

No. _____

**In The
Supreme Court of the United States**

UNITED STATES *ex rel.* BRANDON BARRICK,
Petitioner,

v.

PARKER-MIGLIORINI INTERNATIONAL, LLC;
PARKER INTERNATIONAL, INC. aka
PMI FOODS USA; COTTONWOOD TRADING, LLC;
FORTUNA FOODS, LLC; JOHN/JANE DOES 1-10,
Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Relator Brandon Barrick brought suit on behalf of the United States under the “reverse false claims” provision of the federal False Claims Act alleging liability against the Respondent exporters for their extensive fraudulent scheme involving the exportation of U.S.-based meat products to their customers in Japan, Hong Kong, and China.

The federal False Claims Act (“FCA”) has been evolving since its early beginnings when Congress passed the original statute in 1863. Long thereafter in 1986, Congress amended the FCA and explicitly attempted to encourage *qui tam* actions, adding the reverse false claims provision at issue here. In 2009, Congress again amended the FCA as part of the Fraud Enforcement and Recovery Act of 2009. At this time, Congress made clear its intent that the FCA and its reverse false claims provision be applied with broad scope. However, despite both the FCA’s plain language as well as explicit congressional intent, the Tenth Circuit found that the Respondents’ rampant fraud upon the government is not cognizable under the FCA.

The Question Presented Is:

Are exporters liable under the reverse false claims provision of the FCA when they circumvent the United States regulatory inspection process and in doing so, knowingly conceal and avoid their obligation to obtain and pay for any and all certifications and inspections required when exporting U.S.-based meat products internationally?

PARTIES TO THE PROCEEDINGS

Petitioner Barrick was the plaintiff and relator in the district court and the appellant before the Tenth Circuit.

Respondents, Parker-Migliorini International, LLC; Parker International, Inc. aka PMI Foods USA; Cottonwood Trading, LLC; Fortuna Foods, LLC; and John/ Jane Does 1-10, were the defendants in the district court and the appellees before the Tenth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Barrick is an individual.

Respondents represented to the Tenth Circuit that there is no parent corporation of Parker-Migliorini International, LLC; Parker International Inc., aka PMI Foods USA; Cottonwood Trading, LLC; or Fortuna Foods, LLC; and that there is no publicly held corporation that owns 10% or more of Respondents' stock.

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**IN THE SUPREME COURT
OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Relator Brandon Barrick (“Petitioner Barrick”) respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.



OPINIONS BELOW

The Tenth Circuit’s opinion is reported at 878 F.3d 1224 (10th Cir. 2017) and is reproduced at App. 1-20. The district court’s Memorandum Decision and Order denying Petitioner Barrick’s motion to amend in part is reported at 188 F. Supp. 3d 1231 (D. Utah 2016), and is reproduced at App. 21-47. The Tenth Circuit’s denial of the Petition for Rehearing *En Banc* and for Panel Rehearing is reproduced at App. 48-49.



JURISDICTION

The Tenth Circuit issued its opinion on December 28, 2017. A timely filed Petition for Rehearing *En Banc* and Panel Rehearing was denied February 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS

31 U.S.C.A. § 3729(a)

Liability for certain acts. –

(1) In general. – Subject to paragraph (2), any person who –

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus 3 times the amount of damages which the Government sustains because of the act of that person.



STATEMENT OF THE CASE¹

Respondents are exporters engaged in the business of exporting meat products to customers internationally. For at least a decade, Respondents participated in an extensive illegal and fraudulent scheme through which Respondents circumvented the import/export regulations of the United States and other countries. As part of the scheme, it is estimated that on more than 3,000 occasions, Respondents caused to be made material misrepresentations and false statements to U.S. authorities regarding the true and intended

¹ As permitted by Supreme Court Rule 12(7), Petitioner Barrick at times cites to the Record on Appeal maintained by the Clerk of the United States Court of Appeals for the Tenth Circuit.

destination of U.S.-based meat products bound for Japan and Hong Kong and submitted to U.S. inspectors for inspection.

The Respondents' scheme was accomplished through what amounted to a shell game in which meat products originating in the United States were shipped, or purported to be shipped, from the United States into countries with lesser regulatory oversight than the true destination countries of Japan and Hong Kong (to then be smuggled into China). Although each of these shipments was falsely represented as bound for a sham destination country (usually Costa Rica, Honduras and Moldova), Respondents employed multiple methods to fraudulently export U.S.-based meat products to their customers in Japan, Hong Kong and China. By doing so, Respondents created a windfall for themselves and avoided the burdens imposed on competitors. Also, and specifically relevant to their liability under the FCA, Respondents' concealed and admittedly avoided their obligation to pay for any and all inspection fees and other associated costs required when exporting U.S. meat product to Japan and Hong Kong. This concealment and avoidance of a known obligation renders Respondents squarely liable under the reverse false claims provision of the FCA.

