RECORD NO. 18-1575

In The

United States Court Of Appeals

For The Fourth Circuit

UNITED STATES ex rel. CITYNET, LLC,

Plaintiff – Appellee,

v.

JIMMY GIANATO, individually; GALE GIVEN, individually,

Defendants – Appellants,

and

FRONTIER WEST VIRGINIA, INC., a West Virginia corporation; KENNETH ARNDT, individually; DANA WALDO, Individually; MARK MCKENZIE, Individually; KELLY GOES, Individually,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

BRIEF OF APPELLEE

Benjamin L. Bailey
Rebecca L. Donnellan-Pomeroy
BAILEY & GLASSER LLP
209 Capitol St.
Charleston, WV 25301
304-345-6555
rpomeroy@baileyglasser.com

Counsel for Plaintiff - Appellee

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Tillman J. Breckenridge Date: June 5, 2018

Counsel for: Citynet, LLC

CERTIFICATE OF SERVICE

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I certify that on June 5, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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s/ Tillman J. Breckenridge
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June 5, 2018
(date)

ATTACHMENT A

J. David Fenwick
Benjamin B. Ware
Lucas R. White
Goodwin & Goodwin, LLP
300 Summers Street, Ste. 1500
Charleston, WV 25301

C. Simon Davidson
Charles W. McIntyre, Jr.
Jeremy S. Byrum
MCGUIRE WOODS
Suite 300
310 Fourth Street, NE
Charlottesville, VA 22902
Counsel for Defendants Frontier West Virginia, Inc., Kenneth Arndt, Dana Waldo and Mark McKenzie

Charles D. Schmitz
U.S. Dept. Justice
P.O. Box 261, PHB-9220
Ben Franklin Station
Washington, DC 20044

Jennifer M. Mankins
U.S. Attorney's Office
P.O. Box 1713
Charleston, WV 26326-1713
Counsel for the United States of America

Gary E. Pullin
Stephen M. Fowler
Geoffrey A. Cullop
Christopher S. Ross
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Counsel for Defendants Kelley Goes, Jimmy Gianto and Gale Given

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STATEMENT OF APPELLATE JURISDICTION

For the reasons stated in its motion to dismiss this appeal, Dkt. 12, and its reply brief in support of the motion to dismiss this appeal, Dkt. 15, Citynet asserts that this Court lacks jurisdiction over this appeal. At the very least, this Court lacks jurisdiction over the third issue presented. Even if the Court has jurisdiction over the qualified immunity issues under the collateral order doctrine, there is no pendent jurisdiction for issues that are not inextricably intertwined with or necessary to determining qualified immunity in such appeals. *See Evans v. Chalmers*, 703 F.3d 636, 658-59 (4th Cir. 2012) (declining to exercise pendent jurisdiction over state constitutional claims in qualified immunity appeal).

ISSUES PRESENTED

1. Whether this Court has jurisdiction for interlocutory review of a denial of a motion to dismiss on qualified immunity grounds under the collateral order doctrine when the district court ruled that there were issues of fact preventing dismissal.

2. Whether state officials are entitled to qualified immunity when they knowingly submit false claims to the United States.

3. Whether this Court has pendent jurisdiction over issues unrelated to qualified immunity in an interlocutory appeal of a denial of a motion to dismiss on qualified immunity grounds under the collateral order doctrine.

4. Whether government officials sued in their individual capacities may be liable under the False Claims Act.

STATEMENT OF THE CASE

As the district court's Memorandum Opinion and Order ("Opinion") recites, Citynet alleges violations of the False Claims Act (the "Act") by several parties, including Appellants Jimmy Gianato, the Director of the West Virginia Division of Homeland Security and Emergency Management, and Gale Given, the State Technology Officer, in connection with bids on government telecommunications contracts. A355. Under the American Recovery and Reinvestment Act ("Reinvestment Act"), the federal government appropriated nearly $5 billion to a program devoted to expanding "middle mile" access to broadband telecommunications service, meaning broadband line would be laid between hubs to allow for greater

service. A355. The West Virginia Executive Office (the "Executive Office") sought a grant from the program for $126,323,296 under a specified grant for a West Virginia broadband project. A356. The complaint alleges that the grant application contained numerous misrepresentations. A356.

The Executive Office application simply cribbed defendant Frontier West Virginia, Inc.'s "last mile" application—applying for a grant to lay broadband line that connects hubs to end-users—with the intent that Frontier would receive the "middle mile" funds. A357. At the same time, Frontier was in merger discussions with Verizon. A357. And together, they provided the Executive Office with information needed for its grant application. A357. During the merger discussions, Frontier and the Executive Office contemplated a considerable amount of the grant going to Frontier, and at the same time, the state "informed Frontier that it would be required to make a capital investment of $250-$300 million in West Virginia" for the merger to be approved by the state's public service commission. A357-58.

