

**No. 22-16715**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA; STATE OF CALIFORNIA EX REL.  
TAMARA EVANS, *PLAINTIFF-APPELLANT*,  
v.  
SOUTHERN CALIFORNIA INTERGOVERNMENTAL  
TRAINING AND DEVELOPMENT CENTER,  
*DEFENDANT-APPELLEE*.

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Appeals from the United States District Court for the Eastern District of California  
Civil Case D.C. No. 2:15-cv-00619-MCE-CKD

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF  
TAXPAYERS AGAINST FRAUD EDUCATION FUND SUPPORTING  
APPELLANT**

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Taxpayers Against Fraud Education Fund (“TAFEF”) seeks leave to file a brief as *amicus curiae* in support of Relators-Appellants. The Relator-Appellant have consented to the filing of this brief. The Defendant-Appellee has not responded to TAFEF’s inquiry regarding consent. In support of its motion, TAFEF states as follows:

1. TAFEF is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the FCA, has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. TAFEF is supported by whistleblowers and their counsel, and by membership dues and foundation grants. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.<sup>1</sup>

2. TAFEF has filed *amicus curiae* briefs on important legal and policy issues in FCA cases before numerous federal courts, including the United States Supreme Court. TAFEF’s broad base of knowledge of the FCA is reflected in its many

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<sup>1</sup> In accordance with Federal Rule of Appellate Procedure 26.1, TAFEF represents that it has no parent corporations and no publicly held corporation owns ten percent or more of its stock.

publications and educational outreach. TAF publishes the False Claims Act & *Qui Tam* Quarterly Review, a quarterly law journal that provides an overview of court opinions, settlements, and other developments under the Act. Past issues of the publication are available online at [www.taf.org](http://www.taf.org).

3. TAFEF has produced and makes available a variety of other resources regarding False Claims Acts, including: Advising the *Qui Tam* Whistleblower: From Identifying a Case to Filing Under the False Claims Act; Reducing Health Care Fraud, An Assessment of the Impact of the False Claims Act; Fighting Medicare Fraud: More Bang for the Federal Buck; Reducing Medicaid Fraud: The Potential of the False Claims Act; and Reducing Medicare and Medicaid Fraud by Drug Manufacturers. Most of these publications are available online at [www.taf.org](http://www.taf.org).

4. TAFEF also presents a yearly educational conference for FCA attorneys, typically attended by more than 300 practitioners – including federal, state, and private attorneys. TAFEF collects and disseminates information concerning the FCA and *qui tam* cases and regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAFEF has also provided congressional testimony and conference presentations on the FCA.

5. TAFEF seeks leave to file an *amicus* brief to address the district court's conflation of falsity and scienter under the FCA, its improper interpretation of the

materiality under the FCA, and its erroneous interpretation of the 2009 amendments under FERA to the FCA. Each of these issues could have implications beyond this case and TAFEF believes that its brief in this case is desirable to ensure the proper and consistent interpretation of the FCA. Based on TAFEF's experience with the development of the FCA and work with practitioners and the government across a range of FCA cases, TAFEF can provide a broad perspective on the significance of these issues to the effective implementation of the FCA.

6. TAFEF's brief, which is being filed contemporaneously with this Motion on January 11, 2023, is timely submitted as Relators-Appellants' brief was filed on January 4, 2023.

7. TAFEF respectfully requests that the Motion for Leave to file an *Amicus Curiae* brief be granted.

Respectfully Submitted,

Dated: January 11, 2023

TAXPAYERS AGAINST FRAUD  
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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Corporate Disclosure Statement	v
Interest of Amicus Curiae	1
Summary of Argument	3
Argument	3
I.    Falsity and Scienter Are Distinct Elements Under the False Claims Act	3
II.   In Evaluating Materiality, the Relevant Knowledge is the Knowledge of the Federal Government Payor, Not the Knowledge of the State’s Pass-Through Entity	8
A.  The Relevant Knowledge is the Knowledge of the Federal Government Payor	9
B.  No One Factor is Determinative of Materiality	10
III.  The FERA Amendments to the False Records Provision, Now (a)(1)(B), Apply to this Case	12
Conclusion	23
Certificate of Compliance	24

## TABLE OF AUTHORITIES

### Cases

#### Page

<i>Allison Engine Co., Inc. v. U.S. ex rel. Sanders</i> , 553 U.S. 662 (2008).....	14, 19
<i>Cafasso, United States ex rel. v. General Dynamics C4 Systems, Inc.</i> , 637 F.3d 1047 (9th Cir. 2011) .....	11, 12
<i>Hopper v. Solvay Pharms., Inc.</i> , 588 F.3d 1318 (11th Cir. 2009).....	13
<i>Hughes Aircraft Co. v. United States ex rel. Schumer</i> , 520 U.S. 939, 946 (1997) .....	12
<i>McNutt ex rel. U.S. v. Haleyville Medical Supplies, Inc.</i> , 423 F.3d 1256 (11th Cir. 2005) .....	15
<i>Universal Health Services, Inc. v. United States ex rel. Escobar</i> , 579 U.S. 176 (2016).....	5, 10
<i>U.S. ex rel. Kirk v. Schindler Elevator Corp.</i> , 601 F.3d 94 (2d Cir. 2010) .....	13
<i>U.S. ex rel. Kirk v. Schindler Elevator Corp.</i> , 563 U.S. 401 (2011).....	13
<i>U.S. ex rel. Rigsby v. State Farm Fire &amp; Cas. Co.</i> , 794 F.3d 457 (5th Cir. 2015) .....	13
<i>U.S. ex rel. Sanders v. Allison Engine Co.</i> , 703 F.3d 930 (6th Cir. 2012) .....	13
<i>U.S. v. Griswold</i> , 24 F. 361 (D. Or. 1885).....	15
<i>United States ex rel. Campie v. Gilead Scis.</i> , 862 F.3d 890, 902 (9th Cir. 2017).....	4
<i>United States ex rel. Druding v. Care Alternatives</i> , 952 F.3d 89 (3 <sup>rd</sup> Cir. 2020), <i>cert. denied</i> , 114 S.Ct. 1371 (2021).....	6
<i>United States ex rel. Int’l Brotherhood of Electrical Workers, Local 98 v. The Farfield Co.</i> , 5 F.4th 315 (3rd Cir. 2021):.....	12, 13
<i>United States ex rel. Oliver v. Parsons, Co.</i> , 195 F.3d 457 (9th Cir. 1999)....	4, 5
<i>United States ex rel. Totten v. Bombardier</i> , 380 F.3d 488 (D.C. Cir. 2004).....	18
<i>United States v. Corinthian Colls.</i> , 655 F.3d 984 (9th Cir. 2011).....	4
<i>United States. ex rel. Garbe v. Kmart Corp.</i> , 824 F.3d 632 (7th Cir. 2016) .....	13
<i>United States ex rel. Winter v. Gardens Regional Hospital and Medical Center, Inc.</i> , 953 F.3d 1108, 1118 (9th Cir. 2020) .....	5

Statutes

§ 31 U.S.C. § 3729(b)(4) .....	7
31 U.S.C. § 3729(a)(1)(B) .....	11
31 U.S.C. § 3729(a)(1)(G) .....	16
31 U.S.C. § 3729 .....	14, 18
31 U.S.C. § 3729(a)(1)(A) .....	3
31 U.S.C. § 3729, et seq. ....	3
31 U.S.C. §§ 3729-3733 .....	1
31 U.S.C. § 3730(h) .....	16

Other Authorities

S. Rep. 99-345 (1986) <i>reprinted in</i> 1986 U.S.C.C.A.N. 5266, 5276 .....	4, 18
S.Rep. 111-10 (2009) .....	18
S. Rep. No. 110-507 (2008) .....	16
155 Cong. Rec. E1295-03, E1298, 2009 WL 1544226 .....	18
Pub. L. No. 111-148, §10104(j)(2), 124 Stat. 119, 901 (2010) .....	17
The False Claims Act: Fraud Against the Government	
§ 4:26 .....	19

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund (“TAFEF”) states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund (“TAFEF”) submits this brief in support of the Appellant, Tamara Evans. The plaintiff has consented to the filing of this brief. TAFEF requested consent from the defendant, but did not receive a response.<sup>1</sup>

### **INTEREST OF *AMICUS CURIAE***

TAFEF is a non-profit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

TAF takes no position on the merits of this case, but submits this *amicus* brief to address points of law in the district court’s opinion that are inconsistent with Ninth Circuit precedent and the weight of authority in other circuits and could have wide

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<sup>1</sup> No party’s counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

ranging consequences beyond this case if not corrected.

## SUMMARY OF ARGUMENT

The district court’s opinion contains several legal errors in ruling on the defendant’s motion for summary adjudication and denying the relator’s petition for rehearing. First, the district court improperly conflated falsity and scienter, which as this Court has recognized, are distinct elements in determining liability under the FCA. Second, the district court erred in determining that the relator could not establish materiality. The court considered the knowledge and actions of the state pass-through agency in determining whether violations were material to the federal government’s payment decision, rather than the knowledge and actions of the federal government payor. Finally, the district court erred in finding that the FERA amendments to the FCA do not apply to this case. Even if the claims in this case were not encompassed by the FERA amendments, the district court misinterpreted the pre-FERA FCA, which did not require claims to be submitted directly to the federal government for liability to attach.

## ARGUMENT

### **I. Falsity and Scienter Are Distinct Elements Under the False Claims Act.**

Under the FCA, 31 U.S.C. § 3729, et seq., liability attaches to a person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1)(A). As this Court has explained “the

essential elements of False Claims Act liability are: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.” *United States ex rel. Campie v. Gilead Scis.*, 862 F.3d 890, 902 (9th Cir. 2017); *see also* *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011).

Each element of a violation must be considered separately in order to establish an FCA violation, because each of the elements serves a different purpose under the Act. The falsity element “is determined by whether [the defendant’s] representations were accurate in light of applicable law.” *United States ex rel. Oliver v. Parsons, Co.*, 195 F.3d 457, 463 (9th Cir. 1999). As this Court has recognized, whether a claim is false is not determined by what the defendant knew or should have known, but by whether the claims submitted to the government reflected the government’s bargain. *Id.* (explaining that the reasonableness of a defendant’s interpretation of the law may be relevant to knowledge, but that falsity is determined by assessing the accuracy of the claims submitted); *see also* S. Rep. 99-345, at 9 (“a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation”).

If a court determines that a claim is false, it then determines whether the defendant acted “knowingly” within the meaning of the FCA. As this court has explained, “falsity is a necessary, but not sufficient, requirement for FCA liability—

after alleging a false statement, a plaintiff must still establish scienter.” *United States ex rel. Winter v. Gardens Regional Hospital and Medical Center, Inc.*, 953 F.3d 1108, 1118 (9th Cir. 2020). In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the Supreme Court emphasized the distinction between the elements of falsity and scienter, admonishing that “instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act’s materiality and scienter requirements.” *Id.* at 192 (quotations omitted); *Oliver*, 195 F.3d at 463 (explaining that the reasonableness of the defendant’s actions is not relevant to falsity).

In this case, the relator alleged that the federal government’s contract with the Commission on Peace Officer Standards and Training (“POST”) and POST’s subcontracts with the Southern California Intergovernmental Training and Development Center (“RTC”) required that the invoices submitted be based on actual costs and not budget-based. *See* Dkt. 81, Plaintiff’s Motion for Summary Adjudication, p. 1. It is undisputed that RTC submitted budget-based invoices. *Id.* The invoices, or claims for payment, are false because they do not comply with “the applicable law,” which in this case is a contract.

The district court concluded that the relator had not established *falsity* because although RTC knew that the contract with the government required billing for actual

costs (or at the very least had access to the contracts to enable it to determine what the requirements were), and RTC's own contracts with POST explicitly required billing for actual costs, POST had informed RTC that it could use budget-based billing, and that RTC believed that it could use budget-based billing, and did so for 12 years under the contract without attempting to conceal the practice. *See* Dkt. 101, Memorandum and Order Granting Defendant's Motion for Summary Adjudication, p. 15. RTC's belief about the requirements does not bear on falsity, but rather is relevant to scienter – it's awareness that the claims did not comply with the contract and were therefore false.

The scienter inquiry focuses on whether the defendant had actual knowledge that the claims were false, or acted with deliberate ignorance or in reckless disregard “of the truth or falsity of the information.” 31 U.S.C. § 3729(b)(1)(A). That is a distinct element that should not be conflated with falsity. *See United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89, 96 (3<sup>rd</sup> Cir. 2020), *cert. denied*, 114 S.Ct. 1371 (2021) (finding that the district court improperly conflated scienter and falsity by failing to find falsity where the relator failed to produce evidence of a physician's knowledge that they were improperly certifying patients for hospice care, and noting that “scienter is an element independent of falsity”).

**II. In Evaluating Materiality, the Relevant Knowledge is the Knowledge of the Federal Government Payor, Not the Knowledge of the State's Pass-Through Entity.**

The FCA defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” § 31 U.S.C. § 3729(b)(4). The Supreme Court in *Escobar* did not resolve whether that definition applied to the case before it, stating that whether a court looks to the FCA definition or the common law definition, in assessing materiality a court must “look to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” 579 U.S. at 193 (quoting 26 R. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003)). Materiality is a holistic inquiry that includes such factors as whether a requirement is labeled a “condition of payment,” is minor or insubstantial, or goes to the very essence of the bargain, how the government has treated such violations in the past, and if the government continues to pay claims despite its actual knowledge of the violations. *See id.*, at 194 (explaining that no single factor is determinative of materiality).

Here, the district court relied solely on the fact that the state pass-through entity, POST, and not the federal government which actually issued the VAWA funds, knew about and allowed RTC to submit budget-based invoices for many years, and that POST continued to pay the invoices despite this knowledge. *See* Dkt. 101, Memorandum and Order Granting Defendant’s Motion for Summary Adjudication,

p. 18 (finding that because “the undisputed evidence shows that POST was aware of the terms contained in the written contract but modified that requirement by accepting budget-billing and paying RTC’s invoices accordingly,” the relator could not establish materiality). The district court erred both by failing to consider the actual knowledge of the federal government payor, and by considering only the State entity’s knowledge in making its materiality determination.

**A. The Relevant Knowledge is the Knowledge of the Federal Government Payor.**

Although *Escobar* stated the government’s continued payment after actual knowledge of a violation is relevant to materiality, here the district court rested its decision on the actual knowledge of a pass-through entity, not the federal government payor. The VAWA funds were paid by the federal government, with POST serving solely as a pass-through agency to distribute the funds. As the Department of Justice explained in its Statements of Interest submitted to the district court, both at the summary adjudication and reconsideration stages, the inquiry that may be relevant to materiality is whether the federal government payor knew of RTC’s violations and continued to pay. *See* Dkt. 9, United States Statement of Interest Regarding the Parties Cross Motions for Summary Judgment; Dkt. 106, United States Statement of Interest Regarding the Relator’s Motion for Reconsideration.

There was no evidence that the federal government had any knowledge that

POST had allowed RTC to submit budget-based invoices, nor does RTC suggest that the federal government had any such knowledge. *See* Dkt. 98, United States Statement of Interest Regarding Parties’ Cross-Motions for Summary Judgment, p. 4. There is no basis in the text or caselaw from which the court could conclude that the acquiescence of a pass-through agency with no knowledge by the government payor is relevant to materiality. *Id.* at 4. In fact, as soon as a new state agency took over the disbursement of federal VAWA funds, it told POST that it must “stop paying [SD]RTC budget costs and begin paying actual costs for classes.” *See* Dkt. No. 85-2, p. 13. Further, the evidence shows that the budget-based invoices were significantly inflated, and, taking into account the many factors bearing on materiality, it is reasonable to conclude that the government could have denied payment when the terms of its contract were violated and that violation resulted in vast overpayments. *See* Dkt. 98, United States Statement of Interest Regarding Parties’ Cross-Motions for Summary Judgment, p. 6 (“[h]abitual overpayments are unquestionably something a reasonable man would attach importance to in determining his choice of action in the transaction.”) (quotations omitted).

#### **B. No One Factor is Determinative of Materiality.**

Despite the Supreme Court’s emphasis on a holistic assessment of materiality, some courts, like the district court below, have misconstrued and given excessive weight to the Supreme Court’s observation that continued government payment with

actual knowledge of noncompliance is “strong evidence that the requirements are not material.” *Id.* at 195. At most, *Escobar* observed, as one potential factor, that continued government payment after *actual knowledge* by the actual government payor of an *actual violation* may be evidence relevant to, but not dispositive of, materiality. None of that is present in this case. Accordingly, any continued payment was not evidence of lack of materiality.

The district court found that the relator could not establish materiality because the evidence showed that POST was aware of the terms of the contract, knew that RTC was submitting improper budget-based invoices, and continued to pay the invoices anyway. Dkt. 101, Memorandum and Order Granting Defendant’s Motion for Summary Adjudication, p. 18. The district court failed to consider any other factors in making this determination, nor did the court consider the many reasons why the government would continue to pay claims even if it did know of noncompliance. The district court should have considered whether the evidence that was presented provided a basis from which a reasonable factfinder could conclude that the representations were capable of influencing a payment decision by a reasonable person.

The relator presented evidence that the damages to the federal government were in the “millions of dollars,” which is not minor or insubstantial. *See* Dkt. 90, Plaintiff’s Opposition to Motion for Summary Adjudication, p. 9. The

misrepresentations that caused the government and the taxpayers to pay significantly more money than the contract provided when those VAWA funds could have gone to additional training or programs as the government intended goes to the “essence of the bargain” with RTC.

### **III. The FERA Amendments to the False Records Provision, Now Section (a)(1)(B), Apply to This Case**

The case was initiated on March 15, 2015 and included allegations under § 3729(a)(1)(B), former § 3729(a)(2), the false records provision, that involved claims for payment submitted prior to June 7, 2008. Those allegations are governed by the 2009 Amendments to the FCA.

Congress amended the FCA in 2009 (“FERA Amendments”), which among other things created a new liability standard for former section (a)(2). Pub. L. No. 111-21, 123 Stat. 1617 at § 4(f)(1) With respect to the retroactivity of the amendments, FERA provided:

The amendments made by this section. . . shall take effect on the date of enactment of this Act [May 20, 2009], and shall apply to conduct on or after the date of enactment [May 20, 2009], **except that** ---  
(1) Subparagraph (b) of section (a)(1) [of § 3729] . . . shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act . . . that are pending on or after that date;

Relying on this court’s decision in *Cafasso, United States ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047 (9th Cir. 2011), the district court found that none of the FERA amendments applied retroactively, despite explicit language

in the amendments. Dkt. 101, p. 13. *Cafasso* did not involve the retroactivity of the FERA amendments, and that opinion simply stated in a footnote, without elaboration, that the amendments “do not apply retroactively to this case.” See *Cafasso*, 637 F.3d 1051, n. 1.

The district court opinion also cites to *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) for the proposition that there is a general presumption against retroactivity and that the Supreme Court has found that amendments to the FCA are not retroactive. However, *Hughes* predated FERA and addressed the 1986 amendments to the FCA, which did not contain language about retroactivity. With respect to FERA, there is no need for the presumption applied in *Hughes* because Congress did expressly address retroactivity. Congress expressly stated that the amendments to former section (a)(2) applies to any “claims under the False Claims Act...that are pending on or after” June 7, 2008. The remaining FERA amendments apply prospectively.

The Third Circuit recently explained this in *United States ex rel. Int’l Brotherhood of Electrical Workers, Local 98 v. The Fairfield Co.*, 5 F.4th 315 (3rd Cir. 2021):

The critical language in FERA’s retroactivity provision applies § 3729(a)(1)(B) to “all *claims* under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after [June 7, 2008].” FERA § 4(f)(1) (emphasis added). By designating a pre-enactment effective date for § 3729(a)(1)(B)’s new liability standard, Congress sought to apply the provision to *some* conduct

predating its enactment. Accordingly, we are applying a statute that includes an “express command” to apply it retroactively.

