

In the
Supreme Court of the United States

BUD CONYERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After the Government intervenes in a False Claims Act (“FCA”) case, is the whistleblower “relator” entitled to 15%-25% of the “proceeds of the action,” as 31 U.S.C. § 3730(d)(1) clearly states, or can the Government deprive the whistleblower of this statutory “relator’s share,” whenever it wants, by writing up a “Covered Conduct” release in a settlement agreement and then asserting that there are differences between this “Covered Conduct” and what the whistleblower alleged—even when the settlement agreement releases the whistleblower’s claims, as well? In short, can the Government unilaterally gut the whistleblower provisions at the heart of the FCA, at will, as the decision below authorizes?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellee/ Cross-Appellant below

- Bud Conyers

Respondent and Intervenor-Appellant/ Cross-Appellee below

- The United States of America

False Claims Act Defendants Who Did Not Participate in the Appeal (non-parties to this petition)

- Halliburton Company *Terminated: 04/04/2014*
- Kellogg Brown & Root Inc
- Kellogg Brown & Root Services Inc
- Kellogg Brown & Root LLC
- Overseas Administration Services, Ltd.
- La Nouvelle General Trading & Contracting Company *Terminated: 03/23/2020*
- La Nouvelle General Trading & Contracting Company WLL *Terminated: 03/23/2020*
- La Nouvelle General Trading and Construction Corp *Terminated: 03/23/2020*
- First Kuwaiti Trading Company *Terminated: 03/30/2015*
- First Kuwaiti Trading and Contracting *Terminated: 03/30/2015*

- First Kuwaiti General Trading & Contracting Company *Terminated*: 03/30/2015
- First Kuwaiti General Trading & Contracting Company WLL *Terminated*: 03/30/2015
- First Kuwaiti Trading & Contracting WLL *Terminated*: 03/30/2015
- La Nouvelle General Trading & Contracting Corp *Terminated*: 03/23/2020

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required under Sup. Ct. R. 29.6 because Bud Conyers is not a nongovernmental corporation.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit
No. 23-20227

United States of America, ex rel Bud Conyers,
Plaintiffs, United States of America, *Intervenor-Appellant/Cross-Appellee*, v. Bud Conyers, *Plaintiff-Appellee/Cross-Appellant*.

Final Opinion: July 16, 2024

Rehearing Denial: September 20, 2024

U.S. District Court for the Southern District of Texas
No. 4:06-cv-04024

United States of America, v. Kellogg Brown & Root Inc, et al., *Defendants*.

Final Order: February 9, 2023

Reconsideration Denied: March 16, 2023

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OPINIONS BELOW

The decision of the Fifth Circuit was officially reported as *United States ex rel. Conyers v. Conyers*, 108 F.4th 351 (5th Cir. 2024). (App.1a). The decision from which the appeal was taken was reported unofficially as *United States ex. rel. Conyers v. Kellogg, Brown & Root, Inc.*, Civ. No. 4:06-CV-04024, slip op. (S.D. Tex. Feb. 9, 2023). (App.20a).



JURISDICTION

The date that the judgment or order sought to be reviewed was entered on July 16, 2024. *United States ex rel. Conyers v. Conyers*, 108 F.4th 351 (5th Cir. 2024). (App.1a). The date of the order below respecting rehearing was Sept. 20, 2024. (App.25a). *Bud Conyers v. United States of America*, No. 23-20227, rehearing denied (5th Cir. Sept. 20, 2024). The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1). The notifications required by Sup. Ct. R. 29.4(b) and (c) are not applicable.



STATUTORY PROVISIONS INVOLVED

The crucial statute involved in this case is the first sentence of 31 U.S.C. § 3730(d)(1), which states:

If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. . . .

The decision below (and the parties, in their briefs) referred to other parts of the FCA statute. The provisions of the FCA are lengthy, so they are set out at App.29a-46a. There are no constitutional provisions, treaties, ordinances, or regulations involved in the case.



STATEMENT OF THE CASE

The False Claims Act (“FCA”), also known as “Lincoln’s Law” is “the primary tool for fighting fraud against the federal government.” *United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1013 & n.1 (9th Cir. 2017). Under the FCA, the whistleblower files allegations of false claims in court, in which the Government can “intervene” or decline to participate. 31 U.S.C. § 3730. The FCA’s whistleblower provisions establish a carefully calibrated balance among the interests of the Government, the whistleblower and the FCA defendant. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). From time to time, as it did last year, the U.S. Supreme Court has intervened in order to maintain that balance. *See, e.g., United States ex rel. Schutte v. Supervalu Inc.*, No. 21-1326, 598 U.S. ____ (June 30, 2023) (Government

and lower court could not disfavor FCA defendants by misapplying “objective reasonable person” standard to FCA scienter).

In this FCA case, after 18 years of litigation, the Government and the defendant joined together to write up a “settlement agreement” that the Government exploited to deprive the whistleblower of his share of the proceeds of the case – directly contrary to the plain meaning of the FCA. The district court rejected this ploy, but the Fifth Circuit accepted it. The Fifth Circuit decision establishes a template that the Government (and defendants who cheat the government) can adopt in any FCA case, to bilk the whistleblower and deprive him of his statutory rights. If the decision below is left undisturbed, then the FCA will become essentially null and void, because the Government will be able to swindle every whistleblower out of his share of the proceeds, at will. In essence, Lincoln’s Law, having done an outstanding job of protecting the Government and the taxpayers for 16 decades, will be no more.

The FCA provides: “If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. . . .” 31 U.S.C. § 3730(d)(1). This case was brought by a “person under subsection (b)” Bud Conyers; the Government “proceeded” with it (*i.e.*, intervened in it); and, after 18 years, the Government settled it with Defendant KBR. The Government and KBR concocted a settlement agreement that the Government claims – falsely – did not settle any claims of Bud Conyers. Is Conyers entitled to a share of “the proceeds of the action or settlement of the claim”?

Does the Fifth Circuit decision, reversing the district court's award to Conyers, substantially impair the statutory rights of whistleblowers under the FCA?

The whistleblower, Bud Conyers of Enid, Oklahoma, was a man with one leg who volunteered to drive supply trucks to U.S. troops through warzones in Iraq, during the War in Iraq. This followed two honorable discharges that he received from the U.S. military. Shortly after the War in Iraq began, Conyers signed up with Kellogg, Brown and Root, Inc. ("KBR"), for this purpose. KBR was the U.S. military's primary logistical contractor in Iraq, under the LOGCAP III contract between KBR and the U.S. Army (Contract No. DAAA09-02-D-0007, "LOGCAP"). *See* Dist.Ct. Dkt.No. 85 at 2-5.

The KBR trucks traveled in convoys, through areas controlled by the enemy. Four other contractor workers were killed and dragged from their vehicles; their bodies were beaten, burned, dragged through the city streets, and hung from a Euphrates River bridge. In Conyers's case, his convoys were attacked by roadside bombs and rocket-propelled grenades, three times. The third time, when Conyers was escaping from the conflagration, his artificial leg broke. *See, e.g.*, Dist. Ct.Dkt.No. 492 at 14 n.16. KBR subsequently refused to replace his leg.

KBR bought many supplies from local subcontractors, including equipment and vehicles. A number of these local subcontractors bribed KBR employees, and the KBR employees took kickbacks from the subcontractors. This resulted in KBR overcharging the U.S. Government – sometimes because of inflated prices, and sometimes because of deficient supplies. One subcontractor tried to bribe Conyers himself. Conyers

also witnessed subcontractors bribing other KBR employees. Dist.Ct.Dkt.Nos. 1 & 85. Ultimately, it came to light that more than 30 KBR LOGCAP employees in Iraq and Kuwait were taking bribes and kickbacks from suppliers.¹

In December 2003, Conyers reported this both to KBR management (the KBR Internal Affairs Office) and to the Army Criminal Investigative Division (“CID”).² At that time, Conyers resided in a “hooch” (essentially, a container) at a KBR facility. The following day, the Conyers hooch was broken into, and all of Conyers’s personal effects were stolen. KBR discharged Conyers, explaining “this is what happens when you are not a team player.” Dist.Ct.Dkt.No. 1 ¶¶ 46-49; Dist.Ct.Dkt.No. 511 at 8. In short, Conyers blew the whistle and then “lived through hell.” *Comm’n v. Sanchez*, 405 Mass. 369, 375 n.4, 540 N.E.2d 1316 (Sup. J. Ct. 1989). Conyers then returned to the United States.

Shortly after Conyers made his report, KBR made a “voluntary disclosure” of subcontractor bribes and kickbacks to the U.S. Government.³ Dist.Ct.Dkt. No. 461 at 19; 2022 KBR Form 10-K at 118. Neither KBR nor the Government has identified any earlier

¹ See Ray Hanania, “Op-Ed: 800-pound war gorilla hangs over Peoria trial,” PEORIA JOURNAL STAR (Oct. 4, 2008).

² The Government later informed Conyers and his attorneys, in 2007, that it had lost this CID complaint by Conyers in 2003. Dist.Ct.Dkt.No. 482 at 7.

³ A “voluntary disclosure” reduces a contractor’s liability under the FCA. 31 U.S.C. § 3729(a)(2).

report to the Government of fraud, bribes and kickbacks under the LOGCAP contract.

The statutory route for whistleblowers to report fraud against the United States Government is the FCA. It dates from the Civil War, when contractors were buying defective, inoperative guns from the Union Army as surplus, and then reselling them to the Union Army as new and fully functional. *See American Civil Liberties Union v. Holder*, 673 F.3d 245, 247 (4th Cir. 2011). The current version of the FCA incentivizes whistleblowers by awarding them between 15% and 30% of the monetary recovery by the Government. 31 U.S.C. § 3730(d).

After the war in Iraq started, it became widely known and reported that the U.S. Government was “sitting on” reports of contractor fraud in Iraq, in part by extending the 60-day “seal” period under in FCA whistleblower cases over and over again. This made it difficult to obtain counsel to file an FCA action.⁴ Conyers eventually found counsel, and his FCA Complaint was filed in 2006.

The Conyers Complaint, Dist.Ct.Dkt.No. 1, made three allegations of overcharging and fraud by KBR against the Government:

- The aforementioned subcontractor bribe and kickback scheme in which KBR subcontractors enlisted KBR employees (such as Ron Nuble and Willie Dawson), including the unsuccessful attempt to enlist Conyers himself – offering Conyers “a kickback on all equipment that

⁴ See, e.g., “Attorney Pursues Iraq Contractor Fraud,” WALL ST. JOURNAL (Apr. 19, 2006).

hits the ground, good or bad.” Dist.Ct.Dkt.No. 85 at 2-5.

- KBR providing mortuary trucks with human remains in them as “refrigerated storage trucks” for use by the U.S. military.
- KBR hiring prostitutes and billing them to the U.S. Government.

Dist.Ct.Dkt.No. 1. Specifically, Conyers alleged that KBR employees “took kickbacks from leasing companies for trucks, trailers, and equipment This resulted in false and fraudulent claims to the Government, for several reasons.” *Id.* ¶¶ 35 & 37, at 10. It is undisputed that Conyers relied solely on personal knowledge when he made these allegations.

In the meantime, between the time in 2003 when Conyers blew the whistle and the time in 2006 when Conyers filed his FCA Complaint, the Government had initiated legal action against three KBR employees (Stephen Seamans, Jeff Mazon and Anthony Martin) amongst the 30+ who had taken bribes and kickbacks under KBR’s LOGCAP contract. As it turned out, none of these three was one of the ones whom Conyers had identified by name to the CID in 2003. But Conyers did have personal knowledge and evidence regarding one of these three prosecuted KBR employees (Jeff Mazon), which Conyers provided to the Government shortly after he filed his FCA Complaint. Dist.Ct.Dkt.Nos. 482 at 6-7, 487-1, 487-2 & 487-3. During that time, Government investigators repeatedly contacted Conyers for information by telephone, and arranged for multiple face-to-face meetings. Conyers, who was in a wheelchair at the time, had his son drive him the 500+ miles in each direction. Conyers was a

severely and totally disabled veteran, who nevertheless remained at the Government investigators' beck and call for many years, as 200 of his attorney time records attest. Dist.Ct.Dkt.No. 487-2. Regarding one of the indicted KBR employees, the Government asked Conyers to testify at the trial, but then decided not to call Conyers as a witness. Dist.Ct.Dkt.No. 496 at 2.⁵

The FCA provides that a whistleblower case, when filed, remains under seal for 60 days. 31 U.S.C. § 3730(b)(2). In this case, employing 32 docket entries that still remain under seal, the Government kept this case out of public view for seven years, until January 6, 2014. Dist.Ct.Dkt.No. 54. The Government has never offered any explanation for this extreme delay.⁶

What prompted the Government's action was that the district court judge gave the Government a deadline. Dist.Ct.Dkt.No. 50-51. The Government was required to decide whether to "decline" the case (at which point Conyers would have been allowed to proceed with it on his own, in the name of the Government) or "intervene" in the case, which would give the Government formal control over the proceedings:

the Government shall—

- (A) proceed with the action, in which case the action shall be conducted by the Government; or

⁵ The Government actually lost the trial (via a deadlocked jury), but that KBR employee later accepted a plea agreement. *See* Project on Government Oversight, "KBR Employee Fraud Prosecution Ends With a Whimper" (Mar. 27, 2009).

⁶ Compare this to the statutory standard, *i.e.*, "reasonable diligence." 31 U.S.C. § 3730(c)(4).

- (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

31 U.S.C. § 3730(b)(4). The Government belatedly decided to intervene in the case; it filed an Amended Complaint, *id.*, and put out a news release to that effect. Dist.Ct.Dkt.Nos. 51 & 462-1 at 2.⁷

The Government's Amended Complaint alleged that between early 2003 and August 2004 (*i.e.*, ten years earlier), KBR subcontracts had bribed KBR staff under the LOGCAP contract in Iraq and Kuwait, resulting in inflated billing to the Government – which is exactly what Conyers had alleged. *See* Dist. Ct.Dkt.No. 51 ¶¶ 122-140. The FCA indicates that the Government's Amended Complaint should distinguish between “clarify[ing] or add[ing] detail to the claims in which the Government is intervening and [] add[ing] additional any claims.” 31 U.S.C. § 3731(c). The Government's Amended Complaint did not identify anything as an added additional claim.

As the FCA indicates, the Government's Amended Complaint “arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint” of Conyers. 31 U.S.C. § 3731(c). The Government had wasted so much time before

⁷ At around the same time, the Government filed a markedly similar separate Complaint against the same Defendants, including the bribing subcontractors, in an apparent maneuver to deprive Conyers of any recovery of the proceeds of that action. The Government ultimately recovered \$50+ million in that case. Whether Conyers should receive part of the Government's recovery from that case is a separate issue, still pending, and not raised in the current appeal.

intervening (*i.e.*, more than a decade after Conyers blew the whistle) that claims that the Government asserted that did not “relate back” to the Conyers Complaint likely would have been time-barred. 31 U.S.C. § 3731(c). Government claims relate back only “to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint” by the whistleblower. *Id.*

After intervening, the Government then completely botched the case against the two bribing subcontractors. Regarding one of the two, the Government neglected ever to serve that Defendant (after it refused to waive service) – even after the Court reminded the Government of its responsibility, and urged the Government to comply—and that Defendant was dismissed. Dist.Ct. Dkt.No. 280. Regarding the other bribing subcontractor, the Government somehow failed to prove “minimum contacts” to establish personal jurisdiction of that Defendant—even though that Defendant had overbilled KBR by millions of dollars, knowing that KBR would then submit those bills to the Government for reimbursement. Dist.Ct.Dkt.No. 85.