As the Opinion further notes, the complaint alleges that Gianato helped prepare that fraudulent application and caused some of the false statements. A357-58. For instance, the application falsely stated that none of the "middle-mile" funds received from the grant would go toward providing "last mile" service, and the application misstated the number of communities that already had broadband service. A359.

The government ultimately awarded the Executive Office grant. A362. Accepting the award came with numerous conditions, including that the grant be spent on the "middle-mile" program. A363. Yet in performing the work, Frontier did not construct the middle mile network to the program's specifications; rather it used the funds to build out the last mile project, which had been rejected. A365. Under Gianato's direction, Frontier used the grant money to connect fiber from central locations to Frontier's own utility poles. A366. This prevented competitor broadband companies, like Citynet, from using the lines, even though the grant required providing open access lines. A365-66.

Frontier further defrauded the government by billing the grant for work it did not do, and then concealing the fact it was not done. A367. In the end, Frontier billed the state $41,531,832.25—nearly one million dollars more than its estimate—when it laid less than one-third of the line. A368. Frontier received more than triple the compensation per mile of line than the estimate it placed in its own grant application. A368.

According to the complaint, Given and Gianato assisted Frontier by approving improper invoices, failing to verify that billed work was completed, concealing invoices from scrutiny and bidding for surpluses by other service providers. A368-69. Indeed, Given changed the invoicing process upon becoming the State Technology Officer and approved bills for practices that were rejected by her predecessor. A369-74.

The Opinion goes on to recount the procedural history of the case. Citynet filed this *qui tam* suit in 2014, alleging violations of the Act. A375. Defendants, including Appellants Gianato and Given, moved to dismiss the complaint based on, among other things, an assertion that they are entitled to qualified immunity. A379. Gianato and Given also claimed they were not

"persons" within the meaning of the Act. A384. The district court rejected Given and Gianato's argument that they were not "persons." A388-89. In the process, the district court analyzed the Eighth Circuit's decision on the issue, in which the court ruled that state officials are not "persons" under the Act unless special facts are pled, the dissent in that case, and a Ninth Circuit decision that sided with the dissent, ruling that state officials were persons under the Act when sued in their individual capacities. A388-89. The district court found the Ninth Circuit's reasoning "to be more persuasive" and ruled that Given and Gianato could be sued under the False Claims Act. A389-90.

The district court also rejected Given and Gianato's assertion of qualified immunity. It determined that the complaint adequately pled violation of a statutory right, and the only question was whether it was clearly established to the point that Given and Gianato acting "knowingly," as is required under the Act, would meet that standard. A396. "While the complaint sufficiently alleges that the defendants acted with the requisite scienter, the court cannot at this juncture decide the level of scienter with which the State Employees acted in allegedly violating the FCA." A396. The

court thus decided that "the qualified immunity decision consequently must be deferred until a time when the court can make an informed decision based upon the evidence." A396. This appeal followed.

SUMMARY OF THE ARGUMENT

This appeal comes down to Defendants' premature factual claims that the allegations of the complaint are "demonstrably untrue." Opening Br. 11. That is not reviewable on an interlocutory appeal from denial of a motion to dismiss, even if it were correct (which it is not). Defendants similarly claim their performance was "thorough and professional," but the complaint plausibly alleges otherwise. Thus, the appellants cannot assert qualified immunity.

Nor does the court have pendent jurisdiction to address the appellants' claim that they are not "persons." The collateral order doctrine does not allow interlocutory appeal of issues that are not necessary to or inextricably intertwined with the issue appealed—here, qualified immunity. Given and Gianato do not even attempt to claim that their personhood under the False Claims act is indelibly tied to whether they are entitled to qualified

immunity. Indeed, it is an alternative argument—*only* individuals sued in their individual capacities enjoy qualified immunity.

In any event, Gale Given and Jimmy Gianato are people. Thus, they are "persons" under the False Claims Act. The fact that the Supreme Court held that *states* are not people under the Act does not change that. There is no reasonable justification for extending that rule to individuals. The Ninth Circuit has recognized as much, and the only authority in the appellants' favor is an Eighth Circuit case where the court relied on a prior Ninth Circuit case and engendered a dissent. The foundation for the 2-1 decision was destroyed when the Ninth Circuit subsequently ruled otherwise, and this Court should not follow that wrong decision. Given and Gianato should stand trial for their graft, and they cannot hide behind the fact that they took advantage of their state government positions to defraud the United States.

