No. 14-41297

In the United States Court of Appeals for the Fifth Circuit

IN RE TRINITY INDUSTRIES, INCORPORATED; TRINITY HIGHWAY PRODUCTS, LLC,

Petitioners.

On Petition for Writ of Mandamus from the United States District Court for the Eastern District of Texas, Marshall Division, Case No. 2:12-CV-0089

BRIEF OF TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M TRANSPORTATION INSTITUTE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or 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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Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

The Texas A&M Transportation Institute ("TTI") is an agency of the State of Texas and a member of the Texas A&M University System. Founded in 1950, it is the nation's largest transportation research agency, and one of the world's most prestigious academic institutions in the field of transportation safety. It is headquartered on the campus of Texas A&M University in College Station, Texas.

TTI is the designer and developer of, and holds the patent on, the ET-Plus system. It has licensed that system for manufacture by Trinity Industries, Inc., the defendant in this case. As a result, TTI has a profoundly intense personal interest in this case. The jury verdict not only imposes massive liability on Trinity Industries, it also threatens TTI's valuable reputation and even the existence of TTI's roadside safety program—one of the crown jewels of this prestigious, half-century old icon of transportation research. *See* App. A (Aff. of Dr. Roger Bligh).[1]

[1] Texas A&M and TTI are state agencies and therefore not subject to the amici consent and disclosure requirements of Federal Rules of Appellate Procedure 29(a) and 29(c)(5). Out of an abundance of caution, however, amici curiae wish to provide additional information to the Court. Lead counsel for amici curiae has represented Texas A&M in various capacities and at various times since 2009—including in this case. While serving as counsel for Texas A&M in these proceedings, counsel also appeared as counsel for Trinity Industries for a limited period of time—to ensure, among other reasons, full access to the trial. But now that the trial has concluded, counsel for amici no longer represents Trinity, and once again represents only Texas A&M and TTI. In addition, as noted above, Texas A&M has a long-standing licensing agreement with Trinity for the manufacturing of the ET-Plus system. Under the agreement, Trinity is required to indemnify Texas A&M for all legal expenses it incurs in connection with that agreement—including this amicus brief.

INTRODUCTION

The district court erred on a rudimentary question of False Claims Act law. Even worse, the district court should have known better. After all, this Court has already issued one mandamus opinion expressing its "concern[]" with the proceedings below. Yet in response to this Court's mandamus opinion, the district court did—nothing.

Mandamus is an unusual remedy. But this is an unusual case. Indeed, past mandamus precedents provide multiple grounds for granting mandamus relief in these types of extreme cases. To begin with, the district court has already disregarded one mandamus opinion by this Court. In addition, the court could even attempt to avoid this Court altogether, by taking certain procedural measures to pressure Trinity into an *in terrorem* settlement prior to appeal. Moreover, the verdict has created nationwide confusion over the legal status of the ET-Plus system. And as a result, state officials are enduring heavy media and political pressure to undertake the massive and irrevocable expense of dismantling and replacing hundreds of thousands of ET-Plus systems across the country—despite the complete absence of any legal or public safety need to do so.

Accordingly, amici ask the Court to grant the petition and order supplemental briefing and oral argument—or alternatively, order the district court to certify the case for interlocutory appeal.

ARGUMENT

I. The False Claims Act Imposes Severe Penalties—But Only In Cases Of Fraud Against The United States Treasury, Not Product Liability Suits.

Federal courts are well familiar with abuses of the False Claims Act. The Act is not designed to remedy regulatory non-compliance or alleged defects in product design or manufacture, but to punish fraud on the United States treasury. Federal courts have rejected countless False Claims Act suits because they were based on regulatory noncompliance or product liability, rather than fraud.[2]

II. The Error In This Case Is Particularly Compelling, Because The United States—The Plaintiff In Any False Claims Act Case—Has Repeatedly *Disclaimed* The Existence Of Any Fraud Against The Treasury.