Regarding the primary defendant, KBR, the Government accomplished nothing notable until another seven years after it intervened, which was the deadline that the district court set for motions for summary judgment.⁸ The Government and KBR filed motions for summary judgment regarding the subcontractor

⁸ Note that KBR had voluntarily disclosed its liability in this case to the Government, way back in early 2004. It is incomprehensible why the Government had accomplished nothing in the case by 2020.

bribery and kickback scheme in November 2020. Dist. Ct. Docket Nos. 336 & 337. The Government has offered no explanation for this extreme delay, either.

The Government abandoned the claims against KBR regarding the mortuary trucks and the prostitutes, without explanation. Conyers had no way to press these claims himself, because 17 years had passed without any action by the Government, the pertinent witnesses were scattered all over the globe, and the Government refused to provide any of its investigative materials to Conyers.

In the meantime, Bud Conyers's broken body gave out on February 17, 2018, more than fourteen years after Conyers had reported KBR's fraud to CID. Funeral services were held in Enid on February 24, 2018. Dist.Ct.Dkt.No. 174.

The district court then granted summary judgment in part, denied it in part, and set the case for trial on Monday, May 23, 2022. Dist.Ct.Dkt.Nos. 346 & 448. On the Thursday before that, the Government and KBR advised the Court that they had settled the claims that had been set for trial.

Both the claims that the Government won in summary judgment and the claims that were settled were the exact same claims that Conyers had sued for, in the Conyers Complaint. Dist.Ct.Dkt.No. 1 & 475-1. They are the inflated claims that KBR submitted to the Government due to the bribes and kickbacks that KBR subcontractors gave to KBR employees.

The Government and KBR then prepared a Settlement Agreement reflecting the last-minute settlement. In the Settlement Agreement, KBR agreed

to pay the Government \$13,677,621.⁹ As far as Conyers was concerned, this directly invoked 31 U.S.C. § 3730(d)(1): “If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. . . .” The Settlement Agreement also provided that: (a) Conyers released his FCA action against KBR (in the action that had been conducted by the Government for the past decade) [Settlement Agreement ¶¶ 3 & 6, Dist.Ct.Dkt.No. 475-1.], and (b) that the Government released KBR for a list of items that the Government and KBR had apparently negotiated between themselves, which the Settlement Agreement refers to as the “Covered Conduct.”¹⁰ Obviously, Conyers had no influence over the terms of what the Government released.

The Settlement Agreement was then submitted to the district court. The Government itself noted that as part of the Settlement Agreement, “Relator

9 Conyers later learned, from a subsequent KBR filing with the U.S. Securities and Exchange Commission, that this amount was only a third as much as the \$39 million write-off that KBR had taken when the case was unsealed, which was KBR’s own assessment of its liability in the case.

10 The Settlement Agreement sets forth six paragraphs of “Covered Conduct.” Dkt.No. 475-1 ¶ 6. Four of the six paragraphs, *i.e.*, Paragraphs 1, 2, 3 and 5, all relate to “Mr. Conyers’ allegations of kickbacks for trucks and trailers and the government’s allegations of kickbacks for trucks and trailers.” Dkt.No. 474 at 3; ECF 475-1. All six of the six paragraphs of “Covered Conduct” relate to KBR “t[a]k[ing] kickbacks in exchange for awarding inflated subcontracts to Kuwaiti subcontractors,” as the Government itself characterized them. Gov’t App. Br. at 2.

voluntarily dismissed his *qui tam* action ‘with prejudice to the Relator as to any claim the Relator has asserted against Defendants on behalf of the United States in this Action.’ ECF 453 at 1, ¶ 1.” Dist.Ct.Dkt.No. 480 at 11-12.

At this point, however, the Government refused to pay Conyers *anything* out of the “proceeds of the action or settlement of the claim.” 31 U.S.C. § 3730 (d)(1). Conyers¹¹ filed a motion with the district court for the award of his whistleblower’s share. Dist.Ct. Dkt.No. 462. The Government then concocted a bizarre narrative that: (i) all of the money that it had received for KBR was only for the Government’s release of the “Covered Conduct”; (ii) none of it was for the Conyers release of the Conyers FCA claims; (iii) there was no “factual overlap” between the “Covered Conduct” and the claims that Conyers had released; and (iv) the \$13.7 million somehow qualified as neither “proceeds of the action” nor “settlement of the claim.” Dist.Ct. Dkt.No. 464. None of this was true. The Government expressly argued that the whistleblower receives nothing unless what the whistleblower alleged in the FCA Complaint and what the Government chooses to release in a settlement agreement are “exactly the same” – regardless of what claims the whistleblower releases in the same Settlement Agreement. Dist.Ct. Dkt.No. 480 at 14. This isn’t correct, either. In short, the Government acted like a “sore winner,” *Lawyer v. Department of Justice*, 521 U.S. 567, 579 (1997).

The district court rendered this common-sense rejection of the Government’s extreme position:

¹¹ Or, more accurately, at this point, the Estate of Bud Conyers.

The next question is whether the settlement's covered conduct overlaps with Mr. Conyers' three *qui tam* allegations. The first alleges that KBR used mortuary trailers to deliver consumable supplies to United States soldiers. The second alleges that KBR managers billed prostitutes to the United States. The third alleges that two KBR employees accepted kickbacks from truck suppliers; specifically, that Willie Dawson accepted kickbacks for trucks, trailers, and equipment in exchange for accepting defective vehicles, and that Rob Nuble accepted kickbacks in exchange for charging the United States for more trucks than the supplier delivered.

