**No Oral Argument Yet Scheduled**
**No. 20-7062**

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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**UNITED STATES ET AL. EX REL. ELIZABETH W. KENNEDY**
Plaintiffs-Appellees
and
**ELIZABETH W. KENNEDY,**
Plaintiff-Appellant,

v.

**NOVO A/S et al.,**
Defendants.

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On Appeal from the
United States District Court for the District of Columbia
Case No. No. 1:13-cv-01529-RBW
Hon. Reggie B. Walton presiding

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# BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURAIE* IN SUPPORT OF APPELLANT

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## CERTIFICATE AS TO RULING AND RELATED CASES

**I.** References to the rulings at issue appear in the Brief for Appellant.

**II.** This case was not previously before this Court. There are no related cases currently pending before this Court or any other court.

## 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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## GLOSSARY

| | |
|---|---|
| FCA | False Claims Act |
| FDCA | Federal Food, Drug, and Cosmetic Act |
| FDA | U.S. Food and Drug Administration |
| DOJ | U.S. Department of Justice |
| *Qui tam* | Lawsuit brought by a private individual (relator) on behalf of the government, which gives the relator a right to a share of any proceeds. |
| REMS | Risk Evaluation and Mitigation Strategy |
| Relator | Private individual who brings a False Claims Act lawsuit on behalf of the government. |
| TAFEF | Taxpayers Against Fraud Education Fund |

## STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellant.

## INTEREST OF AMICUS CURIAE[1]

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.

TAFEF has an interest in ensuring that the FCA is interpreted in the manner in which Congress intended. Specifically, that the alternate remedy provisions are

[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. Both Appellant and Appellee have consented to the filing of this brief.

read broadly to include any alternate remedy, regardless of the government's intervention decision.

## SUMMARY OF ARGUMENT

The district court's holding that a relator is only entitled to a share of an alternate remedy in a *qui tam* action if the government declines to intervene in her case is not supported by the text of the FCA, is not in line with the intent of Congress in adding the provision, and would do substantial damage to the *qui tam* provisions of the Act. The ability of the government to intervene and settle a case for less than it is worth or to dismiss it altogether and then pursue damages based on the relator's allegations in another venue would have a dangerous chilling effect on the willingness of whistleblowers to come forward with allegations of fraud. This would be particularly damaging in cases involving the healthcare industry, which make up a large majority of FCA cases, where the Food, Drug and Cosmetic Act (FDCA) and other civil remedies overlap substantially with claims brought under the FCA.

Because the government often intervenes and settles cases for less than the treble damages required by the FCA, unless it is disclosed to the relator, there is no way for a relator to know whether the government is pursuing an alternate remedy based on the amount of the settlement. Preventing a relator from obtaining a share of an alternate remedy based on her allegations simply because the government intervened in the case is fundamentally unfair to relators, who may not even have a

chance to object to a settlement number with full knowledge of the remedies being pursued by the government, and if they do, will likely be overruled.

Further, the reason that the FCA has been so successful in uncovering fraud and returning stolen funds to the taxpayer is because the whistleblower reward structure included in the *qui tam* provisions of the FCA have worked as Congress intended by creating an incentive for relators to bring allegations of fraud to light and to work as partners with the government in investigating and litigating cases against unscrupulous actors. Indeed, since the 1986 amendments were passed, *qui tam* actions have accounted for nearly thirty-four billion of the nearly forty-five billion dollars recovered under the FCA.

Since 1986, Congress has consistently amended the FCA to encourage more whistleblowers to come forward, and the amendments represent non-partisan efforts to promote whistleblower lawsuits through increased incentives. The whistleblower reward provisions of the FCA operate superbly and economically to achieve exactly what Congress had intended. The district court's holding threatens that operation by allowing the government to intervene in a relator's case and settle it while simultaneously pursuing another civil case and shifting the damages to that case in order to avoid paying the relator a share. This would frustrate the purpose of the *qui tam* provisions of the FCA generally, and the alternate remedy provisions specifically, by undermining Congress's intention to safeguard whistleblower rights

to share in a recovery that would not have been realized without the relator's information and efforts.

Additionally, the text of the FCA supports a reading allowing for a relator to receive a share of an alternate remedy whether or not the government intervenes in her case. Congress specifically provided that "notwithstanding" the government's intervention decision, relators retained their rights in an alternate remedy proceeding. This interpretation is in keeping with the broader purpose of the amendments in encouraging more whistleblowers to come forward with allegations of fraud.

