No. 20-5301

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, EX REL. GURPREET MAUR, M.D.,
Plaintiff-Appellant,

v.

ELIE HAGE KORBAN; DELTA CLINICS, PLC, dba The Heart and Vascular Center of West Tennessee; KNOXVILLE HMA HOLDINGS, LLC, dba Tennova Healthcare; JACKSON HOSPITAL CORPORATION, dba Regional Hospital of Jackson; DYERSBURG HOSPITAL COMPANY, LLC, dba Dyersburg Regional Medical Center,
Defendants-Appellees,

COMMUNITY HEALTH SYSTEMS, INC.,
Defendant.

On Appeal from the United States District Court
for the Western District of Tennessee

MOTION FOR LEAVE TO FILE BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

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Proposed *amicus* Taxpayers Against Fraud Education Fund ("TAFEF") respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 29(a)(3), for leave to file the attached brief as *amicus curiae* in support of Plaintiff-Appellant. In support of its motion, TAFEF states as follows:

1. TAFEF is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. This includes the federal and state False Claims Acts, the Illinois Insurance Claims Fraud Prevention Act ("ICFPA"), the California Insurance Fraud Prevention Act ("CIFPA"), and the Motor Vehicle Safety Whistleblower Act, as well as the Securities and Exchange Commission, Commodity Futures Trading Commission, and Internal Revenue Service whistleblower programs. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act, ("FCA") has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve whistleblower laws. Since 1986, TAFEF's more than 400 members, in partnership with the Department of Justice and state attorneys general, have represented whistleblowers in *qui tam* matters that have generated tens of billions of dollars in public recoveries.

2. TAFEF has a strong interest in ensuring the proper and consistent interpretation of the provisions of the federal FCA, including the public disclosure bar and original source exception. In particular, TAFEF's interest in this appeal is to ensure the public disclosure and original source provisions of the FCA are interpreted consistently with the statutory text and the intent of Congress when it enacted the FCA and its amendments.

3. The proposed *amicus curiae* brief will assist this Court's determination by explaining how the district court's misinterpretation of the public disclosure and original source provisions would do harm to the purposes of the *qui tam* provisions of the FCA, including the public disclosure bar, as well as the government's efforts to uncover fraud generally.

4. The brief will also discuss the real and unintended consequences that the district court's decision will have on fraud enforcement by allowing entities to commit fraud without the threat of *qui tam* actions brought by whistleblowers who have firsthand knowledge of on-going fraud schemes, including the promotion of recidivist fraudulent activity.

WHEREFORE, for the foregoing reasons and those in the *amicus curiae* brief, the Taxpayers Against Fraud Education Fund respectfully requests leave to file the attached brief instanter.

Date: May 20, 2020

Respectfully submitted,

__/s/David J. Chizewer__

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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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INTEREST OF THE AMICUS[1]

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[1] No party's counsel authored this brief in whole or in part, and no person other than the amicus curiae, its members, and its counsel contributed money intended to fund preparing or submitting this brief. Counsel for Elie Hage Korban and Delta Clinics PLC, dba The Heart and Vascular Center of West Tennessee had not responded to the request for permission to file as of filing of this brief. All other parties have given consent to file this brief.

TAFEF has a strong interest in ensuring proper interpretation and application of the FCA's public disclosure bar and original source provisions under § 3730(e)(4)(A) and § 3730(e)(4)(B).

SUMMARY OF THE ARGUMENT

The district court erred in its interpretation of the FCA's public disclosure bar and original source provisions by finding that the provisions disallowed new allegations of wrongdoing involving a continued fraud scheme occurring after a defendant settled allegations with the government. As this Court has recognized, neither the text of the public disclosure bar, nor its purposes, suggest that it bars allegations that a defendant once again engaged in fraudulent behavior for which it had previously settled claims, or that a defendant continued to engage in fraudulent behavior despite entering into agreements disavowing such behavior.

