No. 17-1149

In the Supreme Court of the United States

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

v.

TRINITY INDUSTRIES, INC. &
TRINITY HIGHWAY PRODUCTS, LLC,
Respondents.

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

BRIEF FOR CONGRESSMAN H. MORGAN GRIFFITH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae H. Morgan Griffith is a member of the United States House of Representatives. The United States Constitution empowers Congress to enact laws and tasks it with responsibility for the public fisc. As a result, members of Congress have a strong interest in ensuring that courts construe the False Claims Act consistent with its text and purpose. In addition, members of Congress routinely file briefs as *amici curiae* in this Court and in other federal courts.

The interests of members of Congress are particularly strong here. Although purporting to apply the materiality discussion in *Universal Health Services, Inc. v. United States & Massachusetts ex rel. Escobar*, 136 S. Ct. 1989 (2016) [*Escobar*], the United States Court of Appeals for the Fifth Circuit has potentially resurrected the exclusive control the Executive once had over False Claims Act litigation that resulted from the "government knowledge" provisions Congress eliminated in 1986. Another possible explanation for the Fifth Circuit's decision is invasion of the role of the jury as factfinder, itself troubling. Congressman Griffith submits this brief to make clear that it is inappropriate for courts to grant to the Executive through interpretation what Congress rescinded through legislation.

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[1] Counsel for all parties received notice at least ten days before the due date of Congressman Griffith's intention to file this brief, and the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amicus curiae* and his counsel made any such monetary contribution.

SUMMARY OF THE ARGUMENT

Under separation-of-powers principles, courts should defer to Congress's decisions about lawmaking and decline invitations to substitute their judgment for that of Congress. The history of the False Claims Act shows that Congress has decided it is inappropriate to give the Executive Branch complete control over protecting government coffers from fraud. In fact, in 1986, Congress expressly repealed the old "government knowledge" provisions of the False Claims Act, which had given the Executive the sole power to bring suit once the government knew of the activity the relator claimed was fraudulent.

The Fifth Circuit's decision in this case raises the specter of giving the Executive similar if not greater power over False Claims Act suits. Purporting to apply the materiality analysis from this Court's decision in *Escobar*, the Fifth Circuit granted judgment as a matter of law in favor of Respondents Trinity Industries, Inc. and Trinity Highway Products, LLC (referred to collectively as Trinity), dismissing the claims of the Petitioner and Relator Joshua Harman. That decision is riddled with confusion about what the Court meant when it stated that government decisions to continue to pay claims despite knowledge of violations is "very strong evidence" of immateriality.

The Fifth Circuit has apparently interpreted "very strong evidence" as: (1) an invitation to reweigh evidence and substitute its judgment for the jury's; (2) creating some sort of rebuttable presumption of immateriality; or (3) creating an irrebuttable, outcome-determinative presumption of immateriality. All three of those possible interpretations should concern the

Court. And the third of them would give the Executive Branch through "interpretation" even greater control of False Claims Act litigation than the old "government knowledge" defense that Congress repealed through legislation.

There is disagreement among the courts of appeals about how to apply the *Escobar* materiality analysis, and the Fifth Circuit's decision in this case shows the need for the Court to give additional guidance. Because that need is great, because this case is a good vehicle for giving that guidance, and because the issue is important, the Court should grant Harman's petition for a writ of certiorari.

ARGUMENT

I. Courts should respect Congress's policy decisions and should not rewrite statutes in the name of interpreting them.

Separation of powers is a foundational principle of the American republic. In service of that principle, the United States Constitution provides different roles for the legislative and judicial branches of the national government. At the risk of oversimplification, Congress makes the law, and courts apply the law.

