a contractor has complied with every one of the thousands of contractual and regulatory requirements potentially applicable to the contractor. But as Trinity has explained at length in its opening brief, FHWA has not indicated that compliance with Report 350 is a prerequisite of federal reimbursement. Appellants Br. 45-51. To the contrary, DOT regulations explicitly provide that a contractor may not be paid unless it complies with specified regulations, but Report 350 is not among the specified regulations. *Id.* at 49 (citing 23 C.F.R. § 630.112(c)).

Allegedly "false certifications of compliance create [FCA] liability only when certification is a prerequisite to obtaining a government benefit." *Spicer*, 751 F.3d at 365-66. Harman alleges that Trinity violated Report 350 by failing to timely disclose to FHWA the full extent of its 2005 changes to the ET-Plus. Even assuming that Trinity's failure to disclose violated Report 350 and that Trinity

inaccurately stated that it complied with Report 350, there can be no FCA liability in the absence of evidence that the parties understood that reimbursement for the cost of the ET-Plus was conditioned on compliance with the alleged timely-disclosure requirement. *See Absher*, 764 F.3d at 710-11 (relator bears burden to prove compliance is a condition of payment).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
Tel.: (202) 588-0302
Fax: (202) 588-0386
rsamp@wlf.org

Dated: March 28, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,382, not including the certificate of interested parties, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

Dated: March 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2016, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp