

CASE NO. 97023

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**IN THE  
SUPREME COURT OF ILLINOIS**

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**Raymond G. SCACHITTI, Patrick J. HOULIHAN and Robert F. RIFKIN,**

*Plaintiffs-Appellants,*

**v.**

**UBS FINANCIAL SERVICES AND DELOITTE & TOUCHE, LLP,**

*Defendants-Appellees.*

On Direct Appeal from Cook County Circuit Court, Case No. 02 CH 21121  
The Honorable Stephen Schiller, Judge Presiding

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BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS  
AND TAXPAYERS AGAINST FRAUD IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Department of Justice Press Release, TAP Pharmaceutical Products Inc. And Seven Others Charged With Health Care Crimes; Company Agrees To Pay \$875 Million To Settle Charges (October 3, 2001), available at [www.usdoj.gov/opa](http://www.usdoj.gov/opa)

Department of Justice Press Release, Drug Giant Pfizer & Two Subsidiaries To Pay \$49 Million For Defrauding Drug Medicaid Rebate Program (October 28, 2002), available at [www.usdoj.gov/opa](http://www.usdoj.gov/opa)

Department of Justice Press Release, Astrazeneca Pharmaceuticals LP Pleads Guilty To Healthcare Crime; Company Agrees to Pay \$355 Million To Settle Charges (June 20, 2003), available at [www.usdoj.gov/opa](http://www.usdoj.gov/opa)

TAF Press Release (November 6, 2003), available at <http://www.taf.org/press/prnov6-2003.htm>

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*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*Vermont Agency of Nat'l Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000)

740 ICLS 175/4

735 ILCS 5/20-104(b)

## ARGUMENT

### **I. THE IWA'S *QUI TAM* PROVISIONS CODIFY THE PUBLIC-PRIVATE PARTNERSHIP DEEPLY ENTRENCHED IN THE COMMON LAW TO PREVENT FRAUD AGAINST THE GOVERNMENT**

*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*Vermont Agency of Nat'l Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)

*Marvin v. Trout*, 199 U.S. 212, 225 (1905)

*Chicago & Alton R.R. Co. v. Howard*, 38 Ill. 414 (1865)

*Illinois Central R.R. Co. v. Herr*, 54 Ill. 356 (1870)

*Dempsey v. Donnelly*, 58 Ill. 40 (1871)

*Holland v. Swain*, 94 Ill. 154 (1879)

*Cairo & St. Louis R. R. Co. v. Warrington*, 92 Ill. 157, 160 (1879)

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## **II. A *QUI TAM* RELATOR UNDER THE IWA HAS INDIVIDUAL STANDING TO SUE**

### **A. As The U.S. Supreme Court Has Held, *Qui Tam* Provisions Confer Standing To Relators By Virtue Of A Partial Assignment Of The Government's Damages Claim.**

*Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)

*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*People v. Whitlow*, 89 Ill. 2d 322, 433 N.E.2d 629 (1982)

*People ex rel. Levenstein v. Salafsky*, 338 Ill. App. 3d 936, 789 N.E.2d 844 (2<sup>nd</sup> Dist. 2003)

*Dr. Charles W. Smith III, Ltd. v. Gen. Life Ins. Co.*, 122 Ill. App. 3d 725, 462 N.E.2d 604 (1<sup>st</sup> Dist. 1984)

*U.S. ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870 (D.D.C. 1999)

*Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 759 N.E.2d 533 (2001)

740 ILCS 175/4(b)(1)

740 ILCS 175/4(d)

740 ILCS 175/3(a)

305 ILCS 5/11-22a

40 ILCS 5/13-312

30 ILCS 500/53-10

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*Droste v. Kerner*, 34 Ill. 2d 495, 217 N.E.2d 73 (1966)

*Cremer v. Peoria Hous. Auth.*, 399 Ill. 579, 78 N.E.2d 276 (1948)

*Cairo & St. Louis R.R. Co. v. Warrington*, 92 Ill. 157 (1879)

*Fodge v. Bd. of Educ. of Village of Oak Park*, 309 Ill. App. 109, 32 N.E.2d 650 (1<sup>st</sup> Dist. 1941)

Ill. Const. art. VIII § 2(b)

Ill. Const. art. XIII § 4

30 ILCS 550/2

740 ILCS 175/4(b)(1)

Transcript of the Illinois House of Representatives, May 15, 1999 (50<sup>th</sup> Legislative Day)

**C. Illinois Has Long Recognized The Standing Of Assignees.**

*Saltzberg v. Fishman*, 123 Ill. App. 3d 447, 462 N.E.2d 901 (1<sup>st</sup> Dist. 1984)

*Hitchcock Air Conditioning, Heating & Piping Co. v. Hazen*, 43 Ill. App. 3d 483, 357 N.E.2d 69 (3<sup>rd</sup> Dist. 1976)

*Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc.*, 181 Ill. 2d 214, 692 N.E.2d 269 (1998)

**D. The Statute Found Unconstitutional In *Lyons* Did Not Confer Assignee Standing.**

*Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)

*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*People ex rel. Ulrich v. Bosman*, 279 Ill. App. 3d 36, 664 N.E.2d 119 (1<sup>st</sup> Dist. 1996)

*Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc.*, 181 Ill. 2d 214, 692 N.E.2d 269 (1998)

*Puckett v. Empire Stove Co.*, 183 Ill. App. 3d 181, 539 N.E.2d 420 (5<sup>th</sup> Dist. 1989)

*U.S. ex rel. Robinson v. Northrop*, 824 F. Supp. 830 (N.D. Ill. 1993)

*East St. Louis Fed'n of Teachers, Local 1220 v. East St. Louis School Dist. No.189 Fin. Oversight Panel*, 178 Ill. 2d 399, 687 N.E.2d 1050 (1997)

*U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9<sup>th</sup> Cir. 1993)

*U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9<sup>th</sup> Cir. 1998)

740 ILCS 175/4(b)(5)

740 ILCS 175/4(e)(4)(A)

**III. THE IWA DOES NOT USURP THE ATTORNEY GENERAL'S CONSTITUTIONAL AUTHORITY TO DIRECT THE LEGAL AFFAIRS OF THE STATE.**

**A. The IWA's *Qui Tam* Provisions Were Carefully Crafted To Ensure The Attorney General Retains Authority To Control The Litigation At Every Stage.**

*Fair Employment Practices Comm. v. Rush-Presbyterian-St. Luke's Med. Center*, 41 Ill. App. 3d 712, 354 N.E.2d 596 (1976)

*Fergus v. Russel*, 270 Ill. 304, 110 N.E.2d 130 (1915)

*U.S. ex rel. Sarmont v. Target Corp.*, No. 02 C 0815, 2003 WL 22389119 (N.D. Ill. Oct. 17, 2003)

*U.S. ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323 (M.D. Fla. 2001)

*U.S. ex rel. Robinson v. Northrop Grumman Corp.*, 89 C 6111, 2002 WL 31163734 (N.D. Ill. Sept. 26, 2002)

*U.S. ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7<sup>th</sup> Cir. 2002)

*U.S. ex rel. Found. for Fair Contracting, Ltd. v. G&M Eastern Contracting, Inc.*, 259 F. Supp. 2d 329 (D.N.J. 2003)

*U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9<sup>th</sup> Cir. 1998)

*Swift v. U.S.*, 318 F.3d 250 (D.D.C. 2003)

*Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154 (5<sup>th</sup> Cir. 1997)

*U.S. ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335 (6<sup>th</sup> Cir. 2000)