## ARGUMENT

### I. Preventing Relators from Receiving a Share of Alternate Remedies Where the Government Intervenes Would Drastically Decrease the Number of *Qui Tam* Cases Filed, Particularly in the Healthcare Industry.

The district court's holding – that relators can never recover a share of an alternate remedy when the government intervenes in a *qui tam* action – would have detrimental unintended effects on fraud enforcement. Over 75% of the funds recovered in *qui tam* actions come from healthcare cases such as this one, which is one reason that the district court's holding would potentially have such a negative impact on future *qui tam* actions. *See* Press Release, Department of Justice, Fraud Statistics (January 9, 2020), *available at,* https://www.justice.gov/opa/press-release/file/1233201/download. The FDCA covers the precise conduct alleged in the related FCA action here, including misbranding and the falsification of required risk evaluation and mitigation strategies, and off-label marketing. *See* 21 U.S.C. §352. There have been countless successful *qui tam* actions filed alleging frauds that may overlap with claims under the FDCA. *See, e.g.,* Press Release, Department of Justice, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations, *available at,* https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations (November 4, 2013) (announcing the settlement of FCA claims against Johnson & Johnson and its subsidiaries "relating to the prescription drugs Risperdal, Invega and Natrecor,

including promotion for uses not approved as safe and effective by the Food and Drug Administration (FDA)…"); Press Release, Department of Justice, Celgene Agrees to Pay $280 Million to Resolve Fraud Allegations Related to Promotion of Cancer Drugs For Uses Not Approved by FDA (July 24, 2017), *available at*, https://www.justice.gov/usao-cdca/pr/celgene-agrees-pay-280-million-resolve-fraud-allegations-related-promotion-cancer-drugs (announcing the settlement of FCA claims against Celgene alleging that "Celgene promoted two cancer drugs – Thalomid and Revlimid – for uses that were not approved by the FDA and not covered by federal health care programs. The allegations included the use of false and misleading statements about the drugs…"); Press Release, Department of Justice, Endo Health Solutions And Endo Pharmaceuticals Of Malvern, Pa To Pay $171.9 Million To Resolve Civil False Claims Allegations (February 21, 2014), *available at*, https://www.justice.gov/usao-edpa/pr/endo-health-solutions-and-endo-pharmaceuticals-malvern-pa-pay-1719-million-resolve (announcing the settlement of FCA claims against Endo Health Solutions and its subsidiary resolving allegations that "Endo knowingly promoted Lidoderm for treatment of non-FDA-approved (off-label) conditions, including lower back pain and chronic pain…"). These recoveries would not be possible without the brave whistleblowers who come forward with allegations of fraud. Reducing the incentives for them to do so by allowing the government to shift a portion of the recovery to an enforcement mechanism outside

of the FCA and avoid paying the relator a share would be detrimental to fraud enforcement.

The district court's holding would incentivize the government to intervene in a relator's case and settle it, and then pursue additional recovery through the FDCA or other civil statutes regulating a given industry. A rule depriving relators of a share of the full recovery would severely hamper FCA enforcement, within the healthcare industry and beyond. There are many factors that the government considers when deciding whether to intervene in a *qui tam* action and whether to seek any alternate remedies instead of or in addition to intervening in a case. Whether a relator will receive a share of the funds recovered is not, and cannot be, one of them. Congress specifically removed that factor when it added the alternate remedy provision to the FCA by requiring the government to pay whistleblowers a share of the recovery made as a result of the information they brought forward regardless of the government's intervention decision. If the district court's ruling stands, the government will have the option to intervene in the *qui tam* as a way of shifting some of the award to the FDCA or any other alternate remedy, thereby avoiding payment to the relator. In fact, the district court's decision not only legitimizes this conduct by the government, it makes it the most cost effective plan—at least for that case. This would severely erode the economic incentive structure embodied in the FCA.

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 risk that the government may intervene and settle your case, only to pursue a separate civil or administrative remedy to which you will not be entitled to a share greatly complicates the risk/reward calculus.

The chilling effect on whistleblowers' willingness to take the risks of filing a *qui tam* case if the district court's holding stands 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.[2] A finding that

[2] 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).

the government is free to use the relator's information, only to shift focus to a non-*qui tam* means of recovering federal funds, thus preventing a relator from obtaining a share of the recovery, would find whistleblowers much less likely to step forward with information about fraud on the government. This would undermine the improvements that more than thirty years of FCA amendments have sought to achieve.

