IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10046

UNITED STATES OF AMERICA *ex rel.*, PAUL J. SOLOMON,
Plaintiff – Appellant,

v.

LOCKHEED MARTIN CORP. and NORTHROP
GRUMMAN SYSTEMS CORP.,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Civil Action No. 3:12-CV-4495-D
The Honorable Sidney A. Fitzwater, United States District Judge

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BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL OF THE COURT BELOW

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

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

CERTIFICATE OF INTERESTED PERSONS

No. 17-10046

United States Of America ex rel., Paul J. Solomon v. Lockheed Martin Corp. and Northrop Grumman Systems Corp.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Rule 29 of the Rules of this Court, Taxpayers Against Fraud Education Fund respectfully submits this brief as *amicus curiae* in support of Appellant Paul J. Solomon ("Relator" or "Solomon"). All parties to this appeal have been informed, and none opposes the filing of this brief. Taxpayers Against Fraud Education Fund supports the Relator for the reasons set forth below.

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

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

B. The Importance of the Outcome of this Litigation

The False Claims Act, 31 U.S.C. §§ 3729-3731 (the "FCA"), was enacted in 1863 with President Lincoln's full support to combat procurement fraud during the Civil War. S. Rep. No. 99-345, at *8 (1986). Since that time, Congress has struggled to find the right balance between *encouraging* private persons with knowledge of fraud against the government to come forward in order to fight that fraud on the government's behalf, and *discouraging* opportunistic litigants who seek only to profit from the knowledge and efforts of others. Congress enacted and subsequently amended the "public disclosure" bar and its exception, the "original source" provision (31 U.S.C. § 3730(e)(4)(A), (B)), to strike that balance. The interpretation of these provisions impacts the FCA's effectiveness in addressing rampant fraud in government procurement and programs.

In this case, the district court terminated on a motion for summary judgment a significant case under the FCA brought by Solomon, who is exactly the kind of whistleblower that Congress intended and encouraged to come forward. He is the former employee of a for-profit corporation who personally discovered and disclosed to the government that his employer intentionally, secretly, and conspiratorially engaged in a massive fraud against the government. Solomon was not subpoenaed to provide information about his employer's fraud, nor did government investigators ferret out the information by finding and interrogating

him. Instead, Solomon voluntarily came forward to report the fraud and return taxpayer money to the federal fisc.

In granting summary judgment against the Relator, the district court applied court precedent interpreting the "original source" exception to the "public disclosure" bar that precludes *government* employees from establishing original source status. Yet Solomon was not a government employee – either literally or on a "*de facto*" basis, as argued by his former employer, Northrop Grumman Systems Corp. ("Northrop"). No appellate court has ever held that the narrow "government employee" bar forecloses an employee of a *private* contractor from blowing the whistle on the employer and pursuing a claim under the FCA.

The purpose of TAFEF's brief as *amicus curiae* is to address the lower court's unprecedented but material misinterpretation of the "voluntarily provided" aspect of the "original source" exception to the "public disclosure" bar. If the district court's ruling is affirmed, the most knowledgeable employees of private contractors who voluntarily come forward will be prevented from pursuing FCA claims on behalf of the taxpayers of the United States. TAFEF leaves other issues to the parties.

II. ARGUMENT

The FCA bars a relator from pursuing claims that have been the subject of a specific kind of public disclosure. But Congress included an important

exception to that bar for relators who are an "original source" as long as they have "voluntarily provided" their information to the government before filing suit. By including the exception, Congress provided that even after a public disclosure of information suggesting fraud on the government, the FCA allows someone with independent information to come forward *voluntarily* and to file suit to help the government fight fraud. That is precisely what the Relator did in this case. The plain language of the statute, its legislative history, and the law's underlying purposes all support application of the exception to the public disclosure bar to Solomon.

A. The FCA's Legislative History Demonstrates the Importance of the Original Source Exception in Encouraging Relators to Come Forward.

The historical background of the FCA, including its 1943 and 1986 amendments, places this case's statutory construction issue in context, and explains why Congress struck the balance it did. The 2010 amendments to the FCA were not considered by the parties or the district court, and are not discussed in this *amicus brief*, other than to note that the "voluntarily provided" language survived the 2010 amendments. Therefore, FCA cases brought under the 2010 amendments may be heavily influenced, and possibly controlled, by the Court of Appeals' ruling in this matter.