The district court's decision would undermine the FCA's purpose of deterring fraud. Defendants in FCA actions can be repeat offenders. *See e.g.* Sammy Almashat, M.D., M.P.H., et al., Public Citizen, *Pharmaceutical Industry Settlements 1991-2015 (Chart Book)*, p. 26, Table 5, https://www.citizen.org/wp-content/uploads/migration/publiccitizen-pharmasettlements1991-2015-chartbook.pdf (chart displaying entities that had settled multiple FCA actions). Whether they find new avenues by which to defraud the government, or revive or continue their past bad behavior, fraudsters cannot be insulated from *qui tam* actions simply because they have been caught previously. The public disclosure bar is designed to prevent parasitic claims, not claims involving information about new violations of the FCA, even if they employ the same scheme. If *qui tam*

actions raising such claims are barred, the government will be deprived of information obtained by potential whistleblowers about ongoing fraud schemes. This Court should reverse the district court's decision.

ARGUMENT

The public disclosure provision was amended in 2010 to narrow the bar's application. It provides that:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless... the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4) (effective March 23, 2010). The condition that the complaint's allegations be substantially the same as those publicly disclosed is a critical one. Entirely new and different allegations of fraud are valuable to the government and do not implicate the public disclosure bar's purpose of precluding parasitic suits that bring no new information to light. *See United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 506 (6th Cir. 2009) (explaining that the *qui tam* provisions of the FCA, including the public disclosure bar, are "intended to encourage private citizens to expose fraud but to avoid actions by opportunists seeking to capitalize on public information.") (quoting *United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004). Non-public information about conduct occurring after a previous case was settled and a defendant (in this case, not even all of the defendants named in the relator's

suit) entered into a CIA cannot be considered "substantially the same" as previously settled allegations. It would be impossible for allegations involving exclusively post-settlement claims – and including new facts, defendants, and harmed patients – to have been disclosed in the previous litigation. The allegation here is that the fraud continued long past the point where the defendant entered into an agreement promising to stop it. That allegation or transaction of fraud was not publicly disclosed prior to the filing of the complaint.

The district court's determination that the relator's new allegations of fraud were precluded by the public disclosure bar, *see* Order Granting Motions to Dismiss, R. 71, Page ID #762, is not supported by statute's text, conflicts with this Court's controlling decision in *United States ex rel. Ibanez v. Bristol-Myers Squibb Company*, 874 F.3d 905 (6th Cir. 2017), and is contrary to the purpose of the public disclosure bar and the FCA's *qui tam* provisions generally. Whistleblowers are the government's primary resource for bringing fraudulent schemes to light. A finding that a *qui tam* action is precluded simply because the defendant had been caught committing a similar fraud in the past is be illogical and would deter whistleblowers from bringing forward information about fraud as the FCA intends. The effect would be to shield recidivist offenders from *qui tam* actions, thereby enabling them to continue to engage in the very fraud schemes they vowed to end

in their agreements with the government undeterred by the possibility that a whistleblower would report them.

I. Upholding the District Court's Decision Would Improperly Insulate Defendants from *Qui Tam* Suits and Thereby Deprive the Government of Critical Information.

If the district court's decision is upheld, the result would be to shield defendants from potential *qui tam* suits, so long as they have already been caught committing fraud in the past. Given the historically high rate of recidivism among entities found to have violated the FCA, such a rule could shield a broad range of fraudulent activity from scrutiny.

For instance, consider Novartis, which, in 2015, agreed to pay $370 million to resolve allegations that it paid kickbacks to induce fraudulent prescriptions of its drugs in violation of the FCA. Press Release, Department of Justice, Manhattan U.S. Attorney Announces $370 Million Civil Fraud Settlement Against Novartis Pharmaceuticals For Kickback Scheme Involving High-Priced Prescription Drugs, Along With $20 Million Forfeiture Of Proceeds From The Scheme (Nov. 20, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-370-million-civil-fraud-settlement-against-novartis. As the United States Attorney remarked at the time, Novartis was a "repeat offender." Bernard Vaughan & Jonathan Stempel, *U.S. sues Novartis, alleging kickbacks to pharmacies*, Reuters (Apr. 23, 2013), https://www.reuters.com/article/us-novartis-fraud-lawsuit/u-s-