This case is a classic misuse of the False Claims Act—a (meritless) product liability suit brought as a (meritless) False Claims Act suit. But that is not all. This case is a special breed of wrong. In this case, the United States government—

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[2] *See, e.g.*, *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) ("[t]he FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts"); *United States ex rel. Gudur v. Deloitte & Touche*, No. 07-20414, 2008 WL 3244000, at *2 (5th Cir. Aug. 7, 2008) ("The FCA is an anti-fraud statute and not the appropriate vehicle for policing regulatory compliance."); *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822-23 (8th Cir. 2009) ("allegations of consumer injury and non-compliance with [FDA] regulations, allegations arguably relevant to a products liability case . . . [are] insufficient to satisfy the Rule 9(b) requirement that FCA fraud claims be pleaded with particularity"); *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) ("Were we to accept relator's theory of liability based merely on a regulatory violation, we would sanction use of the FCA as a sweeping mechanism to promote regulatory compliance, rather than a set of statutes aimed at protecting the financial resources of the government from the consequences of fraudulent conduct."); *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532 (6th Cir. 2012) ("The False Claims Act is not a vehicle to police technical compliance with complex federal regulations.").

the plaintiff in any case under the False Claims Act—has expressly *disclaimed* the existence of any fraud against the United States treasury. The Federal Highway Administration (FHWA) has definitively rejected the relator's claim of fraud, and reaffirmed the eligibility of the ET-Plus system for federal reimbursement.

That should have ended the matter. At the end of the day, this case boils down to a single, simple question: Who is the real plaintiff in this case? It is, of course, the United States—not Joshua Harman. *See, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 n.10 (5th Cir. 2001) ("it is the government, not the individual relator, who is the real plaintiff in the suit"). And the plaintiff has disclaimed liability. That should have disposed of this entire case.

1. The FHWA has reaffirmed the eligibility of the ET-Plus system for federal reimbursement—not once, but over a dozen times. Moreover, the agency did so *after* Harman presented his allegations of fraud to the agency in January 2012—including as recently as just one week ago, *after* the verdict in this case.

For example, between October 2012 and August 2013, the FHWA reaffirmed the eligibility of the ET-Plus system in over a dozen letters and emails, stating that the "Trinity ET-Plus end terminal with the 4-inch guide channels is

eligible for reimbursement under the Federal-Aid Highway Program under FHWA letter CC-94 of September 2, 2005" (or similar words to that effect).[3]

In June 2014, the FHWA issued an authoritative memorandum reconfirming that it rejected Harman's fraud allegations, and reaffirming that "[a]n unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005, and the ET-Plus continues to be eligible today." Pet'n App. 13.

In October 2014, the FHWA issued another letter reaffirming the eligibility of ET-Plus and referencing its earlier June 2014 letter. Pet'n App. 30.

And finally, just one week ago—after Harman repeated his full presentation in open court—the FHWA again reaffirmed that the ET-Plus is "still eligible for funding," and that "[t]here is no conclusive evidence at this time that indicates that this product is not performing in the field as designed." Pet'n App. 34.[4]

2. These numerous statements should have been fatal to this suit, because they negate multiple elements of a False Claims Act suit. Specifically, they show that any allegedly false statement was immaterial to the government's

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[3] *See*, *e.g.*, Trial Exs. D-36 (Illinois), D-37 (South Carolina), P-1002 (New Hampshire), D-260 (Maryland), D-261 (foreign news outlet), D-23 (Iowa), D-262 (AASHTO), P-534 (American Association of State Highway and Transportation Officials), D-31 (Wisconsin), D-29 (North Carolina), D-257 (California), D-263 (Virginia). There are additional examples that the district court (improperly) refused to admit. Moreover, the examples that the district court did admit were (improperly) redacted.

[4] Of course, the FHWA has the right to alter its eligibility determinations at any time in the future. Past eligibility, however, is the only concern of the False Claims Act.

reimbursement decision and caused no damages—after all, the United States has made clear it has no concerns with the product or the allegedly false statement.

Moreover, as this Court has made clear, a relator cannot recover under the Act if the defendant was "entitled to . . . payment[]." *United States v. Southland Mgt. Corp.*, 326 F.3d 669, 675 (5th Cir. 2003). Here, the United States has repeatedly reaffirmed that the ET-Plus system is "eligible for . . . reimbursement," closely mirroring the language in *Southland*.

