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,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JAN 23 2012

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 GARY BLAND AND APPELLEE DAVID CONTARINO'S ANSWER BRIEF

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Statement of Compliance with Rule 12-213(G)NMRA

This brief complies with the limitations of Rule 12-213(F) NMRAin that in contains 10,709 words in the body of the brief (headings, footnotes, quotations and all other text except the cover page, caption, table of contents, table of authorities, signature blocks, statement regarding oral argument and certificate of service). The type style is Times New Roman. This word count information was obtained using the word-processing program Microsoft Word 2010.

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SUMMARY OF PROCEEDING

This appeal involves two very similar lawsuits in state district courts that are premised upon alleged violations of The Fraud Against Taxpayer's Act, NMSA 1978, Section 44-9-1 *et seq.* (hereinafter "FATA"). The narrower issue involved in this interlocutory appeal is whether the retroactive application of FATA to conduct that has already occurred is constitutional based upon the *ex post facto* clauses in the United States and New Mexico Constitutions. Notably, both district courts addressing this issue came to the same conclusion, based upon solid legal reasoning, that the retroactive application of FATA was unconstitutional.

Appellants have doggedly pursued what they acknowledge are two lawsuits which contain allegations that are strikingly similar. This approach dances on a fine line that quite often allows Appellants the proverbial "two bites of the apple." The Appellants' first lawsuit, *State ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, D-101-CV-2008-1895, produced a well-written 31-page decision by the Honorable Stephen Pfeffer which found the retroactive application of FATA unconstitutional. See pp. 3143-3173. Appellants sought an interlocutory appeal of Judge Pfeffer's opinion which was immediately denied.

Undeterred, Appellants sought to reargue the issue before the Honorable John Pope in the case now before this Court, the *Austin Capital* case, by asking the Court to essentially ignore Judge Pfeffer's conclusion. In their argument before

Judge Pope, the Appellants utilized the same reasoning they now raise in this appeal, which had been rejected by Judge Pfeffer. Even though Appellants' argument was again rejected, Appellants turned around and made a second request for interlocutory appeal which was granted by the Court. In both requests, Appellants made representations to this Court that interlocutory appeal of this issue was imperative.

While not an issue in this case, it should be noted that the Appellants' rather stubborn persistence to seek an appellate ruling on the issue of FATA's constitutionality is laced with arguments of convenience. For example, while Appellants made numerous representations to this Court about how this matter involves a controlling issue of law, they turn around without compunction and are now seeking an order lifting the automatic stay imposed by this Court's interlocutory appeal.

Examples of inconsistent representations from Appellants are abundant. They urge the Court to ignore compelling case law interpreting the False Claims Act (FCA), 31 U.S.C. §3729, et. seq., the federal counterpart to FATA, but then ask for one exception. They incorrectly assert that a judicial rewrite of the statute is allowable. Appellants' cited caselaw is misstated and repeatedly taken out of context.

The district court rulings are proper and should be affirmed. No further re-argument of the inevitable conclusion should be countenanced.

STANDARD OF REVIEW

The applicable standard of review is *de novo* in that the facts material to the issues are not disputed, and the Court is presented with only issues of law. *State v. Kirby,* 2003-NMCA-074, ¶12, 133 N.M. 782, 70 P.3d 772.

ARGUMENT

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

The New Mexico Fraud Against Taxpayers Act (FATA), NMSA 1978 §§44-9-1 to -14 (2007), prohibits knowingly presenting a false claim for payment from the State, knowingly presenting false records to obtain payment from the State, or knowingly making false statements to obtain payment from the State. NMSA 1978, §44-9-3(A). Section 44-9-5 creates standing for a private citizen to bring a FATA cause of action as a *qui tam* plaintiff. The *qui tam* plaintiff, who had no right to sue for the targeted wrongdoing before passage of FATA, is entitled to a percentage of the "proceeds of the action or settlement." NMSA 1978, §44-9-7. There is no statute of limitations found in FATA.

The consequences of violating FATA are: (1) a mandatory award to the plaintiff assessing "three times the amount of damages sustained by the State"; (2) a mandatory penalty of not less than five thousand dollars ($5,000.00) and not

more than ten thousand dollars ($10,000.00) for each violation; (3) a mandatory award of costs of the action to the plaintiff; and (4) a mandatory award of attorney fees to the plaintiff. NMSA 1978, §44-9-3(C).