The settlement's covered conduct includes three employees' conduct—Stephen Seamans, Jeff Mazon, and Anthony Martin. Mr. Seamans inflated bids for a cleaning contract in exchange for kickbacks, and Mr. Mazon did the same with a fuel contract. Mr. Martin received kickbacks that inflated the price of truck and trailer contracts that were formed after Mr. Conyers began working for KBR.

The Court finds there is sufficient factual overlap between Mr. Conyers' allegations of kickbacks for trucks and trailers and the government's allegations of kickbacks for trucks and trailers. The details concerning the guilty parties or the specific vehicles and their use are inconsequential because equity aids the statute in ensuring that a relator does not lose the favor of the statute based on the government's determination of how

and on what basis it will proceed, either to trial or in settling the case.¹² The facts establish that in December of 2003, Mr. Conyers reported the fraud he alleged to both the United States Army and KBR's Office of Internal Affairs. Alerting the government to fraud in the form of kickbacks for truck contracts put the government on notice of the practice and arguably impelled and/or focused its investigation into Mr. Martin's conduct. On the other hand, the Court does not find sufficient factual overlap between the covered conduct and Mr. Conyers' two other claims.

The next question is apportionment. The settlement agreement does not indicate the weight of each claim. Accordingly, the Court weighs each of the settled claims equally, entitling Mr. Conyers to a percentage of one third of the total settlement amount of \$13,677,621-\$4,559,207. The Court determines that the appropriate percentage is 25%. The Act instructs that a relator shall receive "at least 15 but not more than 25 percent . . . depending upon the extent to which the [relator] substantially contributed to the prosecution of the action." 31 U.S.C. § 3730 (d)(1). Mr. Conyers supported the government's investigation through multiple meetings and phone calls, and the government has not produced documents establishing that it was aware of the fraud before Mr. Conyers' report. Additionally, the government has not

¹² "Relator" is the FCA's statutory term for "whistleblower."

argued for an alternative percentage, other than 0%. For these reasons, the Court concludes that Mr. Conyers is entitled to 25% of one third of the total settlement amount—\$1,139,801.75.

Therefore, IT IS ORDERED that the United States of America pay to the relator, the Estate of Bud Conyers, the sum of \$1,139,801.75, plus reasonable attorney's fees, within 60 days of this memorandum—failing that, the Court will enter a Final Judgment in that same amount along with interest and attorney's fees.

It is so ORDERED.

Dist.Ct.Dkt.No. 474 at 3-5 (emphasis added). More specifically, the “factual overlap” includes:

- Same contract (LOGCAP III);
- Same prime contractor (KBR);
- Same location (Iraq and Kuwait);
- Same time (at the beginning of the War in Iraq);
- Same bribing subcontractors;
- Same subcontractor misconduct (bribery and kickbacks);
- Same contractor mismanagement (hiring, empowering and failing to supervise numerous corrupt staffers);
- Same intermediaries (KBR employees);
- Same resulting harm to the Government (inflated KBR invoices);

- Same primary FCA defendant (KBR); and
- Same false and fraudulent *actual claims* by KBR (*i.e.*, the specific KBR LOGCAP inflated claims for payment that KBR submitted to the Army).

In sum, basically, “the same everything.” *Upjohn Co. v. Schwartz*, 246 F.2d 254, 261 (2d Cir. 1957). None of this is disputed. In fact, if there were no factual overlap, that would beg the question of why the Government asked Conyers to sign the Settlement Agreement at all.¹³

The Government appealed from this decision by the district court. Conyers cross-appealed, on the issue of “apportionment.” Dist.Ct.Dkt.Nos. 500 & 505.

The most important point here, for present purposes, is that a whistleblower not “lose the favor of the statute based on the government’s determination of how and on what basis it will proceed, either to trial or in settling the case.” Dist.Ct.Dkt.No. 474 at 3-5. Under the Fifth Circuit’s subsequent published holding, a whistleblower can, and will, lose the favor of the FCA based on the government’s determination of how and on what basis it will proceed. The Settlement Agreement in this case has transmogrified into a poisonous recipe on how to cheat the whistleblower out of his statutory share of the proceeds.

¹³ All of this commonality between the Conyers allegations and the “Covered Conduct” released by the Government in the Settlement Agreement also applies equally to the indictments of Stephen Seamans, Jeff Mazon and Anthony Martin, the three KBR corrupt staffers whom the Government chose to prosecute.

To make a long story a little shorter, the subsequent Fifth Circuit decision:

- Ignored the fact that in the Settlement Agreement, Conyers had released his claims, and treated the entire amount paid by KBR as in exchange only for the Government's release of "Covered Conduct";
- Held that the "claims" that had been settled were not the claims asserted against the inflated charges from KBR subcontractors that KBR had foisted on the Government, but rather only the release (not the claims, the release) for "Covered Conduct" that the Government had crafted.
- Disagreed with the district court's self-evident syllogism that as to the Covered Claims, there was "factual overlap between Mr. Conyers' allegations of kickbacks for trucks and trailers and the government's allegations of kickbacks for trucks and trailers," and did not defer to this district court fact-finding;
- Avoided the issue of whether the \$13.7 million settlement payment qualified as statutory "proceeds of the action"; and
- Decided that the \$13.7 million did not qualify as "settlement of the claim," because of the *non sequitur* that the Conyers Complaint had not identified, by name, the three KBR employees (among the 30+) whom the Government had decided to prosecute for taking

bribes and kickbacks from KBR subcontractors under the LOGCAP contract.¹⁴

United States ex rel. Conyers v. Conyers, 108 F.4th 351 (5th Cir. 2024).

