No. 124754

IN THE SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS *ex rel.* DAVID P. LEIBOWITZ, as Trustee of the Bankruptcy Estate of Marie A. Cahill,

Plaintiff-Appellee,

v.

FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois First Judicial District
No. 18-0697.

Appeal from the Circuit Court of Cook County, County Department, Law Division
Case No. 2017 L 4200.
The Honorable John C. Griffin, presiding.

AMICUS BRIEF OF THE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF THE PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST

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 educate the public and the legal community about the *qui tam* provisions of the False Claims Act, has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve whistleblower laws. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF is supported by whistleblowers and their counsel, and funded by membership dues and foundation grants.

TAFEF has a strong interest in ensuring the proper and consistent interpretation and application of all whistleblower laws, including the Insurance Claims Fraud Prevention Act ("ICFPA"). In particular, TAFEF's interest in this appeal is to ensure the ICFPA is interpreted consistent with the statutory text and the Illinois General Assembly's purposes when it enacted the ICFPA.

INTRODUCTION

The cost of insurance fraud in the United States amounts to tens of billions of dollars annually. Insurance companies pass on the costs of fighting and absorbing fraud to policyholders, and therefore individuals, families, and businesses are left to fund these losses each year in the form of higher premiums. State and federal governments, for their part, dedicate millions of dollars and significant employee time to policing, investigating, and prosecuting insurance fraud, all of which diverts scarce public resources from other pressing public needs. As a result, insurance fraud victimizes not only insurance

companies, but also individual citizens, businesses, state and federal governments, and society at large.

Experience and social science research demonstrate there is perhaps no better tool to combat widespread fraud than a *qui tam* statute like the ICFPA. Given that *qui tam* relators are often corporate insiders, as is the case here, they have unique access and insight into the operations of alleged corporate fraudsters, and are often in the best position to identify and blow the whistle on fraud. Moreover, *qui tam* statutes fill a gap where public resources are scarce by recruiting and enlisting numerous private parties to enforce the law whether through assessment of penalties or recovery of monetary damages. The legislative history of the ICFPA demonstrates that the Illinois General Assembly sought to leverage these well-known benefits of *qui tam* statutes to address widespread insurance fraud.

It is clear from relevant Illinois and U.S. Supreme Court precedents, and the centuries-long history supporting the use of *qui tam* statutes in the U.S. and England, that *qui tam* relators have standing to sue. As this Court previously held in a case involving the Illinois False Claims Act, "the interest of a *qui tam* plaintiff in a claim under the Act is justified as a partial assignment of the state's right to bring suit." *Scachitti, et al. v. UBS Fin. Servs.*, 215 Ill. 2d 484, 508–09 (Ill. 2005). The federal courts that have addressed the issue have all held that such assignment is valid whether the *qui tam* plaintiff seeks to enforce a statutory penalty, or to recover monetary damages.

An "interested person" entitled to bring a claim under the ICFPA is an individual or entity with information that insurance fraud has been committed in Illinois, and therefore can sue on behalf of the State. Defendants' argument that the phrase "interested person" should be constrained to mean an individual or entity personally harmed by insurance fraud

makes no sense. Such a reading would render the *qui tam* provision of the ICFPA meaningless and ineffective. It is precisely because relators have unique access to information about alleged fraud—which a victim of fraud may not have—that *qui tam* provisions are so effective.

Individuals and entities directly harmed by insurance fraud, like insurance companies, already have claims for fraud against the perpetrators. If the Illinois Legislature intended such parties to be the *only* claimants under the ICFPA, a *qui tam* provision would not be necessary. The Legislature could have simply enacted a statute providing penalties and treble damages for "individuals harmed by insurance fraud." Finally, the legislative history of the ICFPA, and relevant cases brought pursuant to the Act, weigh in favor of finding that individuals, like the plaintiff-relator here, are proper plaintiffs under the ICFPA.

ARGUMENT

I. Widespread Insurance Fraud Exacts a Heavy Toll on the Government and Taxpayers, Depleting Already Scarce Public Resources.

Perpetrators of insurance fraud in the United States steal billions of dollars each year. The Federal Bureau of Investigations (FBI) estimates the total cost of insurance fraud, not including health insurance fraud, is about $40 billion annually. FBI, *Insurance Fraud*, https://www.fbi.gov/stats-services/publications/insurance-fraud (last visited Mar. 5, 2020). The California legislature has estimated that "fraudulent activities account for billions of dollars annually in added health care costs nationally." Cal. Ins. Code § 1871(h) (legislative findings). And, it appears that the prevalence of insurance fraud generally is on the rise. In a 2019 study published by the Coalition Against Insurance Fraud ("CAIF") and SAS Institute, three-quarters of the 84 insurance companies surveyed reported that

fraud increased either significantly or slightly in the previous three years. CAIF and SAS Institute, *The State of Insurance Fraud Technology* (Mar. 2019) (available at https://www.sas.com/content/dam/SAS/en_us/doc/whitepaper2/coalition-against-insurance-fraud-the-state-of-insurance-fraud-technology-105976.pdf). In the last six years, no insurer reported a significant decrease in fraud. *Id.*

