No. 20-15831

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CECILIA GUARDIOLA, *ex. rel.* United States of America
Plaintiff – Appellee,

v.

UNITED STATES OF AMERICA,
Intervenor – Appellant, and

RENOWN HEALTH; RENOWN REGIONAL MEDICAL CENTER;
and RENOWN SOUTH MEADOWS MEDICAL CENTER,
Defendants.

On Appeal from the United States District Court for the District of Nevada
Civil Case No. 3:12-cv-00295-LRH-VPC (Honorable Larry R. Hicks)

AMICUS CURIAE BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND SUPPORTING APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund ("TAFEF") submits this brief in support of plaintiff-appellee, Cecilia Guardiola, and affirmance. Both Appellee and Appellant have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

TAFEF is a non-profit 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 ("FCA"), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

[1] No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This brief makes three points. First, that the whistleblower reward structure has worked exactly as Congress intended and has returned nearly thirty-four **billion** dollars to the taxpayers. Congress rewrote the FCA to encourage precisely this response. The 1986 amendments to the FCA represent a non-partisan effort to encourage whistleblower lawsuits through increased incentives. The whistleblower reward component of the FCA has enjoyed consistent bipartisan support because it operates brilliantly and economically to achieve exactly what Congress had intended. The government's position threatens that operation by rebranding great swaths of government recovery efforts as being beyond the reach of the alternative remedies provisions, which Congress intended to safeguard whistleblower rights to share in the recovery.

Second, in contravention of the plain language of the statute, the Government seeks to ignore the word "any" in the alternate remedy provision by simultaneously insisting that Recovery Audit Contractor ("RAC") audits are an anti-fraud regime (UGS Br. at p. 1) but are not alternative remedies because they are not fraud audits (UGS Br. at p. 31). This categorical error is compounded by the Government's argument that any effort to recover funds for similar misconduct before a *qui tam* suit has been filed operates to exclude any *qui tam* suit covering the same type of fraud, even though the *qui tam* suit assails fraudulent conduct

occurring after the Government's efforts at recovery. This argument comes close to resurrecting an obstacle to enforcement that Congress quite deliberately removed from the FCA when it amended the law in 1986.

Third, the Government would impose a burden on whistleblowers not contemplated by the statute. A defendant which is found to violate the FCA becomes liable for "3 times the amount of damages which the Government sustains because of the act of that person." (31 U.S.C. §3729(a)(1)). In practical application treble damages are only imposed after a victory at trial, and FCA settlements, as do all settlements, represent compromises at less than the value of complete trial victories. But here the Government argues that even if its administrative procedures recovered the single damage sustained because of the misconduct, the relator cannot complain because she is free to go to trial and recover the multiplier and penalties the FCA allows. The statute does not contemplate that the United States would resolve the actual damages without paying a relator's share, and then force whistleblowers to accept increased litigation risks and smaller rewards to attempt to recoup the delta between an alternate remedy and the multipliers and penalties provided by statute.

ARGUMENT

I. The FCA Has Succeeded Because Congress Increased Rewards for Whistleblowers and Removed Major Obstacles That Barred Their Lawsuits.

A. The FCA Receives Bipartisan Acclaim for Recovering Nearly $45 Billion For the Taxpayers.

The FCA has been widely recognized as the government's number one fraud enforcement tool, and since its inception has been consistently amended in order to expand the number of *qui tam* actions filed and cases allowed to proceed. S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; *United States ex rel. Green v. Northrop*, 59 F.3d 953, 963 (9th Cir. 1995). The FCA was enacted in 1863 during the Civil War, and was intended to "protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly." S. Rep. No. 99-345, at 11, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (quoting *U.S. v. Griswold*, 24 F. 361, 366 (D. Or. 1885)). In 1986, Congress adopted amendments designed to reinvigorate the FCA after decades of dormancy. Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 2 (1986). The amendments were designed to "encourage any individual knowing of Government fraud to bring that information forward." *Id.* Congress stated that "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims

Act is to encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24. Since 1986, the FCA has been responsible for recovering almost $45 billion wrongfully taken from the federal Treasury,[2] and thereby redressing and deterring fraud in programs as diverse as military procurement, crop subsidies, disaster relief, government-backed loan programs, and healthcare. *See* S. Rep. No. 110-507, at 7 (2008).