The district court rejected this rudimentary principle of False Claims Act law. It treated the relator, rather than the United States, as the plaintiff in this case. And it allowed the relator to recover hundreds of millions of dollars based on a theory of fraud that the United States itself has repeatedly rejected.

This error infected the entire trial from head to toe. Indeed, the trial began when the judge instructed the jury that it could ignore the FHWA's statements and enter a verdict against Trinity—even if there was no basis to question the authority of the statements. Trial Tr. Day 1 PM (Oct. 13, 2014) at 19:22-22:8. And the trial ended when counsel for the relator stated, during closing argument, that Harman failed to "get [action] at the FHWA . . . but he [could] get it here" from the jury in this False Claims Act suit. Trial Tr. Day 6 AM (Oct. 20, 2014) at 56:21-25.

3. The relator contends that all of the FHWA's statements should be ignored, because they were all procured by fraud. There are two problems with

this contention. First, it is demonstrably untrue. Harman admitted that the FHWA had full knowledge of all of his allegations of fraud, prior to issuing its statements. *See, e.g.*, Trial Tr. Day 2 AM (Oct. 14, 2014) at 52:19-53:8. Indeed, the agency again reaffirmed the eligibility of the ET-Plus system *after* the trial and verdict in this case. Second, the argument ignores the reality of how this case was tried. As noted, both the district court and relator tried this case on the ground that the jury could disregard the agency statements, *regardless* of whether the statements are authoritative or procured by fraud. Harman himself insisted that he was entitled to recovery simply because he disagreed with the FHWA. *See, e.g.*, Trial Tr. Day 1 PM (Oct. 13, 2014) at 99:23-25 (Harman filed suit after he brought his allegations to the FHWA and "nothing happened").

* * *

At bottom, the district court fundamentally misunderstood a bedrock principle of False Claims Act law. The relator can disagree with the United States on a matter of eligibility or safety. But he cannot sue under the False Claims Act based on a disagreement. The court was indisputably wrong to hold otherwise.

III. Moreover, This Court Reaffirmed The Correct Legal Rule In A Dramatic Mandamus Opinion On The Eve Of Trial—Yet The District Court Proceeded To Trial As If This Court Had Said Nothing.

There is an even more troubling element to this case. On the eve of trial, this Court issued a mandamus opinion expressing "concern[]" with the district

court's entire approach to this case. Pet'n App. 1. As this Court observed, the FHWA's statements rejecting Harman's fraud theory are "authoritative" "on its face"—and the argument for granting judgment as a matter of law to Trinity is therefore "strong," based on numerous precedents. *Id*. (collecting cases).

So Trinity immediately moved the district court to stay the trial based on this Court's mandamus ruling. Trinity asked the district court to either certify the case for interlocutory appeal, schedule briefing on a motion for judgment as a matter of law, modify its jury instructions to conform to the mandamus ruling, or otherwise do "something" in light of this Court's mandamus ruling. Pet'n App. 3-4.

In response, the district court did—nothing. Instead, the district court proceeded with trial as if this Court had never said a word.

IV. Past Mandamus Precedents Provide Multiple Grounds For Granting Mandamus Relief In This Unusual and Extreme Case.

Trinity is entitled to judgment as a matter of law. The only real question is whether the district court's rudimentary error of False Claims Act law is so compelling as to justify mandamus relief. It does.

This Court's earlier mandamus opinion noted that "this is a close case" for mandamus relief. Pet'n App. 1. If that is true—if the case for mandamus was "close" before trial—it is compelling now.

The Supreme Court has announced three conditions for granting mandamus relief. *See, e.g., Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403

(1976). First, the petitioner's position on the underlying legal issue must be "clear and indisputable." *Id.* at 403. Second, the petitioner must have "no other adequate means to attain the relief he desires." *Id.* Third, the mandamus court must be satisfied that mandamus relief is appropriate under the circumstances. *Id.*

Since *Kerr*, courts have identified a number of conditions that warrant mandamus relief—at least *five* of which are present here.