*U.S. ex rel. Taxpayers Against Fraud. v. G.E. Co.*, 41 F.3d 1032 (6<sup>th</sup> Cir. 1994)

*Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5<sup>th</sup> Cir. 2001)

*U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9<sup>th</sup> Cir. 1993)

*Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990)

*U.S. ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347 (D. Mass. 1999)

*U.S. ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611 (W.D. Wis. 1995)

*U.S. ex rel. Bantolas v. Superior Air & Ground Ambulance Transport, Inc.*, No. 01 C 6168, 2004 WL 609793 (N.D. Ill. March 22, 2004)

*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 32, 759 N.E.2d 533, 540 (2001)

740 ILCS 175/4(b)(2)

740 ILCS 175/4(b)(3)

740 ILCS 175/4(c)(1)

740 ILCS 175/4(c)(2)(C)

740 ILCS 175/4(c)(3)

740 ILCS 175/4(c)(4)

740 ILCS 175/4(e)(3)

740 ILCS 175/4(c)(5)

740 ILCS 175/4(c)(2)(A)

740 ILCS 175/4(c)(2)(B)

740 ILCS 175/4(d)

740 ILCS 175/4(b)

**B. The IWA Does Not Contain The Same Constitutional Defects As Article XX.**

*Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002)

*People ex rel. Ulrich v. Bosman*, 279 Ill. App. 3d 36, 664 N.E.2d 119 (1<sup>st</sup> Dist. 1996)

*Ryan v. Consentino*, 793 F. Supp. 822 (N.D. Ill. 1992)

735 ILCS 5/20-104(b)

**IV. EXTENDING *LYONS* v. *RYAN* TO THE IWA WOULD STRIP AWAY THE STATE'S MOST EFFECTIVE ANTI-FRAUD WEAPON**

Department of Justice Press Release, False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003), available at [www.usdoj.gov/opa/pr/2003/November/03\\_civ\\_613.htm](http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm)

Arkansas Medicaid Fraud False Claims Act, Ark. Code Ann. § 20-77-91

California False Claims Act, Ca. Gov. Code § 12650

Colorado Medical Assistance Act, Colo. Rev. Stat. § 26-4-1101

Delaware False Claims and Reporting Act, Del. Code 6-1201

District of Columbia Procurement Reform Amendment Act, D.C. Code Ann. § 1-1188.13

Florida False Claims Act, Fla. Stat. § 68.081

Hawaii False Claims Act, Haw. Rev. Stat. § 661-21

Massachusetts False Claims Law, Mass Gen. Laws ch. 12, sec. 12, §§ 5A-5O

Michigan False Claims Act, Mich. Comp. Laws 400.601

Nevada False Claims Act, Nev. Rev. Stat. § 357.010

New Mexico Medicaid False Claims Act, 2004 N.M. Laws 49

Tennessee False Claims Act, Tenn. Stat. § 4-18-101

Texas Medicaid Fraud Prevention Law, Tex. Hum. Res. Code §§ 36.001-36-117

Utah False Claims Act, Utah Code Ann. § 26-20-1

Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.1

Office of the Illinois Attorney General Press Release, UIC Medical Center Pays \$2 Million to United States and State of Illinois To Settle Live Transplant Fraud Suite (November 17, 2003), available at [http://www.illinoisattorneygeneral.gov/pressroom/2003\\_11/111703.html](http://www.illinoisattorneygeneral.gov/pressroom/2003_11/111703.html)

S. Rep. No. 99-345 (1986)

May 15, 1999 transcript of the Illinois House of Representatives, p. 48 (50<sup>th</sup> Legislative Day)

### **INTEREST OF AMICI**

**AARP** is a non-partisan, non-profit organization with more than 35 million members, approximately 1.6 million of whom live in Illinois. As the largest membership organization dedicated to addressing the needs and interest of people 50 and older, AARP is concerned whenever fraud leads to the misdirection of public monies. AARP is especially concerned when this occurs in the nation's publicly-funded health care system, upon which older persons are particularly reliant. Health care fraud has a significant impact on cost, quality, and utilization of services under the Medicare and Medicaid programs.

In 1996, an AARP task force began to work on a public campaign to focus attention on fraud in the Medicare program. The goal was to educate AARP members and the general public on health care fraud and to involve them in the process of reducing fraud and abuse in this program. The extensive public education campaign, launched in 1998, was carried out in partnership with the U.S. Department of Justice and the U.S. Department of Health and Human Services, including the Health Care Financing Administration (now the Center for Medicare and Medicaid Services) and the Office of the Inspector General (OIG). The "Who Pays? You Pay" campaign was designed to motivate Medicare beneficiaries to be alert for signs of Medicare fraud and to report suspected fraud on the OIG's national toll-free hotline number. AARP, working with others in both the public and private sectors, has continued to educate the public about the role they can play in fighting health care fraud, thus helping to lower health care costs and, at the same time, to increase the quality of patient care.

**Taxpayers Against Fraud, the False Claims Act Legal Center (TAF)**, is a non-profit public interest organization dedicated to preserving effective anti-fraud legislation at the state and federal levels.

TAF has participated as an *amicus curiae* in numerous cases in order to defend the constitutionality of the federal False Claims Act, 31 U.S.C. § 3729-33 (FCA). It also works to pass false claims legislation modeled on the FCA, such as the Illinois Whistleblower Reward & Protection Act, 740 ILCS 175/4 *et seq.* (IWA). TAF has a profound interest in ensuring federal and state false claims statutes are upheld against constitutional attacks.

*Amici* strongly support the FCA and parallel state statutes, including the IWA. These statutes are critical and effective tools for fighting fraud and abuse in government programs such as Medicare, Medicaid and other government-funded programs, and in enabling the government to recover significant dollars, the loss of which ultimately is borne by taxpayers. Since Congress substantially strengthened the FCA in 1986, the federal government has recovered over \$12 billion in civil fraud cases, the vast majority of which were initiated by *qui tam* relators.<sup>1</sup> Over sixty-five percent of these recoveries are attributable to Medicare and Medicaid fraud.

The FCA and state false claims statutes such as the IWA have also recently been employed in the fight against the ever-rising cost of prescription drugs. Fraud in prescription drug pricing and marketing has become an increasing target of *qui tam* prosecutions initiated under the FCA and state false claims statutes. Since 2001 alone, *qui tam* cases against pharmaceutical manufacturers resulted in government recoveries of \$1.6 billion.<sup>2</sup>

Because the Medicaid program (including prescription drug benefits) is funded in part through state revenues, state false claims acts are an important enforcement tool to recover improperly paid state taxpayer dollars. *Amici* support state false claims statutes such as the IWA because they recognize *qui tam* relators often will expose and prosecute frauds that, because of finite resources and competing priorities, the various state attorneys general cannot single-handedly pursue.

<sup>1</sup> Statistics are courtesy of the Department of Justice. See Department of Justice Press Release, False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003), available at [www.usdoj.gov/opa](http://www.usdoj.gov/opa).

<sup>2</sup> Statistics are courtesy of the Department of Justice and TAF. See Department of Justice Press Releases dated January 23, 2001, October 3, 2001, October 28, 2002 and June 20, 2003, relating to settlements with Bayer, TAP Pharmaceuticals, Pfizer and Astrazeneca, respectively, all available at [www.usdoj.gov/opa](http://www.usdoj.gov/opa) and TAF Press Release (November 6, 2003), available at <http://www.taf.org/press/prnov6-2003.htm>.