I. LEGAL BACKGROUND

A. Birth of the FCA

The FCA has been evolving since its early beginnings. Congress passed the original False Claims Act

in 1863 in response to Civil War fraud and prohibited the knowing submission of false claims to the government. *See, e.g., United States v. Neifert-White Co.*, 390 U.S. 228, 232-33, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); David J. Ryan *The False Claims Act: An Old Weapon with New Firepower*, 4 Annals Health L. 127, 128 (1995) (discussing history of the FCA). Debates at the time suggest that the FCA “was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.” *Neifert-White*, 390 U.S. at 232-33. Among other things, the FCA contained provisions for civil penalties for fraud against the government and allowed private individuals to prosecute those who submitted false claims to the United States, successful individuals receiving one-half of the amount recovered. *See id.* This early law is the ancestor of today’s FCA, and the United States Supreme Court gave this early version an expansive reading. *See id.*

Eighty years later in 1943, Congress severely limited these *qui tam* provisions. As a result, significantly fewer cases were thereafter brought or maintained by whistle blowers. *See, e.g.,* David J. Ryan, *The False Claims Act, supra*, at 128. Since then, the reach of the FCA’s *qui tam* provisions “has followed an erratic pattern over the years, expanding, contracting, and then expanding again.” *Id.*

B. 1986 Amendments and Enactment of “Reverse False Claims” Liability

In 1986, Congress responded to evidence that government fraud was “on a steady rise.” S. Rep. No. 99-345, at 2 (1986). Desiring to “encourage more private enforcement suits,” Congress sought to strengthen the FCA. *Id.* at 2, 23-24. Debates reveal congressional frustration over what was perceived as rampant fraud and governmental acquiescence. *See id.* at 2-3. Congress was also concerned about the number of judicial rulings that it believed had hindered enforcement of the statute. *See id.* As a result, Congress introduced major changes in order to strengthen both the power of the legislation and the power of *qui tam* relators to prosecute fraud under it. Virtually all of the changes introduced regarding the *qui tam* provisions expanded the rights of *qui tam* relators. Overall, the “amendments reduced the plaintiff’s burden of proof, lowered standards for showing intent and knowledge, and significantly raised penalties and damages.” Ryan, *The False Claims Act, supra*, at 129.

One of the more significant 1986 Amendments was the enactment of the reverse false claims provision, which prohibited the use of false statements or records to “conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.” 31 U.S.C. § 3729(a)(7). The section was added to hold those individuals who make material misrepresentations to avoid their obligations to the government equally as liable under the FCA as those who presented false claims to receive money. *See, e.g., United States*

ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1194 (10th Cir. 2006), *cert. denied sub nom.* 552 U.S. 950 (2007) (quoting S. Rep. No. 99-345, at 18). This particular subsection is described as a reverse false claim because the obligation “that is the subject of the fraud flows in the opposite of the usual direction.” *Id.* at 1195 (internal quotation omitted). Unfortunately, the term “obligation” was not defined and this oversight would serve as the topic of much debate among the courts which continues to this very day and in this very case.

C. Judicial Reaction to the 1986 Amendments

After the 1986 Amendments, clear disagreement developed between circuits as to the scope and interpretation of a number of the FCA provisions. *See, e.g., American Textile Mfrs. Institute, Inc. v. The Limited, Inc. et al.*, 190 F.3d 729, 734-36 (6th Cir. 1999) (noting that courts were struggling with the “expansive reading[s] of the statute”). Emblematic of the struggle, the Sixth Circuit acknowledged that although Congress may well have intended to extend FCA liability through passage of the 1986 Amendments, the implications of such liability gave it pause, especially since there existed “powerful potential financial incentives provided to plaintiffs.” *Id.* at 737-38 and n.3.

The courts also particularly struggled to agree upon a definition of the term “obligation.” As noted, the FCA was specifically expanded in 1986 to hold liable those persons who made false statements in

order to conceal, avoid, or decrease an “obligation to pay or transmit money or property to the Government.” 31 U.S.C. § 3729(a)(7). The early line of cases interpreting then-Section (a)(7) was based upon the creation of false documents which reduced potential fines that would have been assessed by the government had the documents been accurate. The question arose in the courts as to whether a potential fine was appropriately deemed an “obligation” to “pay or transmit money or property to the government” under the reverse false claims provision. The resultant line of cases answered this specific question in the negative, finding that a potential fine was not an “obligation” cognizable under the FCA. Case law thereafter refined the scope of the term obligation to require an “existing obligation” and limited the term to mean existing liabilities and not contingent future fines. *See, e.g., United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999); *United States v. Quick Int’l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997). While all courts found the need for an “existing” obligation, two cases – *American Textile Mfrs. Inst. v. The Limited, Inc.* and *United States ex rel. Bahrani v. Conagra, Inc.* – represented the two ends of the spectrum in ascertaining congressional intent behind the term “obligation.”

In *American Textile Mfrs. Institute, Inc. v. The Limited, Inc. et al.*, 190 F.3d 729 (6th Cir. 1999) (“ATMI”), the American Textile Manufacturers Institute filed a *qui tam* action against several defendants alleging that they submitted false claims to the government to avoid payment of “fines, duties, and liquidated

damages” for the illegal transshipment of imported textiles. *ATMI*, 190 F.3d at 731. The plaintiffs alleged that the defendants’ practices exposed them to liability and penalties under a variety of customs statutes, and therefore, the filing of false documents concealed from the government defendants’ liability. *See id.* at 731-32. According to the plaintiffs, the FCA applied because defendants made false statements to avoid the fines, liquidated damages, and duties arising from their violations of the customs laws. *See id.* at 732. The Sixth Circuit rejected the reasoning, framing the issue as one where the “defendants violated laws and made false statements to avoid discovery and the consequences.” *Id.* at 734. The Sixth Circuit further noted that whatever the scope of the phrase “obligation to pay or transmit money or property to the Government” meant, a plaintiff may not state a reverse false claim unless the pertinent obligation attached before the defendant made or used the false record or statement. *Id.* Thus, where “an obligation arises if and only if a defendant makes a false statement or files a false claim (*e.g.*, a law prohibiting the filing of false customs documents), an action under the False Claims Act will not lie.” *Id.* The *ATMI* court reasoned:

