

Case No. 15-41172

In The United States Court Of Appeals
For The Fifth Circuit

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

Plaintiff/Relator – Appellee,

v.

**TRINITY INDUSTRIES, INCORPORATED;
TRINITY HIGHWAY PRODUCTS, L.L.C.,**

Defendants – Appellants.

On Appeal from the United States District Court for the
Eastern District of Texas, Marshall Division
Case No. 2:12-CV-00089

**BRIEF OF *AMICUS CURIAE* MOTHERS AGAINST
DRUNK DRIVING IN SUPPORT OF APPELLANTS**

Adam W. Vanek
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Freeway,
Suite 700
Irving, Texas 75062
T. 469.420.4517

Danny S. Ashby
John C. Sullivan
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001

Attorneys for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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.

Amicus Curiae

Mothers Against Drunk Driving

Attorneys for Amicus Curiae

Danny S. Ashby

John C. Sullivan

MORGAN, LEWIS & BOCKIUS LLP

1717 Main Street, Suite 3200

Dallas, Texas 75201

Adam W. Vanek

MOTHERS AGAINST DRUNK DRIVING

511 E. John Carpenter Freeway,

Suite 700

Irving, Texas 75062

/s/ John C. Sullivan

John C. Sullivan

Attorney for Amicus Curiae

TABLE OF CONTENTS

	Page
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS.....	i
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
Allowing FCA Liability Here—Where The Government Has Approved The Product At Issue—Places Highway Safety At Risk.....	4
A. Highway Safety Products Like The ET-Plus Guardrail End Terminal System Are Proven To Save Lives	4
B. The ET-Plus Design Has Been Specifically Approved By The Federal Agency Responsible For Ensuring Highway Safety.....	6
C. FCA Liability For A Government-Approved Safety Modification Places Highway Safety At Risk	9
CONCLUSION.....	11
CERTIFICATE OF SERVICE	13
CERTIFICATE OF COMPLIANCE.....	14

TABLE OF AUTHORITIES

	Page(s)
STATUTES	
23 U.S.C. § 109	9
31 U.S.C. §§ 3729 <i>et seq.</i> (False Claims Act)	<i>passim</i>
OTHER AUTHORITIES	
<i>2014 Motor Vehicle Crashes: Overview</i> , TRAFFIC SAFETY FACTS (U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin.), Mar. 2016, http://www-nrd.nhtsa.dot.gov/Pubs/812246.pdf	4, 5
<i>A Brief History of Roadside Safety at the Texas A&M Transportation Institute (TTI)</i> , TEXAS A&M TRANSPORTATION INSTITUTE, https://tti.tamu.edu/wp/wp-content/uploads/2014/12/History-of-Roadside-Safety-at-TTI-FINAL-12-16-14.pdf	11
<i>AASHTO Overview</i> , AASHTO, http://www.transportation.org/Pages/Organization.aspx	7
<i>About the Federal Highway Administration</i> , U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN. (Sept. 17, 2012), https://www.fhwa.dot.gov/about	7
AM. ASS’N STATE HIGHWAY & TRANSP. OFFICIALS, <i>ROADSIDE DESIGN GUIDE</i> (4th ed. 2011).....	5, 6
<i>ET-Plus Passes All Crash Tests; Task Force Finds ‘No Evidence’ of Multiple Versions</i> , AASHTO JOURNAL (Mar. 13, 2015), http://www.aashtojournal.org/Pages/031315etplus.aspx	2, 4
<i>FHWA Review of ET-Plus, AASHTO/FHWA Crash Analysis Task Force</i> , U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN. (Sept. 11, 2015), http://www.fhwa.dot.gov/guardrailsafety/isptf.cfm	8
<i>FHWA Review of ET-Plus, Retesting of the ET-Plus</i> , U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN. (Mar. 24, 2015), http://www.fhwa.dot.gov/guardrailsafety/retesting.cfm	8

TABLE OF AUTHORITIES
(continued)

Page(s)