## SUMMARY OF ARGUMENT

The trial court erred by extending this Court's decision in *Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002), to invalidate the *qui tam* provisions of the Illinois Whistleblower Reward & Protection Act (IWA), 740 ICLS 175/4 *et seq.* In *Lyons*, this Court found that taxpayers do not have constitutional standing to bring an action on behalf of the State under 735 ILCS 5/20-104(b) ("Article XX"). Article XX allowed a private citizen without any personal stake in the outcome to prosecute a claim on behalf of the State if the Attorney General declined to do so, with no subsequent involvement by the Attorney General in the action. This Court held the statute unconstitutionally usurped the common law powers of the Attorney General, by giving a private citizen the unfettered right to prosecute an action that belongs exclusively to the State. *Lyons*, 201 Ill. 2d at 541, 780 N.E.2d at 1106.

There are three critical reasons why the holding in *Lyons* is inapplicable to the IWA. First, unlike the statute at issue in *Lyons*, the IWA's *qui tam* provisions are deeply rooted in Anglo-American law. *Qui tam* statutes co-existed with traditional executive branch powers going back over six hundred years, long before the State of Illinois was founded and long since then. Thus, *qui tam* actions cannot usurp the common law powers of the Attorney General, as they have always complemented those powers.

Second, the IWA's statutory framework differs vastly in form and function from the taxpayer statute struck down in *Lyons*. In interpreting the federal FCA -- which was the model for the IWA -- the U.S. Supreme Court recently held that identical *qui tam* provisions in the federal statute constitutionally confer standing by virtue of the government's partial assignment of its cause of action. *Vermont Agency of Nat'l Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). Following the U.S. Supreme Court's rationale, the IWA is grounded in the well-established authority of the Illinois legislature to assign property rights belonging to the State. Unlike the taxpayer in *Lyons*, the *qui tam* relator has been assigned an individual interest in the outcome separate and apart from that of the State.

Finally, unlike the statute struck down in *Lyons*, under the IWA, the Attorney General has continuing power and prerogative to control the litigation. Because the Attorney General retains control over a *qui tam* action under the IWA at every stage of the litigation, the statute cannot and does not usurp

the Attorney General's authority. As shown below, the IWA fully comports with the standing and separation of powers principles of the Illinois Constitution as articulated in *Lyons*. The trial court's sweeping extension of *Lyons* to this wholly different statute is unwarranted and its decision must be reversed.

## ARGUMENT

### **I. THE IWA'S *QUI TAM* PROVISIONS CODIFY THE PUBLIC-PRIVATE PARTNERSHIP DEEPLY ENTRENCHED IN THE COMMON LAW TO PREVENT FRAUD AGAINST THE GOVERNMENT**

Respect for the common law underscored this Court's decision in *Lyons*. In interpreting the scope of the Attorney General's authority, this Court recognized, "[t]he duties of the Attorney General are prescribed by law and include those powers traditionally held at common law." *Lyons*, 201 Ill. 2d at 541, 780 N.E.2d at 1105. The statute at issue was struck down because the legislature "cannot reduce the Attorney General's common law authority in directing the legal affairs of the state." *Id.* By this same reasoning, the common law standing of *qui tam* relators should not be compromised. The standing of *qui tam* relators rests on over six hundred years of common law precedent.

By the time Daniel Pope Cook – the namesake of Cook County -- served as Illinois' first Attorney General for eleven days in March of 1819, courts had already been hearing *qui tam* actions for hundreds of years.<sup>3</sup> *Qui tam* actions have been a part of Anglo-American law since the thirteenth century in England when private individuals began bringing actions in the royal courts in both their own name and for the Crown.<sup>4</sup> *Vermont Agency of Nat'l Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000), citing *Prior of Lewes v. De Holt* (1300), reprinted in 48 Selden Society 198 (1931). In the fourteenth century, Parliament began enacting statutes that explicitly allowed private parties to sue for

<sup>3</sup> For a history of the Attorney General's office, visit [www.ag.state.il.us/abouttheoffice/history.html](http://www.ag.state.il.us/abouttheoffice/history.html).

<sup>4</sup> *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means he "who pursues this action on our Lord the King's behalf as well as his own." The phrase dates back to at least the time of Blackstone. *Vermont Agency of Nat'l Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 769, n. 1 (2000), citing 3 W. Blackstone, Commentaries 160.

themselves and the Crown (and receive an award for doing so), even if they suffered no injury. *Stevens*, 529 U.S. at 775.

*Qui tam* actions have also existed in America “ever since the foundation of our government.” *Marvin v. Trout*, 199 U.S. 212, 225 (1905); *see also Stevens*, 529 U.S. at 777 (the history of *qui tam* in America is “well nigh conclusive”). They were also a highly significant feature of Illinois law from earliest times, and were commonplace by 1870 when language virtually identical to what is now article V, section 15 of the Constitution of Illinois was enacted.<sup>5</sup> *See, e.g., Chicago & Alton R.R. Co. v. Howard*, 38 Ill. 414 (1865) (holding *qui tam* action was properly brought by informer on behalf of himself and the State of Illinois); *Illinois Central R.R. Co. v. Herr*, 54 Ill. 356 (1870) (affirming award of penalty in *qui tam* action, one-half to the State and one-half to the prosecuting witness who sued for himself and the State of Illinois); *Dempsey v. Donnelly*, 58 Ill. 40 (1871) (affirming penalty awarded in *qui tam* action); *Holland v. Swain*, 94 Ill. 154 (1879) (affirming penalty of treble damages in *qui tam* action, one-half awarded to the county and one-half to the private citizen).

It is inconceivable that the framers of article V, section 15 could have understood it to deprive *qui tam* relators of standing, or to strip the legislature of the power it had always enjoyed to create *qui tam* actions. Indeed, less than a decade after the 1870 Constitution was enacted, this Court emphatically affirmed the power of the legislature to enact *qui tam* legislation:

The statute books of Great Britain and of the various States of the Union abound with such enactments. They give popular or *qui tam* actions to recover forfeitures for the omission or violation of duty. In some cases the penalty is given to the informer, in others one-half to the government and the other half to the informer, or one-half to the informer and the other half to some charity or specific fund. We are aware of no case since the organization of our government, State or Federal, which has questioned the power of the legislature to thus dispose of a penalty or forfeiture.

<sup>5</sup> The language creating the office of the Illinois Attorney General changed only slightly from the 1870 to 1970 versions of the Constitution of Illinois. The 1870 Constitution provided that the Attorney General “shall perform such duties as may be prescribed by law,” and the 1970 Constitution, that the Attorney General “shall have the duties *and powers* that may be prescribed by law (emphasis added).” Section 1, art. 5 and sec. 15, art. 5, of the 1870 and 1970 Constitutions of Illinois, respectively. In *Lyons*, this Court determined the drafters of the 1970 Constitution intended no change in the law concerning the scope of the Attorney General’s authority. 201 Ill. 2d at 536, 780 N.E.2d at 1103.

*Cairo & St. Louis R. R. Co. v. Warrington*, 92 Ill. 157, 160 (1879).

Illinois' modern *qui tam* statute, the IWA, was enacted well over a decade ago in 1991. The IWA is closely modeled after a Civil War era federal statute known as the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* The FCA was substantially revamped by Congress in 1986 and since that time, has fast become the federal government's most potent fraud-fighting weapon. Both the FCA and IWA contain *qui tam* provisions that put into play a powerful public-private partnership designed to ferret out fraud and abuse of government-funded programs.