ARGUMENT

I. Qualified immunity does not shield Given and Gianato from liability here.

Qualified immunity is inapplicable here, where Given and Gianato knowingly perpetuated a fraud on the United States government. Qualified

immunity may shield government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects government officials making discretionary decisions unless (1) "taken in the light most favorable to the party asserting the injury" the facts alleged show that the official's conduct violated a statutory or constitutional right, and (2) that right was "clearly established." *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Here, Citynet pled a violation of a clearly established right against knowingly providing false statements to the United States government. The complaint alleged that Gianato participated in preparing the fraudulent grant application, and that Gianato falsely claimed, among other things, that fiber estimates were for new lines that did not already exist. A451. Gianato also "made the unilateral decision not to build the fiber back to the Central Offices," as was required under the grant. A452. Moreover, "[t]he complaint

alleges that Given and Gianato assisted in the plan to ensure that all the grant funds were expended for Frontier's benefit so that its competitors could not utilize the remaining funds." A453. The court further concluded that "Citynet adequately alleged that Gianato and Given accepted frontier's invoices containing impermissible indirect costs, and billed them to the grant fund knowing that they were impermissible." A454. Citynet adequately alleged violation of the United States' statutory right against false claims. And that right is clearly established. In addition to the fact that the False Claims Act is clear on its face, the complaint alleges that Given and Gianato *knew* what they were doing. A396. Thus, Given and Gianato are not entitled to qualified immunity.

In any event, qualified immunity does not apply to allegations under the Act. The Fifth Circuit has recognized that qualified immunity is "particularly ill-suited" for statutes like the False Claims Act that attempt to "discourage fraud against the government." *Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998). While the qualified immunity is an understandable doctrine when applied to the split-second decisions of law enforcement

officials in the field, it has no discernible application in False Claims Act cases. *U.S. ex rel Parikh v. Citizens Medical Center*, 977 F. Supp. 2d 654 (S.D. Texas 2013). Under the False Claims Act, "liability only attaches if a defendant 'knowingly presents . . . a false or fraudulent claim.'" *Id*. at 684. Because the Act already contains a scienter requirement and qualified immunity does not protect those who knowingly violate the law, qualified immunity "has little role to play in False Claims Act Cases." *Id*.

The district court did not need to reach whether qualified immunity even applies under the Act because it recognized that it could not apply it in this case at this stage in any event. In line with *Parikh*, the Court correctly recognized that if Given and Gianato knew they were acting illegally, qualified immunity, of course, did not protect their actions. A396.

Given and Gianato have effectively waived any assertion of error by the district court in light of their argument's failure to apply the law to the allegations in the complaint. In the Opening Brief, Given and Gianato do not attempt to apply the law to the allegations here, nor do they address the district court's reasoning. Rather, they spend four of their five pages of

discussion lauding the general value of qualified immunity, and they wedge within that one page of discussion claiming that the complaint's allegations are "demonstrably untrue." Opening Br. 11. They also seem to suggest—without citing any authority suggesting as much—that qualified immunity renders state officials immune to suit for any act taken in the course of government employment. That, of course, is false. Indeed, such a rule would render officials immune in *every* case filed under 42 U.S.C. § 1983. But that is not the case. *See, e.g., Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 506 (4th Cir. 2018).

Citynet does not dispute the value of qualified immunity in cases where government officials make reasonable discretionary split-second decisions, but the defendants' four pages of discussion saying as much is irrelevant here. This case does not involve reasonable discretionary decisions. The complaint alleges a knowing fraud on the United States government. And Given and Gianato's arguments that they did not knowingly defraud the United States government are procedurally inappropriate here. The complaint alleges that Given and Gianato

knowingly submitted false statements to the United States government to help procure the contract for Frontier, and then continued to submit false statements and otherwise obscure the fraud through the duration of the grant. A356-64. They are not entitled to qualified immunity for those acts.