A. The District Court Has Already Disregarded One Prior Ruling By This Court—And Could Take Additional Steps To Delay or Even Avoid Further Review By This Court If It Wants To.

Federal courts of appeals have granted mandamus relief where a district court refused to follow a prior ruling, and where mandamus is therefore necessary to protect the authority of the appellate court.[5]

Moreover, if a district court was willing to disregard one ruling of this Court, there is every reason to fear that it would do so again—and perhaps even attempt to avoid appeal altogether, through various procedural measures.

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[5] *See, e.g.*, *Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002) ("As we have previously instructed the district court on this matter, the appropriate action at this point would appear to involve the issuance of a writ of mandamus, compelling the district court to comply with our prior mandate."); *Citibank N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978) ("Regardless of the availability of appeal, we think that the writ of mandamus is the proper remedy to compel the district court to comply with our earlier order."); *In re Chambers Dev. Co.*, 148 F.3d 214, 217 (3d Cir. 1998) ("Chambers argues that mandamus is necessary because the district court ignored that mandate. We agree, and will therefore grant a writ of mandamus and remand this matter once again for proceedings consistent with this opinion.").

Earlier today, Newegg Inc. filed a remarkable amicus brief in this proceeding. Newegg expressed sincere concern, based on personal experience, that district courts have a variety of procedural tools available to delay (or avoid altogether) an appeal, by creating an environment of uncertainty over the availability of appeal in order to induce an *in terrorem* settlement. The brief is particularly striking considering that Newegg is complaining about a judicial district that also has a reputation for moving quickly (at least prior to verdict).

If that is true—and if the mediation order in this case is an example of just that—it would provide additional grounds for relief.

Federal courts of appeals have granted mandamus relief where necessary to redress situations where a district court has simply refused to rule, thereby inhibiting review by the appellate court.[6]

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[6] *See, e.g.*, *In re Hood*, 135 F. App'x 709, 710-11 (5th Cir. 2005) ("Seven months have now passed with no action by the district judge, despite repeated respectful requests by Hood's counsel. In the exercise of our discretion, we are satisfied that the writ is appropriate under these circumstances."); *In re Syncora Guarantee Inc.*, 757 F.3d 511, 515-16 (6th Cir. 2014) ("[m]andamus is justified here" because "[t]he deprivation of meaningful and timely appellate review itself constitutes substantial and irreparable prejudice"); *In re Int'l Bus. Machs. Corp.*, 687 F.2d 591, 603-04 (2d Cir. 1982) ("[W]e think [the district judge] has clearly abused his power by taking such a substantial amount of time to resolve what we have shown to be a clear-cut issue. He has been presented repeatedly with several factors which emphasize the importance of a prompt disposition of this matter and of the litigation."); *In re Sharon Steel Corp.*, 918 F.2d 434, 436-37 (3d Cir. 1990) ("By refusing to rule on ARCO's motion to reconsider, the district court in the present case has failed to exercise its judicial power, which in turn has inhibited this Court's exercise of appellate jurisdiction. . . . The district court failed to perform this duty, choosing instead to block ARCO's avenue of appeal, thereby frustrating our jurisdiction. . . . When, as in the present case, a district court

[Footnote continued on next page]

In addition, courts of appeals have granted mandamus relief where a defendant has strong prospects for reversal on appeal, but is nevertheless pressured into an *in terrorem* settlement, due to the combination of enormous risk and litigation delay. This has occurred most frequently in the class action context, prior to the enactment of Rule 23(f)—but the same principles apply here.[7]

Indeed, this case presents a perfect storm for inflicting *in terrorem* pressure on a defendant to settle, regardless of merit, through delay: A massive judgment, publicized by a compliant media, creating a political firestorm in Washington, D.C. and state capitals across the country. *See* Pet'n App. 32.