FATA has an effective date of July 1, 2007 (NMSA 1978, §44-9-16) but contains a retroactivity clause which reaches back to conduct that occurred up to twenty (20) years earlier. NMSA 1978, §44-9-12(A) (action may be brought for "conduct that occurred prior to the effective date of the act, but not for conduct that occurred prior to July 1, 1987").

Both the United States and the New Mexico Constitutions prohibit any law which renders an act punishable in a manner it was not punishable when it was committed. *See* U.S. Const. art.I, §10 and N.M. Const. art.II, §19. A court cannot apply a statute retroactively if it violates the constitutional prohibitions against *ex post facto* laws. *State of New Mexico v. Nunez*, 2000-NMSC-013, ¶112, 129 N.M. 63,2 P.3d 264(filed 1999). The indicia of an *ex post facto* law is "the imposition of what can fairly be designated punishment for past acts." *De Veau v. Braisted,* 363 U.S. 144 (1960). As the United States Supreme Court stated in *Collins v. Youngblood*, 497 U.S. 37, 42 (1990), a case relied upon by Appellants in their brief, the *ex post facto* clause is violated when a law is passed that changes the punishment and inflicts a greater punishment on an individual than the punishment assigned to the action at the time the act is committed.

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of anydefense available according to law at the time when the act was committed, is prohibited as *ex post facto.*"

Id. at 42 *citing Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925) (emphasis added).

While the wrongdoing targeted by FATA may not have been "innocent when done," there can be no argument that FATA certainly increased the penalties for said wrongdoing after the commission of the wrongdoing.[1] *See*NMSA 1978, §44-9-3(C). FATA also newly creates standing for private persons to bring suit. *See*NMSA 1978, § 44-9-5. As such, retroactive application of FATA violates the *ex post facto* clause of both the federal and state constitutions.[2] Two state district court judges in New Mexico have found that retroactive application of FATA

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[1] Appellees Bland and Contarino strongly deny they were involved in any wrongdoing and assert they have not violated any laws including FATA. However, since this case is before this Court on a question of law only, Appellees Bland and Contarino will not set forth a factual argument regarding the unfounded allegations in the Appellants' complaint.

[2] "Because both the United States and the New Mexico Constitutions provide overlapping protections" against the application of a law that violates the *ex post facto* clause, this Court applies an interstitial approach and may find that a law that does not offend the federal constitution does offend the state constitution. *See State v. Rowell*, 2008-NMSC-041, ¶12, 144 N.M. 371, 188 P.3d 95 (addressing the overlapping constitutional protections against unreasonable search and seizures).For example, as the District Court below stated, "[i]n determining whether a penalty is punitive or remedial in nature, the Supreme Court of New Mexico has, in the past, given less deference to legislative descriptions and intent than has the Supreme Court of the United States." [RP 4894, 3146]

violates the *ex post facto* clause, and one federal district court judge in New Mexico has come to the same conclusion as to FATA's federal counterpart, the False Claims Act, 31 USC §§3729 *et seq.*as amended.[3] *See also* Aspen Publishers–*Civil False Claims and Qui Tam Actions*, Vol. 2, pages 6-70, §6.01[N] The New Mexico Fraud Against Taxpayers Act ("The retroactive application of the statute's punitive damages and penalties to conduct that occurred 20 years before the statute was enacted raises serious due process concerns).

A. <u>A Civil Statute Can Run Afoul of the Constitutional Ex Post Facto Law Prohibition.</u>

Appellants devote pages of their Brief in Chief asserting, and citing oddments of caselaw in support of the assertion, that retroactive application of a civil statute can never violate the *ex post facto* clause. [BIC 21-25] In doing so, Appellants ignore the abundance of caselaw holding that when a civil statute provides for statutory fines or damages that are considered punitive, the civil statute can run afoul of the constitutional *ex post facto* law prohibition, if the civil statute is applied retroactively. As explained by the New Mexico Supreme Court, "[i]n New Mexico, the fact that the Legislature has chosen to label a proceeding

[3]The Honorable John Pope in the case which is appealed herein; the Honorable Stephen Pfeffer in *State of New Mexico ex rel. Foy v. Vanderbilt Capital Advisors.LLC*, First Judicial District Court, No. D-101-CV-2008-1895, filed April 28, 2010 [RP 3143-3173]; and the Honorable William P. Johnson in *United States ex rel. Baker v. Community Health Systems, Inc.*, 709 F.Supp.2d 1084, 1112 (D.N.M. 2010).

