IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
FRANK C. FOY AND SUZANNE B. FOY,

Qui tam Plaintiffs/Appellants,

v.

Court of Appeals No. 31,421

Santa Fe County
Case No. D-101-CV-2009-01189

AUSTIN CAPITAL MANAGEMENT, LTD, *et al.*,

Defendants/Appellees.

APPELLEE BRUCE MALOTT'S ANSWER BRIEF

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SUMMARY OF PROCEEDINGS

The Fraud Against Taxpayer's Act, NMSA 1978, Section 44-9-1 *et seq.* (hereinafter "FATA"), explicitly withdraws subject matter jurisdiction over this case; *i.e.*, Appellant Frank C. Foy's second-filed *qui tam* action alleging precisely the same scheme as his first-filed *qui tam* lawsuit in *State ex rel. Foy v. Vanderbilt Capital Advisors,* LLC, D-101-CV-2008-1895.

While Mr. Foy may choose to increase his chances of hitting the lottery by buying multiple tickets, New Mexico law prohibits him from pursuing that same strategy in our Courts. *See, e.g., GCM, Inc. v. Kentucky Central Life Insurance Company,* 1997-NMSC-052, ¶ 32, 124 N.M. 186, 196, 947 P.2d 143, 153 (discussing the "public policy designed to avoid a multiplicity of suits"). If the law were otherwise, all parties would have the option of multiplying the proceedings as Mr. Foy has done here, in order to hedge their bets before one District Judge by pursuing duplicative cases before one or more other District Judges.

Regarding this FATA claim in particular, aside from the generally applicable principles prohibiting multiplicitous lawsuits, the statute abrogates the judiciary's power to adjudicate the second-filed case. The statute does so by (a) requiring full disclosure to the New Mexico Attorney General at the time of the first FATA filing, and (b) withdrawing subject matter jurisdiction over any subsequent FATA claims against State officials based on evidence previously disclosed to the

Attorney General. *See* NMSA 1978, Section 44-9-5(C) ("On the same day as the complaint is filed, the qui tam plaintiff shall serve the attorney general with a copy of the complaint and written disclosure of substantially all material evidence and information the qui tam plaintiff possesses"), and Section 44-9-9(B) ("No court shall have jurisdiction over [a *qui tam* claim] against an elected or appointed state official . . . if the action is based on evidence or information known . . . to the attorney general when the action was filed").

Mr. Foy's judicial admissions establish that both of his lawsuits allege the identical scheme. For example, his Notice of Related Proceeding filed on June 30, 2009, in his first-filed *Vanderbilt* case and placed in the record in this matter admits: "In the original complaint in the present Vanderbilt case, Foy alleged that there were other instances of kickbacks and other illegal inducements at the New Mexico Educational Retirement Board ("ERB") and State Investment Council ("SIC"). . . . The *Austin Capital* complaint explains the other instances of 'pay-to-play' at the ERB and the SIC. As the *Austin Capital* complaint demonstrates, the facts in that case are closely intertwined and interrelated with the facts in this case, because the Vanderbilt investment and the Austin Capital investment were both part of a larger pay-to-play scheme . . . ." [RP004774] *See also* Plaintiffs' *Austin Capital* Corrected First Amended Complaint Under the Fraud Against Taxpayers Act (filed June 26, 2009), ¶ 2 ("This complaint expands upon, and sets forth in

greater detail, the allegations set forth in the original complaint filed by Frank Foy. On July 14, 2008, Mr. Foy filed . . . *State ex rel. Foy v. Vanderbilt*, No. D-101-CV-2008-1895 (N.M. 1st Jud. Dist. Ct.). The Vanderbilt complaint alleged the Vanderbilt investment was influenced by kickbacks and other illegal inducements. The complaint also alleged that there were other instances in which the ERB and SIC investments were based upon kickbacks and other illegal inducements. . . . This complaint explains the other instances of 'pay to play' at the ERB and SIC.") [RP000135]