Since 2010 whistle blower-driven recoveries have been more than two billion dollars every single year.[3] U.S. Dep't of Justice, Fraud Statistics (2020), *available at*, https://www.justice.gov/opa/press-release/file/1233201/download. There is clear bipartisan support for whistleblowers and the role they play in returning stolen funds to the federal fisc. Republican Senator Charles Grassley, one of the authors of the 1986 amendments, observed that "[s]ince 1986 the FCA has become the premier tool for recovering money lost to fraud against the Government." Senator Charles Grassley, Prepared Statement at the False Claims Act hearing, Feb. 27, 2008, *available at*, https://www.grassley.senate.gov/news/news-releases/prepared-statement-senator-

[2] U.S. Dep't of Justice, Fraud Statistics (2020), *available at* https://www.justice.gov/opa/press-release/file/1233201/download

[3] By contrast, only 28% of the False Claims Act recoveries come from cases originated by the Department of Justice or referred to it by administrative agencies. 72% of all FCA recoveries arise from whistle blower suits.

chuck-grassley-false-claims-act-hearing. Encouraging whistleblowers to prosecute fraud cases even where the government will not help them "is exactly why the *qui tam* provisions were included in 1986, to maximize the number of eyes looking for government fraud." *Id.* More recently, Senator Grassley wrote to Attorney General William Barr stating that "the basic, essential purpose of the Act, [which] is to empower private citizens to help the government fight fraud." Letter from Senator Charles Grassley, Chair of the United States Senate Committee on Finance, to Attorney General William Barr, September 4, 2019, *available at,* https://www.grassley.senate.gov/sites/default/files/documents/2019-09-04%20CEG%20to%20DOJ%20%28FCA%20dismissals%29.pdf. President Trump appointed former Acting Assistant Attorney General Chad Readler, who emphasized the importance of whistleblowers to bringing fraud to light, noting that "[b]ecause those who defraud the government often hide their misconduct from public view, whistleblowers are often essential to uncovering the truth. The [Justice] Department's [monetary] recoveries this past year continue to reflect the valuable role that private entities can play in the government's effort to combat false claims."[4] *See* Acting Assistant Attorney

[4] Republican Senator Jeffrey Sessions, at his confirmation hearing before the Senate Judiciary Committee said that the *qui tam* provisions of the False Claims Act have "saved this Country lots of money. And probably has caused companies to be more cautious because they could have a whistleblower that would blow the whistle on them if they try to do something that's improper. So I think it's been a

General Chad A. Readler, Department of Justice, Civil Division (2017), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017. President Obama appointed former Assistant Attorney General Stuart Delery, who also expressed appreciation for the efforts of whistleblowers, noting that "[t]he whistleblowers who bring wrongdoing to the government's attention are instrumental in preserving the integrity of government programs and protecting taxpayers from the costs of fraud. We are extremely grateful for the sacrifices they make to do the right thing." Assistant Attorney General Stuart Delery, U.S. Department of Justice (2012), *available at*, https://www.justice.gov/opa/pr/justice-department-recovers-nearly-5-billion-false-claims-act-cases-fiscal-year-2012.

B. The Largest Single Factor Increasing the Number of Successful Whistleblower Suits Has Been the Increased Rewards and Other Incentives Available to Relators Investigating, Developing, and Prosecuting *Qui Tam* Actions.