Because the Constitution vests lawmaking authority in Congress, courts should respect Congress's policy decisions when applying the law. Courts use Congressional intent as the touchstone for determining a statute's proper construction. *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent."). To determine

that intent, courts begin with the language of the statute itself—the language Congress enacted. *See Allison Engine Co. v. U.S ex rel. Sanders*, 553 U.S. 662, 668 (2008). They also consider Congress's historical regulation of the same subject matter and the context in which Congress enacted the statute. *See Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987); *Kumar v. Republic of Sudan*, 880 F.3d 144, 154 (4th Cir. 2018); *Taxman v. Bd. of Educ. of Twp. of Piscatawnay*, 91 F.3d 1547, 1556–57 (3d Cir. 1996). Courts should decline parties' invitations to rewrite a statute under the guise of interpreting it.[2] This is particularly true when the rewritten statute would thwart, rather than achieve, Congress's intent.

II. Congress has rejected granting the Executive Branch absolute control over False Claims Act litigation.

Before the Civil War, the United States Army contained fewer than 20,000 soldiers.[3] By January 1863, that number had swollen to over 600,000.[4] For the first time, the federal government had to feed, clothe, and supply an army of that size. And less-than-ethical suppliers were happy to take advantage of the

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[2] *See* A. Scalia, *A Matter of Interpretation* 20 (1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.")

[3] *See* Clayton R. Newell, *The Regular Army Before the Civil War: 1845–1860*, 50 (U.S. Army Ctr. of Military History 2014), https://goo.gl/syg3h6.

[4] Nat'l Park Serv., *The Civil War: Facts*, https://goo.gl/poE9B1.

situation.[5] They sold the government sand instead of gunpowder, and they sold it sick mules.[6] They "billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

After a series of Congressional investigations revealed the rampant pilfering of the Union war chest,[7] Congress responded by passing the "Informer's Act" or "Lincoln Law." *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The purpose of what would eventually become the modern False Claims Act was to end the widespread fraud. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265–66 (9th Cir. 1996). The law provided for double damages and a civil fine along with criminal penalties for violations. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

Congress could have given the executive branch sole authority to prosecute false claims, but it did not. Instead, it included a *qui tam* provision that allowed private citizens to sue on behalf of the government and receive half of any recovery as well as their costs. *See* Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698.

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[5] *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 2.6 (2d ed. 2010).

[6] Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud that "Counts" Under the False Claims Act*, 2017 U. Ill. L. Rev. 1811, 1815.

[7] *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 348 (1863) (statement of Sen. Wilson).

After the Civil War, government spending rapidly diminished, which reduced the opportunity for fraud.[8] Despite expanding the application of the Lincoln Law to general claims of fraud, use of the law was uncommon.[9] This continued to be the case for decades. The law languished, with few recorded cases in the late nineteenth and early twentieth centuries.[10]

By 1943, however, creative relators had begun bringing *qui tam* actions based on information they obtained from public sources, including indictments the Department of Justice had obtained. These so-called "parasitic" *qui tam* actions were unpopular, but in *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Court held that the 1863 Lincoln Law permitted relators to bring them.

Congress reacted swiftly to *Hess*, amending the 1863 Act later that same year. *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. Congress resisted calls from the executive to eliminate the *qui tam* provisions altogether. Instead, it stripped courts of jurisdiction to hear *qui tam* actions when the "suit was based upon evidence or information in the possession of the United

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[8] By the end of Reconstruction in 1877, federal spending was roughly one-third of what it had been in 1863, and spending would not return to 1863 levels until 1913. *See* 2 U.S. Dep't of Commerce, *Historical Statistics of the United States: Colonial Times to 1970*, 1104 (1975), https://goo.gl/wg74Va.

[9] *See* Francis E. Purcell, Jr., *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 Cath. U. L. Rev. 935, 941 (1993).

[10] *Id.*; *see also* Sylvia, *supra*, note 5.

States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1946). The effect of that "government knowledge" provision was to bar all *qui tam* claims if the government already knew of the fraud when the relator filed the claim. *See id.* So once the government knew of the fraud—even if it learned of it from the would-be relator[11]—the Executive had unfettered discretion to decline to litigate or overlook the fraud.