1. The Original FCA Allowed Relators to Bring Claims Based Only on Public Information.

The original FCA allowed relators to bring suit alleging that someone else had defrauded the government. S. Rep. No. 99-345, at *7-11. The statute provided that suit "may be brought and carried on by *any person*, as well for himself as for the United States." *Id*. at *10 (emphasis added). This "permitted a private relator to initiate suit even though that private individual contributed nothing to the exposure of the fraud alleged." *United States ex rel. Williams v. NEC Corp*., 931 F.2d 1493, 1497 (11th Cir. 1991). Therefore, relators could pursue even "parasitic" or "copycat" claims using information taken from criminal indictments or other public files. *Id*.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court rejected a challenge to such parasitic claims, holding that even if the relator had copied his allegations from a criminal indictment, he could proceed. *Id*. at 545-46. The Court rejected the argument that allowing such claims would encourage "unseemly races for the opportunity of profiting from the government's investigations" because nothing in the statute prohibited such conduct. *Id*. at 546-47. The Court concluded that "[t]he trouble with [the policy arguments against parasitic lawsuits] is that they are addressed to the wrong forum." *Id*. at 547.

2. The FCA as Amended in 1943 Went to the Opposite Extreme, Stifling Private Suits.

In response to *Hess*, Congress amended the FCA in 1943 to bar *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609. "This amendment erected what came to be known as a Government knowledge bar: '[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (*citing Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)). The "government knowledge bar" was enforced multiple times in the years following the 1943 amendments. S. Rep. No. 99-345, *11-13. As a result, the FCA was no longer an effective tool against fraud. *Graham Cnty*., 559 U.S. at 294 ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled."); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 2.9 (Thomson Reuters 2016).

The government knowledge bar was "roundly, and properly, criticized as illogical and unreasonable." John T. Boese, *Civil False Claims and Qui Tam Actions*, § 4.02[A] (Aspen 2010). It barred even the very sources of the

government's knowledge – relators who were the opposite of parasites – from pursuing their cases. *See, e.g., United States ex rel. State of Wis. (Dep't of Health & Soc. Servs.) v. Dean*, 729 F.2d 1100 (7th Cir. 1984). It also discouraged potential relators with deep knowledge of fraud – for example, experienced employees of for-profit corporations doing business with the government – from coming forward. These potential relators were unwilling to risk the retaliation and ostracism endemic to whistleblowing because of the possibility that information they offered was buried somewhere in the government's vast "file cabinets," and therefore they could not know before filing suit whether they would be subject to the government knowledge bar. *See id.* at 1103, 1105 (noting that the government knowledge bar prevented suits even when the government's knowledge was not exactly the same as the relator's). This deterrence of relators was not helpful to the government's own fraud fighters who might not have been aware of the frauds alleged by these relators, despite the evidence buried somewhere deep in government "file cabinets."

Ultimately, it became clear that Congress' effort to prevent copycats and parasites had gone too far, and actually harmed the FCA's core purpose of ferreting out fraud against the government. *Dean* was the proverbial straw that broke the back of the government knowledge bar. In that case, the State of Wisconsin conducted an investigation of a doctor, and was required to provide the

investigation's results to the government as part of the Medicare reimbursement program. *Id*. at 1103. When Wisconsin subsequently attempted to file an FCA action against the doctor, the Seventh Circuit held that the government knowledge bar precluded the suit, notwithstanding the fact that Wisconsin was itself the source of the government's knowledge. *Id*. at 1106-07. Finding that nothing in the legislative history justified an exception for Wisconsin's case, the Court of Appeals concluded that "[i]f the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption." *Id.* at 1106. The National Association of Attorneys General responded to the Seventh Circuit's invitation in *Dean* by adopting a resolution in June 1984 which strongly urged Congress to amend the FCA precisely to rectify the unfortunate result of that case. S. Rep. No. 99-345, at *13.

3. In the 1986 Amendments, Congress Achieved a Balance Between Encouraging Non-Parasitic Relators and Preventing Opportunism.