Congress adopted the alternate remedy provision, along with the rest of the 1986 amendments, to encourage additional whistleblower cases. *See U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963-64 (discussing the intent of Congress in passing the 1986 amendments, which included the alternate remedy provision,

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very healthy thing …." *available at* https://www.judiciary.senate.gov/meetings/01/10/2017/attorney-general-nomination at 10:32:21- 10:32-41.

and explaining that the addition of real incentives for whistleblowers throughout the amendments were designed to encourage more whistleblowers to come forward, and noting that relators are entitled to a share of the government's recovery and attorneys' fees "even if the government decides to intervene and conducts the action itself, or elects to pursue its claim in an administrative proceeding.) (citations omitted); *U.S. ex rel. Bledsoe v. Comm. Health Sys., Inc.*, 342 F.3d 634, 648 (6th Cir. 2003) (construing the alternate remedy provision broadly as was "consistent with the congressional intent expressed in making the 1986 amendments to the FCA," and noting that a narrow reading of the alternate remedy provision "would not further Congress' legislative intent that the government and private citizens collaborate in battling fraudulent claims, and it would impede, not further, Congress' legislative intent to encourage private citizens to file *qui tam* suits."). Congress also gave relators a more active role in the litigation, recognizing that many "are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem." S. Rep. 99-345 at 5290. An important aspect of that was to ensure that if the Government chose to proceed administratively that the *qui tam* relator could maintain an active role. *Id.* at 5292.

Consistent with this goal, Congress has amended the FCA twice more since 1986 in order to encourage more whistleblowers to file *qui tam* suits.[5]

The 1986 amendments, which Congress designed to "increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government. *United Sates ex rel. Green v. Northrop,* 59 F.3d 953, 963 (9th Cir. 1995) (citing S. Rep. No. 99-345 at 2-3 (1986), *reprinted in* U.S.C.C.A.N. 5266, 5267). Through increased whistleblower rewards and active participation of relators, Congress meant to, and has, encouraged more private enforcement suits. *Id.*

[5] When Congress amended the FCA again in 2009 with Fraud Enforcement and Recovery Act ("FERA"), it broadened the scope of the FCA by removing any perceived requirement for direct presentment of claims to the government, broadened the so-called "reverse false claims" provision of the FCA in §3729(a)(1)(G), expanded retaliation protections for whistleblowers in §3730(h), expanded the use of Civil Investigative Demands in §3733, clarified that complaints-in-intervention relate back to the date that the relator filed a *qui tam* action for the purposes of the statute of limitations in §3731(c), and clarified the conspiracy provisions in §3729(a)(3). Pub. L. 111–21. Further, less than a year after passing FERA, Congress passed the Patient Protection and Affordable Care Act ("PPACA"), which contained amendments that further expanded the scope of the FCA in order to allow additional cases to move forward by limiting the application of the public disclosure bar and expanding the definition of false claims. *See* Pub. L. No. 111-148, §10104(j)(2), 124 Stat. 119, 901 (2010) (allowing the government to veto dismissals pursuant to the public disclosure bar, providing that the bar only apply to information disclosed in federal sources, eliminating the "direct knowledge" requirement to obtain original source status, clarifying that the FCA applied to claims submitted through healthcare exchanges, providing a time limit for returns of overpayments, providing that any claim submitted in violation of the Anti-Kickback Statute constitutes a false claim).

The new incentive system has worked exactly as Congress intended. Where only thirty *qui tam* suits were filed in 1987, 636 suits were filed in 2019. And recoveries have grown along with the suits. In the past ten years alone (2010-2019) *qui tam* suits have recovered over $31 billion for the taxpayers, including over $2.3 billion recovered exclusively by the relators after the Government refused to join the case.