Since insurance companies must pass on the costs of investigating and fighting insurance fraud, policy holders pay the multi-billion dollar bill each year through increased premiums. *See* CAIF, *The impact of fraud*, http://www.insurancefraud.org/the-impact-of-insurance-fraud.htm (last visited Mar. 5, 2020 ("[i]nsurance companies generally must pass the costs of bogus claims – and of fighting fraud – onto policy holders."); *see also People ex rel. Allstate Ins. Co. v. Weitzman*, 107 Cal. App 4th 534, 562 (Cal. Ct. App. 2d Dist. 2003) ("Insureds are the indirect victims who pay higher premiums due to the prevalence of insurance fraud."). Insurance fraud "costs the average U.S. family between $400 and $700 per year in the form of increased premiums." FBI, *Insurance Fraud*, *supra*.

Given the scope of the problem, state governments dedicate significant resources to combat insurance fraud. As of 2006, the CAIF estimated that "[a]bout 80 percent of states sponsor insurance fraud bureaus with a combined budget of nearly $130 million annually." CAIF, *United We Brand: Toward a national anti-fraud outreach campaign* (Dec. 2006), http://www.insurancefraud.org/downloads/unitedWeBrand.pdf, at 7. "By late 2019, 44 states and the District of Columbia had fraud bureaus or divisions where fraud [could] be reported, investigated, and prosecuted." Insurance Information Institute, *2020 Insurance Fact Book*, http://iii.org/publications/2020-insurance-fact-book, p. 217. A February 2007 study by the CAIF reported that state fraud bureaus received nearly 125,000

referrals or complaints about suspected fraud in 2005. CAIF, *State Insurance Fraud Bureaus: A Progress Report: 2001 to 2006*, http://www.insurancefraud.org/downloads/FraudBureauReport06.pdf. In addition to insurance fraud bureaus, criminal prosecutors and law enforcement must devote significant resources to pursuing insurance fraud investigations and cases. CAIF, *The impact of fraud*, *supra*.

Nonetheless, state law enforcement initiatives are insufficient to address the problem. For example, the CAIF reports that, to address the nearly 125,000 referrals or complaints of fraud in 2005, state fraud bureaus employed only 1,559 individuals full-time. CAIF, *State Insurance Fraud Bureaus*, *supra*. Given the volume of referrals and limited capacity to address them, Alan Haskins, the Vice President of Government Affairs for the National Insurance Crime Bureau (NICB), acknowledges, "[i]t's typical for a fraud bureau to only be able to meaningfully investigate a fraction of referred cases." NICB, *Combating insurance fraud requires adequate resources*, https://www.nicb.org/news/blog/combating-insurance-fraud-requires-adequate-resources (last visited Mar. 9, 2020). Similarly, state fraud bureau directors acknowledge that their biggest challenge, by far, is "lack of resources – funding, people and technology – they need to combat fraud effectively." CAIF, *State Insurance Fraud Bureaus, supra*, at 20. For example, in 2017, when the North Carolina General Assembly appropriated an additional $2.4 million to hire additional agents, North Carolina's Department of Insurance Criminal Investigations Division nearly doubled the amount of arrests for suspected insurance fraud. NICB, *Combating insurance fraud requires adequate resources, supra.* "Insurance fraud didn't double in those years," commented NICB's Senior Director of Government Affairs. *Id.* What changed is that

"more money meant the ability to hire more investigators which meant more crooks were investigated and brought to justice." *Id.*

As discussed below, *qui tam* statutes effectively augment scarce public resources to address fraud by providing critical information and resources in the form of whistleblowers and their counsel. *See infra*, at 8–9. California courts have recognized that *qui tam* actions under the California Insurance Fraud Prevention Act (CIFPA), on which the ICFPA was based, "enable and encourage the enforcement of regulatory provisions . . . that would otherwise be beyond the resources of public entities to enforce." *State ex rel. Wilson v. Super. Ct.*, 227 Cal. App. 4th 579, 596 (Cal. Ct. App. 2d Dist. 2014); *see also People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th 487 (Cal. Ct. App. 4th Dist. 2012) (concluding that *qui tam* actions under the CIFPA confer a public benefit because the government gains both in fraud prevention and financially, through enhanced enforcement resources).

II. *Qui Tam* Statutes Like the ICFPA Incentivize Private Persons to Bring Information About Fraud to the Government's Attention and Enhance the Government's Ability to Detect and Deter Fraud.