'civil' or 'criminal' is not dispositive of the true nature of the proceeding." *Nunez,* 2000-NMSC-013, ¶46. A penalty in a civil proceeding may be fairly characterized as punishment. *See id.*

A two-part test is used to determine whether a civil law imposes "punishment." *See Smith v. Doe,* 538 U.S. 84, 92 (2002); *see also United States v. O'Neal*, 180 F.3d 115, 122 (4th Cir. 1999). First, a court looks to "whether the legislature's intent, as discerned from the structure and design of the statute along with any declared legislative intent, was to impose a punishment or <u>merely</u> to enact a civil or regulatory law." *O'Neal*, 180 F.3d at 122 (emphasis added). Second, even if the legislature did not intend to impose a punishment, a court examines whether the sanction imposed by the civil law "is 'so punitive in fact' that the law 'may not legitimately be viewed as civil in nature.'" *Id. citing United States v. Ursery,* 518 U.S. 267, 288 (1996) (internal quotation marks omitted by the *O'Neal* opinion).

1. The structure and design of FATA reveals that the New Mexico legislature did not intend to merely enact a civil law but instead intended to impose punishment on the targeted wrongdoers.

The New Mexico legislature did not declare its intent in the language of FATA. There is no "purpose" section as is found in many New Mexico statutes. However, the structure and design of the statute reveals that the New Mexico

legislature did not intend to merely enact a civil law but instead intended to impose punishment on the targeted wrongdoers.

Section 44-9-3(C) sets forth the main consequences which will be suffered by a person who violates the statute. All of the remedies are mandatory, and the majority of the remedies are not closely tied to the losses suffered by the state but instead go well above and beyond what is required to make the state whole. Section 44-9-3(C)(2) imposes mandatory penalties of at least $5,000.00 per violation, regardless of the harm suffered, and indeed regardless of whether the state suffered any harm. Section 44-9-3(C)(1) mandates an award of "three times the amount of damages sustained by the state." While the award of court costs and attorney's fees found in Section 44-9-3(C)(3) and (4) can be fairly characterized as designed to compensate the state, the mandatory penalties and the mandatory treble damages only serve to punish the wrongdoer. As such, NMSA 1978, Section 44-9-3(C) reveals a legislative intent to impose punishment. *SeeTexas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)("[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers" (emphasis added)).

Furthermore, FATA contains a provision that if the wrongdoer cooperates with any investigation by the Attorney General, treble damages are no longer mandatory as to that particular wrongdoer. NMSA 1978, §44-9-3(D). It is only on

the assumption that treble damages serve to punish the wrongdoer that the reduction of that award for a cooperative wrongdoer makes sense. *See Nunez,* 2000-NMSC-013 at ¶93 (the fact that the New Mexico civil forfeiture law has an innocent owner provision proves that civil forfeiture serves to punish a wrongdoer).

Also, as noted by the District Court below, FATA's use of the term "prosecute" suggests a legislative intent to punish. [RP 4894, 3159-3160]. Section 44-9-6 of FATA speaks of "prosecuting the action." Section 44-9-7 utilizes the phrase "prosecution of the action."

Finally, the fact that a large portion of the excess damages go to a general purpose fund and not to the agency that suffered the loss demonstrates that the mandatory treble damages do not serve a compensatory purpose."[P]roceeds in the amount of the false claim paid and attorney fees and costs shall be returned to the fund or funds from which the money, property or services came," but all additional recoveries, after the *qui tam* plaintiff is paid his bounty, are split between a fund for the use of the Attorney General in enforcing FATA and the New Mexico General Fund. NMSA 1978, §44-9-7(E). Penalties assessed under FATA are deposited into the "school fund." NMSA 1978, §44-9-7(E)(2). In *Kirby,* this Court found that penalties assessed for violating securities law, which were earmarked for public education and training on securities matters, may have a

remedial purpose. *Kirby,*2003-NMCA-074, ¶36. However, all the FATA penalties and a large portion of FATA treble damages are not earmarked for any purpose regarding the wrongdoing targeted by FATA.