Congress gave the new incentive system a firm foundation by also removing obstacles that impeded relators but did not protect any actual Government interest. from proceeding with cases that Congress intended go forward. Before the 1986 amendments to the FCA, Relators could not bring suits for false claims "based evidence or information the government had when the action was brought". 31 U.S.C. §3730(b)(4) [1982]. Known as the "government knowledge bar" this rule had throttled nearly all whistleblower suits because if even a procurement clerk with no real authority to correct a contract or halt procurement knew of the false claim, whistleblowers were barred from proceeding with their suit. Recognizing that this had paralyzed enforcement, "[t]he most significant aspect of the 1986 Amendments to the *qui tam* provisions of the FCA was the elimination of the 'prior government knowledge' jurisdictional bar." Helmer, *False Claims Act: Whistleblower Litigation* 7th ed. p. 78. With the amendment, the fact that someone

in the government might have some knowledge of fraud allegations no longer precluded a whistleblower with valuable information pursuing a *qui tam* action

As we explain in Section II, *infra*, the inter-related and overlapping network of government-conducted or contracted audits and reviews can often lead to direct or indirect "recoupment," and the new standard the Government proposes will complicate the risk/reward calculus that whistleblowers have to make, reducing the number of relator-driven lawsuits filed under the FCA. Instead of furthering Congressional intent, it frustrates it.

II. The Government's Proposed Redefinition of Alternate Remedies Would Ignore the Statute's Language and the Established Law of This Circuit.

Despite the proven success of increased whistleblower rewards the Government asks this Court to ignore clear statutory language, overturn long-standing Circuit precedent, (*see, United States ex rel. Barajas v. United States.*, 258 F.3d 1004 (9th Cir. 2001)) and adopt a novel position which would greatly reduce those whistleblower rewards and undermine the purpose of the *qui tam* provisions of the FCA, which is to reduce risk to whistleblowers.

Congress specifically repeated that a relator has rights when the Government attempts to use **"any** alternate remedy." The statute states that, "[n]otwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to

determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section." 31 U.S.C. §3730(c)(5). Controlling law in this Circuit, *Barajas*, makes it clear that reading the phrase "any alternative remedy" to mean what it says, is entirely consistent with the FCA's purpose, and that one purpose of this provision and the Ninth Circuit's interpretation of it is to protect relators, who risk their careers and social networks, from being further harmed by Government stratagems. *See Barajas*, 258 F.3d at 1012.

The Government asserts that RAC audits are "anti-fraud regimes" (USG Br. at p.1), yet subsequently denies that the RAC audit, pursuing precisely the same upcoding as the *qui tam* action, is - an alternate remedy because "[a] RAC audit is not a fraud proceeding." (USG Br. at p. 31). Both of these claims cannot be true. Neither the statute's language, its legislative history, or any authority supports this proposition. And there is substantial authority opposing it. The RAC audit is clearly aimed at uncovering the submission of improper claims, whether they are knowingly false or not. The phrase "alternate remedy" refers to the government's pursuit of any alternative to pursuing the claims brought by the relator in her *qui tam* action, whether that alternative is part of an anti-fraud regime or not. Otherwise the Government could decline to intervene and reach a separate

settlement (or intervene and settle the FCA action for a fraction of the total possible recovery while pursuing another suit to recoup its losses outside of the FCA context), thus denying the relator a share of the recovery that she risked her career to obtain for the government. Such a result would impede Congress' intent instead of furthering it. (*United States ex rel. Sun v. Baxter Healthcare Corp*., 892 F.Supp. 2d 341, 343-344 (D. Mass. 2012) favorably discussing *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 649 (6th Cir. 2003). The purpose of the alternate remedy provision is to "provide relators with the right to claim a share of the proceeds and a hearing regarding the fairness, of the government's settlement of their claims." *Sun*, 802 F.Supp.2d 344.