Qui tam statutes are perhaps the best antidote for situations where the extent of fraudulent activity in the market far outstrips government resources to address it. *Cf.* Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. Rev. 73, 109 (2012) (finding that "[w]ithout whistleblowing, existing measures to detect fraud in financial settings are limited," and "[g]overnment enforcement alone is ineffectual because of the sheer massiveness of the market.") (internal quotations omitted); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 n.2 (9th Cir. 1993) ("[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or

otherwise involved in the fraudulent activity."); Jill E. Fisch, *Class Action Reform,* Qui Tam, *and the Role of the Plaintiff*, 60 Law & Contemp. Probs. 167, 196 (1997) (recognizing that *qui tam* statutes place a premium on the "unique access and insight" of relators into the operations of corporate fraudsters, which enables them to "identify instances of fraud that the government would be unable to address on its own."). Enlisting private individuals to combat fraud, complementing efforts of government agencies by providing information about fraud, adding resources to enforce the law, and helping to recover damages or assess penalties, *qui tam* statutes like the ICFPA serve an important and unique function.

This is why the U.S. Department of Justice has described the federal False Claims Act, with its robust *qui tam* provisions, as "the single most important tool that American taxpayers have to recover funds when false claims are made to the federal government[.]" U.S. Dep't of Justice, *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986* (Jan. 31, 2012) *available at* http://www.justice.gov/opa/pr/2012/January/12-ag-142.html. In 2019, whistleblowers helped the federal government recover more than $3 billion. U.S. Dep't of Justice, *Justice Department Recovers Over $3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020) *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019. Accordingly, policymakers have come to learn that some of the most effective tools against fraud are *qui tam* statutes, which enhance and complement criminal enforcement. *See* Rapp, *supra*, at 119 ("Empirical research on whistleblowing has indicated that financial incentives create significant motivation to detect and report fraud, which is observable regardless of the severity of the fraud.") (internal quotations omitted); U.S. Dep't of Justice, *Justice Department Recovers*

Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012) *available at http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html* (explaining that "increased incentives for whistleblowers to file lawsuits on behalf of the government," led to "more investigations and greater recoveries").

The legislative history of the ICFPA demonstrates that the Illinois General Assembly understood the potency of *qui tam* statutes, and enacted one to address widespread insurance fraud in Illinois. Before enacting the ICFPA, the Legislature appointed an Insurance Fraud Task Force ("Task Force") to make recommendations. *See* Ill. Pub. Act. 91-522 (codified at 20 ILCS 1405/56.3). The Legislature charged the Task Force with investigating "methods to combat organized insurance fraud," and examining "ways to unite the resources of the insurance industry with the appropriate components of federal and State criminal justice systems so that organized insurance fraud schemes are identified and thoroughly investigated and the perpetrators are prosecuted in the best interests of justice." 20 ILCS 1405/56.3(b)(1)–(2). Based on that charge, the Task Force's principal recommendation was to enact a whistleblower statute, which would ultimately become the ICFPA. *See* Insurance Journal, *Illinois Insurance Fraud Task Force Makes Recommendations* (Nov. 20, 2000), available at https://www.insurancejournal.com/news/midwest/2000/11/20/10800.htm. Accordingly, on March 27, 2001, presenting for a vote Senate Bill 879, which would become the ICFPA, Senator O'Malley stated the purpose of the Act was to "provide a significant monetary incentive" for the government and private parties alike to bring civil actions against the perpetrators of all forms of insurance fraud. Ill. S. Tran. 2001 Reg. Sess. No. 17, p. 43 (2001).

Moreover, Senator O'Malley noted that the ICFPA was modeled after the California Insurance Fraud Prevention Act (CIFPA). *Id.* California courts have recognized that the *qui tam* mechanism and procedures of the CIFPA "enable and encourage the enforcement of regulatory provisions, such as section 1871.7, that would otherwise be beyond the resources of public entities to enforce." *Wilson,* 227 Cal. App. 4th at 596. Without the involvement of "potential whistleblowers in the enforcement of regulatory provisions such as section 1871.7, the [State Insurance] Commissioner would lack the evidence and the resources to discover violations and prosecute action[s] such as these." *Id.*

Defendants contend that the term "interested person" in the ICFPA should be limited to those who have suffered actual financial or monetary damage from an alleged insurance fraud scheme. *See*, *e.g.*, Def. Brief, at 8–9. Under such a theory, ICFPA relators would essentially be limited to insurance companies harmed by the fraud. But Defendants' conception of the ICFPA would vitiate its effectiveness as a *qui tam* statute, along with the Illinois General Assembly's policy goal of combating insurance fraud. Relators who are firsthand observers of fraudulent conduct, such as employees of the corporation engaged in the fraud, are ideal witnesses to the wrongdoing.