The modern FCA and state false claims statutes, including the IWA, target the submission of "false" or fraudulent claims to government-funded programs. The *qui tam* provisions of these statutes incentivize private citizens to promptly report fraud that otherwise would go unchallenged. The private citizen, also referred to as a "relator," is entitled to receive a portion of the government's recovery from a successful action. This incentive has paid off. Since 1986, the federal government alone has recovered over \$12 billion as a result of suits arising under the FCA. The overwhelming success of the FCA is what inspired the various states, including Illinois, to pass false claims legislation designed to facilitate the return of fraudulently obtained state funds.

## **II. A QUI TAM RELATOR UNDER THE IWA HAS INDIVIDUAL STANDING TO SUE**

### **A. As The U.S. Supreme Court Has Held, *Qui Tam* Provisions Confer Standing To Relators By Virtue Of A Partial Assignment Of The Government's Damages Claim.**

The issue in this appeal is whether the IWA properly confers standing to private citizens to sue under the Act's *qui tam* provisions. The United States Supreme Court recently considered this issue -- under the identical *qui tam* provisions of the federal FCA -- and found that standing was constitutional because *qui tam* relators had been assigned a partial interest in the litigation. *Vermont Agency of Natural*

*Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).<sup>6</sup> The language of the IWA and the well-established legislative power to assign property compels the same result.

In *Lyons*, this Court held that a taxpayer plaintiff lacked standing to bring suit under Article XX because the State was the only real party in interest to the litigation. 201 Ill. 2d at 535, 780 N.E.2d at 1102. The “real party in interest” is “the person or entity entitled to the benefits if the action is successful.” *Id.* at 534, 780 N.E.2d at 1102.

This presents a key difference between the relator’s standing in a *qui tam* action and the plaintiff’s interest in an Article XX action. Under Article XX, only the State was entitled to receive any benefits from the action. The plaintiff taxpayer could only recover attorneys’ fees upon successful completion of the suit. But under the federal and state *qui tam* statutes, the relator also is entitled to benefit from the action. As the U.S. Supreme Court emphasized:

[T]he statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery. Thus, it provides that “[a] person may bring a civil action for a violation of section 3729 *for the person and for the United States Government.*”

*Stevens*, 529 U.S. at 772. In the IWA, relators’ standing is conferred through identical language, establishing that “[a] person may bring a civil action for a violation of Section 3 *for the person and for the State.*” 740 ILCS 175/4(b)(1) (emphasis added). As *Stevens* went on to note, this language “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” 529 U.S. at 773.<sup>7</sup> Every Justice, including those concurring and dissenting, adopted this interpretation. *Id.* at 788 (Ginsberg, J. and Breyer, J. concurring); *id.* at 802 (Stevens, J. and Souter, J. dissenting).

The U.S. Supreme Court’s authoritative interpretation applies equally to the IWA. Illinois courts look to federal interpretations when the legislature models a statute on a federal law. *People v. Whitlow*,

<sup>6</sup> While the *Stevens* Court analyzed this issue with respect to standing for purposes of Article III, its conclusion that a relator has an individual stake in the outcome and standing to bring suit is relevant here because it confirms *qui tam* suits are not brought simply in a representative capacity and must therefore be analyzed in light of the individual rights afforded to relators.

<sup>7</sup> Illinois law concerning the creation of an assignment further supports this construction, as courts will find an assignment wherever there was an intent to assign, without the necessity of explicit language. *See, e.g., Dr. Charles W. Smith III, Ltd. v. Gen. Life Ins. Co.*, 122 Ill. App. 3d 725, 727, 462 N.E.2d 604, 606 (1<sup>st</sup> Dist. 1984).

89 Ill. 2d 322, 333, 433 N.E.2d 629, 633-34 (1982); *see also People ex rel. Levenstein v. Salafsky*, 338 Ill. App. 3d 936, 942, 789 N.E.2d 844, 849 (2<sup>nd</sup> Dist. 2003) (because the IWA is modeled closely on the FCA, federal court opinions construing the federal statute are instructive).

The language of Article XX made it clear that the taxpayer actions were brought to recover damages “on behalf of” the State. Moreover, Article XX actions were exclusively “on behalf of” the State, with the plaintiff having no interest in the outcome separate and apart from the State or anyone else. Article XX was not a *qui tam* statute as that term has been used by lawmakers and courts for hundreds of years, but rather, a derivative cause of action that permitted a plaintiff to bring suit for the sole benefit of another party – the State of Illinois – where the State declined to.

In contrast, the IWA’s language “for the person and for the State” precludes an interpretation that a *qui tam* case is brought solely in a representative capacity. *Stevens*, 529 U.S. at 772; *see also U.S. ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 884 (D.D.C. 1999) (holding that a relator also is a “real party in interest” in an FCA action, which is “brought for the benefit of *both* the relator and the United States, not for the benefit of the United States alone”). Under the IWA, a relator is entitled to receive up to thirty percent of the State’s recovery in the action, which may include treble damages and civil penalties assessed against a defendant. 740 ILCS 175/4(d) and 740 ILCS 175/3(a). While the *Lyons* Court held that the Illinois Attorney General has the exclusive right to conduct litigation where the State is “*the* real party in interest,” it has never held, nor should it, that this right prevents the State’s citizens from litigating a claim where they too are a real party in interest in the litigation. 201 Ill. 2d at 541, 780 N.E.2d at 1105-1106 (emphasis added).

To put it another way, because a *qui tam* relator under the IWA brings suit to protect his or her own substantial property rights and interests, he or she is not acting simply *for* the State, but for themselves individually. That by virtue of the suit the State is alerted to fraud that may otherwise go uncovered can only be a great benefit, and indeed the reason the legislature made the decision to assign this property right to relators in the first place.

Illinois routinely becomes *a* real party in interest, along with other private real parties in interest, due to subrogation under the Medicaid laws and Illinois Pension laws. *See* 305 ILCS 5/11-22a (public aid); 40 ILCS 5/13-312 (pension system). State agencies are specifically authorized to transfer interests in intangible property within their jurisdiction, thereby creating potential shared rights of action. 30 ILCS 500/53-10. In many other situations the government is *a* real party in interest in private litigation, such as when it is a participant in a common fund, all cases involving the constitutionality of a statute, and even the venerable tort of public nuisance.

All of these cases enabling private litigants to vindicate a government or public right have one thing in common: the individual litigant has a stake in the action distinct from that of the public-at-large. As the U.S. Supreme Court recognized in *Stevens*, this stake is created by the government's valid partial assignment of its damages claim. This Court should adopt *Stevens*' reasonable construction of the rights afforded a relator by virtue of the *qui tam* provisions to uphold the legislative act. *See, e.g., Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 32, 759 N.E.2d 533, 540 (2001). Any doubts must be resolved in favor of the IWA's validity. *Burger*, 198 Ill. 2d at 32, 759 N.E.2d at 540-41.

**B. The Standing Of *Qui Tam* Relators Derives From The Inherent Legislative Power Over State Property.**

The partial assignment of the State's interest to a *qui tam* relator derives from inherent legislative authority to dispose of State property. By well established precedent, the Illinois legislature may assign State property directly to private parties. *Droste v. Kerner*, 34 Ill. 2d 495, 500-501, 217 N.E.2d 73, 76-77 (1966) (real property), *cert. denied*, 385 U.S. 456 (1967), *overruled on other grounds by Paepcke v. Public Bldg. Comm'n of Chicago*, 46 Ill. 2d 330, 263 N.E.2d 11 (1970); *Cremer v. Peoria Hous. Auth.*, 399 Ill. 579, 586, 78 N.E.2d 276, 280 (1948) (direct appropriation of State funds); *Cairo & St. Louis R.R. Co. v. Warrington*, 92 Ill. 157 (1879) (statutory double damages to private party who initiates suit held constitutional, citing *qui tam* cases as analogous).