The Senate Report for the 1986 amendments recognized that fraud in government programs and procurement presented an increasingly severe problem, and that the FCA, as it had developed, was not serving its intended purpose. S. Rep. No. 99-345, at *1-4. From 1943 to 1986, the number of cases brought under the FCA averaged only six per year. Sylvia, at § 2:9. The Senate Report

stated: "Through hearings and research on Government fraud, the Committee has sought and is continuing to seek out the reasons why fraud in Government programs is so pervasive yet seldom detected and rarely prosecuted. It appears there are serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools." S. Rep. No. 99-345, at *4.

One of the primary goals of the 1986 amendments was to return to the original purpose of the FCA – encouraging non-governmental, private relators to bring forward evidence of fraud. S. Rep. No. 99-345, at *1-2; *see also id. at* *23-24 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). Congress recognized the need to assure non-parasitic relators who were aware of important information that their efforts would lead to results, thereby addressing the unwillingness among potential relators to report fraud to the government. *Id*. at *3-5.

Congress found a middle ground between the original FCA, which allowed "parasitic" claims based purely on public disclosures, and the 1943 amendments, which barred relators even when they themselves had independently discovered, investigated, and reported fraud to the government. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) ("the public disclosure bar was 'an effort to strike *a balance* between encouraging private

persons to root out fraud and stifling parasitic lawsuits'") (citation omitted) (emphasis in original); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376, 376-77 (5th Cir. 2009) ("The 1986 amendment to the FCA . . . attempted to achieve 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own'") (internal citations omitted); *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 471 (5th Cir. 2015), *aff'd sub nom. State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 137 S. Ct. 436 (2016) ("[T]he 1986 amendments to the FCA were intended to encourage more, not fewer, private FCA actions").

"Congress apparently concluded that a total bar on *qui tam* actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress replaced it with the public disclosure bar in an effort to strike a balance between encouraging *private* persons to root out fraud and stifling parasitic lawsuits such as the one in *Hess*." *Graham Cnty.*, 559 U.S. at 294-95 (emphasis added). This new compromise standard was found in the "public disclosure" and "original source" provisions. 31 U.S.C. § 3730(e)(4)(A) (1986) provided:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a

> criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Section (B) defined the term "original source" as follows:

> [A]n individual who has direct and independent knowledge of the information on which the allegations are based and has *voluntarily provided* the information to the Government before filing an action under this section which is based on the information.

Section 3730(e)(4) (B) (1986) (emphasis added). Under this provision, FCA lawsuits are *not* prohibited just because information may be in the government's possession, as was the case in *Dean*. If that were the case, a relator who could show that he was an "original source" of information which he had "voluntarily provided" to the government could still proceed. Thus, Congress decided that even when an alleged fraud scheme had been publicly disclosed in one of the statutorily identified fora, a person with his own knowledge of the fraud who had "voluntarily" reported it to the government before filing suit is allowed to pursue an FCA action.

The provisions on public disclosure, original source, and "voluntarily provided" must be interpreted with this history in mind. Through these mechanisms, Congress balanced the goals of encouraging non-parasitic private whistleblowers against the prevention of "'windfalls' for persons who may not have had direct involvement with investigating or exposing alleged false claims . . . ."

S. Rep. No. 99-345 at *16. If a relator can show that he was an original source – meaning that the relator *voluntarily* provided direct and independent information to the government – the fact that the relator's information had been publicly disclosed and is in the government's possession is not a bar to that relator's ability to file an FCA suit.

B. Private Employees With Direct and Independent Knowledge of Fraud are the Persons the FCA Intended to Incentivize.

Circuit Courts have recognized that the FCA embraces whistleblowers who come forward voluntarily with their own knowledge of fraud, regardless of a public disclosure, and that they should be allowed to proceed with an FCA case. For example, in *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999), the Seventh Circuit observed that a relator who conducted his investigation based on information available to the public "may be viewed by some as a bit of a busybody with his own agenda, but he is certainly not a parasite. And to a certain degree, Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud."