Experience demonstrates the value of whistleblowers who are not themselves the victim of fraud. A 2009 study surveying 216 cases of alleged corporate frauds between 1996 and 2004 found that corporate employees played the most significant role of any group in blowing the whistle on fraud, reporting 17 percent of all cases surveyed. Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?* 65 J. Fin. 2213, 2-3 (2009). In comparison, financial-market regulators and the media each accounted for reporting 13 percent of such cases. *Id.* The study found that "having access to inside

information rather than relying just on public information increases an actor's probability of detecting fraud by 15 percentage points." *Id* at 3. The study explains that "[e]mployees clearly have the best access to information." *Id* at 23. "Few, if any, fraud[s] can be committed without the knowledge and often the support of several" corporate employees. *Id.*; *see also* Rapp, *supra*, at 108 (explaining that whistleblowing is "the single most effective way to detect fraud" because "whistleblowers who are insiders actually have access to information sources."). Demonstrating the overwhelming effectiveness of *qui tam* statutes, the 2009 study compared employee whistleblowing in the healthcare industry, where the government is a significant buyer of health care services and *qui tam* lawsuits are available, to industries in which *qui tam* lawsuits are not available. Dyck, *supra*, at 24–25. The study found that in the health care industry, corporate employees reveal fraud in 41 percent of cases. *Id.* at 25. That is almost three times more than in industries in which *qui tam* suits are not available, where employees reported fraud in 14 percent of cases. *Id.*

Moreover, corporate insiders ordinarily face significant *disincentives* to bringing claims against their employers—including the prospect of retaliation, the difficulty of finding a new job, and the rigors of being involved in litigation—and must be incentivized with a significant monetary reward. *See id.* at 5 (finding that in 82 percent of *qui tam* cases where the relator was named, the relator was allegedly "fired, quit under duress, or had significantly altered responsibilities as a result of bringing the fraud to light."); Rapp, *supra*, at 114–16 (explaining that whistleblowers face an "endless chain of abasement," including being fired, demoted, or sued by their employers, as well blacklisting in their industry and protracted legal battles in which the defendant attacks their professional reputation). Insurance companies victimized by fraud already have legal claims against

the fraudster, as well as financial incentives to protect their bottom line, so the need for a monetary reward in such situations is not nearly as great. If Defendants' argument were accepted, Illinois' primary tool for fighting insurance fraud would be rendered useless. Authorities would face greater difficulty uncovering and punishing insurance fraud, and Illinois taxpayers and private insureds would pay the price through higher taxes and increased insurance premiums.

III. Like the Federal and State False Claims Acts and the CIFPA on which the ICFPA is Modeled, the ICFPA Properly Assigns the Government's Civil Claims to Private Litigants.

A. *Qui tam* relators have standing to pursue claims on behalf of the State.

Legal and historic precedent confirm that *qui tam* relators have standing to pursue their claims regardless of whether they suffered an individualized injury. Upholding *qui tam* relator standing under the federal False Claims Act, the United States Supreme Court found that such laws effect a partial assignment of the government's claim to private individuals. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). The *Vermont Agency* Court observed that such cases meet the three traditional requirements of Article III standing—a concrete harm, traceable to the conduct of the defendant, and the likelihood that the requested relief would remedy the alleged injury. *Id.* at 771. In addition, the Court noted that *qui tam* statutes, which often granted individuals the right to sue and collect penalties under criminal statutes, have existed in England and the American Colonies for centuries, and were widely used at the time the federal Constitution was adopted.[1] The Court concluded:

[1] *Id.* at 776-77 (discussing informer statutes that permitted private individuals to sue and collect a bounty for the enforcement of laws, including criminal laws). *See also generally*

> We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. . . . When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.

Id. at 777–78.

Vermont Agency addressed relator standing under the federal Constitution, and analysis under the Illinois Constitution compels the same result. Indeed, this Court adopted the reasoning of *Vermont Agency* in *Scachitti*, concluding that under the Illinois False Claims Act, *qui tam* relators have legal standing to sue. *Scachitti,* 215 Ill. 2d at 508–09. There, as in *Vermont Agency*, this Court held that "the interest of a *qui tam* plaintiff in a claim under the Act is justified as a partial assignment of the state's right to bring suit." *Id.* Like the Illinois False Claims Act at issue in *Scachitti*, the ICFPA effects a partial assignment of the government's right to bring suit to private individuals, which is sufficient to establish standing.

1. The Type of Monetary Relief the Relator Seeks Has No Bearing on Standing in an ICFPA Action.

Defendants' argument is based on the fallacy that *qui tam* relator standing exists only in the context of enforcing the government's pecuniary damages claims, which are property rights and therefore assignable. Def. Brief, at 21. Contrary to the Defendants' contention, *Scachitti* and *Vermont Agency* did not turn on the nature of the monetary relief the relators sought. In *Scachitti*, this Court explained that a *qui tam* relator is "a partial

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Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 290-303 (1989).

assignee of *the state's claim*" and a relator's standing is "justified as a partial assignment *of the state's right to bring suit*." 215 Ill. 2d at 508-09 (emphasis added). The state's right to bring suit under the Illinois False Claims Act includes the right to seek both damages and civil penalties. *See* 740 ILCS 175/3 ("a person is liable to the State for a civil penalty . . . plus 3 times the amount of damages which the State sustains"). The court in *Vermont Agency* did not limit its holding to claims for pecuniary damages. *See Vermont Agency*, 529 U.S. at 774 (holding that the government's "injury in fact" sufficed to confer standing on the relator). Under the FCA, the government can seek both pecuniary damages and statutory penalties. *See* 31 U.S.C. §3729(a)(1) (imposing liability "for a civil penalty . . . plus 3 times the amount of damages which the Government sustains because of the act of that person"). The penalties are available "solely upon proof that false claims were made, without proof of any damages." *See* S. Rep. No. 99-345, at 8-10 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5466, 5273.