... we hold that a reverse false claim action cannot proceed without proof that the defendant made a false record or statement at a time that the defendant owed to the government an obligation sufficiently certain to give rise to an action of debt at common law. Whatever its scope, the False Claims Act clearly encompasses specific and legal duties to pay or

transmit money or property to the government. A defendant risks liability when making a false statement to conceal, avoid or decrease obligations such as his prior acknowledgment of indebtedness, a final court or administrative judgment that the defendant owes money or property to the government, or a contractual duty to pay or transmit money or property to the government.

Id. at 736.

The *ATMI* court went on to note:

Although we do not decide the matter, we think that the history of the 1986 amendments suggest that *Congress may well have intended reverse false claims liability to extend to **obligations created by statute or regulation***, at least where the statute or regulation imposes an obligation “essentially contractual in nature”

Id. at 737-38 (italics and bold added).

But, the *ATMI* court left that question for another day:

. . . because the plaintiffs in the instant case found their claims on purported obligations that fall outside the scope of “obligation” as used in the False Claims Act, even if we interpret the Act to permit those claims contemplated in the [regulation]. A defendant does not execute a reverse false claim by engaging in behavior that might or might not result in

the creation of an obligation to pay or transmit money or property to the government.

Id. at 738.²

Approximately seven years later in *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189 (10th Cir. 2006), the Tenth Circuit addressed the issue reserved by *ATMI* and found a claim cognizable under the FCA based upon an obligation that was created by regulation. The court specifically sought to determine how to characterize the defendants’ “obligations” as alleged – whether the obligations were more like “existing debts” which had been found by courts to be covered by the FCA, or more like “contingent penalties” which were not. *Bahrani*, 465 F.3d at 1197.

In *Bahrani*, the relator filed a reverse false claims action against his former employer Conagra who was engaged in exporting meat products and animal hides. *See id.* at 1192. The relator maintained that when Conagra employees discovered errors and omissions in export certificates, they either altered the original certificates or forged new ones instead of obtaining “in lieu of or replacement certificates.” *Id.* at 1194. By

² Many courts followed *ATMI*’s lead and limited what type of obligation met the requirements of the FCA. *See, e.g., Quick International Courier, Inc.*, 131 F.3d at 773 (obligation cannot be merely a potential liability; defendant must have a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness); *United States v. Bourseau*, 531 F.3d 1159, 1169-70 (9th Cir. 2008) (agreeing with Sixth Circuit that specific legal obligation owed at the time alleged false statement was made or used was required).

altering the original certificates, the Conagra employees avoided the fees that the company would have been required to pay for new certificates, thereby violating the reverse false claims provision. *See id.*

The Tenth Circuit agreed, in part. Citing to *ATMI*, the Tenth Circuit noted that “[t]here is widespread agreement that the making or using of the false record or statement is not sufficient in itself to create an obligation under § 3729(a)(7).” *Id.* at 1195. The Tenth Circuit further recognized “the fact that the making or using of a false statement or record might result in a fine or a penalty is insufficient to establish a § 3729(a)(7) obligation.” *Id.* The Tenth Circuit then expressly recognized that there are times when an “obligation” may indeed exist, but may not be fixed, explaining: “there are instances in which a party is required to pay money to the government, but, at the time the obligation arises, the sum has not been precisely determined.” *Id.* at 1201. And as a final point in its reasoning, the Tenth Circuit noted that although the obligation “need not be for a precise amount in order to be actionable . . . the obligation must arise from a source independent of ‘the allegedly fraudulent acts taken to avoid it.’” *Id.* at 1202.

With these principles in mind, the Tenth Circuit distinguished *ATMI* and found the presence of an existing obligation:

Here, it is not Conagra employees’ making of corrections on the original export certificates

that creates the obligation to pay the fee.³ Instead, that obligation arises from an independent source – from the determination that the original certificate contains a major or significant error or omission and that an “in lieu of” or replacement certificate and payment of the accompanying fee are necessary. *It is the discovery that these changes are necessary that creates the obligation.*

Id. at 1202-03 (emphasis added).

The Tenth Circuit continued, expressing that this type of regulatory fee was neither a “fine” nor a “penalty”:

Here, the fees for “in lieu of” and replacement certificates are best characterized as *user fees*; they are not penalties. The fees must be paid in limited circumstances, and they are thus distinguishable from the general obligation to comply with statutes and regulations. . . .

Id. at 1203 (emphasis added).

Ultimately, the Tenth Circuit agreed with the Sixth and Eighth Circuits as to the need for an “existing” obligation, but went where *ATMI* would not, finding that governmental regulations created the obligation. The Tenth Circuit also found that fees due to the USDA were not penalties, but were “best characterized as user fees” and thus “obligations” under the “regulatory scheme at issue . . . one that involves the provision

³ In other words, it is not the making of the false statement in and of itself that creates the obligation to pay the fee.

of government services in exchange for payment of a fee.” *Id.*

D. FERA

In 2009, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (“FERA”), which amended a number of existing federal antifraud statutes, including the FCA. In large part a response to what was perceived to be overly restrictive judicial interpretations, FERA modified and renumbered Section 3729(a). These amendments were expressly meant to “broaden the coverage” of the FCA by abrogating “several court decisions” that had “limited the reach of the False Claims Act” and “derailed meritorious actions.” H.R. Rep. No. 111-97, at 2, 5 (2009); *also* S. Rep. No. 111-10, at 10. Through the changes made to the FCA, Congress clearly intended the effect to be the expansion of liability and an increase in FCA recoveries.