Similarly, in *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 (11th Cir. 1994), the Court of Appeals honored the efforts of a non-governmental relator who discovered and disclosed a fraud:

> The record shows [the relator] acquired his knowledge of BCBSF's alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and [the

> Health Care Financing Administration, or "HCFA"]. Three weeks before the hearing in which an OIG inspector announced it was investigating BCBSF at HCFA's request, [the relator] had asked HCFA to act against BCBSF. Thus, his knowledge was direct. And it was obtained independently of the allegations disclosed at the hearing.

See also United States ex rel. Davis v. D.C., 679 F.3d 832, 838 (D.C. Cir. 2012) (*citing Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 472 (2007)) ("the relator's information can be different and more valuable to the government than the information underlying the public disclosure, which might be nothing more than speculation or rumors. The relator may have an eyewitness account or important documents supporting the public allegation, but not available from any other source, which could aid the government.") (internal citation omitted).

C. The District Court's Ruling Violates the Plain Meaning and Purpose of "Voluntarily Provided."

The district court granted summary judgment and held, as a matter of law, that under the 1986 version of the FCA, Solomon's action was barred because he had not "voluntarily provided" his information to the government. This unprecedented decision – not allowing a jury to decide whether Solomon "voluntarily provided" information to the government – undermined Congress's effort to encourage relators to come forward with independent evidence of fraud on the government, even if there was a public disclosure.

Both the Relator and his former employer Northrop agreed in the district court that there are no appellate case holdings supporting the proposition

that the "voluntarily provided" case law has any application outside the government employee context unless the employee was subpoenaed or otherwise forced to disclose information to government investigators. Indeed, Northrop explicitly acknowledged the point in the district court: "No case has addressed the factual scenario presented here." ROA.3164. Without any directly applicable precedent, Northrop argued that case law addressing the original source status of "government-employees" – principally represented by the seminal decision of *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995) (*en banc*) and adopted by *United States ex rel. Little v. Shell Exploration & Prod. Co.*, 690 F.3d 282 (5th Cir. 2012) – should be expanded to apply to this Relator, Northrop's former employee, who admittedly was not a government employee.

Northrop based its argument to expand the case law on its unsupported theory that the decisions regarding government employees turned on the relator's job duties, rather than the fact that their employer was the government. Yet Northrop's briefing showed that it knew it was seeking a dramatic expansion of the law when it argued that the "unique facts here" compelled a ruling in Northrop's favor, and that the district court's "application of the voluntariness inquiry [should be] limited to the circumstances here, and will have no far-reaching implications for future cases." ROA.3165. In a footnote, Northrop acknowledged, apparently reluctantly, that "no party to this action has identified a court decision

that considers the 'voluntarily provided' language in a situation of a private sector relator" such as this. ROA.3165, n. 18.

The Relator and Northrop were thus clear, forceful, and in unison on the issue of the complete absence of supporting case law holdings for the proposition Northrop argued on summary judgment. Therefore, it was especially puzzling that the district court's decision on the "voluntarily provided" issue cited *Fine* and *Little* (which the court called *Shell*) in a single paragraph of seven lines, and that the court did not discuss either the holdings of those opinions, their rationale, or the import of the fact that those cases involved government-employee relators. ROA. 3250-51. The district court noted in passing that the relator in *Little* was a "government auditor" and a "government employee" (ROA.3251, n. 5), but did not discuss the fact that Solomon was *not* a government employee, or why the holdings in *Fine* and *Little* should be expanded to include a private contractor employee such as Solomon.

It is of great concern that the district court completely ignored the central issue that was so obvious and important both to the Relator and to Northrop. Moreover, the district court did not discuss any of the policy arguments or precedential concerns that both the Relator and Northrop had fully briefed. While the district court cited *Fine* and *Little* without discussion, those decisions

were intensely focused on the government employee status of the relators, and this was the critical legal issue the district court simply ignored.