Moreover, the proceedings in this Court demonstrate that the legal issues in this second-filed action likewise duplicate those being litigated in Mr. Foy's first-filed case. Indeed, the legal question presented for interlocutory review here is the identical issue on which Mr. Foy and his counsel unsuccessfully sought interlocutory review in their first-filed *Vanderbilt* case. Court of Appeals No. 30,700, Order denying application for interlocutory review (October 21, 2011) (Castillo and Kennedy, JJ.). *See* Mr. Foy's Brief in Chief on Appeal in this action at p. 1 ("This is an interlocutory appeal...from a decision by the District Court... holding that the Fraud Against Taxpayers Act is unconstitutional...In his order [RP 4893-4900], Judge Pope simply adopted by reference an earlier decision by Judge Stephen Pfeffer in the companion case, *State ex rel. Foy v. Vanderbilt Capital Advisors,* LLC, D-101-CV-2008-1895, Order of Dismissal (April 28, 2010). [RP

3143-3174]" [BIC 1]). Accordingly, Mr. Foy's filings in this Court likewise demonstrate that he and his counsel have employed duplicative lawsuits as vehicles to obtain multiple bites at every apple.

Finally, the New Mexico Attorney General has confirmed that "[t]here is significant overlap between the disclosures made in [the first-filed *Vanderbilt*] case and those made in [this second-filed] Austin Capital Management case." New Mexico Attorney General's Motion for Protective Order, p. 2 n.1. [RP004778] Accordingly, it is indisputable that this *Austin Capital* case "is based on evidence or information known . . . to the attorney general" from the prior disclosures in the first-filed *Vanderbilt* case.

ARGUMENT

I. THIS COURT SHOULD REMAND AND DIRECT THE DISTRICT COURT TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION

Eight decades ago, our Supreme Court announced that subject matter jurisdiction "is a fundamental consideration at all stages of any proceeding, and will be noticed by the court upon its own discovery or at the suggestion of any party." *Davidson v. Enfield*, 35 N.M. 580, 583, 3 P.2d 979, 980 (1931). Therefore, notwithstanding the limited scope of an interlocutory review, "[p]rior to addressing the substantive issue certified for interlocutory appeal" appellate courts must determine "whether the district court had subject matter jurisdiction." *Wilson v.*

Denver, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13, 961 P.2d 153, 157-158. Accordingly, while this Court's September 27, 2011 Order denied the request in Appellee Malott's Suggestion of Lack of Jurisdiction for an immediate remand, this Court ruled that "[t]he parties may raise this issue in their briefing."

Although the lack of subject matter jurisdiction can be raised at any stage of the proceedings and is not waivable, *Wilson v. Denver*, 1998-NMSC-016 at ¶ 8, 125 N.M. at 312, Appellee Malott and others did bring the want of subject matter jurisdiction to the attention of the district court. *See, e.g.*, Suggestion of Lack of Jurisdiction (filed September 29, 2009). [RP000736-000744] The district court did not make a final determination on subject matter jurisdiction before proceeding to decide and certify the Constitutional issue now pending before this Court (although the district court did indicate that it was not inclined to dismiss, at least absent further briefing and possibly jurisdictional fact-finding). *See* Order on May 13, 2011 Hearing (filed July 8, 2011) [RP004893-004900]

The simplest and most direct route to remand and dismissal for want of subject matter jurisdiction is NMSA 1978, Section 44-9-9(B), which specifically excludes the exercise of jurisdiction over private *qui tam* actions brought "against an elected or appointed state official, . . . if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed." Plaintiffs' Complaints and

Appellants' other judicial admissions affirmatively preclude the exercise of subject matter jurisdiction under this provision, because Appellants' allegations establish that *both* the state agency *and* the New Mexico Attorney General were well aware of Mr. Foy's allegations.

Accordingly, this Court should remand with instructions that the district court dismiss for lack of subject matter jurisdiction. *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13 (remanding one of two election challenges on interlocutory appeal *sua sponte*, with instructions to dismiss for want of subject matter jurisdiction). *See, e.g.*, Rule 1-012(H)(3) NMRA 2009 ("[w]henever it appears by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). In the alternative, this Court should dismiss this interlocutory appeal as improvidently granted, with instructions that the district court vacate all of its rulings and make a final determination regarding whether it has subject matter jurisdiction before proceeding to decide any substantive issue in the case.