Existing law required merely that a whistleblower identify some factual overlap between the whistleblower's claims and the Government's recovery of proceeds. The Fifth Circuit's decision reverses that, and it bars any whistleblower award unless the Government elects to put 100% overlap into a settlement agreement. If this Court allows this new legal standard to prevail, then the FCA is "dead, dead, dead." See Walt Whitman, LEAVES OF GRASS 285-86 (Oxford Univ. Press 1990).

¹⁴ In a concurrent case, however, the Fifth Circuit openly mocked the Government for its "have-its-cake-and-eat-it-too strategy," which surely applies here. *See State of Texas v. Biden*, 20 F.4th 928, 958 (5th Cir. 2021).



REASONS FOR GRANTING THE PETITION

The basis for federal jurisdiction in the court of first instance is federal question jurisdiction, 28 U.S.C. § 1331, applicable to the FCA, 31 U.S.C. §§ 3729-32. The Fifth Circuit had jurisdiction of the appeal under 28 U.S.C. § 2107 and Fed. R. App. P. 4(a).

I. CONYERS IS ENTITLED TO A SHARE OF “THE PROCEEDS OF THE ACTION OR SETTLEMENT OF THE CLAIM,” AND THE FIFTH CIRCUIT DECISION, REVERSING THE DISTRICT COURT’S AWARD TO CONYERS, SUBSTANTIALLY IMPAIRS THE STATUTORY RIGHTS OF WHISTLEBLOWERS UNDER THE FCA

The Conyers argument is that the FCA means what it says. In a case in which the Government intervenes (as here), the FCA dictates:

If the Government proceeds with an action¹⁵ brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph,¹⁶ receive at least 15

¹⁵ “Proceeds with an action” means to intervene in the action, as the Government did here in 2014. *United States ex rel. Doghramji v. Community Health Systems, Inc.*, Nos. 3:11-C-442 *et al.* (M.D. Tenn. April 1, 2020).

¹⁶ The “second sentence” reduces the whistleblower’s share “when [the whistleblower’s claims are] based primarily on disclosures of specific information” in certain types of public disclosures. The Government has never argued that that reduction properly applies here, nor does it. The Complaint is based entirely on what Conyers told to counsel from what Conyers personally experienced in 2003, not on any public disclosure of anything.

percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

31 U.S.C. § 3730(d)(1).¹⁷ Thus in 1943, Congress established a very simple, clear rule about the recovery of the “relator’s share” in an FCA action:

- In an FCA action,
- In which the Government intervenes,
- The whistleblower/relator receives (since 1986) 15%-25% of the proceeds of the action (whether by recovery on a judgment, or by settlement), here \$13,677,621.

¹⁷ The FCA expressly defines the term “claim” as follows:

(2) the term “claim”—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
 (i) is presented to an officer, employee, or agent of the United States. . . .

31 U.S.C. § 3729(b)(2)(A). Hence in this case, the term “claim” refers to KBR’s requests for money, under the LOGCAP contract, that KBR presented to the Army – *not* to the Government’s “claims” in the Government’s Amended Complaint. Either way, however, Conyers still is entitled to his share of the “proceeds of the action” – and to “settlement of the claim,” whichever way “claim” is construed. *Id.* § 3730(d)(1).

- With the Court adjudging the percentage within that range.¹⁸

Id.

The wording in the 1943 FCA was that the whistleblower would be paid “out of the proceeds of such suit or any settlement of any claim involved therein. . . .” 57 Stat. 608, 609 (1943). This term was subsequently simplified to “the proceeds of the action or settlement of the claim,” without changing its meaning. It is, however, notable that the 1943 statute wording made it plain that the whistleblower would receive a share of “any settlement of any claim involved” in “such suit.” Both the Government’s claims and Conyers’s claims, whatever their overlap, are “claims involved in this suit.” *A fortiori*, all of the \$13,677,621 settlement payment can be properly characterized as “any settlement of any claim involved” in this “suit.”

In any event, as the U.S. Supreme Court has held:

Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says. Nothing about th[is statute] gives us any reason to doubt the plain-text result in this case.

Simmons v. Himmelreich, 578 U.S. 621, 627 (2016).

Here, “Congress in its wisdom decided to use a general [rule] rather than trying to envision what[ever] the ingenuity of man would evolve as something substantial.” *First Victoria Nat. Bank v. United States*,

¹⁸ *United States v. Wegeler*, 941 F.3d 665, 675, 677 (3d Cir. 2019).

620 F.2d 1096, 1104 (5th Cir. 1980). The Government ignores the plain language of this general rule (as well as unequivocal legislative history and Supreme Court precedent buttressing it), because the Government is “trying to envision,” or conjure up, “something substantial” in its place. *Id.* This is not what the FCA requires, nor what it permits.

The law is set by the plain meaning of the statute, but furthermore, as it happens, the legislative history is perfectly clear on this subject. As Congressman Berman, the primary Congressional author of this provision, said in the Congressional Record:

The final bill adopts the House version of the percentage of recovery provided for the person initiating the action. If the Government comes into the case, the person is guaranteed a minimum of 15% of the total recovery even if that person does nothing more than file the action in federal court. This is in the nature of a ‘finder’s fee’ and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%. In those cases where the person carefully develops all the facts and supporting documentation necessary to make the case and presents it in a thorough and detailed fashion to the Justice Department as required by law, and where that person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States Treasury, the Court should award a percentage substantially above 15% and up to 25%.