Moreover, the Government's proposed reading is not supported by the public policies underlying the FCA. Limiting the protective shield of the alternate remedy provision to instances where the Government has invoked another fraud statute would mean that numerous administrative recoupments, contractual reconciliations, negotiated forbearance by defendants of other claims they might have for government payment, and myriad regulatory fines and penalties could potentially preclude a whistleblower from recovering a reward for stepping forward to report fraud. Given the wide range of available remedies that are not fraud statutes, the chilling effect on whistleblowers' willingness to take the risks of filing a *qui tam* case were this Court to overturn the district court's ruling cannot

be overstated. The decision to file a *qui tam* case very often involves great personal risks to career, income, savings, family, friendship, and in some cases, even personal safety.[6] If the government is free to use the relator's information, only to shift their focus to administrative means of recovering federal funds in order to prevent a relator from obtaining a share of the recovery, the risk-benefit calculus once again tips more heavily against taking risks, undermining the improvements more than thirty years of FCA amendments have sought to achieve.

The Government also argues that merely auditing the "same type of misconduct" by the defendant at some time before the *qui tam* suit was filed frees the Government to collect whatever it can while denying the relator a chance to recover her share. (USG Br. at 20.) The danger is that the "same type of misconduct" doctrine could swallow up a very large number of FCA recoveries and in essence re-institute the "government knowledge" rule rejected by Congress. Because over 75% of the *qui tam* recoveries come from health care cases, (U.S.

[6] The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), available at https://www.judiciary.senate.gov/download/testimony-oftina-m-gonter-pdf. See also, e.g., Alexander Dyck, et al., Who Blows the Whistle on Corporate Fraud?, 65 J.Fin. 2213, 2240-45 (2010); Yuval Feldman & Orly Lobel, *The Incentive Matrix: The Comparative Benefits of Rewards, Liabilities, Duties, Protections for Reporting Illegality*, 88 Tex.L. Rev. 1151 (2010); James Moorman, The Whistleblower Experience: The High Cost of Integrity, 42 False Claims Act and Qui Tam Quarterly Review 73 (2006).

Dep't of Justice, Fraud Statistics (2020), *supra*) they will serve to demonstrate how the Government's proposed doctrine could sweep very broadly, further increasing the risks to whistleblowers.

To illustrate the potential sweep of the Government's proposal, consider that the Government's primary healthcare programs are Medicare and Medicaid. About 70% of all Medicare patients have "classic," fee for service Medicare, as are approximately 31% of Medicaid beneficiaries. ("Ten Things to Know About Medicaid Managed Care," Kaiser Family Foundation October 29, 2020 https://www.kff.org/medicaid/issue-brief/10-things-to-know-about-medicaid-managed-care/.) Fee for service Medicare, and many of the state Medicaid programs, are under statutory requirements to pay providers' bills within thirty days of their submission. Because it is impossible to review so many claims quickly, Medicare claims get a cursory automated review, and are then paid with more detailed reviews occurring after payment. Policy analysts call this the "Pay and Chase" model, and it has plagued Medicare since its inception. ("Medicare Program Integrity: Activities to Protect Medicare from Payment Errors, Fraud, and Abuse," Congressional Research Service, August 3, 2011, p. 12, *available at*, https://crsreports.congress.gov/product/pdf/RL/RL34217.) The RAC activities at issue in this case are just one small part of a myriad of government departments, and private contractors with ongoing audit responsibilities. And any one of those

ongoing audits could be invoked to claim that the Government was auditing the "same type of misconduct" before a *qui tam* complaint was filed.

For example, the Medicare Administrative Contractors (MACs) are private insurance companies or insurance service organizations which Medicare contracts with for review and payment of claims including auditing, medical necessity reviews, and reviews to see if claims are being properly coded and submitted. There are twenty of them – twelve for Medicare Part A (Hospital and Skilled Nursing) and Part B (outpatient), four for home health care and hospice, and another four for durable medical equipment (hospital beds, wheelchairs, breathing apparatus, and much more for Medicare outpatients.) *See* Who Are MACs, *available at*, https://www.cms.gov/Medicare/Medicare-Contracting/Medicare-Administrative-Contractors/Who-are-the-MACs#MapsandLists. Their duties are defined in the Medicare Program Integrity Manual, running several hundred pages and specifying over a dozen kinds of probes, audits, claims reviews, medical record reviews, and data quality reviews to be conducted. The Government also contracts with dozens of private review and audit agencies, including RACs, Medicare Integrity Contractors (MICs), upplemental Medical Review Contractors (SMRCs), Unified Program Integrity Contractors (UPICs), and Zone Program Integrity Contractors (ZPICs). Just the list of abbreviations and acronyms for processes, agencies, and outside contractors is five pages long. *See* FY 2018