The 1943 Act also reduced the relator's portion of the recovery to either 10% (if the government intervened) or 25% (if it did not). *See* 31 U.S.C. § 232(E) (1946). The result of the amendments was a significant reduction in incentive to file claims and a corresponding reduction in the number of claims filed. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled."). From 1943 to 1986, relators filed only an average of about six suits under the statute per year.[12]

More than four decades later, Congress concluded that the False Claims Act had ceased to be an effective tool to protect the government from fraud. The amount of fraud against the government had grown to immense

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[11] *See, e.g.*, *U.S. ex rel. State of Wisc. v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (citing *U.S. ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980)).

[12] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 Vill. L. Rev. 273, 318 (1992).

proportions, becoming "widespread."[13] In response, Congress again amended the False Claims Act. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. As part of those amendments, Congress strengthened the *qui tam* provisions, including eliminating (for the most part) the "government knowledge" defense. *See id.* Congress replaced the "government knowledge" provisions with the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4). And in the process, it took away the Executive Branch's near-absolute control over False Claims Act litigation, restoring the relator to the role envisioned in the original Lincoln Law. No longer would inaction by government officials dictate the viability of False Claims Act litigation.

The False Claims Act has always been the federal government's principal vehicle to protect itself from fraud. For the first eighty years of the False Claims Act's history, Congress ensured that both relators and the Executive Branch had the ability to protect the public fisc. Although Congress once sought to rein in *qui tam* litigation by giving the Executive the sole ability to bring False Claims Act suits once the government learned of the fraud, Congress later concluded that doing so had been a mistake. It amended the False Claims Act to allow relators to bring claims when the government was already aware of a fraud but had decided to do nothing. Thus,

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[13] Sylvia, *supra* note 5, § 2:9; *see also* S. Rep. No. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 (discussing the General Accounting Office's identification of 77,000 cases of fraud against the government).

Congress has tried and rejected giving the Executive sole control over False Claims Act litigation.

III. The Fifth Circuit's application of *Escobar* is contrary to Congress's rejection of absolute Executive control over False Claims Act litigation, or it invades the province of the jury.

In *Escobar*, the Court resolved whether the False Claims Act permitted recovery when a defendant implicitly certified compliance with conditions of payment but failed to disclose some statutory, regulatory, or contractual violation. *See Escobar*, 136 S. Ct. at 1995. The Court unanimously held that an implied false certification could support liability if the misrepresentation by omission was material to the government's payment decision. *See id.* at 1995–96. In doing so, the Court rejected a proposed dichotomy under which undisclosed violations of "conditions of payment" would result in liability but undisclosed violations of "conditions of participation" would not. *See id.* at 2001–02.

Instead, the Court focused on the requirement that any misrepresentation be material to the government's payment decision. *See id.* at 2002–04. The relator in *Escobar* sought liability under 31 U.S.C. § 3729(a)(1)(A), which a defendant violates when it "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Although it noted that the False Claims Act defined the term "material," the Court declined to decide whether that definition governed liability for violating

§ 3729(a)(1)(A).[14] The Court reasoned that the statutory definition was consistent with the common law understanding of materiality. *Compare* 31 U.S.C. §3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."), *with Escobar*, 136 S. Ct. 2002 ("Materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." (cleaned up)).

The Court went on to provide examples of what would constitute evidence of materiality or immateriality.

- Minor or insubstantial noncompliance is insufficient evidence of materiality.
- The option to decline payment based on noncompliance is insufficient evidence of materiality.
- The government's designation of a provision as a condition of payment is evidence of materiality, but is not dispositive.
- Consistent government refusal to pay claims based on noncompliance is evidence of materiality.

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[14] Congress added that definition to the False Claims Act in 2009 as part of amendments that also expressly added a materiality requirement to liability for violating § 3729(a)(1)(B). *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1617, 1623 (2009).

- The government's decision to pay a claim in full despite knowledge of the violation of some requirements is "very strong evidence that those requirements are not material."
- "[I]f the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."

Escobar, 136 S. Ct. at 2003–04.