132 Cong. Rec. H 9388 (Oct. 7, 1986) (emphasis added).¹⁹ This legislative history goes on to state that the “only exception to this 15% minimum recovery” is the one stated in the second sentence of the subsection in the statute, which doesn’t apply here. *Id.* (emphasis added).²⁰

The Senate Report in the legislative history, similarly, states that the 1986 FCA amendments “create[d] a guarantee that relators will receive at least some portion of the award if the litigation proves successful.” S. Rep. No. 99-345 at 28, 1986 U.S.C.C.A.N. 5266, 5293 (emphasis added). This litigation has “proved successful,” and therefore Conyers is entitled to “some portion of the award.” *Id.*

The principle that whenever the Government intervenes in an FCA action, the whistleblower automatically receives 15% to 25% of the proceeds (whether by judgment or settlement) also is the only conclusion consistent with the U.S. Supreme Court’s FCA decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The U.S. Supreme Court expressly adopted the “finder’s fee” principle,

19 This is one of the very rare occasions when the author of the legislation actually “focused on the narrow point before the court.” Scalia and Garner, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* ¶ 66 (2012).

20 The second sentence is notable in one respect: it provides that even if a case is based “primarily” on what the whistleblower reads in the media (which is certainly not the case here), the whistleblower *still* receives a relator’s share of “no . . . more than ten percent” of the proceeds of the case. 31 U.S.C. § 3730(d)(1). This is a prime example of how the FCA works to maintain the motivation of whistleblowers, and ensure that are not cheated out of the whistleblower’s share.

characterizing the whistleblower's share as a "bounty," *e.g.*, "the bounty he [*i.e.*, the whistleblower] will receive if the suit is successful." *Id.* at 772-77; *accord Lujan v. Defenders of Wildlife*, 504 US 555, 573 (1992). In *United States ex rel. Babalola v. Sharma*, 746 F.3d 157, *passim* (5th Cir. 2014), the Fifth Circuit (*i.e.*, the court below, here) applied the term "bounty" to the whistleblower's share, six times. *Accord Barnes v. United States*, 353 F. Supp. 3d 582, 585 (N.D. Tex. 2019) ("qui tam awards . . . are really a bounty or a fee").

Furthermore, the U.S. Supreme Court held that the FCA works an assignment of the relator's share by the Government to the relator, by operation of law, when the case begins (not when the case is settled, or a judgment is entered).

The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. . . . [A] *qui tam* relator is, in effect, suing as a partial assignee of the United States.

529 U.S. at 773 & n.4. This means that when the case begins, the relator's share is fixed "by assignment" at 15% to 25% of the proceeds if the Government intervenes, and 25% to 30% if it does not. This "bounty":

represent[s] a "partial assignment of the Government's damages claim," encompassing both a legal right to assert the claim and a stake in the recovery. 529 U. S., at 773. Thus, it was clear that the False Claims Act gave the "relator himself an interest in the lawsuit," in addition to "the right to retain a fee out of the recovery." *Id.*, at 772.

Sprint Communications Co. v. APCC Services, 554 U.S. 269, ___ (2008) (Roberts, C.J., dissenting).

These bedrock principles in *Vermont* are widely recognized in subsequent case law.

To incentivize private actors to bring *qui tam* actions, the FCA allows for the recovery of a share of government proceeds if the government successfully litigates or settles a claim that the relator originally brought. *See* § 3730(d)(1) and (2). When the government intervenes in a relator's successful lawsuit, the relator is entitled to a portion of the proceeds and relator's counsel is entitled to reasonable expenses and attorney fees. § 3730(d)(1). . . . Section 3730(d)(1) describes the "bounty" to which the *qui tam* relator is entitled when the government intervenes in the relator's lawsuit. . . .

If the government proceeds with an action, then such person "shall"—*i.e.*, will necessarily—receive between a fifteen and twenty-five percent share "of the proceeds of the action or settlement." § 3730(d)(1). The use of the word "shall" shows that Congress clearly envisioned the receipt of proceeds of the action or settlement to be inextricable from the government proceeding with the person's action.

United States ex rel. Bryant v. Community Health Systems, Inc., 24 F.4th 1024, 1030-32 (6th Cir. 2022) (emphasis added); *accord United States ex rel. McGuire v. Millennium Laboratories, Inc.*, 923 F.3d 240, 244 (1st Cir. 2019); *United States ex rel. Chiba v. Guntersville*

Breathables, Inc., 421 F.Supp.3d 1241, 1247 (N.D. Ala. 2019).²¹

Indeed, the U.S. Department of Justice's own internal policy statement regarding the relator's share states, unequivocally, as follows:

Section 3730(d)(1) of the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-33, provides that a qui tam relator, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. . . .

The legislative history suggests that the 15 percent should be viewed as the minimum award—a finder's fee—and the starting point for a determination of the proper award. When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. . . . Of course, absent one of the statutory bases for an award below 15 percent discussed at the end of these guidelines, the percentage cannot be below 15 percent (or 25 percent if we did not intervene).