The Forgiving Roadside: TTI research, facilities are vital to protecting your loved ones, TEXAS TRANSPORTATION RESEARCHER (Texas A&M Transportation Institute), Sept. 2010, <http://tti.tamu.edu/2010/09/01/the-forgiving-roadside-tti-research-facilities-are-vital-to-protecting-your-loved-ones>5

Guardrail 101—Purpose, Function and Crashworthiness of Guardrails, U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN. (Dec. 10, 2014), <https://www.fhwa.dot.gov/guardrailsafety/guardrail101.pdf>6

Memorandum from Michael S. Griffith, Director, Office of Safety Technologies, Office of Safety of the FHWA to Division Administrators, Directors of Field Services, Federal Lands Division Engineers, and Safety Field of the FHWA, ET-Plus W-Beam Guardrail Terminal (June 17, 2014), http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/memo_etplus_wbeam.pdf2, 4, 7

NAT’L COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 350, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_350-a.pdf8

Roadway Departure Safety, U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN. (Feb. 17, 2016), http://safety.fhwa.dot.gov/roadway_dept/5

SAFETY ANALYSIS OF EXTRUDING W-BEAM GUARDRAIL TERMINAL CRASHES, REPORT FROM JOINT AASHTO-FHWA TASK FORCE ON GUARDRAIL TERMINAL CRASH ANALYSIS (2015), <http://www.fhwa.dot.gov/guardrailsafety/safetyanalysis/safetyanalysis.pdf>8

INTEREST OF *AMICUS CURIAE*¹

Mothers Against Drunk Driving (MADD) is a national grassroots organization founded by the mother of a 13-year-old girl whose life was senselessly ended by a drunk driver. In the more than 35 years since its founding, MADD staff and volunteers have fought for the rights of hundreds of thousands of families affected by drunk and drugged driving. The mission of Mothers Against Drunk Driving is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking.

As advocates for victims affected by drunk driving, MADD is particularly concerned with highway safety. One of the major causes of highway fatalities is vehicles leaving the road and striking a stationary object or another vehicle—a danger obviously enhanced by the use of alcohol or drugs. Accordingly, MADD is especially interested in the use of safety guardrails along the nation's highways because those guardrails are instrumental in saving lives.

Safety guardrails require the use of end terminals. *See* Appellants' Br. at 5-8. Thus, because it believes the government should use safe and well-tested equipment on the nation's roadways, MADD has a vested interest in defending the use of compliant highway safety products such as the ET-Plus system at issue. It is

¹All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief.

well accepted that highway safety products have reduced traffic fatalities and injuries, and MADD is concerned that meritless False Claims Act (FCA) suits may deter compliant manufacturers of highway safety products from continuing to produce and advance highway safety technology.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It has been said that the door to safety swings on the hinges of common sense. In this case, common sense dictates that FCA liability should not be allowed to undermine highway safety improvements made by a highway product manufacturer and, most importantly, approved by the government.

Seeking to improve upon the safety of its guardrail end terminal design, Trinity and research engineers at the Texas A&M Transportation Institution (TTI)—like other highway safety product manufacturers—spent considerable time and resources in the research and development of the product. And the government confirmed multiple times that Trinity’s ET-Plus system is compliant with federal safety standards. *See* Memorandum from Michael S. Griffith, Director, Office of Safety Technologies, Office of Safety of the FHWA to Division Administrators, Directors of Field Services, Federal Lands Division Engineers, and Safety Field of the FHWA, *ET-Plus W-Beam Guardrail Terminal* (June 17, 2014), http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/memo_etplu_s_wbeam.pdf (“FHWA Memorandum”) (ROA.4305-06); *ET-Plus Passes All*

Crash Tests; Task Force Finds 'No Evidence' of Multiple Versions, AASHTO JOURNAL (Mar. 13, 2015), <http://www.aashtojournal.org/Pages/031315etplus.aspx>. Nevertheless the district court upheld the FCA claim here for what Trinity contests was an inadvertent omission of a description of the design's improvement. MADD contends that manufacturers of proven, compliant highway safety products should not be penalized for acting in good faith.