A. Absent Subject Matter Jurisdiction, Our Courts Lack The Authority To Take Any Action Other Than To Dismiss.

District courts should address the lack of subject matter jurisdiction first, because absent jurisdiction over the subject matter trial courts lack the power to take any action other than to dismiss. Rule 1-012(H)(3) NMRA 2011 ("[w]henever it appears by suggestions of the parties or otherwise that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action"). *See* 2-12 *Moore's Federal Practice* § 12.30[1] (civil) ("The district court must determine questions of subject matter jurisdiction first, before determining the merits of the case") (section cited with approval in *Protection and Advocacy System v. Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 164, 195 P.3d 1, 9).

Subject matter jurisdiction likewise is the first consideration on appeal, and our appellate courts will raise the issue *sua sponte* when the parties fail to do so. *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13 (noticing want of jurisdiction *sua sponte*); 2-12 *Moore's Federal Practice* § 12.30[1] (civil) ("Lack of subject matter jurisdiction may be raised at any time. Indeed, . . . it is the duty of the court -- at any level of the proceedings -- to address the issue sua sponte whenever it is perceived. . . . [L]ack of subject matter jurisdiction challenges the court's statutory or constitutional power to adjudicate the case, and it may not be waived").

B. The Fraud Against Taxpayers Act Explicitly Withdraws Subject Matter Jurisdiction Under The Circumstances Alleged Here.

The terms of the Fraud Against Taxpayers Act ("FATA") strictly limit jurisdiction where, as here, the purported claims of a self-appointed *qui tam* plaintiff are asserted against "an elected or appointed state official." NMSA 1978, § 44-9-9(B). The relevant statutory subsection, in its entirety, provides:

> No court shall have jurisdiction over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act against an elected or appointed state official, a member of the state legislature or a member of the judiciary if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed.

Section 5 of FATA (codified at § 44-9-5), which is referenced in this jurisdictional limitation, is the provision that creates the private *qui tam* cause of action on which Appellants rely for their purported claims.

The phrase "[n]o court shall have jurisdiction over an action" is unambiguous; the plain text "undoubtedly" constitutes "a clear and explicit *withdrawal* of jurisdiction" in the specified category of disputes. *Rockwell International Corp. v. United States*, 549 U.S. 457, 468 (2007) (construing the identical jurisdictional phrase in the federal False Claims Act) (emphasis in original). *See* NMSA 1978, § 12-2A-19 (1997) ("[t]he text of a statute . . . is the primary, essential source of its meaning"). As the United States Supreme Court held in *Rockwell*, "[t]hat is surely the most natural way to achieve the desired result of eliminating jurisdiction over a category of False Claims Act actions . . . ." *Id.* at 469. And that is precisely what the New Mexico legislature accomplished by excluding this category of suits from the New Mexico Courts' jurisdiction.

Accordingly, the district court initially expressed concern about the lack of subject matter jurisdiction under Section 44-9-9(B) – given that this is Mr. Foy's second-filed lawsuit based on his allegations of a pay-to-play scheme – stating:

> I'm particularly concerned about the notice to the AG's office. Because it seems to me it is pretty much plain that the AG got notice when the first lawsuit got filed.

September 17, 2010 Transcript of Proceedings, p. 109, l. 3-5.

Appellant responded to the district court's concern with two arguments, at least one of which tentatively persuaded the court to reverse course and express the tentative inclination to rule that – absent fact-finding demonstrating otherwise – Appellants adequately alleged subject matter jurisdiction. September 17, 2010 Transcript of Proceedings, p. 109, l. 3 through p. 111, l. 16.

Appellants' first argument attempting to avoid Section 44-9-9(B)'s explicit jurisdictional bar was that the district court's application of the statutory language would "impose an impossible requirement," because Appellants and their counsel "didn't have all of the documents – all of the information that we now have and that we had in June of 2009." September 17, 2010 Transcript of Proceedings, p. 110, l. 2-10. Initially, Appellants' policy argument is irrelevant, because the statutory language governs and cannot be disregarded simply because Appellants contend that their policy judgment is superior to that of the Legislature. NMSA 1978, Section 12-2A-19 ("[t]he text of a statute or rule is the primary, essential source of its meaning").