Among others, FERA made substantial changes specifically to the FCA’s reverse false claims provision. *See* App. 13-14. Renumbered as Section 3729(a)(1)(G), Congress broadened the previous language, imposing liability on anyone who:

knowingly makes, uses or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government is

liable to the United States for a civil penalty

31 U.S.C.A. § 3729(a)(1)(G).⁴

Congress stressed that the FCA needed to be “corrected and clarified in light of ‘confusion among the courts’ with respect to the term ‘obligation.’” S. Rep. No. 111-10 at 14. To do so, FERA also added a definition of “obligation” which was not present in the 1986 provision, as:

an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment. . . .

31 U.S.C. § 3729(b)(3).

The Senate Judiciary Committee explained that an obligation arises “the instance where there is a

⁴ The amended provision provides for two main types of reverse false claims, although it does not place them in separate subparts. A claim arising under the first clause of 31 U.S.C. § 3729(a)(1)(G) is a false-statement reverse false claim. A claim implicating the second clause does not require any false statement, but is based upon concealment, avoidance, or decrease in an obligation.

This distinction is important for multiple reasons. First, no loss to the government is actually required. Making or using a false statement or record material to the obligation is sufficient alone for liability to attach under the first clause. Also, under the second clause, a false statement or false record is not a required element. Thus the mere knowledge and avoidance of an obligation is sufficient to give rise to liability.

relationship between the Government and a person that ‘results in a duty to pay the Government money, whether or not the amount owed is yet fixed.’” *The FERA and the Reverse False Claims Act Provision*, 2010 Health L. Handbook § 6:10 (citing S. Rep. No. 111-10 at 14). Congress also explained that the concept of obligation since the enactment of the reverse false claims provision in 1986 was always intended to be broad, and expressly rejected those cases, like *ATMI*, which had too narrowly interpreted the term to apply only to fixed obligations. *See* S. Rep. No. 111-10, at 14, n.10. Instead, Congress adopted the interpretation of those courts, specifically naming the Tenth Circuit’s *Bahrani* decision, which found the existence of an obligation when there was a relationship with the government that resulted in a duty to pay, regardless of whether the amount owed was yet fixed. *See id.* The FERA amendments were also consistent with the United States’ position that the reverse false claims provision was meant to encompass those holding specialized relationships with the government.

II. FACTUAL BACKGROUND

A. The Respondents’ Fraudulent Scheme and Liability Under the FCA

Petitioner Barrick brought this action under the FCA’s reverse false claims provision against his former employer and others who were exporters of U.S. meat products to wholesale markets around the world. *See* App. 23. Petitioner Barrick alleged that Respondents

not only defrauded the USDA, but engaged in a complex operation wherein they smuggled U.S. beef product into Japan and China (through Hong Kong), and in doing so, circumvented the import/export regulations of the United States and other countries. *See, e.g.*, App. 9-10, 23-28.

By way of summary, Petitioner Barrick alleged that Respondents not only knowingly made, used, or caused to be made or used, false statements and records material to their obligation to pay or transmit money to the government, but that Respondents further concealed and avoided necessary inspections and thus, their attendant inspection fees, required when an exporter seeks to export U.S. beef product to Japan and Hong Kong.⁵ From the moment Respondents received an order from a customer in Japan, Hong Kong, or China, Respondents were well aware that they were required to follow particularized procedures and obtain heightened inspections, which carried more costly inspection fees. Rather than comply with their known obligations, Respondents made false statements, produced false documents, failed to follow requisite regulatory procedures, and engaged in other illegal acts which concealed the true destination of their product and thereby both concealed and avoided the requisite onerous and expensive inspections. As a result, Respondents successfully, and admittedly, avoided payment of

⁵ All meat product Respondents smuggled into China was first imported into Hong Kong. Hong Kong required special inspections and thus, heightened inspection fees were imposed when exporters sent U.S. meat product to Hong Kong.

inspection fees altogether, rendering the Respondents liable under the FCA.

B. Regulation of Meat and Poultry in the United States

The export of U.S. meat and meat products to other countries is facilitated, regulated, and monitored by the U.S. meat industry; the United States Department of Agriculture (“USDA”) and its Food Safety and Inspection Service (“FSIS”); and the USDA Agricultural Marketing Service (“AMS”). Two departments within the USDA are responsible for overseeing the mandatory inspection of all meat products – the FSIS and the AMS. The FSIS is responsible for inspecting meat before export from the United States to ensure the meat complies with USDA standards. The AMS develops Export Verification (“EV”) Programs to ensure meat certified for export is compliant with the specific standards of the receiving country where the receiving country has more rigorous standards than the USDA. *See* App. 23.