Legitimate lawsuits promote safety concerns by holding bad actors accountable. The plaintiff's meritless claim in this case, however, threatens the viability of credible highway safety product manufacturers and must be rejected. Compliant end terminals for guardrails, like the ET-Plus system, are critical for highway safety and their development is essential to saving lives. Holding Trinity liable in this FCA case—when the end terminal product in question was repeatedly confirmed to be compliant by the federal government—undermines highway safety by discouraging manufacturers from continuing production of highway safety products, or from conducting necessary research and development in highway safety technology. The lower court's ruling serves as a stark warning and general deterrent to other compliant manufacturers who strive to improve the performance and safety of their roadway products sold to the government. The district court should be reversed.

ARGUMENT

Allowing FCA Liability Here—Where The Government Has Approved The Product At Issue—Places Highway Safety At Risk.

Highway safety products such as guardrails and appropriate end terminals are instrumental in saving the lives of travelers across the country. In this case, the Federal Highway Administration (FHWA), together with the American Association of State Highway and Transportation Officials (AASHTO), confirmed that the ET-Plus system manufactured and marketed by Trinity was compliant with all government safety guidelines and that it was approved for use on the National Highway System. *See* FHWA Memorandum (ROA.4305-06); *ET-Plus Passes All Crash Tests*. Thus the government—and specifically, the federal agency charged by Congress with the responsibility of making relevant safety determinations—agrees that, at all times, the product at issue here was and is a valuable roadside safety precaution. Because the relator’s claim would needlessly undermine such innovation and threaten highway safety, it should be rejected.

A. Highway Safety Products Like The ET-Plus Guardrail End Terminal System Are Proven To Save Lives.

The past 10 years have seen a significant reduction in fatalities on U.S. roadways. *2014 Motor Vehicle Crashes: Overview*, TRAFFIC SAFETY FACTS (U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin.), Mar. 2016, at 1, <http://www-nrd.nhtsa.dot.gov/Pubs/812246.pdf> (noting 25 percent decrease over that time). In 2014, the fatality rate fell to its lowest point since the National

Highway Traffic Safety Administration began collecting fatality data in 1975. *Id.* While multiple factors have contributed to this reduction, many lives are saved each year through specific highway safety innovations such as guardrails and the ET-Plus system. *See* AM. ASS'N STATE HIGHWAY & TRANSP. OFFICIALS, ROADSIDE DESIGN GUIDE 1-1 (4th ed. 2011).

Guardrails—a critical component of highway safety—help to keep cars from leaving the pavement and crashing into stationary objects, oncoming traffic, and the like. *See id.* at 1-3—1-4. These barriers are important because of the sheer number of vehicles involved in such roadway departures—those collisions account for approximately 56 percent of motor vehicle fatalities. *Roadway Departure Safety*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Feb. 17, 2016), http://safety.fhwa.dot.gov/roadway_dept/. At the same time, recent data reveals a significant drop in the number of people killed from roadway departure crashes. *2014 Motor Vehicle Crashes: Overview*, at 4 (noting that from 2013 to 2014, the United States saw a decrease of 2.8 percent for such fatalities). Decades of research and experience are being used to develop what is known as “the forgiving roadside concept,” a series of safety measures taken to keep vehicles on the roadway. *See The Forging Roadside: TTI research, facilities are vital to protecting your loved ones*, TEXAS TRANSPORTATION RESEARCHER (Texas A&M Transportation Institute), Sept. 2010, <http://tti.tamu.edu/2010/09/01/the-forgiving->

roadside-tti-research-facilities-are-vital-to-protecting-your-loved-ones. Statistics show that the forgiving roadside concept—including increased use of guardrails—is having an effect on decreasing the number of roadway departures and fatalities. ROADSIDE DESIGN GUIDE, at 1-3—1-4.