In theory, the government would have no incentive to pursue claims under another civil statute or administrative remedy that does not provide for the treble damages that the FCA does. However, although the text of the FCA provides for treble damages and inflation-adjusted penalties, in practice, particularly where the government has intervened, many cases are settled for double or single damages, and sometimes less.

Unless it is disclosed to the relator, there is no way for a relator to know whether the government is pursuing an alternate remedy based on the amount of the settlement, and because there are myriad reasons for the government to settle for less than the amount of even single damages, a holding allowing the government to settle the relator's case for less than it is worth and pursue additional damages in a venue in which it does not have to pay a relator's share would chill relators from bringing forward allegations of fraud. There are ample examples of cases in which the courts have found that a government settlement was "fair, adequate and reasonable,"

though the settlement amount is far less than the treble damages required by the FCA, with reasons ranging from prohibitively high litigation risks to the defendants' inability to pay the full amount of damages. *See, e.g.*, *United States ex rel. Schweizer v. Océ N. Am.*, 956 F.Supp.2d 1, 14 (D.D.C. 2013) (finding that the government's proposed settlement amount was fair, adequate, and reasonable based in part on their evaluation of the litigation risks and the fact that, though the Department of Justice thought that some claims were meritorious, "two GSA contracting officers who would be trial witnesses provided testimony that would undermine the claims significantly," and noting that the government "came up with a settlement figure equal to a little more than single damages on the claims the government believed it might be able to prevail on at trial."); *United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1289 (11th Cir. 2017) (in settling a FCA case, "the United States did not act unreasonably in preferring the certainty of a settlement to the uncertainty of an appeal," despite the relator's allegations that there was a "potential recovery of billions of dollars."); *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. 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."); *United States 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.")

Further, although an intervened *qui tam* action can only be settled on terms that are "fair, adequate, and reasonable," in the District of Columbia Circuit, the government can intervene in a *qui tam* action and then move to dismiss it for any reason at all, and the Court has granted them the unfettered right to do so. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (reading "§ 3730(c)(2)(A) to give the government an unfettered right to dismiss an action."). Thus, under the district court's holding, the government would be free to intervene and dismiss a relator's case, shifting the entire award to an alternate remedy. Putting dismissal aside, if, as the district court found, it is fair, adequate, and reasonable in an intervened case for the government to shift damages to an alternate remedy in order to avoid paying a relator's share, then that becomes the fair and reasonable thing to do generally. That

is the opposite of what Congress intended in passing amendments to the FCA. If it is not fair and reasonable, it should not be allowed here.

Although the relator in this case was paid a share of the majority of the recovery, the government allocated about 22% of the total amount recovered as a result of the relator's allegations to the FDCA case, substantially reducing the amount of her relator's share. Appellant's Opening Brief at 24. Further, nothing in the district court's holding prevents the government from shifting the majority or all of the recovery to an alternate remedy after intervention.

Taking these practical considerations into account, the threat to FCA enforcement should the district court's holding stand is very real. Creating unintended loopholes not envisioned by Congress or required by the statute would undermine the purpose of the *qui tam* provisions of the FCA and disincentivize whistleblowers from coming forward with allegations of fraud.

## II. The District Court's Holding Would Frustrate the Purposes of the *Qui Tam* Provisions of the FCA and is Not Supported by the Text of the Act.

### A. Congress Passed Amendments to the FCA in Order to Increase the Number of Whistleblowers Willing to Come Forward with Allegations of Fraud.

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. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649–55 (D.C. Cir. 1994) (recounting the history of the FCA and explaining that, with the 1986 amendments, "Congress clearly acted upon its expressed intention to 'encourage more private enforcement suits…'.") 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 *United States 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,[3] and

[3] Press Release, Department of Justice, Fraud Statistics (January 9, 2020), *available at*, https://www.justice.gov/opa/press-release/file/1233201/download.

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).

Congress adopted the alternate remedy provision, along with the rest of the 1986 amendments, to encourage additional whistleblower cases. *United States 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 or with a separate civil case, the *qui tam* relator could maintain an active role and receive a share of the recovery. *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.[4]

Making the decision to come forward and bring a *qui tam* action is not an easy one, and the 1986 amendments were designed to "increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 2000); *see Springfield Terminal*, 14 F.3d at 650-51 (explaining that, in order to "enhance incentives, the amendments also increased monetary awards, adopted a lower burden of proof, and allowed *qui tam* plaintiffs to continue to participate in the actions after

[4] When Congress amended the FCA again in 2009 with the 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).

intervention by the government." (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 intended to, and has, encouraged more private enforcement suits. *Id.*

The 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 thirty-one billion dollars for the taxpayers, including over $2.3 billion recovered exclusively by the relators after the Government declined to join the case. Press Release, Department of Justice, Fraud Statistics (January 9, 2020), *available at,* https://www.justice.gov/opa/press-release/file/1233201/download.