Annual Report, Medicare and Medicaid Integrity Programs, Center for Medicare and Medicaid Services *available at* https://www.cms.gov/files/document/medicare-and-medicaid-integrity-program-fy-2018-annual-report.pdf.

This maze of private contractors and public departments shares data and formal and informal referrals, making it challenging to find any area involving the "same type of misconduct" that is not subjected to at least sporadic collection activity through the direct or indirect consequences of audits, reviews, or other queries. Under the narrow reading of "alternate remedy" which the Government proposes, few health care cases would be free of some claim that the misconduct had been audited at some point before the suit was filed. Thus, many whistleblowers with significant information about fraud would need to reconsider whether to make their disclosures to the government "in light of the potential personal and financial risk" and given that any one of these many avenues of auditing the "same type of conduct" could mean those risks were not worth it. The result would be the opposite of what the 1986 amendments intended, which is encouraging whistleblowers to come forward.

Congress wanted a system that encouraged whistleblowers to step forward by offering incentives that might counterbalance some of the risks they are taking with their careers, their families, and their workplace friendships. Potential relators already face the risk that their case may be barred because of a prior case

based on the same fraud schemes (the 'first to file bar' at 31 U.S.C. §3730(b)(5)) or that there is some form of public disclosure of the fraud which they and their lawyers had not detected (31 U.S.C. §3730(c)(3)). Adding the almost incalculable risk that some part of some paid claim has been recovered greatly complicates the risk/reward calculus, and in ways that cannot possibly be measured until, as here, the case is being readied for trial.

III. Using an Audit To "Cherry-Pick" Single Damages While Claiming That the Relator Should Litigate and Try Cases To Collect the Remaining Penalties and Multiple Damages Imposes Too High a Standard on Relators.

The Government denies that it has used an alternate remedy, however, it has increased relator's litigation risk and reduced the damages the relator can recover for the Government by at least one-third by removing recoverable single damages via the RAC audit. The Government insists that because the Relator can collect *some* quanta of damages the RAC audit is not an alternate remedy. (USG Br. at pp. 32-35). The FCA damages are theoretically three times the government's actual loss and inflation-adjusted penalties that could vary in size depending on when the claims were submitted. But that is theory. In practice, where the Government has intervened:

> [T]he DOJ always foregoes treble damages and penalties if a settlement can be structured that adequately compensates the government for its actual damages, cost of investigation, and bounty for the relator . . . [¶] Most defense counsel know by now that the DOJ always takes treble damages and penalties off the table in FCA

> settlement discussions. Thus, the real negotiation involves the appropriate amount of *single* damages suffered by the government. At the end of the day, the DOJ's target will be to double this amount, and then the case is settled.

Helmer, *False Claims Act* pp. 1347-1348, *supra*.

Since the RAC preemptively collected $3.5 million, treble damages and penalties would be subject to a $3.5 million offset, significantly reducing the recovery without any concomitant reduction in the cost or risk of litigation.[7]

In *qui tam* actions, the relator is required to conduct the same kind of cost-benefit analysis the government does.

As the Sixth Circuit carefully explained:

> If indeed the government settled Relator's claims, either Defendants would assert an accord and satisfaction defense (which, if successful, would deny Relator part or all of his rightful share of the recovered funds), or Defendants would be forced to pay the civil penalties and double or treble damages associated with the very same claims for which they had already paid penalties and damages by way of the settlement. Under either result, adverse consequences (to either Relator or Defendants) would ensue that the FCA had not intended. *See* S. Rep. 99-345, at 27, 1986 U.S.C.C.A.N. at 5292 ("While the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims."); *id.* at 2, 23-24, 1986 U.S.C.C.A.N. at 5267, 5288-89 (emphasizing its intent to provide a financial incentive for relators bringing valid *qui tam* suits and its belief that the government and private citizens must work together to battle FCA violations).