Clearly, the structure and design of FATA reveal a legislative purpose to impose punishment. Likewise, several courts have found that the damages provision of the False Claims Act 31, USC §§3729 *et seq.*(FCA), the federal counterpart to FATA[4], was enacted with the purpose of punishing and deterring fraud against the government. Where a New Mexico state statute has a federal analogue, New Mexico courts may look to the legislative intent behind said federal statute in determining legislative intent behind the state statute. *See Kirby*, 2003-NMCA-074, ¶¶ 13, 24 ("In enacting the [state Securities] Act, our Legislature undoubtedly shared the legislative intent behind the [federal] Securities Exchange Act of 1934…").

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[4] The activity prohibited by FATA is identical to that prohibited by the False Claims Act with respect to obtaining payment from the federal government. *See* NMSA 1978, §44-9-3 *False claims; liability; penalties; exception* and compare to 31 U.S.C. §3729 *False Claims; see also United States ex rel. Sikkenga v. Regence BluecrossBlueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006)("[A] 'defendant's presentation of a false or fraudulent claim to the government is a central element of every False Claims case'" *quoting United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004)).

Appellants argue the FCA and FATA are dissimilar, and therefore the caselaw interpreting one should not be used to interpret the other. This argument is addressed in a separate section of the Answer Brief found below at pages 24-27.

The United States Supreme Court held in *United States v. Bornstein*, 423 U.S. 303 (1976) that "[t]he False Claims Act was adopted 'for the purpose of punishing and preventing...frauds.'" *Id.* at 309-310, fn5, *citing* Cong. Globe, 37th Cong., 3d Sess., 952 (remarks of Sen. Howard) (emphasis added). The Tenth Circuit Court of Appeals described the purpose of the FCA as seeking "to sanction and deter wrongful conduct through the imposition of up to treble damages." *United States ex rel. Burblaw v. Orenduff*, 548 F.3d 931, 956 (10th Cir. 2008). The Ninth Circuit Court of Appeals explained, "the purpose of the damages provision of the FCA is to deter future fraudulent claims, as well as recoup the government's losses due to fraud." *Mortgages, Inc. v. U.S. Dist. Ct. for Dist. of Nev.*, 934 F.2d 209, 213 (9th Cir. 1991) (emphasis added). Recently, the court in *United States ex rel. Sanders v. Allison Engine Co, Inc.*, 667 F.Supp.2d 747, 756 (S.D. Ohio 2009) found "Congress intended to impose punishment when it enacted the FCA and the amendments thereto. The Supreme Court and lower court have also regularly determined that the FCA imposes punishment" (emphasis added).

Under *Kirby*, 2003-NMCA-074, ¶¶13, 24, this Court may assume that, in enacting FATA, the New Mexico Legislature shared the legislative intent behind the FCA, the federal analogue to FATA. The caselaw cited above demonstrates that the legislative intent behind the FCA was to impose punishment. Thus, one can conclude that the legislative intent behind FATA was to impose punishment.

2. Even if the Legislature's intent were to deem it a civil penalty, FATA's statutory scheme is so punitive both in purpose and effect as to negate the Legislature's intention.

Even if the New Mexico legislature did not intend to impose punishment when it enacted FATA, the statute violates the *ex post facto* clause because the statutory scheme is so punitive in both purpose and effect as to negate the legislature's intent. *See O'Neal*, 180 F.3d at 122. As the New Mexico Supreme Court stated in *Nunez*, "in New Mexico, the fact that the Legislature has chosen to label a proceeding 'civil' or 'criminal' is not dispositive of the true nature of the proceeding." *Nunez*, 2000-NMSC-013, ¶46. Labels are not of vital importance and cannot be used to defeat the protections of constitutional law. *Id.*"It is the role of the judiciary, and not the legislature, to interpret the constitution." *Id.* at ¶48. The *Nunez* Court recognized "[l]egislators, in choosing whether to describe a sanction as 'civil' or 'criminal,' will naturally seek to minimize the likelihood of judicial scrutiny." *Id.*

The defendant in *Nunez* argued that a civil forfeiture action violated his constitutional right to be free from double jeopardy. *Id.* at ¶1. In addressing the defendant's argument, the Court analyzed whether the civil forfeiture remedy was remedial or punitive and deterrent. *Id.* at ¶62. If remedial, the defendant's constitutional right to be free from double jeopardy would not be implicated;

however, if the remedy was punitive and deterrent, the state could not both criminally prosecute the defendant and impose the "civil" remedy of forfeiture. *Id.*

The *Nunez* Court began its analysis by recognizing that the aim of a statute's remedies can be a mix of both remedial and punitive. *Id.* at ¶63. The Court stated that when such a mix is present, a court must weigh the remedial against the punitive measures to ascertain which purpose predominates. *Id.* at ¶¶63-64. Ultimately the Court found that the civil forfeiture penalty was punitive, and the state's attempt to criminally prosecute the defendant after having imposed the civil remedy of forfeiture was double jeopardy. *Id.* at ¶94.