State departments of transportation use end treatments to make highway guardrails safer. That is necessary because, at times, vehicles leave the road and contact the end of a guardrail. Functioning as a system with the guardrail itself, the end terminals help absorb energy from a collision and redirect the guardrail away from a vehicle as it comes to a complete stop. *Guardrail 101—Purpose, Function and Crashworthiness of Guardrails*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Dec. 10, 2014), at 2, <https://www.fhwa.dot.gov/guardrailsafety/guardrail101.pdf>. Guardrail end terminals like the ET-Plus system are designed and developed to mitigate the consequences of a head-on impact to the end of a guardrail—otherwise vehicles could be speared or launched off the roadway. *See* Appellants' Br. at 5-8. Thus, the value of the end terminal product at issue to help save lives is beyond dispute.

B. The ET-Plus Design Has Been Specifically Approved By The Federal Agency Responsible For Ensuring Highway Safety.

The Federal government and its agencies are tasked with regulating highway safety equipment. In doing so, they also implement appropriate safety performance measures for things such as guardrails and the ET-Plus System,

thereby helping to improve public safety on the nation's roadways. The FHWA is one of the leading authorities regarding highway safety decisions. *See About the Federal Highway Administration*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Sept. 17, 2012), <https://www.fhwa.dot.gov/about> (“The [FHWA] is an agency within the U.S. Department of Transportation [and] is responsible for ensuring that America's roads and highways continue to be among the safest and most technologically sound in the world.”). The agency coordinates with the American Association of State Highway and Transportation Officials (AASHTO), which works to ensure highway safety at the state level. *See AASHTO Overview*, AASHTO, <http://www.transportation.org/Pages/Organization.aspx> (“AASHTO serves as a liaison between state departments of transportation and the Federal government.”).

The FHWA evaluated the allegations raised by the relator in this case about the ET-Plus system, rejected them, and has repeatedly confirmed that the ET-Plus system has at all times satisfied pertinent safety criteria. *See FHWA Memorandum (ROA.4305-06)*. This analysis should have ended the matter. Highway safety decisions—such as the safety products used on roadways—should be made by federal and state safety experts motivated by a genuine, public-spirited interest in promoting highway safety that is supported by research and data, not by FCA relators.

Following the jury's verdict in this case, the FHWA once again confirmed that the ET-Plus system meets all applicable federal safety standards. After a series of tests at an independent laboratory, the FHWA "concluded that the ET-Plus meets the NCHRP 350 criteria" set in place by the government. *FHWA Review of ET-Plus, Retesting of the ET-Plus*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Mar. 24, 2015), <http://www.fhwa.dot.gov/guardrailsafety/retesting.cfm>. The NCHRP 350 criteria are safety-testing criteria that the government has "applied to roadside safety hardware from 1993 to 2011 and to which a majority of roadside safety devices on the Nation's roadway system currently comply." *Id.*; see NAT'L COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 350, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_350-a.pdf (ROA.19282-355) (outlining recommended procedures for safety performance evaluation of highway features).

The FHWA and AASHTO later assembled a joint task force to "provide important information about the performance and safety of the ET-Plus." *FHWA Review of ET-Plus, AASHTO/FHWA Crash Analysis Task Force*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Sept. 11, 2015), <http://www.fhwa.dot.gov/guardrailsafety/isptf.cfm>. This joint task force confirmed that no further testing was needed on the ET-Plus system. SAFETY ANALYSIS OF EXTRUDING W-BEAM GUARDRAIL TERMINAL CRASHES, REPORT FROM JOINT

AASHTO-FHWA TASK FORCE ON GUARDRAIL TERMINAL CRASH ANALYSIS 8
(2015), <http://www.fhwa.dot.gov/guardrailsafety/safetyanalysis/safetyanalysis.pdf>.