As part of the export process, the USDA’s FSIS employees inspect meat prior to export. *See generally*, App. 23-27. The cost of inspections varies substantially based upon the time and complexity required. (*2nd Amend. Complaint* ¶ 52, ROA Vol. 2 Aplt.App. 0223). Certain inspections require extra charges and fees and because they are more time consuming and complex, are billed at an hourly rate. For example, FSIS will bill for any “voluntary inspections” which are required

when the importing country has specifications that are not covered by USDA's mandatory inspection program. In this way, the term "voluntary inspection" is a misnomer, because the inspection is required and not voluntary at all. (*E.g., id.* ¶¶ 54-62, ROA Vol. 2 Aplt.App. 0223-0226).

To export meat to a country with import requirements more onerous than those found in the USDA's mandatory inspection program, the exporter is required to obtain a voluntary inspection and for that, FSIS must be paid for all reimbursable expenses. (*Id.* ¶ 61, ROA Vol. 2 Aplt.App. 0226). The amount of compensation and hourly billing is determined by the nature, amount and type of product submitted for export and the requirements of the destination country. By way of example, the most expensive inspections occur when the receiving country has strict import requirements and the shipment is comprised of many different animals or animal parts from many different animals. (*Id.* ¶ 62).

Several countries have levied higher importation standards for meat originating in the United States. Relevant here, Japan places strict limitations on the importation of U.S. beef products, which in turn, requires the heightened and more costly inspections. (*Id.* ¶ 65.e, n.6, ROA Vol. 2 Aplt.App. 0227-0228). Likewise, Hong Kong has also historically placed strict specifications on the importation of U.S. beef, again requiring heightened and costly inspections. (*Id.* ¶ 66.a-h, ROA Vol. 2 Aplt.App. 0229-0231). Conversely, countries like Costa Rica, Honduras, and Moldova have minimal

requirements for the importation of U.S. beef, and also, countries like Hong Kong, Japan, and China do not impose the same strict import requirements on these countries that they have placed on the importation of U.S. beef. (*Id.* ¶¶ 74, 80-81, ROA Vol. 2 Aplt.App. 0233-0234).

C. The Relator and the Criminal Investigation

From September 2007 to November 2012, Petitioner Barrick was employed by Parker International, Inc. as a financial analyst. *See* App. 11. In the performance of his duties, Barrick reviewed and analyzed a variety of financial documents related to the sale of U.S. meat products to customers in foreign countries, including customers located in Japan, Hong Kong, and China. (*E.g.*, *2nd Amend. Complaint* ¶¶ 95-106, ROA Vol. 2 Aplt.App. 0239-0240). Through the course of his employment, Petitioner Barrick discovered that Respondents were making false statements, producing false documents, and taking other fraudulent actions to circumvent U.S. export regulations and directives, were illegally rerouting its meat products, and were paying substantial bribes to fill orders of customers in specific countries. (*Id.* ¶¶ 105-13, ROA Vol. 2 Aplt.App. 0240-0243). Most germane here, the false statements and other fraudulent actions allowed Respondents to both conceal and avoid paying heightened inspection fees to the USDA required when U.S. meat product is sought to be exported to Japan and Hong Kong.

(*E.g.*, *id.* ¶¶ 113, 117.l, 129.j, 137-38, 161.a-b, 162.a-b, ROA Vol. 2 Appt.App. 0243, 0246, 0288-0289, 0294-0297).

Armed with information about Respondents' illegal activities, Petitioner Barrick took the appropriate and necessary steps to protect and inform the government. The information and assistance he provided resulted in a criminal information being filed. Respondent Parker International, Inc. ultimately entered a plea to the criminal information pursuant to a plea agreement and was ordered, among other sanctions, to pay a one million dollar fine. *See* App. 10-11, 29-30.

III. PROCEDURAL BACKGROUND OF *QUI TAM* CASE

A. Initial Filing and First Amended Complaint

In addition to cooperating in the criminal investigation and prosecution, Petitioner Barrick followed the required process under the FCA and filed a complaint on April 20, 2012. On February 19, 2015, the government declined to intervene. Shortly thereafter, before any answer or other responsive pleading was filed, Petitioner Barrick filed a First Amended Complaint raising three distinct claims under the FCA: (1) a “reverse false claim” under 31 U.S.C. § 3729(a)(1)(G); (2) a “false claims conspiracy” under 31 U.S.C. § 3729(a)(1)(C); and (3) a retaliatory termination claim in violation of 31 U.S.C. § 3730(h). *See* App. 11.

Respondents filed a motion to dismiss the First Amended Complaint. After briefing and argument, the district court granted the motion and dismissed Petitioner Barrick's claims without prejudice for perceived pleading deficiencies. *See* App. 21.

B. Motion for Leave To Amend and the Proposed Second Amended Complaint; District Court's Dismissal of FCA Claims as "Futile"

In an attempt to meet the district court's pleading concerns, Petitioner Barrick sought leave to amend the complaint and tendered a Second Amended Complaint. *See* App. 22. The Second Amended Complaint went into great detail to describe the Respondents' complex scheme. The Second Amended Complaint also took care to allege that Respondents held a number of obligations to the government that arose from their very participation as exporters and participants in the U.S. meat industry and regulatory scheme. The Second Amended Complaint also alleged that Respondents violated obligations actionable under the FCA – specifically, the obligation to obtain and pay for any and all certifications and inspections required to export to the intended destination country receiving their product.