sues-novartis-alleging-kickbacks-to-pharmacies-idUSBRE93M1C920130423. Only a few years earlier, Novartis had agreed to pay $422 million to resolve claims that it engaged in an off-label promotion and kickback scheme involving several drugs, causing fraudulent claims to be submitted to the government in violation of the FCA. Press Release, Department of Justice, Novartis Pharmaceuticals Corp. to Pay More Than $420 Million to Resolve Off-label Promotion and Kickback Allegations (Sept. 30, 2010), https://www.justice.gov/opa/pr/novartis-pharmaceuticals-corp-pay-more-420-million-resolve-label-promotion-and-kickback. The 2010 settlement involved a Corporate Integrity Agreement ("CIA") which required Novartis to adopt compliance policies and for the board of directors to "annually review the company's compliance program with the help of an outside expert and certify its effectiveness" and "that certain senior executives annually certify that their departments or functional areas are compliant." *Id.* The five-year CIA was in place during the period of time in which the kickback claims resolved in the 2015 settlement were allegedly occurring, yet it did not prevent Novartis from engaging in fraudulent behavior. And just a few months ago, Novartis announced that it had earmarked $700 million for the potential settlement of additional FCA claims stemming from illegal kickback payments. Thomas Sullivan, *Novartis Earmarks Funds for Potential Settlement in Anti Kickback Case*, Policy and Medicine (Aug. 26, 2019),

https://www.policymed.com/2019/08/novartis-earmarks-funds-for-potential-settlement-in-anti-kickback-case.html.

Similarly, Abbott Laboratories has been involved in numerous FCA cases resulting in substantial settlements, including the payment of $1.5 billion in 2012 to resolve criminal and FCA allegations that it marketed its drug Depakote for off-label uses and paid illegal kickbacks to providers in order to induce them to prescribe the drug. Press Release, Department of Justice, Abbott Labs to Pay $1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote (May 7, 2012), https://www.justice.gov/opa/pr/abbott-labs-pay-15-billion-resolve-criminal-civil-investigations-label-promotion-depakote. Abbott pled guilty to criminal off-label promotion charges and entered into a five-year CIA which required, among other things, that high-level executives certify to compliance with the law and that Abbott maintain standardized risk assessment and mitigation processes, and one year later agreed to pay almost $5.5 million to resolve additional kickback allegations. Press Release, Department of Justice, Abbott Laboratories Pays U.S. $5.475 Million to Settle Claims That Company Paid Kickbacks to Physicians (Dec. 27, 2013), https://www.justice.gov/opa/pr/abbott-laboratories-pays-us-5475-million-settle-claims-company-paid-kickbacks-physicians. A few years later, in 2018, Abbott paid $25 million to resolve additional claims that it violated the FCA by promoting another drug for off-label

use and paying kickbacks to induce the submission of false claims. Press Release, Department of Justice, Abbott Laboratories and AbbVie Inc. to Pay $25 Million to Resolve False Claims Act Allegations of Kickbacks and Off-Label Marketing of the Drug TriCor® (Oct. 26, 2018), https://www.justice.gov/usao-edpa/pr/abbott-laboratories-and-abbvie-inc-pay-25-million-resolve-false-claims-act-allegations.

These are only two examples of the rampant recidivism that exists in the area of fraud on the government.[2] It is clear that, while the FCA has returned billions of dollars to the federal fisc, dishonest entities and individuals may not be dissuaded from engaging in fraud simply because they have been held accountable in the past. Removing another barrier to fraud prevention by insulating from *qui tam* suits entities that continue to commit fraud, so long as they utilize past fraud schemes, is illogical and would encourage, not discourage, fraudulent activity.

[2] *See e.g.*, Press Release, Department of Justice, Alabama-Based Hospice Company Pays U.S. $24.7 Million to Settle Health Care Fraud Claims (Jan. 15, 2009), https://www.justice.gov/archive/opa/pr/2009/January/09-civ-043.html *and* Press Release, Department of Justice, Hospice Care Provider Pays Nearly $6 Million to Resolve False Claims Act Allegations (Dec. 13, 2018), https://www.justice.gov/usao-edpa/pr/hospice-care-provider-pays-nearly-6-million-resolve-false-claims-act-allegations; *see also*, Press Release, Attorney General of Texas, AG Paxton Recovers $110 Million for Texas in Medicaid Fraud Settlements (Aug. 7, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-recovers-110-million-texas-medicaid-fraud-settlements (observing that AstraZeneca had signed a CIA in 2010, promising to stop promoting its drug for off-label uses, but instead continued to promote the drug to pediatric psychiatrists), *and* Press Release, Department of Justice, Pharmaceutical Giant AstraZeneca to Pay $520 Million for Off-label Drug Marketing (Apr. 27, 2010), https://www.justice.gov/opa/pr/pharmaceutical-giant-astrazeneca-pay-520-million-label-drug-marketing; *see also*, Testimony of John E. Clark, Hearing on the False Claims Act Before the Subcomm. on the Constitution and Civil Justice of the Comm. of the Judiciary, 113th Cong. 93 (2014) (listing examples of repeat offender companies under the FCA).