Moreover, the history that the Court in *Vermont Agency* found "well nigh conclusive" on the question of relator standing is equally applicable here. *Vermont Agency*, 529 U.S. at 777. That history included numerous statutes authorizing *qui tam* relators to prosecute violations of the criminal law having nothing to do with pecuniary damage to the government, and providing only penalties for criminal violations. *Id.* at 777.

Federal courts have repeatedly rejected the argument that *qui tam* relator standing turns on whether the relator is seeking pecuniary damages or penalties. For example, in *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013), the Fourth Circuit held that a *qui tam* relator seeking only penalties under the FCA had Article III standing to sue. There, as here, the Defendant attempted to argue that "only

the proprietary injury is an injury in fact for standing purposes," pointing to language in *Vermont Agency* referring to the government's assignment of a "damages claim" to confer relator standing. *Id.* at 403. Finding *Vermont Agency* "dispositive of the question," the *Bunk* court rejected the defendant's argument, finding the Supreme Court would not have "embarked by mere implication on the novel dissection urged by [defendant], without so much as a nod that it was breaking new ground." *Id.* at 402–03. The decision of the relator in the *Bunk* case to pursue only civil penalties "altered in no material way the fundamental legal relationship [of the relator] as plaintiff and assignee . . . [to] the government as victim and assignor." *Id.* at 403. The court also noted *Vermont Agency*'s reliance on the history of statutes that "'allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.'" *See id.* at 403 (quoting 529 U.S. at 775–77 & nn. 6–7). The *Bunk* court viewed it as "highly unlikely" the *Vermont Agency* Court would have "relied on the informer statutes to reach the result it did . . . had it intended future relators . . . seeking precisely the same sorts of penalty bounties, to be without standing to sue." *Id.*; *see also United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272 (M.D. Fla. 2014) (finding a relator seeking only FCA statutory penalties had standing to pursue *qui tam* action).

Similarly, the Federal Circuit in *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321 (Fed. Cir. 2010) relied on *Vermont Agency* to hold that a relator seeking only penalties under the false patent marking *qui tam* statute, 35 U.S.C. § 292, had Article III standing. As the government pointed out in that case, "Congress has, by enacting section 292, defined an injury in fact to the United States. In other words, a violation of that statute inherently constitutes an injury to the United States. By passing the statute prohibiting deceptive

patent mismarking, "Congress determined that such conduct is harmful and should be prohibited." *Id.* at 1325. As an assignee of the government's claim under the law, the relator had standing. The Federal Circuit rejected the argument that the plaintiff's standing depended upon the "alleged injury to the United States being proprietary, as opposed to sovereign." *Id.* at 1326. The court pointed out that the Supreme Court in *Vermont Agency* made no distinction between the two types of injury:

> "It is beyond doubt that the complainant asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud."

Id. (quoting *Vermont Agency*, 529 U.S. at 771). The court concluded that the Supreme Court "considered both types of injuries and found them collectively to be sufficient to confer standing on the government and therefore on the relator." *Id.*

Although Congress subsequently repealed the patent *qui tam* statute at issue in *Stauffer* as part of a large-scale reform of the Patent system,[2] that has no bearing on the validity of the Court's standing analysis. Nor is the Federal Circuit's analysis in "substantial tension" with standing principles as Defendants contend. Def. Brief at 27, n.9. In fact, the opposite is true. The reasoning in *Stauffer* is essentially the same as the Fourth Circuit's reasoning in *Bunk*. *Stauffer* is also consistent with the Supreme Court's teaching in *Vermont Agency* that *qui tam* relators have, for centuries, had standing as assignees to assert the government's claim for statutory penalties.

[2] Leahy-Smith America Invents Act, Pub. L. No. 112-29, §16(b), 125 Stat. 284, 329 (Sept. 16, 2011).

2. The ICFPA is a Civil Statute and Does Not Authorize the Enforcement of Criminal Laws by Private Persons.

Defendants next erroneously argue that relator lacks standing because the ICFPA purportedly authorizes the enforcement of a criminal statute. *See, e.g.*, Def. Brief at 27 (contending that private citizens lack an interest in the prosecution of other citizens). But the ICFPA, like the *qui tam* statutes on which it is modeled, authorizes private persons to bring a "civil action," not a criminal enforcement proceeding. 740 ILCS 92/15(a) ("An interested person, including an insurer, may bring a *civil action* for a violation of this Act for the person and for the State of Illinois") (emphasis added). A person found liable under the ICFPA, pays a civil penalty, not a criminal penalty, and does not risk going to jail or forfeiting any other liberty interest. Moreover, the statute expressly provides that the remedies are civil in nature, and preserves the ability of the State to *separately* engage in criminal prosecution for the conduct. *See* 740 ILCS 92/5(c) ("The penalties set forth in subsection (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct."); 740 ILCS 92/20(d) (providing for stay of civil action if a criminal action involving substantially the same conduct is pending against the defendant).