Respondents objected to Petitioner Barrick's motion to amend the complaint, and the district court scheduled oral argument on the "narrow issue of whether Plaintiff's reverse false claim, . . . and conspiracy claim, . . . properly allege an obligation as defined by the

False Claims Act.” App. 22, n.1. After briefing and argument, the district court granted Petitioner Barrick’s Motion for Leave to File a Second Amended Complaint in part, and denied it in part. The district court allowed the amendment of the retaliation claim, but denied permission to amend the FCA reverse false claim or conspiracy claim. *See* App. 11. The district court concluded that amendments would be futile, reasoning that Petitioner Barrick could not show that Respondents avoided an obligation cognizable under the FCA. *See* App. 11, 47.

C. The Tenth Circuit Decision

The Tenth Circuit employed similar faulty reasoning to find that Respondents’ clearly fraudulent and illegal conduct did not create liability under the FCA. Engaging in lengthy mental gymnastics, the Tenth Circuit ultimately concluded that the identified obligation⁶ did not amount to an “established duty” or “existing obligation,” but instead, only a potential and contingent obligation not actionable under the FCA. *See* App. 14-19.

In doing so, as detailed below, the Tenth Circuit misapplied not only its own precedent and that of other federal circuit courts, it ignored both the plain language of the FCA and clear congressional intent, and

⁶ Again, Respondents’ obligation to obtain and pay for any and all certifications and inspections required when exporting U.S. meat product to their customers in Japan, Hong Kong, and China.

effectively set a dangerous precedent which actually incentivizes fraud upon the government.



REASONS FOR GRANTING THE PETITION
THE TENTH CIRCUIT DECISION
DIRECTLY CONFLICTS WITH ITS OWN
PRECEDENT AND A DECISION OF AT LEAST
ONE OTHER CIRCUIT, CONFLICTS WITH
THE PLAIN LANGUAGE OF THE FCA AS
WELL AS CLEAR CONGRESSIONAL INTENT,
AND CONTRAVENES PUBLIC POLICY

The Tenth Circuit has interpreted the FCA's reverse false claim provision in a manner that conflicts with the plain language of the statute, conflicts with clear congressional intent and conflicts with other federal circuit court opinions including its very own precedent. Critically, the Tenth Circuit has interpreted the FCA in a manner that effectively shields the most clever and dishonest actors from FCA liability for fraud against the United States Government.

A. The Tenth Circuit Decision Conflicts Not
Only with its Own Precedent, but with
Congressional Intent Which Adopted It

Petitioner Barrick has always maintained that due to their specialized relationship with the government as participants in a heavily regulated industry, Respondents held a fundamental obligation to obtain

and pay for any and all certifications and inspections required when they seek to export their U.S. product to other countries. Petitioner Barrick also identified that a more particularized obligation arose the instant Respondents received the subject orders from their customers in Japan, Hong Kong, and China, since at this very point in time, Respondents not only knew the true destination ports of their shipments, they also knew these true destinations required specialized processes and expensive government inspections. Thus, Respondents' false statements, misrepresentations, and other fraudulent conduct served the very purpose to conceal and avoid their existing obligations actionable under the FCA, not a "potential" or "contingent" obligation as found by the Tenth Circuit.

This exact lesson is gleaned from prior Tenth Circuit precedent in *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189 (10th Cir. 2006). As noted, the relator filed a reverse false claims action against his former employer Conagra and its related corporations which were engaged in the business, like Respondents here, of exporting animal and meat products. *See id.* at 1192. The relator alleged that Conagra employees routinely altered export certificates issued by the USDA to avoid obtaining and paying for replacement certificates in violation of the FCA's reverse false claims provision. *See id.* The relator maintained that when employees discovered errors in export certificates, they altered the certificates or forged new ones instead of obtaining "in lieu of or replacement certificates," thereby avoiding the fees the company would have been

required to pay for new certificates. *Id.* at 1194. After some detailed analysis of the term obligation and the interpretation of other circuits, the Tenth Circuit found that an “existing obligation” did exist, explaining:

Here, it is not Conagra employees’ making of corrections on the original export certificates that creates the obligation to pay the fee. Instead, that obligation arises from an independent source – *from the determination* that the original certificate contains a major or significant error or omission and that an “in lieu of” or replacement certificate and payment of the accompanying fee are necessary. *It is the discovery that these changes are necessary that creates the obligation.*

Id. at 1202-03 (emphasis added).

The present case is indistinguishable. In both cases, the very same “obligations” arose as the result of participation in the very same regulatory scheme whereby “the USDA provides certificates to companies that export animal products.” *Id.* at 1992. In both cases, obtaining export certificates and the inspection process are part of a comprehensive governmental regulatory scheme. *See id.* In both cases, “exporters are required to obtain certificates from USDA inspectors for each shipment.” *Id.* at 1193. In both cases, requisite fees are “based upon the time expended by its inspectors for providing information over and above minimum certification requirements set forth by federal law.” *Id.* In both cases, the requisite fees “are best

characterized as user fees” and are not penalties. *Id.* at 1203. In both cases, “the kind of regulatory scheme at issue [is one] that involves the provision of government services in exchange for payment of a fee.” *Id.* at 1207. In both cases, it is the participation of the exporters in the regulatory scheme that creates the obligation. And, in both cases, the obligation is created upon the determination or discovery that the fees are necessary. *Id.* at 1202-03. Just as the actionable obligation arose the instant the *Bahrani* defendants knew that special certificates and fees were necessary, the actionable obligation here arose the instant Respondents knew their U.S. product was destined to customers in Japan, Hong Kong and China, and contemporaneously, knew that special procedures and increased inspection fees were necessary.