In *Fine*, the United States argued that government employees could not quality as original sources. Indeed, the Ninth Circuit quoted extensively from the United States' *amicus* brief arguing against the right of a government-employee relator to claim that he "voluntarily provided" information to the government because of the conflicts of interest it would create, and the negative impact it could have on contractor cooperation in government investigations:

> To spend work time looking for personally remunerative cases… rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators … to advance their personal financial interests. Contractors will be deterred from cooperating with Inspector General investigations and audits because they fear, legitimately, that their confidential work papers will be appropriated by Inspector General employees for their personal use in filing *qui tam* actions, rather than for legitimate governmental functions. Criminal prosecutions will be seriously compromised, since IG employees are often the government's prime witnesses in criminal and civil fraud cases, and their personal interest in the outcome of their audits and investigations will make their testimony highly impeachable. Public confidence in the integrity and impartiality of government audits and investigations will necessarily decrease.

72 F.3d at 745. Several of the concurring opinions in that *en banc* decision also stressed these significant policy concerns in ruling against a government-employee relator who claimed "voluntary" provider status. Judge Kozinski observed:

> The Amendments [to the FCA] surely weren't designed to force the government to pay for information to which it's already entitled. . . . IG employees are, in fact, precisely the kind of people who should be excluded from bringing *qui tam* suits under the 1986 Amendments. The government pays salaries calculated to reward them for finding and turning over information about waste, fraud and abuse; it holds out the threat of discipline for failure to fulfill these duties; it imposes criminal sanctions for misusing or suppressing information obtained as part of an investigation. At the same time, IG employees are not subject to *the types of pressures to withhold information that might burden employees of private companies,* or other government employees. These other employees might well be risking their concerns by coming forward with information about their superiors; IG employees are insulated from the agency's chain of command.

72 F. 3d at 746-47 (emphasis added). Judge Trott likewise noted:

> Congress could not have contemplated permitting a current or retired Inspector General employee to bring a lawsuit such as this for personal gain. To quote the government's sensible amicus brief, such a lawsuit would give 'every government auditor a personal financial stake in matters that he is directed to pursue as part of his federal duties.' The idea that Congress would countenance such a result without saying so strikes me as absurd. Why would Congress silently permit auditors like Inspector Fine to use their salaried jobs to set up private lawsuits when such auditors are also subject to a myriad of legal duties and responsibilities, all of which command independence and freedom from personal involvement in their work? Such provisions covering Inspector General employees prohibit the use of public office for private gain.

Id. at 747-48. And Judge Hawkins made the following observations:

> The policy implications which flow from concluding otherwise are frightening. Agents of the United States who are sworn to gather facts in a fair and neutral manner would, like the small town traffic magistrates of a thankfully bygone era, have a personal financial stake in the outcome of their efforts. Persons whose job it is to discover and report fraud to their supervisors would benefit from down playing the importance of their discoveries. Congress intended that inspectors general conduct professional inquiries and report the facts as they find them. As part of the effort to detect fraud, Congress also intended to enlist support from 'whistleblowers' – persons outside the formal investigative structure. It is difficult to imagine that Congress, through the enactment of these two complementary measures, could have intended the creation of some sort of mad combination of the Sheriff of Nottingham and Inspector Clouseau.

Id. at 749.

In *Little*, the United States' *amicus* brief took an even stronger stance against government-relators, arguing that a government-employee lacked "standing" to sue under the FCA. 690 F.3d at 285. This Court rejected the government's position on the standing issue, but went on to hold, principally citing *Fine*, that the government-employee relator who filed suit could not have "voluntarily provided" the information. *Id.* at 294. Neither *Fine* nor *Little*, involving government-employees as relators, supports the vast expansion of those decisions to preclude employees of private contractors from qualifying as original sources.

In granting summary judgment against Solomon, the district judge did not discuss the facts or holdings of *Fine* or *Little*, or any of the significant policy issues implicated by a government-employee relator which were analyzed in depth

by the Ninth Circuit in 1995 and this Court in 2012. Yet not a single one of those policy arguments applies to the employee of a private contractor who, through the 1986 amendments to the FCA, Congress sought to incentivize to provide information of fraud on the government fisc. The failure to discuss or to analyze the statutory history and policy issues when asked to construe and apply the "voluntarily provided" language of the FCA led the district court to commit clear error, and to undercut and to eviscerate the purpose of the FCA. As the record shows, Solomon *voluntarily* provided his research, findings, and analysis to the government without having been subpoenaed, compelled, or interrogated by government employees. This is exactly what Congress wanted to encourage when it adopted the 1986 amendments to the FCA.