Moreover, Trinity is not the only entity that fears irreparable injury absent immediate review. TTI is one of the world's most prestigious academic research institutes specializing in transportation safety. But in this business, reputation is everything. The jury verdict—and the media and political firestorm that has erupted in its wake—threatens TTI's valuable reputation. As a result, TTI's ability

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[Footnote continued from previous page]

> conditions the grant of a motion upon mutual consent, the practical effect is to turn the motion into a consent decree or judgment. By refusing to adjudicate the motion to reconsider unless Sharon and ARCO agreed to the 'consent decree,' the district court insulated itself from appellate review of its disposition of the motion to withdraw and transfer. . . . Not only is the district court's inaction an unexplained abdication of judicial power, but it severely restricts ARCO's right to an appeal by defeating our jurisdiction.").

[7] *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) ("[t]he reason that an appeal will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk").

to attract grants and contracts in the future has been seriously jeopardized. Absent immediate review, TTI's roadside safety program, one of the crown jewels of this half-century old institution of transportation research, may even be forced to close. *See* App. A.

B. The Verdict Creates Nationwide Confusion Over The Legal Status Of The ET-Plus System—And State Officials Need An Answer In Light Of Misguided Media And Political Pressure.

There are additional compelling reasons why this verdict uniquely cries out for mandamus relief. The verdict has caused nationwide confusion. And absent immediate review, it may cause irrevocable national expense as well.[8]

1. Courts of appeals have granted mandamus relief to combat nationwide confusion in other areas of the law.[9] It should do so here. The FHWA has repeatedly affirmed that the ET-Plus system is safe, legal, and federally reimbursable in all 50 states. But a single jury in Texas, joined by a media and

[8] Whether this expense is ultimately borne by taxpayers or others, the point is the same: It is an irrevocable and wasteful expenditure of massive resources for no societal benefit.

[9] *See, e.g.*, *In re Stone*, 986 F.2d 898, 901 (5th Cir. 1993) ("we have used the writ of mandamus as a one-time-only device to settle new and important problems that might have otherwise evaded expeditious review") (quotations and citations omitted); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014) ("many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. . . . mandamus can be appropriate to . . . eliminate uncertainty in important areas of law") (quotations omitted); *In re United States*, 10 F.3d 931, 933 (2d Cir. 1993) ("mandamus will eliminate uncertainty"); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) (Supreme Court mandamus precedent "authorizes departure from the final judgment rule when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice").

political chorus, has now reached the opposite conclusion, contrary to FHWA findings, not to mention basic principles of False Claims Act law. This has created massive nationwide confusion, as state transportation officials now must determine how best to respond in the face of conflicting messages. *See* App. A.

2. Moreover, the verdict has caused not only nationwide confusion, but potential irrevocable nationwide expense as well. Courts of appeals have granted mandamus relief to avoid irreparable injury caused by irrevocable expense.[10]

The Court should do so here as well. After all, the ET-Plus system is no ordinary product that retailers can simply take off the shelves. Hundreds of thousands of ET-Plus guardrails have been installed on highways and roadsides in every state in the Union—consistent with all FHWA safety standards.

As a result—and as countless media accounts have reported since the verdict (Pet'n App. 32)—state transportation officials nationwide now face media and political pressure to undertake the expensive proposition of dismantling and replacing hundreds of thousands of ET-Plus systems nationwide, despite the complete absence of any legal or public safety need to do so. *See* App. A.

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[10] *See, e.g., Int'l Bus. Machs. Corp.*, 687 F.2d at 603-04 ("mandamus is appropriate" where "the parties are expending enormous sums of money" as a result of erroneous district court ruling); *Rowland v. U.S. Dist. Court for the N. Dist. of Cal.*, 849 F.2d 380, 382 & n.* (9th Cir. 1988) (mandamus appropriate where "Petitioners may well be irreparably damaged through interference with the administration of New Folsom and the cost of subsidizing the Monitor's activities," and where "there is no reasonable prospect that petitioners will be able to recoup from them costs wrongfully paid out").