Moreover, even assuming a party's public policy determination ever could take precedence over that of the Legislature, Appellants' reasoning here does not

do so; in fact, it misses the point entirely. This is Mr. Foy's ***second-filed lawsuit***, based on the same alleged scheme, and he is attempting to proceed in both simultaneously. *See* Defendant Bruce Malott's Objection to Claim-Splitting and Notice of Non-Acquiescence (filed September 29, 2009). [RP000778-000785] It is not surprising that the statute would "impose an impossible requirement" prohibiting such duplicative FATA lawsuits. Indeed, multiplying the proceedings as Appellants have serves no purpose other than to burden our Courts and litigants – including State officials – with duplicative lawsuits in the name of the State, all arising out of the same alleged scheme.

Appellants' second argument was that the district court's application of the explicit jurisdictional bar would be "absurd," because it would mean "that if a qui tam plaintiff comes forward and gives this stuff to the AG, that somehow he can't, then, bring suit." September 17, 2010 Transcript of Proceedings, p. 111, l. 6-10. But Appellants' argument mischaracterizes the Legislature's jurisdictional bar, which is in no way "absurd." To the contrary, Section 44-9-5(C) of FATA explicitly requires the disclosure to the Attorney General be "[o]n the same day as the complaint is filed," whereas Section 44-9-9(B) only withdraws jurisdiction over actions based on information already possessed by the State "when the action was filed." Accordingly, Appellants' 44-9-5(C) disclosure in *Vanderbilt* did not

deprive the district court of jurisdiction over that first-filed suit, and no one has contended otherwise.

Indeed, FATA's statutory language creates the cause of action that permits a *qui tam* plaintiff to proceed with a lawsuit on the State's behalf simultaneously with his or her disclosure to the Attorney General, so it admittedly would be absurd to claim that the disclosure barred Appellants' first suit. But plainly there is nothing absurd about an explicit Legislative determination to bar duplicative, statutorily created *qui tam* lawsuits against State officials in the name of the State. Indeed, as Appellant has acknowledged in this very appeal, New Mexico jurisprudence disfavors the splitting of causes of action in any event. *See* Appellant Foy's Response by State of New Mexico *ex rel.* Foy to AG's Motion for Partial Remand, at 3 (filed October 5, 2011) (imploring this Court to enforce "the basic policy embedded in the Rules of Civil Procedure . . . prevent[ing] piecemeal litigation" by prohibiting "an attempt to fractionate one lawsuit into several lawsuits, all arising from the same nucleus of operative fact"). Accordingly, the Legislature had good reason to withdraw jurisdiction over duplicative *qui tam* claims against State officials.

C. <u>The Lack Of Jurisdiction Is Indisputable On The Existing Record.</u>

Section 44-9-9(B) explicitly withdraws jurisdiction over actions against State officials "based on evidence or information" known to the Attorney General.

Notably, notwithstanding Appellants' contrary suggestion in the district court, the statute does *not* provide that jurisdiction is lacking only if *each and every alleged fact* is known to the Attorney General. That language – which is absent from the Act but which Appellant asked the district court to read into § 44-9-9(B) – would render the Legislature's jurisdictional limitation meaningless. *But see* NMSA 1978, Section 12-2A-18(A)(1) and (2) (1997) ("A statute . . . is construed, if possible, to... give effect to its objective and purpose" as well as "its entire text"). A profit-motivated *qui tam* plaintiff always will be able to assert some additional alleged fact that plaintiff claims was not known at the time of the statutory disclosure, if that plaintiff perceives a strategic advantage in the tactic of pursuing duplicative lawsuits against State officials. Indeed, new alleged facts will be developed in any case that proceeds to discovery, but that additional information would no more support duplicative *qui tam* litigation than the press reports in this case do.