It has been widely recognized that among elected officials, no one knows or cares more about the FCA than Senator Charles Grassley, who was the sponsor of the 1986 amendments. Senator Grassley's explanation of information that has not been "voluntarily provided" should be given great weight. If "the individual was a source of the allegations only because the individual was subpoenaed to come forward," then the information was not "voluntarily provided" said Senator Grassley. 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). That makes perfect sense and is consistent with Congress' intent to prevent parasitic actions. A person who reports fraud only after the government has

subpoenaed them is not a whistleblower who voluntarily stepped forward to alert the government to fraud. A person who reports only after a government investigator contacts him to be a witness is similarly opportunistic. Congress did not want to incentivize such opportunistic behavior, and the "voluntarily" requirement excludes him from original source status. But in this case, there was no basis for the district court to conclude, as a matter of law, that Solomon had been subpoenaed, or otherwise compelled, to provide information to the government.

Even Northrop seemed to recognize that the extension of *Fine* and *Little* to this Relator would create unhealthy precedent that would undercut central purposes of the FCA. In an attempt to win this particular case, Northrop contended that (a) this brand-new rule of law should be applied only to this case's "unique facts"; (b) the rule should be "limited to the circumstances" of Solomon himself; and (c) a holding in Northrop's favor would have "no far-reaching implications for future cases." ROA.3165.

In doing so, Northrop was asking for the equivalent of a "private letter ruling" from the Internal Revenue Service, as though the Relator's case was like a submission by Northrop seeking protection from liability for tax dollars improperly retained. That, however, is not a proper use of case law in our common law system where one holding creates precedent for another. The decision below is erroneous,

and an affirmance would create precedential havoc with the purposes of this important statute designed to incentivize relators like Solomon who come forward to protect the public interest.

D. A Whistleblower Who Provides Information to the Government Without Being Compelled to Do So Has Provided Information Voluntarily.

The use of the word "voluntarily" in a statute to describe a desired or prohibited act does not give a court enough guidance to conclude, as a matter of law, whether an act is voluntary. Further, if the law rewards only a "voluntary" act, it is critical to explore why "voluntary" is important. In the specific context of the FCA, the *qui tam* provisions offer a significant financial incentive to a person for bringing a lawsuit in the name of the sovereign against someone who is knowingly committing fraud on the government. But in creating and amending the FCA, Congress wanted to be judicious about when the government would pay a reward.

For example, only the first person to file a suit regarding a particular set of false claims may recover a reward. 31 U.S.C. § 3730(b)(5). Moreover, if the government had already initiated a formal proceeding involving the false claims at issue, then no private citizen may recover a reward. 31 U.S.C. § 3730(e)(3). Finally, and most relevant here, if the allegations of fraud have already been disclosed to the public in ways specified in the FCA, then only

someone who adds material, non-public information about the fraud and who "voluntarily" discloses that information to the government before filing suit may recover. 31 U.S.C. § 3730(b)(4). The context of this provision explains why the government requires a "voluntary" disclosure.

If the government is likely to obtain the information about fraud from an outside source without any financial incentive because the person is already "obligated" to provide it, why should the government pay that person a reward? The purpose of the "voluntary" requirement in § 3730(e)(4) is to make sure the government is not paying for a lawsuit based on information that should have been provided for free. *See Little,* 72 F. 3d at 746-47 ("The Amendments [to the FCA] surely weren't designed to force the government to pay for information to which it's already entitled.") (Judge Kozinski, concurring). In this FCA context, the court must consider what sort of external forces are sufficient to compel a person to disclose the fraud to the government such that the FCA's financial reward is not necessary. If such forces are at play, then the person is not providing information "voluntarily."