The legislature has the exclusive right to authorize spending the State's resources as it sees fit. Ill. Const. Art. VIII § 2(b). It also is made the guardian of State property by virtue of its exclusive

power to legislate sovereign immunity. Ill. Const. Art. XIII § 4. Thus, the legislature has been vested with the exclusive power to determine and authorize the uses, disposition and protections of State property.

This constitutional authority includes the legislative power to transfer the State's right to enforce a civil penalty to a private party. As this Court long ago held:

We are aware of no case since the organization of our government, State or Federal, which has questioned the power of our legislature to thus dispose of a penalty or forfeiture. All must concede that when the General Assembly imposes a forfeiture, that body may dispose of it in such a manner as in their wisdom they see proper. They may appropriate such penalties to the general revenue of the State, to the school or other fund general or local, or to a private person. This, it is believed, has never been questioned.

*Cairo & St. Louis R.R. Co. v. Warrington*, 92 Ill. 157 (1879). There is no reason now to question the established legislative power over state property. This would be particularly inappropriate as applied to the IWA, where the legislature has carefully balanced its own power over state property, with the Attorney General's power to conduct litigation and the relator's interest in the underlying action.

Other laws further confirm the constitutionality of the legislative power exercised in the IWA. For example, since 1931, the legislature has transferred the State's right to sue under public construction bonds to unpaid suppliers and subcontractors. *See* 30 ILCS 550/2 (2004); Laws 1931, p. 385, § 2. amended by Laws 1949, p. 596, § 1; P.A. 81-594, § 1, eff. Jan. 1, 1980; P.A. 84-551, § 14, eff. Sept. 18, 1985; P.A. 86- 333, § 1, eff. Jan. 1, 1990; P.A. 93-562, § 5, eff. Aug. 20, 2003; formerly Ill. Rev. Stat. 1991, ch. 29, 16. As in the IWA, that statute allows a private party to bring an action "in the name of the state." *Id.*; 740 ILCS 175/4(b)(1). The validity of the construction bond statute, a version of which was in force during the drafting of the 1970 Constitution, has never been questioned. *See, e.g., Fodge v. Bd. of Educ. of Village of Oak Park*, 309 Ill. App. 109, 32 N.E.2d 650 (1<sup>st</sup> Dist. 1941) (finding subcontractor had no standing as third party beneficiary under bond, but was entitled to sue in name of government under the statute). [0]

In enacting the IWA, it was the legislature's considered judgment that a partial assignment of the State's damages claim to relators would greatly benefit the State and its citizens. As Representative

McAfee explained to the Illinois House of Representatives back on May 15, 1991, the IWA “is based on the Federal False Claims Act, an Act that was first enacted and adopted at the federal level in 1863 by then President Lincoln...[it] is based on law of over a hundred years old, and it is clearly a way to protect the government and its citizens from fraud without adding cost to the state.” See transcript of the Illinois House of Representatives, May 15, 1999, p. 47 (50<sup>th</sup> Legislative Day). A unanimous House of Representatives agreed. See *id.* at p. 49.

**C. Illinois Has Long Recognized The Standing Of Assignees.**

The assignee of a chose in action has the right to bring suit. See, e.g., *Saltzberg v. Fishman*, 123 Ill. App. 3d 447, 452, 462 N.E.2d 901, 905 (1<sup>st</sup> Dist. 1984). The suit may be brought in the assignee’s own name and in the name of the assignor. See, e.g., *Hitchcock Air Conditioning, Heating & Piping Co. v. Hazen*, 43 Ill. App. 3d 483, 486-87, 357 N.E.2d 69, 72 (3<sup>rd</sup> Dist. 1976). Causes of action sounding in fraud (such as the IWA) and including punitive damages are assignable. *Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc.*, 181 Ill. 2d 214, 227, 692 N.E.2d 269, 275 (1998). Assignability of a cause of action is the rule and non-assignability, the exception. *Kleinwort*, 181 Ill. 2d. at 225, 692 N.E.2d at 274. The exception is narrow and in Illinois, limited to torts for personal injuries and actions for other wrongs of a purely personal nature. *Id.* at 225, 692 N.E.2d at 274.

**D. The Statute Found Unconstitutional In Lyons Did Not Confer Assignee Standing.**

*Lyons* does not foreclose this construction of the IWA, because under Article XX, no part of the State’s right to recover damages was assigned to a private party. Private litigants were “rewarded” solely with the costs and expenses of bringing the action. The litigant (as opposed to its attorneys) had no cognizable stake in the action. The U.S. Supreme Court effectively distinguished statutes like Article XX from the IWA when it noted that the mere right to fees and costs does not give a litigant a stake in the action sufficient to create standing to sue. *Stevens*, 529 U.S. at 773. This Court in *Lyons* was not presented with the issue here, as a relator under the IWA is “entitled to the benefits of a successful action.” 201 Ill. 2d at 535, 780 N.E.2d at 1102.

Second, Article XX purported to create a multiplicity of independent actions from the same wrong. That is, any citizen, indeed any number of citizens, could bring suit on the same basis that the Attorney General might also litigate or attempt to settle. *See, e.g., People ex rel. Ulrich v. Bosman*, 279 Ill. App. 3d 36, 664 N.E. 2d 119 (1<sup>st</sup> Dist. 1996). Thus, Article XX could not be a partial assignment of the State’s chose in action, as it created multiple whole and separate actions “on behalf of the State” over which the Attorney General retained no control. The IWA, on the other hand, specifically recognizes the singular nature and exclusivity of the assignment in the “first-to-file” and “non-intervention” rule, 740 ILCS 175/4(b)(5), as well as the many specific controls available to the Attorney General. *See* discussion *infra* at pp. \_\_\_\_.

Third, the IWA in no way purports to base a suit on general citizen or taxpayer standing. Only those persons possessing and providing the State with valuable non-public information are entitled to the partial assignment. The courts have “no jurisdiction” over any other suit by a private party. 740 ILCS 175/4(e)(4)(A). This comports with the public policy approval of assignment of causes of action to persons who have some nexus—short of standing—with the subject matter of the action. *See e.g., Kleinwort*, 181 Ill. 2d at 226-27, 692 N.E.2d at 275; *Puckett v. Empire Stove Co.*, 183 Ill. App. 3d 181, 191-92, 539 N.E.2d 420, 427 (5<sup>th</sup> Dist. 1989).

The IWA presents a similar situation. The partial assignment affords relators assurance that their perhaps career-threatening whistle-blowing will not go unrewarded for an improper reason.<sup>8</sup> The assignment thus is ancillary to, and in aid of, securing the consideration given by the legislature to reward persons coming forward with non-public information of fraud. It is abundantly clear that some other form of reward “upon successful prosecution” by the Attorney General would provide a significantly lower incentive than the one intended by the legislature.

<sup>8</sup> Amici respectfully urge this Court not to forget that whistleblowers under the IWA often suffer extreme hardship, personal and financial risk and emotional distress by coming forward to report fraud. In fact, in Illinois, Judge Moran concluded that these hardships alone could confer standing. *U.S. ex rel. Robinson v. Northrop*, 824 F. Supp. 830, 835 (N.D. Ill. 1993). Furthermore, as the title of the Act illustrates, a central legislative purpose is the *reward* and *protection* of the Illinois whistleblower. Invalidating this statute could work a harsh injustice on whistleblowers who, even now, may be providing assistance to government authorities, at their own substantial risk.