As the court pointed out in *United States ex rel. Booker v. Pfizer, Inc*.

> [a]llowing *qui tam* suits in the case of old-scheme recidivists who revive their fraudulent activity at least places an additional burden on those contemplating renewed fraudulent activity, rather than sending the message that they can avoid relator-based FCA consequences by "perpetrating a related fraud" and hoping that the government, with its limited investigatory resources, will fail to notice the repeat offense.

9 F. Supp. 3d 34, 46 (D. Mass. 2014).

The district court's decision "would effectively allow any defendant in an FCA case to perpetually commit subsequent FCA violations with impunity so long as it limited its actions to the same general conduct for which it was first sued." *United States ex rel. Willis v. SouthernCare, Inc.*, 2014 WL 4829279, *7 (S.D. Ga. Sept. 29, 2014). It is in the government's interest to "root[] out recidivist FCA violators, especially where, as here, 'this case is seeking to remedy a fraud that the government has not yet attempted to remedy.'" *United States ex rel. Herman v. Coloplast Corp.*, 327 F.Supp.3d 358, 364 (D. Mass. 2018) (quoting *United States ex rel. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 328 (1st Cir. 1994)). Just because the government may be aware of previous fraud committed by the defendant and disclosed in a previous *qui tam* action and settlement "does not bar

other potential *qui tam* litigants from bringing additional instances of fraud to light," otherwise "there would be no *qui tam* remedy for subsequent violations of the FCA by the same defendant when the government is aware of previous wrongdoing." *United States ex rel. Hoggett v. Univ. of Phoenix*, 2012 WL 2681817, at *5 (E.D. Cal. July 6, 2012).

II. The District Court's Decision is Contrary to This Court's Decision Holding That the Public Disclosure Bar Does Not Apply to New Allegations Implicating A Past Fraud Scheme.

This Court's decision in *Ibanez* controls this case. 874 F.3d 905. In *Ibanez,* this Court specifically addressed whether allegations that a defendant was continuing to commit fraud after settling claims are precluded by the public disclosure bar. The answer is no. This Court correctly explained that allegations were not barred simply because the fraud scheme alleged by the relator was similar to a scheme for which allegations were previously resolved, observing:

> It cannot be assumed that the government is aware a fraudulent scheme continues (or was restarted) simply because it had uncovered, and then resolved, a similar scheme before. Indeed, the most logical inference to draw from defendants' agreements to cease improper promotion of Abilify is that they had done so.

Id. at 919.

This is consistent with the conclusions of several courts that have also considered the issue. *See United States ex rel. Leveski v. ITT Educational*

Resources, 719 F.3d 818, 829-30 (7th Cir. 2013) (finding that the relator's claims were not publicly disclosed in prior litigation involving a similar scheme, in part because her allegations covered a different time period than the prior *qui tam* action.); *Coloplast*, 327 F.Supp.3d at 363 (finding that the relator's claims were not publicly disclosed in a previous *qui tam* action because they involved a different defendant and different time period); *Pfizer*, 9 F.Supp.3d at 45 ("The government's awareness of fraud that occurred entirely in the past… may not alert the government to future fraud, and thus that awareness 'does not bar other potential *qui tam* litigants from bringing additional instances of fraud to light.'") (quoting *Univ. of Phoenix*, 2012 WL 2681817 at *5)). It is illogical to expect the government to be on notice of allegations of fraud that have not yet occurred, particularly when the government has entered into an agreement with some or all of the defendants who vowed to end their fraudulent practices and report instances of fraud to the government.