This is a terrible catch-22 for transportation officials. In Harman's view, leaving the ET-Plus system in place would endanger drivers nationwide. But in Trinity's view, dismantling the ET-Plus system before appellate review is concluded is not only entirely unnecessary as a legal or product safety matter—it could also impose massive costs on taxpayers or others. The only way to avoid this catch-22 is to grant mandamus relief. Put simply, the nation needs to know if the verdict is right or not—and it needs to know now. *See* App. A.

* * *

"Mandamus petitions from the Marshall Division are no strangers to the federal courts of appeals." *In re RadMax Ltd.*, 720 F.3d 285, 287 n.1 (5th Cir. 2013) (collecting cases). Mandamus is appropriate in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008). That standard is met here, for the numerous reasons articulated.

The False Claims Act authorizes private relators to help the United States, by privately litigating fraud cases on behalf of the nation. In this case, however, the United States has been adamant that Trinity well served the nation's interest in public safety—and that Trinity committed no fraud on the treasury. So this suit is not a help to the federal government—but a hijacking.

In sum, the error of law in this case is clear and indisputable—and past mandamus precedents afford multiple grounds for granting relief here. Accordingly, amici curiae ask the Court to grant the mandamus petition, order supplemental briefing, and schedule oral argument, so that this Court can decide this case on the merits in this mandamus proceeding. *See, e.g.*, *In re Ford Motor Co.*, 344 F.3d 648, 654-55 (7th Cir. 2003). Alternatively, amici ask the Court to direct the district court to certify this case for interlocutory appeal. *See, e.g.*, *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 839 (5th Cir. 1984); *Fernandez-Roque v. Smith*, 671 F.2d 426, 431-32 (11th Cir. 1982).

CONCLUSION

The Court should grant the mandamus petition. It should order supplemental briefing and oral argument so that the Court can decide this case on the merits in this mandamus proceeding—or, in the alternative, order that the district court certify this case for interlocutory appeal.

In addition, under either scenario, the Court should also stay all proceedings in the district court, pending this Court's ultimate disposition of the mandamus petition (including any subsequent interlocutory appeal). Amici construe Trinity's motion for stay to be consistent with, and supportive of, this request.

DATED: November 19, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Amicus Brief complies with requirements of Federal Rule of Appellate Procedure 29 and 5th Circuit Rule 29.

/s/ *James C. Ho*
James C. Ho
Counsel of Record

CERTIFICATE OF SERVICE

I certify that, on November 19, 2014, a true and correct copy of the foregoing Amicus Brief was served via the Court's CM/ECF system or electronic mail on counsel of record for all parties.

/s/ *James C. Ho*
James C. Ho
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APPENDIX

TAB A – AFFIDAVIT OF DR. ROGER BLIGH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re Trinity Industries, Inc. and Trinity Highway Products, LLC, Petitioners.	Case No. 2:12-CV-0089

AFFIDAVIT OF DR. ROGER BLIGH

Dr. Roger Bligh, being duly sworn, deposes and states as follows:

1. I am over eighteen years of age, am competent to testify, and have personal knowledge of the facts stated in this Affidavit, which are true and correct.

2. I am a resident of College Station, Brazos County, Texas.

3. I received a B.S. degree in Civil Engineering in 1986, an M.S. degree in Civil Engineering in 1988, and a Ph.D. in Civil Engineering in 2001, all from Texas A&M University. I am a registered Professional Engineer in Texas.

4. I have been active in the field of transportation safety—both as an engineer and as an academic researcher—since 1986.

5. During that tenure, I have served as principal or co-principal investigator on numerous studies sponsored by the National Cooperative Highway Research Program, the Federal Highway Administration, the Departments of Transportation of Alaska, Arizona, California, Florida, Louisiana, Minnesota, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia and Wyoming, and private industry. I am currently co-chairman of the "Bridge Rail and Transitions" subcommittee of Task Force 13, which serves a joint American Association of State

Highway and Transportation Officials (AASHTO)-Associated General Contractors of America (AGC)-American Road and Transportation Builders Association (ARTBA) Subcommittee on New Highway Materials and Technologies. I am also a member of the Guardrail Committee and Education Task Force of the American Traffic and Safety Services Association (ATSSA) and incoming chairman of the National Academy of Sciences, Transportation Research Board Committee AFB20 on Roadside Safety Design.