Bledsoe, 342 F.3d at 649-50.

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[7] And the Relator's share of 29% means that even a trial verdict of $1 million would mean only $290,000 for the Relator.

The Government adamantly guards its own right to settle in the face of litigation risk. The ocean of cases finding that a Government settlement was "fair, adequate and reasonable" under such circumstances include *United States ex rel. Pratt v. Alliant Techsystems, Inc.*, 50 F. Supp. 2d 942, 950–51 (C.D. Cal. 1999) (approving settlement based, in part, on parties assessment of "the strengths and weaknesses of their cases."); *United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1289 (11th Cir. 2017) (in settling FCA case, "the United States did not act unreasonably in preferring the certainty of a settlement to the uncertainty of an appeal."); *United States ex rel. Schweizer v. Oce N. Am.*, 956 F. Supp. 2d 1, 14–15 (D.D.C. 2013) (in approving settlement, court relied on facts showing government "assessed a variety of litigation risks specific to each claim."); *United States ex rel. Horsley v. Comfort Care Home Health, LLC*, No. 2:19-CV-00229-RDP, 2020 WL 4002005, at *6 (N.D. Ala. July 15, 2020) (dismissal of unreleased claims as part of FCA settlement is reasonable based, in part, on "the government's aim to avoid the risk of the creation of adverse case law."); *United States ex rel. Balko v. Senior Home Care, Inc.*, No. 8:13-CV-3072-T-17TBM, 2017 WL 9398654, at *3, 7 (M.D. Fla. May 2, 2017), *report and recommendation adopted*, No. 813CV03072EAKTBM, 2017 WL 3268200 (M.D. Fla. Aug. 1, 2017) (approving FCA settlement based, in part, on government's argument "that Relator's case is tenuous at best and, given the risks of continuing the litigation, the settlement

is fair, adequate, and Reasonable."); *United States ex rel. Peterson v. Sanborn Map Co.*, No. 4:11CV000902 AGF, 2014 WL 414358, at *2 (E.D. Mo. Feb. 4, 2014) (upholding settlement based, in part, on government's representation "that there were litigation risks with proceeding forward."); *U.S. ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, No. CIV.A. 00-1837, 2006 WL 925035, at **14, 16 (E.D. Pa. Apr. 4, 2006) (approving settlement when evaluating "the risks of establishing damages" and "in light of all the attendant risks of litigation."); *United States ex rel. Ayers v. BondCote Corp.*, No. CV403-011, 2004 WL 7330782, at *5 (S.D. Ga. Aug. 20, 2004) (approving settlement after agreeing with government that "legitimate factors that this Court should consider" include government's efforts "to conserve its own resources and to avoid litigation risks.")

Similarly, the Government uses exactly this analysis to justify dismissing *qui tam* cases, even where the Government has *not* intervened and where the relator is prepared to proceed on her own. *United States ex rel. Campie v. Gilead Scis., Inc.*, 2019 WL 5722618 at ** 21-22 (N.D. Cal. Nov. 5, 2019) (the government advanced a very roughly estimated cost-benefit analysis as its reason to seek dismissal); *United States ex rel. Cimznhca LLC v. UCB, Inc., et. al.*, 2019 WL 1598109 ** 8-9 (S.D. Ill. April 15, 2019) (Government claimed it had a valid interest in avoiding the costs of having to monitor the litigation and respond to

discovery requests where it thought the likelihood of a favorable outcome was slight.).

CONCLUSION

For the reasons set forth herein, this Court should set affirm the district court's decision..

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains 6,087 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: November 20, 2020 *_/s/ Mark Kleiman_*