The Tenth Circuit’s attempt to distinguish its own precedent in *Bahrani* is misguided, confusing, and convoluted. *See* App. 18-19. In concluding that only a plausible “potential obligation” existed here, the Tenth Circuit ignored its explicit findings in *Bahrani* that an “obligation” comes into existence upon the discovery or awareness that the inspection process and the accompanying fees are necessary. Because that occurred here the moment Respondents received the orders in question, the Respondents’ obligation was not “potential” or “contingent” as found by Tenth Circuit, since it existed regardless of what occurred thereafter and regardless of any other players later involved. Review by this Court is therefore necessary to ensure that there is no irreconcilable intra-circuit split

between the Tenth Circuit’s decision here and *Bahrani*, and is also necessary to further clarify and make sense of this confusing published opinion surely to be relied upon by *qui tam* litigants nationwide.

Also, Congress has repeatedly made it abundantly clear that it has always intended the reach of the FCA to be broad in scope and has long sought to encourage *qui tam* actions to prevent broad based fraud against the government. Despite this unequivocal legislative intent, courts continue to hesitate to apply the congressional directives, even after passage of the FERA amendments – amendments which were expressly meant to “broaden the coverage” of the FCA and adopt those court decisions, to specifically include the Tenth Circuit’s *Bahrani* decision, which did so. Thus, the Tenth Circuit’s faulty distinction of *Bahrani* contravenes the intent of the very congress which depended upon Tenth Circuit reasoning for support. Review by this Court is thus necessary to ensure that fidelity is finally paid to the unequivocal intent of the legislature.

B. The Tenth Circuit Decision Conflicts with at Least One Decision of Another Circuit Court of Appeals

Since the 2009 FERA amendments, a number of the federal Circuits have determined various issues involving certain aspects of the post-FERA FCA.⁷ Of

⁷ See *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017); *United States ex rel. Schneider v. JP Morgan*

these cases, three in particular deal with the definition of “obligation” and the scope of the reverse false claim provision.

First, in *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Company*, 843 F.3d 1033 (5th Cir. 2016), the relator contended that his former employer violated the FCA by concealing an obligation to pay the United States a *penalty* arising from violations of the Toxic Substances Control Act (“TSCA”). The relator alleged that his employer violated the reverse false claims provision by failing to report chemical leaks to the Environmental Protection Agency as required, and therefore, by failing to report, the employer owed the United States a penalty and had avoided that obligation by failing to report the leak. The Fifth Circuit held that even post-FERA, potential or contingent penalties are not obligations under the FCA. *See Simoneaux*, 843 F.3d at 1036.⁸ Although the Tenth Circuit referenced

Chase Bank, Nat’l Ass’n, 878 F.3d 309 (D.C. Cir. 2017); *Olson v. Fairview Health Services of Minnesota*, 831 F.3d 1063 (8th Cir. 2016); *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Company*, 843 F.3d 1033 (5th Cir. 2016); *United States ex rel. Harper v. Muskingum Watershed Cons. Dist.*, 842 F.3d 430 (6th Cir. 2016); *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Company*, 839 F.3d 242 (3d Cir. 2016); *United States ex rel. Mastej v. Health Management Associates, Inc.*, Case No. 13-11859, 591 Fed.Appx. 693 (11th Cir. 2014); *U.S. v. Caremark, Inc.*, 634 F.3d 808 (5th Cir. 2011); *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011).

⁸ A number of federal courts have referenced *Simoneaux* to preclude a finding of obligation and liability under the FCA. *See, e.g., United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 285 F. Supp. 3d 44 (D.D.C. 2017) (unassessed penalties for chemical manufacturers’ failure to report substantial risk

this decision in this case, *see* App. 14, *Simoneaux* does not inform the issue here because *no penalties* are being asserted as the obligation at issue.

Second, in *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017), the Third Circuit was faced with the argument post-FERA that an actionable obligation was not required to be “established” but only “contingent.” Rejecting the notion of contingent obligations, the Third Circuit reasoned that the term “established duty” included in the FERA definition likely refers to one owed at the time the alleged improper conduct occurred. Thus, the term “obligation” does not include a duty that is dependent on a future discretionary act. *Id.* at 504-05.⁹ The Tenth Circuit

information to Environmental Protection Agency in order to avoid payment of penalties were not “obligations” as required to state reverse false claim under False Claims Act; rather, penalties were contingent upon discretionary action undertaken by government and liability did not attach under FCA until penalty was assessed even if payment amount was not fixed); *Jacobs v. Bank of Am. Corp.*, No. 1:15-CV-24585-UU, 2017 WL 2361944, at *1 (S.D. Fla. Apr. 27, 2017) (unpublished); *United States ex rel. Schneider v. JP Morgan Chase Bank, Nat’l Ass’n*, 878 F.3d 309 (D.C. Cir. 2017) (servicer’s potential exposure to penalties for noncompliance with the settlement’s servicing standards was nothing more than a contingent possibility and not an obligation within meaning of FCA); *United States ex rel. Okeeffe v. River Oaks Mgmt. Co., LLC*, No. 2:16-CV-48-KS-MTP, 2017 WL 4685001, at *3 (S.D. Miss. Oct. 18, 2017) (unpublished).