That an ICFPA claim relies on the violation of an underlying criminal statute does not mean a relator is criminally prosecuting the defendant. Under the federal and state FCAs, courts frequently find violations of criminal law, such as the Anti-Kickback Statute, as the basis of the fraud against the government for which the defendant is civilly liable under the False Claims Act. *See, e.g.*, *United States ex rel. Litwiller v. Omnicare*, No. 11-cv-8980, 2014 WL 1458443 (N.D. Ill. Apr. 14, 2014) (denying motion to dismiss allegations under state and federal FCA based on violations of criminal Anti-Kickback

Statutes); *see also* 42 U.S.C. § 1320a-7b(g) (providing that a claim that violates the criminal federal Anti-Kickback Statute also constitutes a false or fraudulent claim under the civil FCA).

B. Offering a Reward to Private Persons to Pursue Claims on Behalf of the Government Does not Violate Due Process.

Defendants are demonstrably incorrect when they contend that courts have "roundly rejected" arrangements that permit private individuals to enforce the law because they undermine the neutrality required of public prosecutors. Def. Brief at 9-10. Numerous courts have rejected the argument that a *qui tam* statute's partial assignment of the government's claim to a private individual who is incentivized with a monetary award violates due process. *See, e.g., Kelly*, 9 F.3d at 760; *United States ex rel. Robinson v. Northrop Corp*., 824 F. Supp. 830, 838 (N.D. Ill. 1993); *Friedman v. Rite Aid Corp*., 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001); *United States ex rel. Fallon v. Accudyne Corp*., 921 F. Supp. 611, 623-24 (W.D. Wisc. 1995); *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc*., 123 F. Supp. 2d 990, 994–95 (W.D.N.C. 2000). As these courts have recognized, prosecutors are not required to be completely neutral and detached. Moreover, *qui tam* relators cannot unilaterally exercise the government's prosecutorial powers, so *qui tam* statutes do not present the same concern that would arise if a government prosecutor were entitled to a bounty. *Kelly*, 9 F.3d at 760 (relators "do not have the 'power to employ the full machinery of the state in scrutinizing any given individual.'"). Unlike government prosecutors, relators cannot conduct police investigations and interrogations, issue warrants, immunize informers and agents, authorize wiretapping, or issue civil investigatory demands, and they do not have enhanced subpoena power. *Id.* Rather,

relators "pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting and action." *Id.*

The Defendants incorrectly assert that California has precluded arrangements that allow private litigants to have financial incentives in prosecuting matters involving sovereign authority. Def. Brief at 32. Defendants rely on *People ex rel. Clancy v. Super. Ct.*, 39 Cal. 3d 740, 745 (Cal. 1985), but they fail to note that subsequent cases have limited that decision. *Clancy* was not based on constitutional principles, but on a court's exercise of its powers to disqualify an attorney in a particular case. *See Am. Bankers Mgmt. Co. v. Heryford*, 885 F.3d 629, 638 n.12 (9th Cir. 2018). The California Supreme Court has explained that the particular nuisance action involved in *Clancy* implicated concerns about targeting of a particular business, and was meant to ensure that an attorney "entrusted with the unique power of the government . . . must refrain from abusing that power by failing to act in an evenhanded manner." *See Cty. of Santa Clara v. Super. Ct.*, 50 Cal. 4th 35, 54–57 (Cal. 2010). The court declined to extend *Clancy* to all cases in which the government used contingency fee lawyers to assist in the prosecution of public-nuisance abatement actions. *Id.* at 58. Instead, it held that government attorneys must retain a certain supervisory role over contingent fee counsel who pursue public nuisance abatement actions as counsel for the State. *Id.* at 61; *see also City of Chicago v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 920719 (N.D. Ill. Mar. 2, 2015) (finding city contingent fee arrangement with counsel to pursue violations of state and municipal law in connection with marketing opioids did not violate due process).

More recently, the Ninth Circuit rejected a due process challenge to a local government hiring counsel on a contingency fee basis to litigate the government's action

for civil penalties under California's Unfair Competition Law. *See Am. Bankers*, 885 F.3d 629. The court concluded that its prior decision rejecting such a due process challenge to the *qui tam* provisions of the federal False Claims Act controlled the case as contingency fee arrangements were not meaningfully different from *qui tam* actions. *Id* (citing *Kelly* , 9 F.3d 743). The court rejected the due process challenge even though, as the defendants argued, contingency fee counsel under the Unfair Competition Law, unlike private *qui tam* litigants, appear as special assistant district attorneys and have prosecutorial powers that *qui tam* relators lack. *Id.* at 635. Moreover, the government has even greater controls over a relator's case, as discussed below.