The district court also noted that in *Cafasso*, this Court cited to *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318 (11th Cir. 2009), in which the court reasoned that “to the extent § 3729(a) referred to a “claim,” the claim had to be pending prior to the dates specified in FERA, which was either June 7, 2008, for existing claims for which material false statements were made, or May 20, 2009, for new claims for payment deemed false or fraudulent.” *See id.* at 1327, n.3. Thus, the district court treated “claims” in the FERA amendments as “claims for payment” rather than cases or causes of action. This reading has since been rejected by the majority of circuits. *United States. ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 639 (7th Cir. 2016) (“We have held before that the word “claims” in § 4(f)(1) refers to cases, not to individual requests for payment.”); *United States ex rel. Sanders v. Allison Engine Co.*, 703 F.3d 930, 942 (6th Cir. 2012); *United States. ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *rev’d on other grounds*, 563 U.S. 401 (2011); *United States. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 465 (5th Cir. 2015); *The Farfield Co.*, 5 F.4th 315.

Each of these circuit courts undertook a rigorous analysis of the text and structure of the FCA and FERA in reaching its decision. As the Seventh Circuit succinctly summarized:

This is the interpretation that best reflects the text and

structure of the statute. Construing “claims” to mean “requests for payment” [in § 4(f)(1)] makes no sense. There is no such thing as a request or demand for payment under the False Claims Act. Rather, a claim “under the [FCA]” is a legal action by the government or a relator to recover fraudulently obtained funds.

*Garbe, supra*, at 640 (internal cites omitted). In addition to noting the absurdity caused by interpreting “claims” to mean “claims for payment,” the Seventh Circuit went on to explain that such an interpretation also violated standard canons of statutory interpretation, and furthermore would vitiate clear Congressional intent in passing FERA. *Id.* at 640-41.<sup>2</sup>

Congress passed the FERA amendments as a direct response to the Supreme Court’s holding in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 553 U.S. 662 (2008). In *Allison Engine*, the Court held that the relator’s allegations failed because there was not enough of a causal link between the defendant subcontractor’s submission of false claims to the prime contractor, and the government’s payment of those claims. *Id.* at 668-69. The court found that the language of the FCA required that a plaintiff prove that the subcontractor submitted a false claim to the prime contractor with not only the intent to be paid, but the intent that the *government* pay the claim, specifically. *Id.* Congress passed the FERA amendments to abrogate that holding, specifying that the FERA provision codified as § 3729(a)(1)(B) should be

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<sup>2</sup> See *Garbe, supra* at 641 (noting that to the extent circuit courts have held otherwise, they have done so in footnotes and have not analyzed the issue).

applied “as if ... enacted on June 7, 2008.” 123 Stat. at 1625. That date is two days before June 9, 2008, the date when the Supreme Court issued its opinion in *Allison Engine*. There can be no doubt that Congress picked June 7, 2008, as the date of retroactivity so that it could “eliminate the approach taken in *Allison Engine* without reopening judgments that were already final when *Allison Engine* was decided.” *Garbe*, 824 F.3d at 640.

The conclusion that Congress intended to allow more FCA suits to proceed, is in accordance with the overall intent of the FCA-related FERA amendments, as well as the amendments to the FCA historically. The FCA is the primary tool on which the Government relies to recover federal funds lost as a result of fraud against the Government. S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; *McNutt ex rel. U.S. v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005). The FCA was enacted in 1863 during the Civil War, and was intended to “protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.” S. Rep. No. 99-345, at 11, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (quoting *U.S. v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

In 1986, Congress adopted amendments designed to reinvigorate the FCA after decades of dormancy. Recognizing a “severe” problem of fraud on the Government, Congress determined that “only a coordinated effort of both the

Government and the citizenry” could solve the problem. S. Rep. No. 99-345, at 2 (1986). The amendments were designed to “encourage any individual knowing of Government fraud to bring that information forward.” *Id.* Congress stated that “[t]he Committee’s overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits.” S. Rep. No. 99-345 at 23-24. Since 1986, the FCA has been responsible for recovering billions of dollars wrongfully taken from the federal Treasury, and thereby redressing and deterring fraud in programs as diverse as military procurement, crop subsidies, disaster relief, government-backed loan programs, and healthcare. *See* S. Rep. No. 110-507, at 7 (2008).