⁹ *Petras* has been cited, relevant to the issues here, by *United States ex rel. Schneider v. JP Morgan Chase Bank, Nat’l Ass’n*, 878 F.3d 309, 315 (D.C. Cir. 2017); and *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 285 F. Supp. 3d 44 (D.D.C. 2017).

peppered its opinion with this same language, asserting that the Respondents' obligation to pay inspection fees depended upon a number of presumptions and discretionary acts by others. *See, e.g.*, App. 14-15, 18. Not only is the *Petras* analysis inapposite on the facts here (because Petitioner Barrick has alleged that the obligation *was in existence* early on, *arose independent* from the acts of others, and *was established* at the time the Respondents' improper conduct occurred), but the Tenth Circuit also ignored both congressional intent and its own precedent in *Bahrani* which spoke to the timing of when an obligation is born. Again, the Respondents' obligation here arose the moment Respondents received the suspect orders from customers in Japan, Hong Kong, and China, because at this moment, Respondents knew that these specific exports required heightened standards and fees. Because Respondents' obligation was extant prior to any further conduct, the obligation was not "potential" or "contingent" as it existed independent of any further discretionary act.

Finally, the Third Circuit's reasoning in *United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Company*, 839 F.3d 242 (3d Cir. 2016), not only supports Petitioner Barrick's cause, but the facts and policy concerns are highly analogous. The Tenth Circuit makes no mention of this case. In *Victaulic*, the relator alleged a reverse false claim based upon a company's failure to comply with import regulations and the payment of duties. The relator alleged that for over a decade, Victaulic imported millions of pounds of

improperly marked pipe fittings without disclosing that the fittings were mismarked as required by regulation. Since the improper markings were not discovered by customs officials, Victaulic avoided paying marking duties on the fittings. The district court held that the failure to pay marking duties could not give rise to a reverse false claim action because the duties were too attenuated and contingent to be covered by the FCA. *See id.* at 252. The Third Circuit disagreed and ultimately found a cognizable obligation, explaining that “Victaulic declined to notify the Bureau of Customs and Border Protection of its pipe fittings’ non-conforming status” and this failure “resulted in the pipe fittings being released into the stream of commerce in the United States and, consequently, marking duties being owed and not paid.” *Id.* at 255. In reaching this conclusion, the Third Circuit recognized that through FERA, Congress specifically enacted amendments to the FCA in response to a perceived narrowing of the scope of the reverse false claims provision. *See id.* at 253. The Third Circuit also highlighted the fact that an actual “false statement is no longer a required element, since the post-FERA FCA specifies that mere knowledge and avoidance of an obligation is sufficient, without the submission of a false record, to give rise to liability.” *Id.* at 255.¹⁰

¹⁰ *Victaulic* has been cited, relevant to the issues here, by *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017); *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1039 (5th Cir. 2016); *Jacobs v. Bank of Am. Corp.*, No. 1:15-CV-24585-UU, 2017 WL 2361944, at *3 (S.D. Fla. Apr. 27, 2017) (unpublished); *United States ex rel. Duffy v.*

Victaulic's analysis is on point. *Victaulic*, as here, deals with the import/export industry which creates a special relationship between the government and industry participants. *Victaulic* also deals with the "mismatching" or misrepresentation of a necessary country and the avoidance of fees associated with doing so. And, *Victaulic* notes and relies on the fundamental principle – one absent from the Tenth Circuit's analysis – that mere knowledge and avoidance of an obligation is sufficient to give rise to liability. *See id.* These principles apply full force here.

C. Critically, the Tenth Circuit Decision Contravenes Public Policy And Incentivizes Unabashed Fraud upon the Government

Victaulic also aptly articulates the policy concerns at issue which the Tenth Circuit has seemingly ignored:

From a policy perspective, the possibility of reverse false claims liability in such circumstances makes sense in the context of the larger import/export regulatory scheme created by Congress. Because of the government's inability to inspect every shipment entering the United States, an importer [or exporter] may have an incentive to decline to mention that its goods are mismatched on the assumption that the mismatching will not be

Lawrence Mem'l Hosp., No. 14-2256-SAC-TJJ, 2017 WL 2905406, at *10 (D. Kan. July 7, 2017) (unpublished).

discovered. In doing so, an importer [or exporter] avoids its obligation under [specified statutes] to provide the government with such information as is necessary to enable [the government] to determine whether the merchandise may be released from government custody or whether it must be properly marked, re-exported or destroyed . . . Moreover, if the importer [or exporter] believes the value of bringing unmarked or improperly marked goods into the country exceeds the risk that the deception will be discovered . . . [it may find that mismarking] would still result in a net gain to the company. Reverse false claims liability changes that value proposition because a finding of deception carries the possibility of treble damages.

Id. at 255-56.

These very policy concerns are contravened by the Tenth Circuit's decision here. The decision not only fails to deter Respondents and others like them, but will actually incentivize fraudulent behavior against the government. The Tenth Circuit's decision rewards dishonest actors and gives them an incentive to dodge inspections as well as incentive to dodge payment for those inspections. Indeed, the Tenth Circuit's decision shields the most dishonest of the dishonest from liability under the FCA, rewarding the most clever and those most capable of lying and cheating their way around an entire regulatory process in order to avoid both detection of their illegal behavior as well as

payment of the usually required governmental fees.
This is exactly what the FCA was designed to sanction.



CONCLUSION

For the foregoing reasons, this Court should grant
this Petition for Certiorari.

Respectfully submitted,

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