Although the district court attempted to distinguish this Court's decision in *Ibanez*, that effort fails. The district court focused on the fact that the CIA the defendant entered into required it to hire an Independent Review Organization ("IRO") to review claims submitted to the government and reimbursements received, and to evaluate and analyze the medical necessity and appropriateness of the services provided, as well as submit quarterly reports on their findings to the

government. Order Granting Motions to Dismiss, R. 71, Page ID #764. The district court found that *Ibanez* did not apply here because "one [CIA] requires implementation of new policies, the other requires substantial independent oversight, review, and reports to the government." *Id.*

The district court's distinction has no bearing on the public disclosure analysis, which requires that the allegations or transactions of fraud be publicly disclosed in one of the statutorily identified ways. As this Court noted in *Ibanez,* while a CIA may be public, it does not reveal future violations. The district court made no finding that an IRO's reports to the government are public at all. *United States ex rel. Whipple v. Chattanooga-Hamilton County Hosp. Authority*, 782 F. 3d 260, 268 (6th Cir. 2015) (holding that disclosure of information in a government report does not implicate the public disclosure bar unless disseminated outside of the government in the public domain.).

While the fact of the CIA may have been in the public domain, no one other than the relator has alleged that in spite of their promises not to continue with the previously alleged fraud scheme, the defendants did just that. Only the misrepresented state of facts – that the defendant is complying with law – not the true state of facts – that they are continuing their fraud – is public. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir.

1994) (explaining that in order for allegations to be publicly disclosed, both the true and false states of facts must be in the public domain.).

The district court went to great lengths to justify its decision by focusing on whether the claims in the relator's complaint allege substantially the same fraud scheme as the claims in the prior case, *United States ex rel. Deming v. Jackson-Madison County General Hospital*, Case 1:07-cv-01116-SHL-egb (W.D. Tenn. 2015). But while the allegations regarding the type of fraud are the same, nothing else about the allegations is similar. The relator's allegations include different defendants, a different time frame, and different harmed patients. The conclusion that allegations of new efforts to engage in a prior fraud scheme are precluded by the public disclosure bar would do great damage to the FCA and the ability of relators to root out fraud.

III. The Relator Qualifies as An Original Source of the Claims.

Even if there has been a public disclosure, a case can proceed if the relator is an original source. *See Ibanez,* 874 F.3d at 918 (explaining that the public disclosure bar prevents cases based on previously disclosed allegations from moving forward unless the relator is an original source.) But that exception does not make the district court's interpretation of the public disclosure bar any less likely to deter whistleblowers from coming forward because there is a risk a court may erroneously find that the relator is not an original source, which is what the

district court did here. Even if this court upholds the district court's decision that the relator's allegations were publicly disclosed, it should overturn the district court's finding that the relator was not an original source of his claims. The FCA defines "original source" as

> [A]n individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. 3730(e)(4)(B).

The district court improperly held that the relator was required to report his allegations to the government prior to the filing of the *Deming* case, which had been filed in 2007, rather than prior to filing his own complaint. Order Granting Motions to Dismiss, R. 71, Page ID ## 766-768. The district court's decision is contrary to the text of the statute, which requires disclosure by an individual ("who") before "filing an action." 31 U.S.C. §3730(e)(4)(B). That would be an odd way to write a requirement that the individual file before *someone else* filed an action. Moreover, the district court's interpretation is unworkable. According to the district court, the relator would have been required to disclose the violations underlying his allegations before the *Deming* complaint was filed in 2007. However, the violations alleged in the complaint did not take place until 2016 (or

later). It would not have been possible to report the allegations to the government nearly a decade before they happened.

Further, taking the relator's allegations as true, he has alleged that he has direct and independent knowledge of the continuing fraud scheme and his allegations materially add to anything theoretically publicly disclosed in the *Deming* litigation. His allegations concern completely new violations of the FCA and the CIA that occurred after the defendants settled. Additionally, the relator has alleged details related to completely new defendants that were not parties to the settlement agreement or CIA. These allegations are sufficient to meet the "independent and materially adds" requirements of the original source exception.

IV. The District Court's Holding Is Not in Keeping with the Text or Purpose of the Public Disclosure Bar.

Congress enacted the FCA in 1863 to attack war profiteering. Cong. Globe, 37th Cong., 3d Sess. 952 (1863). Contractors were not just overcharging and mis-billing, but engaging in and concealing fraud. Id. at 955 (sawdust masqueraded as gunpowder); 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (same mules being sold repeatedly); S. Rep. Com. No. 75, 37th Cong., 3d Sess. 4 (1863) (decrying scheme of providing rotting, old ships painted and sold as new as inconsistent "with that alacrity and faithfulness in the discharge of duty which the government has a right to expect from those to whom important trusts are confided"). The

FCA lay mostly dormant after misguided amendments in 1943, during which time, "fraud against the Government [grew] to unprecedented levels." 155 Cong. Rec. E1295-96 (daily ed. June 3, 2009) (statement of Rep. Berman); S. Rep. No. 345, 99th Cong., 2d Sess. 1-2 (1986).