6. I have extensive experience in applied research dealing with the design, analysis, testing, and evaluation of highway safety appurtenances. I have contributed to the design of numerous roadside safety devices and developed guidelines for their use, including guardrails, bridge rails, median barriers, guardrail/bridge rail transitions, guardrail end treatments, crash cushions, breakaway sign supports, work zone barriers, and other work zone traffic control devices. I have co-authored more than two hundred fifteen publications in this area.

7. I am a Research Engineer, Manager of the Roadside Safety Program, and Director of the Center for Transportation Computational Mechanics at Texas A&M Transportation Institute (TTI). I have worked at TTI since 1986. As a Research Engineer, I conduct research on competitively procured projects sponsored by a number of different governmental agencies and private industry. In my role as Program Manager, I manage the research program in the roadside safety discipline and supervise the research professionals working in the program. As Center Director, I lead, promote and direct research related to the use of computational mechanics in transportation, including finite element analysis.

8. TTI was founded in 1950 as a state agency and member of the Texas A&M University System to serve the State of Texas and the nation as the official research arm of the Texas Highway Department. Widely recognized as one of the premier higher education-affiliated

transportation research agencies in the nation, TTI's research has resulted in significant breakthroughs across all facets of the transportation system. TTI research has established a legacy of saving lives, improving roadways, helping departments of transportation enhance time on projects, and maximize their resources. Our mission is to identify and solve transportation problems through research; to transfer technology and knowledge; and to develop diverse human resources to meet the transportation challenges of tomorrow.

9. The Institute conducts over 600 research projects annually for more than 200 sponsors at all levels of government and the private sector. My colleagues at TTI and I have developed hundreds of state-of-the-art transportation safety devices designed to reduce the severity of roadside crashes. TTI partners with federal and state agencies, other universities and research institutes, foreign countries, and industry on its various research and development projects.

10. Through my positions with TTI, I have extensive experience assisting the federal government, numerous state departments of transportation, local government transportation authorities and foreign countries in addressing their roadside safety needs and challenges. I have been actively involved in numerous research and funding proposals to federal and state transportation officials, including meetings, discussions and other communications with federal and state officials as they evaluate the proposals submitted by TTI and others. Through this experience, I have gained insight into the factors that impact their project and grant award decisions.

11. The vast majority (approximately 80%) of TTI's budget comes from projects and grants awarded by federal, state and local transportation agencies, as well as private industry sponsors. To secure these projects and grants, TTI must compete with a host of other research institutes and universities.

12. Reputation is by far the most important asset of any research institute. TTI has devoted the last sixty plus years to developing its reputation for integrity, objectivity, accuracy, and honesty. That reputation is vital to TTI's continued ability to set itself apart from its competitors and competitively win projects and grants.

13. In sum, TTI's ability to continue its groundbreaking transportation safety research depends on its hard-earned reputation and the reputation of its dedicated research professionals.

14. I have been called as a witness in this case, testified in depositions, and testified live in both of the trials of this matter. I am personally familiar with the ET-Plus system component that forms the basis of Joshua Harman's allegations in this case. I am a co-inventor and helped design the ET-Plus System, including the component in this case. I was involved in administering the crash testing that demonstrated its compliance with federal safety standards. I personally met with FHWA officials to explain the testing, discuss product performance, and refute relator Harman's allegations. At no time did TTI, nor its researchers, commit fraud or otherwise deceive or misrepresent information to FHWA or any other party regarding the ET-Plus system.

15. The Federal Highway Administration has repeatedly affirmed the safety of the ET-Plus and its eligibility for federal reimbursement, both before and after the jury verdict in this case. In a statement posted on its website after the verdict, the FHWA said "[t]here is no conclusive evidence at this time that indicates this product is not performing in the field as designed. When queried in 2012 and 2014, the states did not provide information claiming otherwise." The jury verdict conflicts with this FHWA determination, and creates the wholly unjustified, unfair and inaccurate perception—in the minds of the media, state officials across the country, foreign transportation officials and the public at large—that the ET-Plus is somehow dangerous or forms the basis for a valid claim under the False Claims Act.