C. The Statute Does Not Usurp the Attorney General's Law Enforcement Authority as the Attorney General Retains Control over ICFPA Claims.

The ICFPA also does not usurp the Attorney General's law enforcement role by authorizing private persons to pursue *qui tam* actions. Def. Brief at 29. Evaluating the Illinois False Claims Act, this court concluded in *Scachitti* that the Act did not usurp the Attorney General's powers because it "provide[s] that the Attorney General in all circumstances effectively maintains control over the litigation, consonant with the Attorney General's constitutional role as the chief legal officer of the state." *Scachitti*, 215 Ill. 2d at 513. "Rather than usurping the constitutional power of the Attorney General, the *qui tam* provisions of the Act support the Attorney General's law enforcement duties," and "private citizens and their attorneys play a vital role in bringing cases involving fraud and abuse of government-funded programs to the attention of the state." *Id.* Similar provisions have been found adequate to protect the United States Attorney General under the federal False Claims Act. *Kelly*, 9 F.3d at 752; *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993).

The ICFPA provides the Attorney General significant control over the litigation, nearly identical to the provisions that this Court found sufficient in *Scachitti* to provide the Attorney General control over False Claims Act *qui tam* actions:

- If the State's Attorney or Attorney General proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. 740 ILCS 92/20(a).
- The State's Attorney or Attorney General may dismiss the action notwithstanding the objections of the person initiating the action if they notify the person and the court has provided the person with an opportunity for a hearing on the motion. 740 ILCS 92/20(b)
- The State's Attorney or Attorney General may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. *Id.*
- Upon a showing that the relator's unrestricted participation during the course of the litigation would interfere with or unduly delay the State's Attorney's or Attorney General's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation. *Id.*
- In a non-intervened action, the State's Attorney or Attorney General may monitor the case through service of all pleadings and copies of all deposition

transcripts and without limiting the status and rights of the relator, may intervene later upon a showing of good cause. 740 ILCS 92/20(c).

- Whether or not the State intervenes, upon a showing by the State's Attorney or Attorney General that certain actions of discovery by the relator would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days. 740 ILCS 92/20(d).

Thus, the State exercises substantial control over *qui tam* actions brought under the ICFPA, including the ability to intervene in and assume primary responsibility for the case.

D. An "Interested Person" Under the ICFPA, Like an "Interested Person" Under CIFPA on Which the ICFPA is Modeled, is Someone With Information that Insurance Fraud Has Been Committed and is Entitled to a Reward if He or She Brings a Successful Case.

The plain reading of the statute, as well as a review of the legislative history, and case law, demonstrates that the phrase "interested person" as used in the ICFPA refers to a *qui tam* relator who brings a claim in the name of the government and is entitled to a share of the recovery. Defendants erroneously conclude, based on misguided statutory construction, that the phrase "interested person" means that a relator must have a "personal claim, status, or right which is capable of being affected." *See* Def. Brief, at 13.

As Defendants acknowledge, the ICFPA takes much of its language—including the phrase "interested person, including an insurer"—directly from the CIFPA, upon which it was modeled. Section 1871.7 of the CIFPA provides, "[a]ny interested persons, including an insurer, may bring a civil action for a violation of this section . . ." Cal. Ins. Code § 1871.7(e)(1). California courts have interpreted "interested person" within the meaning

of the statute to refer to a *qui tam* relator who has no personal stake in the litigation, but brings the case on behalf of the government and receives a reward in a successful case. *See Strathmann*, 210 Cal. App. 4th at 500-501 ("[Relator] is an 'interested person' bringing this action as a *qui tam* relator. 'A *qui tam* relator is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer's contingent fee. The relator has no personal stake in the damages sought—all of which, by definition, were suffered by the government.'"); *Allstate*, 107 Cal. App. 4th at 538 (describing an action under CIFPA as a "*qui tam* . . . brought under a statute that allows a private person to sue for a penalty, part of which the government or some specific public institution will receive.") (internal quotations omitted) (quoting Black's Law Dict. (7th ed. 1999)); *People ex rel. Alzayat v. Hebb*, 18 Cal. App. 5th 801, 813 (Cal. Ct. App. 4th Dist. 2017) ("A lawsuit filed on behalf of the state is called a *qui tam* action, and the interested person is called a relator.").

Numerous CIFPA cases have been brought by "interested persons" who did not assert a personal injury, but whose stake was based solely on the assignment of the government's claim. For example, numerous CIFPA *qui tam* cases have been brought by sales representatives that were formerly employed by the defendant. *See Wilson*, 227 Cal. App. 4th 579 (former drug company representative); *United States ex. rel Witkin v. Medtronic, Inc*., 189 F. Supp. 3d 259 (D. Mass. 2016) (medical device sales representative); *United States v. CardioDx, Inc*., No. 15-CV-01339-WHO, 2019 WL 5295127 (N.D. Cal. Oct. 18, 2019) (former cardiovascular test company sales representative); *United States ex rel. Puhl v. Terumo BCT*, No. CV 17-8446 PSG (JPRx), 2019 WL 6954317 (C.D. Cal. Sept. 12, 2019) (former sales representative of medical

technology company); *Cal. v. AbbVie Inc*., 390 F. Supp. 3d 1176 (N.D. Cal. 2019) (former nurse educator and patient ambassador for Abbvie).