When Congress amended the FCA again in 2009 with FERA, in addition to removing any perceived requirement for direct presentment to the government, it significantly broadened the scope of the FCA in other ways. The FERA amendments broadened the so-called “reverse false claims” provision of the FCA in §3729(a)(1)(G), expanded retaliation protections for whistleblowers in §3730(h), expanded the use of Civil Investigative Demands in §3733, clarified that complaints-in-intervention relate back to the date that the relator filed a *qui tam* action for the purposes of the statute of limitations in §3731(c), and clarified the conspiracy provisions in §3729(a)(3). Pub. L. 111–21. Further, less than a year after passing FERA, Congress passed the Patient Protection and Affordable Care Act (“PPACA”),

which contained amendments that further expanded the scope of the FCA in order to allow additional cases to move forward by limiting the application of the public disclosure bar and expanding the definition of false claims. *See* Pub. L. No. 111-148, §10104(j)(2), 124 Stat. 119, 901 (2010) (allowing the government to veto dismissals pursuant to the public disclosure bar, providing that the bar only apply to information disclosed in federal sources, eliminating the “direct knowledge” requirement to obtain original source status, clarifying that the FCA applied to claims submitted through healthcare exchanges, providing a time limit for returns of overpayments, providing that any claim submitted in violation of the Anti-Kickback Statute constitutes a false claim).

Congressman Howard Berman, one of the authors of the FERA amendments stated that the changes were “necessary to plug the loopholes that have been created in the False Claims Act over the last quarter century,” and to “update [the FCA] to ensure that it reaches the modern fraud schemes that are draining our public fisc with impunity.” With respect to the amendments involving section (a)(1)(A), the false claims provision, Congressman Berman stated that:

The amendments clarify that liability under Section 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government’s behalf; or with a third-party contractor, grantee, or other recipient of such money or property.

Representative Berman (CA), “Fraud Enforcement and Recovery Act.” 155 Cong. Rec. E1295-03, E1298, 2009 WL 1544226 (also available at <https://www.govinfo.gov/content/pkg/CREC-2009-06-03/pdf/CREC-2009-06-03-pt1-PgE1295-3.pdf>). That amendment to former section (a)(1) and the definition of claim overruled the D.C. Circuit’s decision in *United States ex rel. Totten v. Bombardier*, 380 F.3d 488 (D.C. Cir. 2004) which had interpreted former (a)(1) to require presentation of a claim to a government officer or employee. It sought to restore Congress’s understanding that the 1986 amendments did extend to fraudulent claims presented to federal grantees and contractors. S.Rep. 99-345, at 22 (1986); S.Rep. 111-10 (2009).

Even if FERA did not apply to the false records allegations in this action, the court misinterpreted the pre-FERA standard. The district court found that “[r]elator’s case against RTC fails to qualify because it is undisputed that no claim was presented directly to the United States government, as required by its terms.” In doing so, the court conflated former § 3729(a)(1) and § 3729(a)(2), and misinterpreted *Allison Engine*. As the Supreme Court held there, claims under former § (a)(2), the false records provision did not require that claims be presented directly to the government. Rather, concerned about subcontractors or others that may not realize government funds were at issue, the Court read into former § (a)(2)

a requirement that the defendant “must intend that the Government itself pay the claim.” 553 U.S. at 669. As the D.C. Circuit later summarized, “*Allison Engine* did not absolve subcontractors, but rather stated that if a subcontractor intends to defraud the government, it does not matter if the false claim was submitted to the government through a prime contractor.” *The False Claims Act: Fraud Against the Government* § 4:26.



**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains 4,219 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: January 11, 2023

\_\_\_\_\_/s/Jacklyn DeMar\_\_\_\_\_