16. Based on my twenty eight years of experience in the transportation safety industry, I conclude that the jury verdict in this case is causing irreparable injury to both TTI and the public as a whole.

17. First, this jury verdict severely impugns TTI's reputation. The erroneous implication that TTI failed to properly develop and test the ET-Plus extruder head component—and in so doing, somehow caused a dangerous product to be placed on highways and roadsides across the country—is absolutely wrong and poses a serious threat to TTI's reputation for integrity, objectivity, accuracy, and honesty.

18. The harm inflicted by the verdict threatens the very existence of TTI's Roadside Safety Program. If TTI cannot protect its reputation for integrity, objectivity, accuracy, and honesty against this unfair and unjustified jury verdict, it will be unable to compete effectively for the grants that make up the support of its research program.

19. Since the verdict in this case, TTI was contacted by a colleague with significant experience and expertise in roadside safety issues; a person who has been a sponsor of roadside safety research and development at TTI over the years. This individual is a longstanding participant in numerous highway safety professional organizations and committees. While still supportive of TTI and its researchers due to a longstanding relationship, the individual stated that the jury verdict and ensuing negative publicity were profoundly and adversely affecting TTI's reputation in the industry. This individual expressed the strong opinion that if left unresolved, the continued impact of the reputational damage from the verdict will take TTI years to recover from, if TTI is able to recover.

20. Based on my twenty eight years of experience in the field of transportation safety, I conclude that the verdict is having a tremendously negative impact on TTI. If the verdict is not

reversed immediately, there will be unavoidable reputational consequences that are likely to become permanent. TTI will suffer irreparable harm, and certain significant, existing research programs may cease to exist. Without such programs, future research results, devices and products that would otherwise be developed and implemented for the public benefit and the safety of the motoring public would not be realized.

21. Second, the verdict threatens irreparable injury to the public at large. That is because the verdict has sowed serious confusion among state transportation officials across the country, concerning the hundreds of thousands of ET-Plus installations on highways and roadsides nationwide.

22. On the one hand, the Federal Highway Administration has repeatedly assured state DOT officials—both before and after the verdict—that the ET-Plus is safe and eligible for federal reimbursement, and has been throughout its history. On the other hand, the jury verdict has created an unsustainable environment in which state transportation officials and their constituents are being pressured by counsel for the relator and their supporters that the ET-Plus poses a danger to drivers across the country. This has resulted in a call for additional testing of the ET-Plus by the FHWA (when no other competing product is being subjected to the same testing protocol) despite the FHWA's complete approval of prior testing of the system and the recent statement — as posted on its website after the verdict—that "[t]he extruder head tested in 2005 and 2010 is the same design that is in use today. Both met AASHTO standards."

23. The ensuing media uproar is exerting substantial pressure on state officials to take action of some kind despite the FHWA's repeated assurances of the safety and eligibility of the ET-Plus system and TTI's enhancement to guide channels that attach to the extruder head component of that system.

24. State officials have already indicated that, caught between federal assurances that the product is safe and the media and political firestorm that has unfolded as a result of the jury verdict, they do not know how to proceed. As of today, a number of state transportation departments have actually removed the ET-Plus from their qualified products lists. Others have ceased the installation of the ET-Plus.

25. Based on my twenty eight years of experience in the transportation safety industry, interacting with state and federal transportation agencies nationwide, I conclude that the only way to eliminate the chaos, confusion, and uncertainty plaguing state officials and the rest of the nation is for this Court to grant immediate review of the jury verdict, and thereby provide clarity to state officials on how they should proceed, in the best interests of the driving and taxpaying public.

* * *

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated: College Station, Texas
November 19, 2014

Roger Bligh

Subscribed and sworn to before me on this 19th day of November, 2014, by Dr. Roger Bligh, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Notary Public for State of Texas

MELISSA PARKER
Notary Public, State of Texas
My Commission Expires
JANUARY 12, 2015

My Commission Expires: 1-12-15