### B. The Text of the FCA Does Not Support a Reading of the Alternate Remedy Provision Which Precludes a Relator from Receiving a Share of an Alternate Remedy When the Government Intervenes.

Congress specifically provided that a relator has rights when the Government attempts to use "any alternate remedy," whether or not the government intervened in a relator's *qui tam* action. The alternate remedy provision states:

> Notwithstanding 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). Subsection (b) governs the government's ability and decision to intervene, and the parties' rights in either case. Thus, Congress made clear that the relator would retain their rights to a share of the recovery of an alternate remedy regardless of the government's intervention decision.

The provision is intentionally broad, in keeping with spirit of the amendments generally. The language refers to "any alternate remedy," and indeed, relator's shares have been paid when the government has recovered funds via another fraud statute or civil action, administrative recoupments, contractual reconciliations, negotiated forbearance by defendants of other claims they might have for government payment, and myriad regulatory fines and penalties. *See, e.g.*, Press Release, Department of Justice, DOJ Agrees to Civil Settlement with Additional Firm Involved in Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (April 8, 2020), *available at*, https://www.justice.gov/opa/pr/doj-agrees-civil-settlement-additional-firm-involved-bid-rigging-and-fraud-targeting-defense (announcing the sixth settlement in a string of cases involving a bid-rigging scheme in which the government intervened in the relator's *qui tam* action and brought parallel civil antitrust claims based on the information provided by the relator, with the relator receiving a share

of the entire amount of the civil recovery for both the FCA and antitrust claims within the statute of limitations period.); *United States ex rel. Guardiola v. Renown Health,* 442 F. Supp. 3d 1319, 1329 (D. Nev. 2020) (finding that the proceeds recovered by the government administratively via Recovery Audit Contractors and Medicare Administrative Contractors were alternate remedies under the FCA); *In re Pharmaceutical Industry Average Wholesale Price Litigation,* 892 F. Supp. 2d 341, 344 (D. Mass. 2012) (finding that the settlement of the relator's claims in a separate FCA case constituted an alternate remedy under the FCA). It does not then follow that Congress would have limited the relator's ability to recover a share of the funds that, without their knowledge and willingness to step forward, the government would not have recovered, to instances where the government declines to intervene. Nothing in the text suggests that the alternate remedy provision should be so limited. *See United States v. L-3 Commc'ns EOTech, Inc.*, 921 F.3d 11, 26 (2d Cir. 2019) (explaining that it was "skeptical" that § 3730(c)(5) prevented a relator from recovering a share of an alternate remedy to cases in which the government declined to intervene, "given other FCA provisions that envision the government's pursuit of other proceedings even after it has intervened in a *qui tam* action--for example, allowing the government to seek stays of discovery by the relator in the *qui tam* action if that discovery "would interfere with the *Government's . . . prosecution of a . . . civil matter arising out of the same facts*," "*[w]hether or not the Government*

*proceeds* with the [*qui tam*] action…"). When the government has argued that the alternate remedy provision should be limited based on its intervention decision in the past, albeit making precisely the opposite argument that it makes here, courts have rejected such limitations. *See, e.g.*, *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 649 (6th Cir. 2003) (finding that the government was not required to intervene in a relator's case in order for him to be eligible for a share of the recovery from an alternate remedy, observing that "§ 3730(c)(5) does not expressly require the government's intervention before the 'alternate remedy' becomes applicable, nor does it define or discuss 'alternate remedy' within the context of a government's intervention in a *qui tam* action").

## CONCLUSION

For the reasons stated above, the Court should reverse the district court's holding.

Dated: December 10, 2020

Respectfully submitted,

By: */s/ Andrea Gold*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1(e), I certify that this brief includes 4803 words. This brief also complies with the typeface and type style requirements of Circuit Rule 32.1 because it has been produced in proportionally spaced Times New Roman 14-point font.

Date: Decmber 10, 2020

TYCKO & ZAVAREEI LLP

*/s/ Andrea Gold*
Andrea Gold

**CERTIFICATE OF SERVICE**

I hereby certify that on December 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that for all participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system.

Date: December 10, 2020

TYCKO & ZAVAREEI LLP

*/s/ Andrea Gold*
Andrea Gold