Finally, unlike the plenary authority to control the litigation possessed by relators in an Article XX action, relators under the IWA are afforded only the minimal due process rights required by virtue of the property conferred on them by the legislature. The need for *some* right to be heard by the relator before settlement, dismissal or delayed intervention is inherent in the relator's property right. *East St. Louis Fed'n of Teachers, Local 1220 v. East St. Louis School Dist. No.189 Fin. Oversight Panel*, 178 Ill. 2d 399, 419-20, 687 N.E.2d 1050, 1062 (1997).

Here, like any assignee, the Relator's rights are subject to the scope and terms of the assignment, in this case, the provisions of the statute as interpreted by the courts. As detailed in Part III of this brief, the federal courts construing identical provisions have found any legitimate exercise of prosecutorial discretion sufficient to support the government's determination of the course of the suit. Furthermore, any provisions that merely *could* be interpreted as usurping the Attorney General's rights must not be so interpreted. These provisions are also subject to the requirement that a court must construe a statute so as to affirm its constitutionality if the statute is reasonably capable of such a construction. *See, e.g., Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 32, 759 N.E.2d 533, 540 (2001). As one federal court noted: "in the absence of any meaningful indication that [FCA] requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such..." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 756 (9<sup>th</sup> Cir. 1993).

Words such as "good cause" and "under all the circumstances" implicitly subsume the controlling importance of the Attorney General's prosecutorial discretion and right to represent the government while affording relators the due process protections required by virtue of their property right against fraud or unconstitutional prosecutorial action. *See, U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9<sup>th</sup> Cir. 1998) (analysis to determine whether government may control litigation over relator's objection is same as applied to determine when executive action violates substantive due process). The Attorney General's traditional powers do not include the right to act unconstitutionally. Thus, the due process mechanisms contained in the IWA cannot – and do not – usurp those powers.

Unlike Article XX, the IWA is a clearly delineated and valid partial assignment of the State's chose in action to relators. The legislature carefully transferred only the property within its inherent rights, and made no delegation of the Attorney General's traditional powers to represent the State.

**III. THE IWA DOES NOT USURP THE ATTORNEY GENERAL'S CONSTITUTIONAL AUTHORITY TO DIRECT THE LEGAL AFFAIRS OF THE STATE.**

Whether or not the Court finds the IWA creates a partial assignment affording a *qui tam* relator standing to sue (an independent basis for upholding the statute's constitutionality), the IWA withstands scrutiny. The IWA was carefully crafted to ensure its *qui tam* provisions enhance, not detract from, the Attorney General's constitutional power and authority as the legal officer of the State. As shown below, the Attorney General retains the authority to control an IWA action at every stage of the litigation. The IWA confers upon the Attorney General absolute discretion to decide *whether, when and how* to intervene in a lawsuit initiated by a private relator.

**A. The IWA's *Qui Tam* Provisions Were Carefully Crafted To Ensure The Attorney General Retains Authority To Control The Litigation At Every Stage.**

This Court has squarely held that the Attorney General's *retention of authority* to control litigation in which the State is the real party in interest (or *a* real party in interest) is sufficient to pass muster under article V, section 15 of the 1970 Illinois Constitution. *Fair Employment Practices Comm. v. Rush-Presbyterian-St. Luke's Med. Center*, 41 Ill. App. 3d 712, 715, 354 N.E.2d 596, 599 (1976); *accord Fergus v. Russel*, 270 Ill. 304, 342, 110 N.E.2d 130, 145 (1915) (recognizing there were multiple representatives of the Crown at common law who were subordinate to the Attorney General). This is so, even where the Attorney General initially *disagrees* with the litigation decision of another actor or *refuses to pursue the case altogether*. *Fair Employment Practices Comm.*, 41 Ill. App. 3d at 715, 354 N.E.2d at 599. As shown below, the legislature carefully crafted the *qui tam* provisions of the IWA to comply with the constitutional requirement.

A relator commences suit under the IWA by filing a *qui tam* complaint under seal and serving it on the Attorney General along with all of the material evidence in his or her possession. 740 ILCS

175/4(b)(2). The complaint remains under seal while the Attorney General investigates the relator's allegations. 740 ILCS 175/4(b)(2) and (3).

The relator can do nothing to force the suit to go forward but must wait until the Attorney General completes its investigation and decides whether to intervene. 740 ILCS 175/4(b)(2) and (3). The Attorney General is entitled to such extensions of the statutory sixty-day seal period as necessary to complete its investigation., 740 ILCS 175/4(b)(3). The extension request is made to the Court *ex parte* and because the lawsuit is under seal, the basis for the request need not be disclosed to anyone, including the relator.

Courts routinely grant extensions of the statutory seal period, often for periods of six months to a year at a time. Many cases remain under seal for years at the Attorney General's request to give the State ample opportunity to investigate and evaluate the relator's allegations. *See, e.g., U.S. ex rel. Sarmont v. Target Corp.*, No. 02 C 0815, 2003 WL 22389119 at \*2 (N.D. Ill. Oct. 17, 2003) (*qui tam* case remained under seal at government's request for nine and a half years); *U.S. ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323, 1328 (M.D. Fla. 2001) (*qui tam* case remained under seal throughout six-year government investigation).

If the State decides to intervene, it has primary responsibility for prosecuting the action and is not bound by any act of the relator. 740 ILCS 175/4(c)(1). Even though the relator remains a real party in interest, the Attorney General may restrict his or her participation in the litigation if it would interfere with or unduly delay the State's prosecution or if it would be "repetitious, irrelevant, or for the purposes of harassment." 740 ILCS 175/4(c)(2)(C).

Even where the State declines to intervene, the Attorney General retains very significant control over the litigation. The relator may proceed with the action, but the Attorney General continues to monitor the proceedings and the relator must serve the State with copies of all pleadings filed and copies of any and all deposition transcriptions. 740 ILCS 175/4(c)(3). The Attorney General also may stay certain discovery actions by the relator if it would interfere with its investigation or prosecution of a criminal or civil suit arising out of the same facts. 740 ILCS 175/4(c)(4).

The Attorney General retains the right to intervene in the lawsuit at any time, even many years *after* an initial declination decision. 740 ILCS 175/4(c)(3); *U.S. ex rel. Robinson v. Northrop Grumman Corp.*, 89 C 6111, 2002 WL 31163734 (N.D. Ill. Sept. 26, 2002) (Government intervened eight years after its initial declination); *see also U.S. ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 974, n. 5 (7<sup>th</sup> Cir. 2002) (at any given time, the Government may have “myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator’s attorney”).

No one but the Attorney General may intervene in a *qui tam* action. 740 ILCS 175/4(b)(5). And, if the Attorney General already has initiated an action under 740 ILCS 175/4(a), or filed any other civil suit or proceeding based upon the allegations of a potential *qui tam* suit, the relator is foreclosed from doing so. 740 ILCS 175/4(e)(3); *see also U.S. ex rel. Found. for Fair Contracting, Ltd. v. G&M Eastern Contracting, Inc.*, 259 F. Supp. 2d 329, 336 (D.N.J. 2003). Alternatively, the Attorney General may elect to pursue the allegations of the *qui tam* complaint through any “alternate remedy” available to the State, including an administrative proceeding to recoup overpayments. 740 ILCS 175/4(c)(5).