While Appellee is unaware of any New Mexico appellate authority construing the FATA phrase "based on evidence or information," appellate authority in the United States Courts construing an analogous phrase in the federal False Claims Act is persuasive. *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051-52 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) (regarding the jurisdictional limitations in actions "based upon the public

disclosure of allegations or transactions"). The United States Court of Appeals for the Tenth Circuit applies a "'restrictive interpretation of the threshold "based upon" test.'" *Id.*, p. 1051. As the Tenth Circuit explained:

> "Based upon" means "supported by" and the threshold analysis is "intended to be a quick trigger . . . ." Even *qui tam* actions only partially based upon publicly disclosed allegations or transactions might be barred. . . . The test is whether "substantial identity" exists between the publicly disclosed allegations or transactions and the *qui tam* complaint.

Id. Since the "crux" of the *qui tam* complaint in *Praxair* was substantially identical to the public disclosures, the Tenth Circuit held that the complaint was "based on" the prior disclosures. *Id.*, p. 1052. Accordingly, and particularly in light of the principles of New Mexico statutory construction cited above, Section 44-9-9(B) precludes subject matter jurisdiction where the second-filed *qui tam* case is partially based upon allegations substantially identical to "evidence or information known to . . . the attorney general when the action was filed."

Appellants' prior disclosures in the *Vanderbilt* case more than satisfy this standard, and Appellants' judicial admissions preclude any genuine dispute about that. Appellants repeatedly have admitted that their first-filed *Vanderbilt* lawsuit (which was the subject of this Court's denial of interlocutory review on the very Constitutional question at issue in this interlocutory appeal, and which likewise remains pending in the First Judicial District before Chief Judge Pfeffer) charges the identical purported pay-to-play scheme Appellants reallege in this duplicative

action. For example, Plaintiffs' Notice of Related Proceeding in *Vanderbilt*, p. 1, unequivocally announced:

> In the original complaint in the present Vanderbilt case, Foy alleged that there were other instances of kickbacks and other illegal inducements at the New Mexico Educational Retirement Board ("ERB") and State Investment Council ("SIC"). . . . The *Austin Capital* complaint explains the other instances of "pay-to-play" at the ERB and the SIC. As the *Austin Capital* complaint demonstrates, the facts in that case are closely intertwined and interrelated with the facts in this case, because the Vanderbilt investment and Austin Capital investment were both part of a larger pay-to-play scheme at the New Mexico Educational Retirement Board and State Investment Council.

[RP004774] Moreover, the Attorney General has confirmed that "[t]here is significant overlap between the disclosures" first received by the Attorney General in *Vanderbilt* – nine months before this action was filed – and the disclosures subsequently submitted by Mr. Foy in this duplicative case. New Mexico Attorney General's Motion for Protective Order in *Vanderbilt*, p. 2, n.1. [RP004778]

FATA no more permits this second-filed lawsuit by Appellants based in part on the previous disclosures than it would permit a third, fourth, fifth, sixth or seventh lawsuit by these Appellants or anyone else. In fact, Appellants implicitly acknowledged as much at the May 13, 2011 hearing, when they successfully opposed the National Education Association's motion to intervene:

> The statute says in black and white -- statutes that people almost never read. They don't read the black letters of the law. Or if they do they glance at them and they scurry off and start talking about cases ignoring what the legislature said. The legislature

> nailed this in black and white. There's no ambiguity, whatsoever. One does not have to go beyond the black and white of one sentence.
>
> When a person brings an action pursuant to this section, no person other than the attorney general, on behalf of the state, may intervene or bring a related action based on the facts underlying the pending action. I think it is almost impossible to write a statute that's as clear as that. And yet, all of a sudden we're going to try to sidle by the statute by citing this, that and the other thing.

May 13, 2011 Transcript of Proceedings, p. 46, l. 5-19.