Following on the heels of *Escobar*, the Fifth Circuit reversed the district court based on its reading of the fifth and sixth of those examples. (*See* Pet. App. 31a–51a.) The court based its analysis on: (1) the Federal Highway Authority's (FHWA) purportedly complete knowledge of all changes to the ET-Plus system as early as 2012; (2) FHWA's June 17, 2014 memorandum stating that the modified ET-Plus became eligible for reimbursement back in 2005 and continued to be eligible for reimbursement; and (3) evidence that FHWA continues to pay for the ET-Plus. (*See generally id.*) The court concluded that, as a result of FHWA's decision to continue to pay for the ET-Plus and its failure to alter its position that the ET-Plus was eligible for reimbursement, there was "very strong evidence" of immateriality. (*See* Pet. App. 40a, 46a–47a.)

The foundational problem with the Fifth Circuit's decision is confusion about what this Court meant when it used the phrases "strong evidence" and "very strong evidence" in *Escobar*. 136 S. Ct. at 2003–04. The

most reasonable conclusion is that "strong evidence" and "very strong evidence" of immateriality are still just evidence for the jury to weigh in its deliberations. That conclusion is consistent with the Court's analysis in *Escobar*, and the Fifth Circuit at least facially gave it that meaning. (Pet. App. 32a–40a, 46a–47a). Moreover, giving the phrase that meaning is also consistent with the decisions of other courts of appeals. *See U.S. ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906 (9th Cir. 2017); *United States v. Triple Canopy, Inc.*, 857 F.3d 174, 178 (4th Cir.), *cert. dismissed,* 138 S. Ct. 370 (2017); *U.S. ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 111 (1st Cir. 2016).

Under that analysis, Harman could rebut the "very strong evidence" of immateriality that Trinity presented and survive a motion for judgment as a matter of law by presenting substantial evidence of materiality. *See* Fed. R. Civ. P. 50; *see also Boeing Co. v. Shipman*, 411 F.2d 365, 374–75 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc). So long as Harman presented substantial evidence, the jury—not the Fifth Circuit—was the body entitled to assign weight to Harman and Trinity's evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") And when assessing the evidentiary record to decide the motion for judgment as a matter of law, the court should have drawn all reasonable inferences in Harman's favor. *See id.* at 150–51.

In both his Petition for Rehearing En Banc and his Petition for Writ of Certiorari, Harman identifies substantial evidence that Trinity's misrepresentations were material and substantial evidence that would allow the jury to question the veracity of FHWA's June 17, 2014 memorandum:

- Before the jury verdict, several states voiced concerns about the modified ET-Plus, (Pet. for Reh'g En Banc 2);
- Before the jury verdict, several states removed the modified ET-Plus from their qualified products list, (Pet. for Reh'g En Banc at 2–3, 14);
- No states would have bought the modified ET-Plus had Trinity disclosed that it differed from the ET-Plus FHWA had approved, (Pet. 7, 11);
- The modified ET-Plus experienced catastrophic failures not present before the 2005 modifications, (Pet. 7, 10; Pet. for Reh'g En Banc 3);
- Trinity took steps to conceal the changes it had made to the ET-Plus in 2005, (Pet. 6, 11; Pet. for Reh'g En Banc 14);
- Trinity failed to disclose five tests of the modified ET-Plus on a flare—an angle to the roadway—all of which resulted in catastrophic failures much like those in documented automobile accidents, (Pet. 10; Pet. for Reh'g En Banc 3); and

- Trinity's significant increase in lobbying and political contributions, which could support an inference that FHWA's decision stemmed from political influence, (Pet. 11; Pet. for Reh'g En Banc 4).

Given the evidence Harman presented that Trinity's misrepresentations were material, the district court properly denied Trinity's motion for judgment as a matter of law. (*See* Pet. App. 58a–109a); *see also* Fed. R. Civ. P. 50; *Reeves*, 530 U.S. at 150–51; *Boeing Co.*, 411 F.2d at 374–75.