Most critically, the Attorney General has unilateral authority to dismiss the litigation if it so chooses. 740 ILCS 175/4(c)(2)(A); *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1144-45 (9<sup>th</sup> Cir. 1998) (holding Attorney General has the power to dismiss a *qui tam* action at any point in the litigation upon showing of “rational basis,” even where it concedes the action has technical merit); *see also Swift v. U.S.*, 318 F.3d 250, 253 (D.D.C. 2003) (holding Government’s decision to dismiss a *qui tam* case over a relator’s objection is not subject to judicial review).

The Attorney General also may unilaterally settle a *qui tam* case, subject only to the court’s determination that the settlement is fair, adequate and reasonable under all the circumstances. 740 ILCS 175/4(c)(2)(B). The State also recovers the lion’s share of any *qui tam* action. 735 ILCS 175/4(d).

On the other hand, a relator may not even dismiss his or her own *qui tam* complaint absent the Attorney General’s written consent. 735 ILCS 175/4(b). Nor can a relator unilaterally settle the action. 735 ILCS 175/4(c)(3); *see also Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5<sup>th</sup> Cir. 1997) (the FCA clearly permits Government to veto settlements even where it has declined to intervene); *accord*

*U.S. ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340-41 (6<sup>th</sup> Cir. 2000) (likewise holding absolute consent of the Attorney General is required before a relator may settle a *qui tam* action, even in the absence of intervention).

Like the FCA -- which has consistently withstood constitutional attack -- the IWA places no substantive constraints on the Attorney General's power to conduct a *qui tam* action. The IWA's limited procedural mechanisms protect the relator's individual stake in the litigation, while at the same time providing the Attorney General unfettered control over the case at every turn.

The FCA's executive branch controls (identical to the IWA's) are so powerful that every federal appellate court to entertain a constitutional challenge to its *qui tam* provisions has swiftly rejected it. *See, e.g., U.S. ex rel. Taxpayers Against Fraud. v. G.E. Co.*, 41 F.3d 1032, 1041 (6<sup>th</sup> Cir. 1994), *reh'g denied*, January 18, 1995; *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5<sup>th</sup> Cir. 2001); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9<sup>th</sup> Cir. 1993).

As one federal court explained in construing the FCA's *qui tam* provisions:

Under our federal scheme, the Attorney General, through those acting in his name, decides whom to prosecute for violations of federal law. The Court will not assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General. The Act nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the *qui tam* plaintiff's charges wholesale. Nor does the Act state that the *qui tam* plaintiff remains free to prosecute any person or entity he wishes, provided the government declines to take over the action.

*Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd* 959 F.2d 1101 (D.C. Cir. 1992); *accord U.S. ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347, 353 (D. Mass. 1999) (the argument that permitting a *qui tam* relator to proceed under the FCA even if the Government declines illegally divests the Executive Branch of its duties "has been rejected by every court that has considered it"); *accord U.S. ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623 (W.D. Wis. 1995) (holding that because of the substantial controls exercisable by the executive branch under the FCA, no unconstitutional delegation has taken place); *see also U.S. ex rel. Bantolas v. Superior Air & Ground Ambulance Transport, Inc.*, No. 01 C 6168, 2004 WL 609793 at \*5 (N.D. Ill. March 22, 2004) (rejecting

arguments that the *qui tam* provisions of the FCA and IWA violate the federal Constitution and Illinois Constitution, respectively).

Nothing in the 1970 Illinois Constitution prohibits private persons from uncovering fraud and assisting the Attorney General in its resulting prosecution of it. The constitutional inquiry is whether the IWA *usurps* the Attorney General's common law authority. *Lyons*, 201 Ill. 2d at 541, 780 N.E.2d at 1106.

As long as the Attorney General can step in and direct the course of litigation, there is no unconstitutional usurpation of its powers. *Fair Employment Practices Comm. v. Rush-Presbyterian-St. Luke's Med. Center*, 41 Ill. App. 3d 712, 715, 354 N.E.2d 596, 599 (1976); *accord U.S. ex rel. Taxpayers Against Fraud v. G.E. Co.*, 41 F.3d at 1041; *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d at 756; *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d at 757. The legislature carefully designed the IWA so this would be -- and is -- the case and its constitutionality should be upheld. *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 32, 759 N.E.2d 533, 540 (2001).

**B. The IWA Does Not Contain The Same Constitutional Defects As Article XX.**

As shown above, the *qui tam* provisions of the IWA preserve the Attorney General's discretionary authority to prosecute claims on behalf of the State. In addition, the Attorney General retains ongoing control of litigation brought by the relator under the IWA.

The IWA's *qui tam* provisions stand in stark contrast to Article XX, the statute before the Court in *Lyons*. This Court found in *Lyons* that the statutory framework of Article XX "improperly reduced the Attorney General's common law authority" and "improperly usurp[ed] the powers of the Attorney General." 201 Ill. 2d at 541, 780 N.E.2d at 1106. The IWA does not suffer from these constitutional defects.

Under Article XX, a private citizen could circumvent the Attorney General's discretionary authority to conduct litigation, even though the private citizen had no individual stake in the litigation and corresponding standing to sue. A private citizen under Article XX was only entitled to recover his or her

attorneys' fees and costs, unlike a *qui tam* relator under the IWA who has a concrete and personal stake in the outcome.

Article XX expressly conferred upon any Illinois citizen the right to make a demand upon the Attorney General to either promptly commence suit or settle an alleged claim of the State. The Attorney General was required to act within sixty days of the citizen's demand, and importantly, had no right to extend or seek an extension of the demand period. Once the demand period had passed without the Attorney General bringing suit or making arrangements to settle the case, the Attorney General was forced to relinquish control over the litigation and the citizen jumped into her shoes. To put it another way, the statute authorized the private citizen to substitute as the Attorney General and prosecute a claim the State no interest in pursuing.

The private citizen's right to unilaterally proceed with the lawsuit at the expiration of the sixty-day demand period was an automatic and irrevocable right. 735 ILCS 5/20-104(b). At that point, the Attorney General's control over the direction and course of the litigation extinguished and no exceptions were permitted.

The decision in *People ex rel. Ulrich v. Bosman*, 279 Ill. App. 3d 36, 664 N.E.2d 119 (1<sup>st</sup> Dist. 1996), underscores the private citizen's unfettered power under Article XX. In *Ulrich*, the Court refused to allow the Attorney General to dismiss the citizen's Article XX lawsuit against officials and faculty of the University of Illinois for the recovery of allegedly fraudulent payments made with State funds by the University. The Court held the Attorney General had no authority to bar the lawsuit even though the Attorney General contended that the University already had settled related claims against these defendants.

We agree with plaintiff that the statute is quite clear in conferring on the private citizen the right to bring the action if the Attorney General does not file suit or make arrangements to settle the claim within the required time. There are no exceptions in the law that would embrace the action taken by the University. Indeed, there are no exceptions at all; if the Attorney General does not act, the right to act belongs to the citizen.

*Ulrich*, 279 Ill. App. 3d at 44, 664 N.E.2d at 125.

In fact, the Attorney General is constrained to assume *any* role that might impair the citizen's power to prosecute an Article XX claim. To the extent the Attorney General retains any involvement in litigation brought under Article XX, it is in the limited role of a nominal defendant.