Moreover, Appellant adopted the principle defendant's argument on this point, differing only from Austin Capital's reliance on the Legislature's explicit use of the word "jurisdiction." May 13, 2011 Transcript of Proceedings, p. 45, l. 6-10. Accordingly, Appellants joined in the following arguments by Defendant Austin Capital:

> Under the Fraud Against Taxpayers Act, similar to the False Claims Act, you are to look at the original complaint and the second filed complaint and see if they are related based on the facts underlying the pending action. This is something that Judge Pfeffer was able to do. He had the Foy complaint as an attachment to our filings in front of him when he was looking at the NEA case and the Foy case. The claims only have to be related; they do not have to be identical. This requires nothing more.

May 13, 2011 Transcript of Proceedings, p. 40, l. 22 through p. 41, l. 6.

> The test here is first to file and whether the allegations are related based on the facts of the underlying pending action. And they clearly are.

May 13, 2011 Transcript of Proceedings, p. 43, l. 2-4. Appellants were correct

then and cannot manufacture subject matter jurisdiction by taking a contrary position now that is explicitly precluded by FATA's terms.

D. Subject Matter Jurisdiction Likewise Is Lacking, Because Appellants Allege That The State Agency Was Aware Of The Alleged Conduct All Along.

The simplest and most straightforward ground for noticing the want of subject matter jurisdiction here is the Attorney General's prior knowledge, discussed above. But Mr. Foy's averments about the ERB's knowledge of the alleged wrongdoing in *both* the *Vanderbilt* first-filed case *and* this second-filed case demonstrate the lack of subject matter jurisdiction under the other prong of Section 44-9-9(B) (no jurisdiction in a *qui tam* action "against an elected or appointed state official . . . if the action is based on evidence or information known to the state agency"). *See* Defendant Malott's Suggestion of Lack of Jurisdiction), ¶¶ 10-15 (filed September 29, 2009) (citing examples of Appellants' allegations, including: (a) that "the ERB and the SIC have been, and continue to be, under the corrupt control and adverse domination of Gary Bland, Bruce Malott, David Contarino, and Governor Richardson" (¶ 165); (b) that "Governor Richardson exercises *de facto* control over the SIC and the ERB" (*id.*); (c) that "the [ERB] Board came to be controlled by persons who were willing to make investments and award contracts for political or other improper reasons, following the lead of Gary Bland, Bruce Malott and the instructions of David Contarino and perhaps others"

(¶ 76); (d) that these "persons" included "State Treasurer Robert Vigil, Veronica Garcia (Secretary of Education), Annadalle Sanchez (Vice Chairperson of the New Mexico Democratic Party), and Doug Brown (Acting State Treasurer after Robert Vigil)" (¶ 75); (e) that "the wrongdoers were thoroughly in control of the ERB" (¶ 159); (f) that the "Richardson Administration engaged in a pattern and practice of awarding, or attempting or conspiring to award, state investment business to persons who were willing to offer illegal inducements" (¶ 77); and (g) that "[t]he award to Austin Capital was part of this pattern and practice" (¶ 78)). [RP000738-000740][1] Accordingly, Section 44-9-9(B) withdraws subject matter jurisdiction on this basis as well.

E. Contrary to Appellants' Argument In The District Court, The Legislature Has Authority To Withdraw Jurisdiction Over A Category Of Claims The Legislature Itself Created.

In a final attempt to avoid FATA's statutory jurisdictional limitations, Appellants contended in the district court that the Legislature is constitutionally prohibited from crafting jurisdictional limits on causes of action that the Legislature itself creates. September 17, 2010 Transcript of Proceedings, p. 95, l. 5

[1] Appellee Malott was not involved in any wrongdoing whatsoever, and did not violate FATA. Appellee Malott acknowledges, however, that he is procedurally barred in this interlocutory appeal from rebutting Appellant Foy's intentionally false factual allegations against him. Accordingly, Appellee Malott is constrained to wait until another day to present the evidence that will vindicate him.

through p. 99, l.7. That is, Appellants challenged the constitutionality of the very *qui tam* statute they rely upon for their claims and in their interlocutory appeal.