Qui tam cases under the CIFPA brought by such interested persons have resulted in substantial recoveries for the State, which in accordance with the CIFPA, receives at least 50 percent of the recovery to enhance the state's enforcement resources. Cal. Ins. Code §1871.7(g)(1)(A)(iv) (providing that portions of recovery not distributed to the relator, who cannot receive more than 50 percent, shall be paid to the General Fund of the state and, upon appropriation by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts."). *See* California Department of Insurance, 2018 Annual Report of the Commissioner, at 167, http://www.insurance.ca.gov/0400-news/0200-studies-reports/0700-commissioner-report/upload/Annual-Report-Final.pdf (noting that the Commissioner settled six *qui tam* matters in 2018 resulting in "substantial recoveries for the State" and reporting that at the end of 2018, 151 active *qui tams* were pending and the Commissioner had intervened in, and taken over responsibility for, five of them.). Among the cases settled in 2018 was a case against a pharmacy for overbilling insurers, which was brought by a former pharmacist who had no personal stake in the controversy. *See* California Department of Insurance, *National Retailer Settles Civil Suit Alleging Prescription Fraud Practices* (Jan. 4, 2018), http://www.insurance.ca.gov/0400-news/0100-press-releases/2018/release001-18.cfm.

Following California's approach, federal courts in Illinois and elsewhere have adjudicated ICFPA claims brought by *qui tam* relators who did not have a personal stake in the controversy, including a data analyst alleging ICFPA claims in *United States ex rel.*

Zverev v. USA Vein Clinics of Chicago, LLC, 244 F. Supp. 3d 737, 741 (N.D. Ill. 2017), a former nurse educator and patient ambassador in *United States ex rel. Suarez v. AbbVie Inc.*, No. 15 C 8928, 2019 WL 4749967, at *1 (N.D. Ill. Sept. 30, 2019), and a medical sales representative in *Medtronic*, 189 F. Supp. 3d at 265. The portion of the recoveries in such cases that are not awarded to the whistleblower are distributed to the State Attorney General or local States Attorney "for enhanced crime investigation, prosecution, and prevention efforts." 740 ILCS 92/25(f)-(h).

Defendants' contention that the phrase "interested person" must mean an injured person because the phrase is further modified by "including an insurer" mistakenly relies on the canon of statutory construction stating that where a statute provides a non-exclusive list, the class of unarticulated things will be interpreted to be similar to the listed things. Def. Brief at 15. That canon—*ejusdem generis*—meaning "of the same kind," refers to circumstances in which a statute lists several classes of things but provides that the list is not exhaustive. *See* Sutherland Statutes and Statutory Construction, § 47:17 (7th ed.); *Sierra Club v. Kenney*, 88 Ill. 2d 110, 127 (Ill. 1981). Here, there is no list that sheds light on the phrase "interested person." An example of "one," as Defendants posit, does not alone reveal much about the contours of the general category.

Moreover, the legislative pedigree of the ICFPA explains the origin of the inclusion of the one example, and it is clear that this example was not added to illustrate a limitation on the types of persons who could bring suit. The legislative history of the CIFPA explains why the phrase "including an insurer" was added to the California statute in 1999. At the time, CIFPA provided only that "[*a*]*ny interested persons* may bring a civil action for a violation of this section for the person and for the State of California." *See* Cal. Ins. Code

§1871.7(e)(1) (version effective to December 31, 1999) (emphasis added). In order to encourage insurers to bring more actions under the CIFPA, the state considered a proposal to offer a larger reward to insurers than to other persons who brought cases under CIFPA. *Allstate*, 107 Cal. App. 4th at 551-52. Ultimately the legislature did not adopt a higher relators' share percentage for insurers because of concerns about providing them with a windfall, and instead increased the percentage of recovery for *all* interested persons, including insurers. *Id.* at 552.

CONCLUSION

Amicus Taxpayers Against Fraud Education Fund urge this Court to affirm the decision of the Appellate Court below.

Date: March 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

Date: March 18, 2020

Respectfully submitted,

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PROOF OF FILING AND SERVICE

I hereby certify that on March 18, 2020, I caused the attached *Amicus* Brief of the Taxpayers Against Fraud Education Fund in Support of Plaintiff-Appellee to be electronically filed with the Clerk of the Supreme Court of Illinois by using the OdysseyIL eFile system. I further certify that I will cause one copy of the above-named filing to be served upon counsel listed below via electronic mail and the OdysseyIL eFile system on March 18, 2020.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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