²¹ Conyers noted below that since the U.S. Supreme Court's *Vermont* decision, there are approximately 300 published and unpublished court decisions adopting the Supreme Court's “guarantee/bounty/finder's fee/assignment” FCA doctrine.

11 TAF Quarterly Review at 17 (Oct. 1997) (emphasis added). As the Department of Justice website explains in THE FALSE CLAIMS ACT: A PRIMER, under a section entitled “Award to the relator”: “If the government intervenes in the qui tam action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government through the qui tam action.” *See* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

In sum, the Government’s intervention is the only “condition precedent” to the award to the relator of 15% to 25% of “the proceeds of the action,” and it is indisputable that the Government intervened in this action.

The “Factual Overlap” Red Herring. The fact that this whistleblower, on these facts, would be denied any whistleblower’s share is a sure sign that FCA “jurisprudence ha[s] gone off the rails” in the decision below. *Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022). The point when it goes off the rails is when the Fifth Circuit disregards the plain meaning of the FCA, and *Vermont* and its progeny, in favor of a tortuous misreading of *Rille v. PricewaterhouseCoopers, LLC*, 803 F.3d 368 (8th Cir. 2015). *Rille* actual protected the whistleblower’s right to the statutory share. The essential holding by the Eighth Circuit in *Rille* is as follows:

[T]hese proceeds of “the claim” must extend to proceeds of a settlement in which “the conduct contemplated in the settlement agreement . . . overlap[s] with the conduct alleged in [the] Relator’s complaint.” *Bledsoe*, 342 F.3d at 651. Otherwise, the government could deprive the relator of his right to

recover simply by recasting the same or similar factual allegations in a new claim or by pursuing the substance of the relator's claim in an alternate proceeding. But there must be a factual overlap for the relators to recover.

Id. at 373-74.²² The claim debated in *Rille* (as to whether the whistleblower would receive a share of the settlement) was "a different claim that does not overlap factually with the claim brought by the relator." *Id.* (emphasis added). Here, purporting to rely on *Rille*, the Government has deprived the whistleblower of "his right to recover" by disingenuously crafting (and then misrepresenting) the release that the Government chose to issue to KBR in the Settlement Agreement – in spite of "factual overlap" galore, here.²³

As the Government conceded in its briefing to the district court, *Rille* was merely an application of the prior Sixth Circuit holding in *United States ex rel. Bledsoe v. Cmtv. Health Sys., Inc.*, 501 F.3d 493, 522 (6th Cir. 2007); *see also United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000). Dist.Ct.Dkt.No. 480 at 14. In *Bledsoe*, the court held that the only time that a whistleblower can be

22 "Overlap" means: a common area of interest, responsibility or authority, etc. World Law Dictionary, <https://dictionary.translegal.com/en/overlap/noun>.

23 Notably, even in *Rille*, the Eighth Circuit did not reject a whistleblower's share for the "non-overlapping claim," but rather remanded the case for that determination to be made by the district court as fact-finder. *Id.* at 374. Here, the lower court already made that determination, in favor of the whistleblower. Dkt.No. 474 at 3-4.

denied his statutory share is when his allegations in his Complaint do not “overlap[] in any way with the conduct covered by the Settlement Agreement.” *Id.*; accord *United States ex rel. Mustafa v. Najjar*, 120 F.Supp.3d 1322, 1327 (M.D. Fla. 2015) (award to relator for recovery from defendant not named in relator’s complaint, because relator disclosed the general scheme). Here, the district court “found” that there is such overlap, and that finding is obviously correct.

Furthermore, in *Rille*, only the Government released the FCA defendant, which is what led the *Rille* court to ask whether there was “factual overlap” between the Government’s release and the whistleblower’s claims. Here, in complete contrast, Conyers also released KBR, and that release is part and parcel of KBR’s settlement payment. Dkt.No. 475-1 ¶ 6.

In essence, the Fifth Circuit holding below has established a conflict among the Circuits, as to its extreme misinterpretation of the term “factual overlap,” between itself and the Third, Sixth and Eighth Circuits. *Rille v. PricewaterhouseCoopers, LLC*, 803 F.3d 368 (8th Cir. 2015); *Bledsoe v. Cmtv. Health Sys., Inc.*, 501 F.3d 493, 522 (6th Cir. 2007); *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000).



CONCLUSION

Bud Conyers, a distinguished veteran with one leg, signed up to drive supply convoys serving our troops in Iraq. His convoys were blown up, three times. Conyers witnessed his coworkers taking bribes from local suppliers – he was offered one, too. He reported this to his employer and to the Government. As a result, he was fired and all of his personal possessions were stolen.

Conyers then met repeatedly with Government investigators, and helped them every way that he could, despite his severe physical limitations. The Government accomplished nothing in this case for more than 14 years, at which point Conyers died.

Since then, almost seven years have passed. During that time, the Government settled with the company that was rife with corruption for 30 cents on the dollar, and then manipulated the situation to cheat the Conyers Estate out of its statutory share of those proceeds. This is how the Government told the ghost of Bud Conyers, “thank you for your service.”

This has also, unfortunately, resulted in a Fifth Circuit decision that puts the statutory share of every FCA whistleblower at risk, and destroys the FCA’s delicate balance between the rights of the Government, the whistleblower and the defendant.

For the reasons stated above, this Honorable Court should grant this petition for certiorari, and save ‘Lincoln’s Law’ from evisceration by the 5th Circuit decision below.

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