The FCA was amended in 1986 to revitalize the Act, and each subsequent amendment has been designed to encourage and protect whistleblower claims. The FCA's "public disclosure provision is not meant to deprive whistleblowers of their role as 'private attorneys-general,' when they come forward with evidence of new fraudulent activity—even new fraud that is perpetrated by old modus operandi." *Pfizer*, 9 F.Supp.3d at 46 (D. Mass. 2014) (quoting *Medtronic, Inc*., 552 F.3d at 507). Rather, the goal of the public disclosure bar is to discourage opportunistic plaintiffs from bringing parasitic lawsuits that allege information about fraudulent activity that is already in the public domain. *Id.* Because entirely new allegations of fraud related to fraudulent activity which took place after the government understood the fraud scheme at issue had ended cannot be considered parasitic, the district court's decision is inconsistent with the purpose of the bar.

V. The District Court's Holding Would Chill Whistleblower Claims.

Whistleblowers and their counsel are a valuable resource to the government in the fight against fraud. Insiders with knowledge of corporate policies and practices are likely to be the only ones who have information about whether or not

an entity is fulfilling its end of the bargain with respect to a CIA, even if an IRO is included in the CIA requirements. How much true access and information is disclosed to the IRO is often controlled by the entity itself and can be manipulated. Insiders, like the relators in this case, are critical to bringing allegations of continued fraud to light.

Congress has continuously reinforced the immense value it places on relator-driven cases through the amendments to the Act since 1986. *See* 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Berman) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward…[and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud"). Congress has also recognized the financial and personal risks associated with coming forward with allegations of fraud. *See e.g.*, S. Rep. No. 345 at 28 (acknowledging the "risks and sacrifices of the private relator"); Testimony of Tina M. Gonter, Hearing on the False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Before the Comm. of the Judiciary, 110th Cong. 167-85 (2008) (detailing risks to career, income, savings, family, friendship, and personal safety.) However, brave whistleblowers continue to step forward and report misconduct, which is critical in cases like this one, where a finding that the relator's claims are precluded would allow the defendants to put patients in

extreme danger by performing medically unnecessary, invasive cardiac procedures. *See* Amended Complaint, R. 25, Page ID # 98.

Because the risks whistleblowers take, the reward to the government and the taxpayer is extraordinary. Since the 1986 amendments, a total of 13,281 *qui tam* actions have been filed, recovering over $44 billion for the government. *See* Department of Justice, Fraud Statistics – Overview 1-3 (2020), https://www.justice.gov/opa/press-release/file/1233201/download. Healthcare fraud represented more than half of that recovery. *Id.* It is vital to encourage and empower whistleblowers in this complex field to come forward with allegations of fraud.

If the district court's decision is upheld, it would chill whistleblowers from coming forward and thwart the purpose of the FCA's *qui tam* provisions by discouraging relators from reporting on-going fraud schemes. It would also insulate repeat offenders from *qui tam* actions when they continue to commit the same fraud for which they have already been caught, which is not the purpose of the public disclosure bar. The public disclosure bar was included in the FCA in order to discourage parasitic and opportunistic whistleblowers who did not bring any new material allegations to the attention of the government, but sought to piggyback on a previous relator's hard work and sacrifice. *See Medtronic, Inc.*, 552 F.3d at507 (discussing the purpose of the *qui tam* provisions and the public

disclosure bar). That concern is not implicated when a relator brings specific allegations about an on-going fraud scheme that the government believed it had resolved. The district court's holding would discourage whistleblowers with knowledge of on-going fraud from coming forward. As this Court has observed, it cannot be assumed that the government is aware of fraud simply because it happened before. In fact, the opposite assumption – that the fraud stopped – is the most logical.

CONCLUSION

In light of the above, *Amicus Curiae,* Taxpayers Against Fraud Education Fund, respectfully requests that the Court reverse the District Court's Order Granting Motions to Dismiss.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains a total of 4,388 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word with size 14 Times New Roman font.

So certified this 20th day of May, 2020.

/s/ David J. Chizewer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20, 2020, I filed a copy of the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit via the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service on them will be accomplished by the CM/ECF system.

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