In *Ryan v. Consentino*, 793 F. Supp. 822 (N.D. Ill. 1992), the Court allowed the plaintiff to join the State as a nominal defendant in an Article XX action. The Court's stated reason was to ensure that the State did not "wreak havoc" or do anything inconsistent with the citizen's prosecution of its claims under Article XX.

The legislature could not have intended to leave to the State the right to wreak havoc in litigation filed under § 20-104. It defies logic to assume that the legislature intended that, after failing to act, State could bring a subsequent action effectively sabotaging any litigation filed pursuant to § 20-104(b).

*Ryan*, 793 F. Supp. at 824.

The Attorney General's relinquishment of all control in an Article XX action stands in stark contrast to what happens if the State declines to proceed in a *qui tam* action under the IWA. While the relator may still go forward with the litigation, the Attorney General can limit the relator's conduct in substantial ways. The Attorney General maintains the power to overrule the relator's litigation choices and can even take back primary control of the case at any time by revisiting the decision to intervene. Finally, the Attorney General maintains unilateral veto power over any settlement. *See supra* at pp. \_\_\_.

In sum, from start to finish, Article XX, the statute before the Court in *Lyons*, removed the discretionary authority of the Attorney General to prosecute claims on behalf of the State. For this reason, the Court struck down the statute as an unconstitutional usurpation of the Attorney General's authority as the chief legal officer of the State. Because, from start to finish, the IWA *qui tam* provisions preserve, and in some respects supplement, the Attorney General's authority as the chief legal officer of the State, the decision in *Lyons* should not be extended to invalidate the IWA.

#### **IV. EXTENDING *LYONS v. RYAN* TO THE IWA WOULD STRIP AWAY THE STATE'S MOST EFFECTIVE ANTI-FRAUD WEAPON**

Federal and state false claims acts such as the IWA are the most powerful tools available to combat fraud against the government. Since Congress substantially strengthened the federal False Claims Act in 1986, the federal government has recovered over \$12 billion in civil fraud cases. *See* Press Release, Department of Justice, False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003), available at [www.usdoj.gov/opa/pr/2003/November/03\\_civ\\_613.htm](http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm). As the Justice Department recognizes, without the *qui tam* provisions in the federal FCA, such recoveries would not be possible. *Id.*

Like Illinois, a growing number of states have adopted their own false claims and *qui tam* legislation since 1986, and today a large number of states have such laws on the books. *See, e.g.,* Arkansas Medicaid Fraud False Claims Act, Ark. Code Ann. § 20-77-91; California False Claims Act, Ca. Gov. Code § 12650; Colorado Medical Assistance Act, Colo. Rev. Stat. § 26-4-1101; Delaware False Claims and Reporting Act, Del. Code 6-1201; District of Columbia Procurement Reform Amendment Act, D.C. Code Ann. § 1-1188.13; Florida False Claims Act, Fla. Stat. § 68.081; Hawaii False Claims Act, Haw. Rev. Stat. § 661-21; Massachusetts False Claims Law, Mass Gen. Laws ch. 12, sec. 12, §§ 5A-50; Michigan False Claims Act, Mich. Comp. Laws 400.601; Nevada False Claims Act, Nev. Rev. Stat. § 357.010; New Mexico Medicaid False Claims Act, 2004 N.M. Laws 49; Tennessee False Claims Act, Tenn. Stat. § 4-18-101; Texas Medicaid Fraud Prevention Law, Tex. Hum. Res. Code §§ 36.001-36-117; Utah False Claims Act, Utah Code Ann. § 26-20-1; Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.1. False claims act legislation is also pending in Alabama, Idaho, Ohio, Nebraska, New York and Pennsylvania.

Illinois pioneered the use of state *qui tam* statutes as a fraud-fighting weapon. The IWA was enacted on September 20, 1991 and became effective on January 1, 1992. In little more than a decade, it has proved to be an invaluable tool to protect the integrity of the public fisc. The fraud uncovered in cases initiated by private citizens pursuant to the IWA's *qui tam* provisions includes:

- Systematic “upcoding” of emergency room services for Illinois Medicaid recipients at inner city hospitals across Chicago. *U.S. and State of Illinois ex rel. Linda Trombetta v. EMSCO Billing Services, et al*; Case No. 96 C 226, consolidated with 99 C 151 (N.D. IL);
- Falsely diagnosing potential liver transplant patients and placing them in intensive care to make them appear sicker than they were, thereby placing these patients ahead of others on the national donor waiting list and entitling the defendant hospitals to certification and reimbursement under the Medicare and Medicaid programs. *U.S. and State of Illinois ex rel. Raymond Pollak, M.D., v. Board of Trustees of the University of Illinois and the University of Chicago*, 99 C 710 (N.D. IL). See Office of the Illinois Attorney General Press Release, UIC Medical Center Pays \$2 Million To United States And State Of Illinois To Settle Liver Transplant Fraud Suit (November 17, 2003), available at [http://www.illinoisattorneygeneral.gov/pressroom/2003\\_11/111703.html](http://www.illinoisattorneygeneral.gov/pressroom/2003_11/111703.html).

Since 2000 alone, lawsuits under the IWA (including some of those described above) have generated recoveries of over \$21 million to the State of Illinois, the vast majority of which is attributable to the efforts of *qui tam* relators.<sup>9</sup>

Federal and state legislatures enacted *qui tam* false claims statutes because they recognized that governments alone lack sufficient information and resources to ferret out and punish fraud adequately. For example, in enacting the 1986 amendments to the federal FCA, Congress observed, “perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies.” S. Rep. No. 99-345 (1986), at 7. Accordingly, Congress amended the FCA to “allow and encourage assistance from the private citizenry,” which it expected to “make a significant impact on bolstering the Government’s fraud enforcement effort.” *Id.* at 8. The *qui tam* provisions of the FCA were intended “to provide the Government’s law enforcers with *more effective tools*” and also to “encourage any individual knowing of Government fraud to bring that information forward.” *Id.* at 2 (emphasis added).

<sup>9</sup> Statistics are courtesy of the Illinois State Treasurer and Office of the Comptroller.

In the wake of this action on the federal level, the Illinois legislature similarly decided to augment the state's resources in fighting fraud by passing the IWA. Like the Congress, our state legislature recognized that the state could not always prosecute such cases effectively on its own, and therefore sought to enlist private citizens in the war against fraud. The legislature determined the IWA was "clearly a way to protect the government and its citizens from fraud without adding cost to the state." Transcript of the Illinois House of Representatives, May 15, 1991, p. 48 (50<sup>th</sup> Legislative Day).

The House debates further reveal that the Illinois legislature worked *with* the Attorney General's office to create a statute that would best serve that office and the citizens of Illinois. Recommendations made by the Attorney General were incorporated by the legislature and adopted in the version of the bill that became the IWA. *See id.* Since then, the public-private partnership that was put into play has been tried, tested and proven to work.

The extension of the holding in *Lyons* to bar *qui tam* actions under the IWA would have a devastating impact on the ability of the State of Illinois to deter and punish fraud. It is the state legislature's considered judgment that the synergy between public and private actors created by the *qui tam* mechanism is essential to protect the state's coffers. *Qui tam* actions have historically been part of the fabric of our law and remain vital to the state's fiscal integrity. For this additional reason, the IWA should be upheld.

### **CONCLUSION**

For all of the reasons stated above, *amici curiae* respectfully request the Court to reverse the trial court and uphold the constitutionality of the Illinois Whistleblower Act.

Respectfully submitted,

**AARP AND TAXPAYERS AGAINST FRAUD**

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