II. Reversal is not warranted on the asserted ground that Given and Gianato are not "persons" under the Act.

A. The Court lacks jurisdiction to review this issue in this interlocutory appeal.

Even if the Court exercises jurisdiction over the qualified immunity question, it lacks jurisdiction to address whether Given and Gianato are "persons" under the False Claims Act. There is no pendent jurisdiction for issues that are not inextricably intertwined with or necessary to determining qualified immunity in such appeals. *See Evans v. Chalmers*, 703 F.3d 636, 658-59 (4th Cir. 2012) (declining to exercise pendent jurisdiction over state constitutional claims in qualified immunity appeal). Thus, in *Cannon*, the Court dismissed the appeal as to whether the district court erred in denying summary judgment on a defamation claim after resolving the qualified immunity questions. 891 F.3d at 507. There, the Court held that rulings are "inextricably intertwined if the same specific question will underlie both the

appealable and non-appealable order, such that resolution of the question will necessarily resolve the appeals from both orders at once." *Id*. (*quoting Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013)). Here, the meaning of "person" under the False Claims Act is not inextricably intertwined or necessary to determining qualified immunity. Notably, Given and Gianato do not use any of the same authorities or argument to address the two questions. They are independent, and Given and Gianato do not even suggest otherwise. Therefore, this issue should be dismissed.

B. Given and Gianato are persons under the Act.

Given and Gianato are "persons" who can be held liable under the Act. Under the False Claims Act, "any person" who commits an act violating the statute is liable. Given and Gianato claim that they are not "persons" because they were employed by the State, and were acting in the course of their employment, Opening Br. 14-19, but that does not survive scrutiny.

In *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, the Supreme Court held that Congress did not intent states to be considered "persons" under the Act because (1) another provision of the Act expressly

includes states, so Congress did not intend to include it here, (2) the Act includes punitive damages, and states are not normally subject to punitive damages, (3) a related statute does not include states in its definition of "persons". 529 U.S. 765, 783-86 (2000). None of these rationales suggest that an individual sued under the Act is not a "person" simply because he or she acted in the course of state employment.

The Ninth Circuit refused to extend the Supreme Court's decision to individuals in *Stoner v. Santa Clary County Office of Education*. 502 F.3d 1116 (9th Cir. 2007). There, the court first recognized that school boards are not "persons" subject to False Claims Act liability. *Id*. at 1123. But with respect to individual education department employees sued in their individual capacities, state employees are persons subject to liability with no heightened proof requirement. *Id*. at 1124. The court relied on the plain language of the statute, as well as the Supreme Court's decision in *Hafer v. Melo*, 502 U.S. 21, 27 (1991), which "rejected the argument that state officials may not be held personally liable under 42 U.S.C. § 1983 for actions taken in their official capacities." *Id*.

Before the Ninth Circuit had ruled on this issue, the Eighth Circuit relied on prior Ninth Circuit precedent to hold otherwise. In a 2-1 decision, the Eighth Circuit ruled that state employees are only subject to False Claims Act liability if the plaintiff pleads and proves that the individual employees acted outside their official duties. *United States ex rel. Gaudineer & Comito LLP v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001). Judge Gibson dissented, based on the Supreme Court's decision in *Hafer*, and the fact that there is no indication that Congress intended to grant absolute immunity from the False Claims Act to state employees. *Id*. at 938.

Given and Gianato chide the district court for relying on Judge Gibson's dissent in *Gaudineer* three times, but they do not once mention that (1) the Ninth Circuit ruled against their position in a published opinion, (2) *Gaudineer* relied on a prior Ninth Circuit decision that clearly does not support its conclusion in light of the Ninth Circuit's subsequent ruling, or (3) that the district court relied on those points before even mentioning Judge Gibson's dissent.

There is no reason to exclude Given and Gianato—indisputably individual humans—from the definition of "person" in the False Claims Act.

They are just as liable as anyone else for their false statements to the federal government about the amount of money they needed and then the amount of money they spent on the middle mile project. So, if the Court reaches this issue, it should affirm the district court's denial of the motion to dismiss.

CONCLUSION

For the foregoing reasons, Citynet respectfully requests that the Court dismiss this appeal for lack of jurisdiction, or in the alternative, affirm the decision of the district court.

STATEMENT REGARDING ORAL ARGUMENT

Citynet agrees that this case does not warrant oral argument, as it presents straight-forward application of existing precedent both to find that the Court lacks jurisdiction, and that the arguments fail on the merits.

Respectfully Submitted,

/s/ Benjamin L. Bailey

Benjamin L. Bailey
Rebecca L. Donnellan-Pomeroy
BAILEY & GLASSER LLP
209 Capitol St.
Charleston, WV 25301
304-345-6555
rpomeroy@baileyglasser.com

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Dated: November 8, 2018

/s/ Benjamin L. Bailey
Benjamin L. Bailey

Counsel for Plaintiff - Appellee

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/s/ Karen R. Taylor
Karen R. Taylor
GIBSON MOORE APPELLATE SERVICES, LLC
P.O. Box 1460
Richmond, VA 23218
(804) 249-7770
karen@gibsonmoore.net