Here, Solomon sued his former employer in the name of the government for submitting false claims to the Department of Defense. Solomon has shown that his job duties made him well-situated to detect and to report that fraud. The district court concluded, as a matter of law, that the combination of

Northrop's obligations to report its own fraud to the government, combined with Solomon's specific position at Northrop, obligated Solomon himself to report the fraud, and that this obligation made his reporting mandatory and not voluntary. In other words, the district court concluded that the government did not need to provide Solomon with the *qui tam* financial incentive to report the conduct because, in light of his job duties, Solomon surely would have reported it anyway. But it is not enough that Solomon had a theoretical obligation to report. Rather, the obligation must be of such importance that he would have been likely *to fulfill* that obligation without a further financial incentive. An empty obligation does not help the government uncover the fraud, and does not replace the powerful effects of a financial incentive.

This is so because not all laws deliver their intended results. For example, prohibitions on fraud do not stop all fraud, and the *qui tam* provisions of the FCA exist for precisely that reason. Congress decided that a law merely prohibiting an entity from submitting false claims to the government was not sufficient to stop such conduct. Thus, Congress created the *qui tam* provisions to provide people with financial incentives to bring such fraudsters to justice through the use of private lawsuits in the government's name. One cannot assume that a company that is *breaking* the law by submitting false claims will *follow* the law that requires the reporting of such conduct once a company employee (like

Solomon) calls the wrongdoing to its attention. If the laws against such false claims in the first place are not sufficient to stop such conduct, an employer controlled obligation is not likely to do so. This is why the critical whistleblowers Congress sought to incentivize were employees working for private companies that contract with the government. Many if not most of those companies have compliance programs ostensibly requiring reporting to the government. If those requirements bar the contractor's employees from being *qui tam* relators, the FCA will be dramatically curtailed.

Indeed, research about human behavior suggests that the incentives provided by Congress are required to fulfill the purpose of uncovering fraud against the government. In their seminal paper, "*Who Blows the Whistle on Corporate Fraud*," Alexander Dyck (University of Toronto), Adair Morse (University of Michigan), and Luigi Zingales (University of Chicago), studied 230 cases of alleged corporate fraud in companies with more than $750 million in assets. *See 65 Journal of Finance 2213-2253 (Dec. 2010).* Among the cases in the healthcare industry, where *qui tam* claims are most likely, the authors found that 46.7% of the frauds are brought to light by employees. In contrast, only 16.3% of frauds are reported by employees in all other industries, most of which are not subject to the financial incentives of the FCA. Thus, relying on reporting

obligations alone uncovers only 16% of corporate fraud. The detection rate triples when financial incentives such as those available under the FCA are present.

To regard an employee reporting fraud pursuant to a company's contractual obligation as an "involuntary act" is to suggest that the *qui tam* financial incentives in the FCA are unnecessary. Yet virtually all companies who do business with the government have employees like Solomon who are in a position to detect and to report false claims. If the contractual obligations imposed on such employees to report fraud were sufficient such that they were highly likely to report fraud without any *qui tam* incentive, then Congress might as well do away with the incentives for relators under the FCA.

Experience in the real world proves otherwise. As it turns out, 82% of the dollars recovered in FCA cases come from whistleblowers who filed suit under the statute's *qui tam* provisions – people who responded to financial incentives. Only 18% came from suits initiated by the government. *See* Dept. of Justice, *Fraud Statistics* (Dec. 13, 2016), https://www.justice.gov/opa/press-release/file/918361/download. If most people in Solomon's position had, as the district court assumed, met their "involuntary" obligation to report fraud to the government through a traditional channel, rather than as an FCA relator, then most of the recoveries under the FCA would have come from lawsuits that the government initiated based on the mandatory reporting.

The "voluntarily provided" requirement is relevant only when the fraud scheme has already been "publicly disclosed." In that case, the statute assumes that the government may need less help from an FCA relator. But by the same token, the "voluntarily provided" requirement is only relevant if the FCA relator has knowledge independent of the public disclosure because such individuals are not parasitic and may have valuable contributions to make. Congress decided that the importance of this additional information justified a *qui tam* financial incentive, and that same analysis applies here.

When Solomon provided information to the government about Northrop's false claims, he was acting voluntarily. The government cannot afford to rely simply on contractors' contractual obligations to be honest. This Court should reject an interpretation of "voluntarily provided" that is divorced not only from the reality of human behavior as typified by Solomon, but also from the FCA's statutory purpose.