Because the FHWA and AASHTO serve as neutral arbiters of the products offered by competitors seeking to gain advantages in the marketplace, these government agencies should be given deference on their public safety positions. The present case, however, may undermine FHWA's duty merely because the crash testing laboratory forgot to include part of the description of the product upgrade. If the defendants' actions were intentionally taken in order to conceal a true safety shortcoming—caused by something such as cutting corners in production—FCA liability could be understandable. The district court seemed to disregard, though, the fact that the government did in fact approve the ET-Plus system end terminal. This discounting impermissibly undercuts the agency tasked with highway safety. *See* 23 U.S.C. § 109(a).

C. FCA Liability For A Government-Approved Safety Modification Places Highway Safety At Risk.

The precedent set in this case will have an effect on overall highway safety and may implicate the government's role as arbiter of the safety of highway products. Highway safety product manufacturers, like Trinity, supply roadway safety products based upon specific crash test criteria and performance requirements set by and adopted by the federal government. If credible

manufacturers can no longer rely on the government's set standards, highway safety product manufacturing will be harmed.

First, when credible manufacturers acting in good faith can no longer rely on federally-approved testing and performance standards to design, test, and improve their products, good business judgment and practice may compel them to discontinue producing highway safety products. A company cannot continue to manufacture a product in compliance with government standards when the government's testing and approval of such products does not shield the manufacturer from meritless claims. The nation's highways may become less safe and traffic deaths may rise without important highway safety products like the ET-Plus system.

Second, the liability imposed here may discourage continuing and future safety innovation. In the immediate case, the FCA claim involves an improvement to the ET-Plus system guardrail end terminal. But it must be considered that Trinity could have avoided the FCA suit here altogether by foregoing innovation and improvements. This type of disincentive for innovation is unacceptable as public policy dictates that credible highway safety product manufacturers, like Trinity, should strive to improve their existing products and invest in research and development. New and better highway safety products, like the ET-Plus system, may lead to safer highways and reduced traffic fatalities and injuries. Thus the

FCA claims at hand and the district court’s ruling cannot be what lawmakers intended. If credible manufacturers are dis-incentivized from producing compliant highway safety products, overall highway safety will be threatened.²

In sum, if the district court’s ruling were allowed to stand, the unintended result would inflict serious, potentially irreparable, damage to public highway safety. Credible manufacturers, like Trinity, that act in good faith may be discouraged from producing and supplying roadside safety products, like the ET-Plus system. Similarly, credible manufacturers, like Trinity, may be discouraged from developing new highway safety technologies that federal and state highway agencies require to achieve their mission to protect and promote public safety on our nation’s roadways.

CONCLUSION

For the foregoing reasons, the district court should be reversed.

² Further exacerbating this issue here is the fact that Trinity—in conjunction with TTI—is one of the few manufacturers with the capability to support the level of R&D necessary to create significant safety advancements (such as the ET-Plus) moving forward. *See A Brief History of Roadside Safety at the Texas A&M Transportation Institute (TTI)*, TEXAS A&M TRANSPORTATION INSTITUTE, at 1, <https://tti.tamu.edu/wp/wp-content/uploads/2014/12/History-of-Roadside-Safety-at-TTI-FINAL-12-16-14.pdf>. Safety innovation will be harmed if manufacturers like Trinity depart from the highway products space.

Dated: March 28, 2016

Respectfully submitted,

/s/ John C. Sullivan

Danny S. Ashby

John C. Sullivan

MORGAN, LEWIS & BOCKIUS LLP

1717 Main Street, Suite 3200

Dallas, Texas 75201

T. 214.466.4000

F. 214.466.4001

john.sullivan@morganlewis.com

Adam W. Vanek

MOTHERS AGAINST DRUNK DRIVING

511 E. John Carpenter Freeway,

Suite 700

Irving, Texas 75062

T. 469.420.4517

adam.vanek@MADD.org

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2016, a true and correct copy of the foregoing document was served via electronic transmission via portable document format (.pdf) to the CM/ECF internet web portal for this Court in this case on all counsel of record.

/s/ John C. Sullivan

John C. Sullivan

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,332 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2007.

/s/ John C. Sullivan

John C. Sullivan

Attorney for Amicus Curiae