The Fifth Circuit's decision to reverse the district court admits of only three possible conclusions. The first possible conclusion is that the Fifth Circuit improperly made credibility determinations, reweighed the evidence, and displaced the jury's findings with its own. That possibility is disturbing.

The second possible conclusion is that the Fifth Circuit has interpreted *Escobar*'s use of the phrase "very strong evidence" as denoting some sort of rebuttable presumption of immateriality. The Fifth Circuit wrote that "continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." (Pet. App. 37a–38a.) If Harman's burden can be met but is more than showing substantial evidence, then the Fifth Circuit's treatment of the "very strong evidence" that results from continued government payment would be consistent with a rebuttable presumption. That sort of reasoning would, however, deviate from the other courts of appeals and would be a significant extension of *Escobar* that finds no basis in the statutory text.

The third and last possible conclusion is that, despite its statement to the contrary, (*see* Pet. App. 40a), the court treated the "very strong evidence" resulting from continued government payment as outcome determinative—creating an irrebuttable presumption of immateriality. Such a reading of *Escobar* could leave the *qui tam* provisions of the False Claims Act toothless.

This third possible conclusion goes from bad to worse. The bad: just as before the 1986 amendments, Executive acquiescence or even mere inaction after learning of a fraud would make it impossible for a relator to return funds taken through fraud to the public coffers. The worse: unlike the defunct "government knowledge" defense, the spoiled fruits of Executive acquiescence or inaction could very well extend even to situations in which the relevant officials learn of the fraud after the filing of the *qui tam* lawsuit. In short, the Fifth Circuit would give the Executive truly unfettered control over False Claims Act litigation even though Congress passed legislation to reduce Executive control in 1986.

All three of these possibilities should trouble the Court. And all three suggest the Fifth Circuit's decision should not stand. Yes, the Court has stated that "[t]he materiality standard is demanding," *Escobar*, 136 S. Ct. at 2003, and it is likely that most relators faced with government acquiescence or indifference will be unable to establish materiality. But nothing in *Escobar* indicates that meeting the demanding materiality standard is or ought to be impossible, and nothing in *Escobar* empowers courts to supplant the jury's judgment with their own.

At minimum, the Fifth Circuit's decision highlights the need for the Court to give additional guidance on how to apply *Escobar*'s materiality analysis consistent with the text and purpose of the False Claims Act. The Petition gives the Court the opportunity to do just that.

IV. This case is an excellent vehicle to resolve important issues that are likely to recur.

The confusion in the courts of appeal about how to apply *Escobar* shows the need for the Court to give additional guidance. The courts of appeals have rendered multiple decisions in the last twenty-one months on the materiality issue, and the Petition in this case is one of two currently pending before Court that raise similar issues. *See* Pet. for Writ of Cert., *Gilead Scis., Inc. v. U.S. ex rel. Campie*, No. 17-936 (Dec. 26, 2017). Granting certiorari will permit the Court to provide needed guidance on how to apply the materiality standard post-*Escobar*.

Determining the proper interpretation of the False Claims Act is also important to the national interest. False Claims Act litigation affects nearly every industry. It also generates significant recoveries of government funds. Between 1987 and 2016, more than 11,000 *qui tam* actions have led to settlements and judgments totaling more than $37 billion.[15] In 2016 alone, the Department of Justice obtained more than

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[15] *See* Dep't of Justice, *Fraud Statistics Overview* (2017), https://goo.gl/VaE4fL.

$4.7 billion in judgments and settlements in False Claims Act cases.[16]

Finally, this case is a good vehicle for resolving questions *Escobar* left unanswered. There has already been a trial, and the jury's award is substantial. As a result, there will be no need to speculate on what evidence of materiality might ultimately be available, and the parties have significant incentive to advocate zealously for their positions. The case also garnered attention from *amici curiae* in the Fifth Circuit, and it is likely to do so in this Court as well.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[16] *See* Press Release, Dep't of Justice, Justice Department Recovers Over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), https://goo.gl/ZC5HVz.