Appellants rely for this counterintuitive proposition on the following excerpt from the text of Article VI, § 13, of the New Mexico Constitution: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution . . . ." Appellants contended that this excerpt means the Legislature cannot limit the scope of subject matter jurisdiction over its statutorily created *qui tam* lawsuits. But if it were true that the New Mexico Legislature were powerless to limit subject matter jurisdiction over actions the Legislature itself creates, a whole host of well-accepted New Mexico statutes repeatedly enforced by our Supreme Court likewise would be unconstitutional (including administrative exhaustion requirements, jurisdictional amount limits, notice prerequisites, etc.) *See, e.g., U.S. Xpress, Inc. v. State*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999 (enforcing subject matter jurisdiction limitation based on administrative exhaustion requirement). Therefore, Appellants' argument plainly cannot be correct, and it is not.

As this Court has held, Article VI, § 13 – the provision on which Appellants relied – has no application to legislatively created causes of action. *Sanchez v. Attorney General*, 93 N.M. 210, 213, 598 P.2d 1170, 1173 (Ct. App. 1979). To the contrary, notwithstanding Appellants' unsupported argument, this constitutional

provision applies solely to "matters known 'to the common law and equity practice of England prior to 1776 . . . .'" *Id.*at 214 (citation omitted). Nevertheless, Appellants continued to press their contention in the district court that § 44-9-9(B) is unconstitutional under Article VI, § 13, even after Appellee Malott brought the *Sanchez* case to Appellants' attention. September 17, 2010 Transcript of Proceedings, p. 71, l.19 through p. 72, l. 16.

If Appellants' contention were correct (and it unequivocally is not), the Legislature would be constitutionally forced to choose between either creating a new cause of action without any jurisdictional limits whatsoever, or declining to create any new cause of action at all. Appellants offer no constitutional justification for that absurd result, because there is none.

In sum, there is no constitutional basis for hampering legislative prerogatives in the manner advocated by Appellants. *See, e.g., Gamble v. Velarde*, 36 N.M. 262, 13 P.2d 559, 562 (announcing the now clearly settled principle that Courts should not "hamper legislation without promoting the constitutional purpose"). At bottom, Appellants' attempt to pick-and-choose which provisions of the *qui tam* act shall apply is a thinly-veiled effort to enrich themselves in a manner explicitly precluded by the Legislature. Accordingly, Appellants' argument does not begin to rise to constitutional dimensions.

II. FATA'S RETROACTIVITY PROVISION VIOLATES THE UNITED STATES AND NEW MEXICO CONSTITUTIONS

Assuming this Court determines that subject matter jurisdiction exists, for the reasons stated by Chief Judge Pfeffer in *Vanderbilt* and adopted by Judge Pope below (and as supported by legal arguments presented by various other appellees in this appeal), this Court should affirm the District Court's holding that FATA's retroactivity provision violates the federal and state constitutions.

III. THE DISTRICT COURT BELOW CORRECTLY SEVERED THE RETROACTIVITY CLAUSE

Again assuming this Court determines that subject matter jurisdiction exists, for the reasons stated by Chief Judge Pfeffer in *Vanderbilt* and adopted by Judge Pope below (and as supported by legal arguments presented by various other appellees in this appeal), this Court should affirm the District Court's holding severing FATA's retroactivity clause.

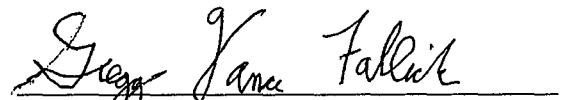
IV. THE COURT ALSO LACKED JURISDICTION OVER APPELLEE MALOTT UNDER THE TORT CLAIMS ACT.

Appellee Bruce Malott likewise agrees with the Tort Claims Act argument presented by other appellees insofar as it shows the District Court lacked jurisdiction over him under the TCA.

CONCLUSION

This Court should remand and direct the district court to dismiss for want of subject matter jurisdiction. In the alternative, this Court should dismiss this interlocutory appeal as improvidently granted, with instructions that the district court vacate all of its rulings and make a final determination regarding whether it has subject matter jurisdiction before proceeding to decide any substantive issue in the case. Finally, assuming this Court determines that subject matter jurisdiction exists, and further assuming this Court determines that the claims against Appellee Malott are not barred by the Tort Claims Act, this Court should affirm the decision of the district court below.

Respectfully submitted by:



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