E. This Relator Is Exactly the Kind of Whistleblower Encouraged to Come Forward by the 1986 Amendments.

Solomon is exactly the type of person that Congress wanted to encourage to come forward. He has unique abilities to assist the government in investigating his former employer's alleged fraud and in analyzing the appropriateness of Northrop's activities. He gained his knowledge through his own personal recognition of the possibility of wrongdoing, which he pursued through

extensive effort and research to determine whether Northrop was defrauding the government. Moreover, he obtained his knowledge before any public disclosure, and he was the actual source of the information provided to the government. He is not a "parasite."

In adopting the 1986 amendments, Congress had specific considerations in mind: the need to encourage relators and to provide them with some assurance of results and rewards if their allegations were sufficient and not based on a public disclosure. Original sources turn the government "opportunity" to discover information into a reality. Where a relator has knowledge that is independent of a public disclosure and, therefore, is not the type of parasitic relator precluded by the public disclosure bar; where the relator's information materially adds to the government's knowledge; and where the relator is not a government employee and came forward voluntarily – then the relator meets the exception.

F. Whether Solomon "Voluntarily Provided" Information to the Government Is a Factual Determination that Should Be Left to the Jury.

Solomon was not compelled by a subpoena or other governmental pressure to disclose the fraud. Nonetheless, and with no analysis, the district court ruled that Solomon's claim failed because he did not "voluntarily provide" his information to the government. In doing so, the district judge invaded the province of the jury to decide the factual (not legal) question as to whether Solomon's

disclosures to the government were "voluntary." The phrase "voluntarily provided" has no special or arcane meaning which a court must interpret as a matter of law, except for the powerful policy reasons explained in *Fine* and adopted in *Little* when government employees are attempting to be relators. Instead, the ordinary phrase "voluntarily provided" belongs in a jury instruction, and a jury should be allowed to decide, based on the facts, if Solomon "voluntarily provided" his information to the government.

This case is an unfortunate example of the overly aggressive use of Rule 56 of the Federal Rules of Civil Procedure to abrogate the rights of a citizen to present his case to other citizens. *Cf. Niemi v. NHK Spring Co.*, 543 F.3d 294, 303 (6th Cir. 2008) (district court's factual determination of a central issue – that plaintiff failed to act "reasonably" – was improper on summary judgment because a determination of this ordinary phrase "is a question for the trier of fact," and based on the evidence "a reasonable jury could find" that plaintiff's efforts were indeed reasonable). *And see United States v. White Horse*, 807 F.2d 1426, 1430 (8th Cir. 1986) ("when the judge is no longer deciding the law that applies to the evidence, but rather is applying the law to the facts . . . the judge has invaded the jury's province.").

III. CONCLUSION

Turning away relators such as Solomon would frustrate the primary goal of the 1986 amendments: to encourage non-parasitic, whistleblowing relators. Obtaining information through a comprehensive analysis of a company's non-public records and through interviews with its top-level employees does not make this Relator a parasite. Indeed, Solomon – someone personally involved in the ordinary course of his employer's operations – is precisely the sort of relator that the original source provision was designed to incentivize. The purpose and plain meaning of the statute confers original source status on a relator who personally investigated a defendant's alleged fraud using non-public data and interviews of the executives involved, and who voluntarily disclosed this information to the government. Solomon, a former employee of a private contractor and paradigmatic whistleblower, should be allowed and indeed encouraged to vindicate the essential purposes of the FCA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 29(c)(5)

The undersigned, counsel for Taxpayers Against Fraud Educational Fund, *Amicus Curiae*, hereby certifies pursuant to Federal Rule of Appellate Procedure 29 that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than Taxpayers Against Fraud Educational Fund, *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

DATED: March 22, 2017

/s/ David J. Chizewer

CERTIFICATE OF COMPLIANCE WITH FRAP 29(d) AND FRAP 32(a)

The undersigned, counsel for Taxpayers Against Fraud Educational Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,900 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

DATED: March 22, 2017

/s/ David J. Chizewer

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on March 22, 2017, he caused a copy of **Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund in Support of Appellant and in Support of Reversal of the Court Below** to be served via the Court's ECF/electronic mailing system upon all counsel of record.

By: /s/ David J. Chizewer