Appellants attempt to distinguish *Nunez* arguing that the civil forfeiture provision was only found to be a criminal penalty because it was "predicated on the commission of a crime." [BIC 33] Appellants cite to paragraph fifty-seven (57) of the Nunez opinion in support of their argument. However, at this place in the opinion, the Court was not discussing the issue of whether the civil forfeiture penalty was punitive; the Court was examining whether the Controlled Substances Act and the civil forfeiture law punish the same conduct. *Nunez,* at ¶¶56-57. While this inquiry is relevant to a double jeopardy claim, it is irrelevant to an *ex post facto* examination. The analysis of a double jeopardy claim and an *ex post facto* violation claim "come together" in the inquiry regarding the punitive or remedial nature of the sanction. This analysis begins at paragraph sixty-one (61) of the

Nunez opinion. In discussing *ex post facto* implications, the *Nunez* Court does not rely upon whether the forfeiture provision is predicated on the commission of a crime. Indeed, if the relevant inquiry for the *ex post facto* analysis were simply whether the forfeiture is predicated on the commission of a crime, the *Nunez* Court would have had no need to launch into a lengthy inquiry as to the punitive nature of the civil forfeiture.

The factual analysis performed by the New Mexico Supreme Court in *Nunez* is similar in many ways to the analysis performed by the federal courts faced with the question of whether civil remedies are "punishment" thereby implicating concerns of *ex post facto* violations.[5] In *Allison Engine,* 667 F.Supp.2d at 754, the federal court examined whether an amendment to the FCA (the federal counterpart to FATA) could be applied retroactively. The defendants in *Allison Engine* were accused of fraud in the negotiations of contracts relating to the construction of Navy destroyers thereby violating the FCA. *Id.* at 749. At the conclusion of the plaintiff's case, the district court directed a verdict in favor of the defendants. *Id.* at 750. This decision was appealed first to the Sixth Circuit and then to the United States Supreme Court, which ultimately remanded the case to the district court. *Id.*

[5] In interpreting state statutes, New Mexico courts can look to federal cases interpreting analogous federal statutes. *See State v Rivera,* 2009-NMCA-132, ¶11 , 147 N.M. 406, 223 P.3d 951.

However, during the appellate process, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA) amending the FCA. As the *Allison Engine* court explained:

> Prior to these amendments, any person was liable under 31 U.S.C. §3729(a)(2) who "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." This subsection of the FCA was amended by the FERA to provide that any person who "knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable. 31 U.S.C. § 3729(a)(1)(B). Thus, the FERA amendments to the FCA eliminate the "to get" language and eliminate the words "paid or approved by the Government."

Id. at 750. FERA contained a retroactivity clause and was to be applied retroactively to all claims under the FCA that were pending on or after June 7, 2008. *Id.*

Thus, on remand the *Allison Engine* court had to decide whether the retroactive application of the amendment to the FCA violated the *ex post facto* clause. The defendants argued that such an application would violate the *ex post facto* clause because it would expose them to liability for actions that did not violate the FCA at the time those actions were committed. *Id.* at 752. In deciding whether retroactive application of the amendment was constitutional, the *Allison Engine* court relied on the seven-factor test set forth in the United States Supreme Court's decision, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Id.* at 756. To wit:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether the sanction comes into play only on a finding of scienter; (4) whether operation of the sanction will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assigned to the sanction; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned.

Allison Engine, 667 F.Supp.2d at 756, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69.

New Mexico courts have also employed the seven-factor test. *See Kirby*, 2003-NMCA-074, ¶¶29-30 (seven-factor *Kennedy v. Mendoza-Martinez* test is "helpful" in determining whether administrative penalties of the New Mexico Securities Act are punitive), *see alsoNunez*, 2000-NMSC-013, ¶¶73-94; *State v. Druktenis*, 2004-NMCA-032, ¶¶30-31, 135 N.M. 223, 86 P.3d 1050; *City of Albuquerque v. One (1) 1984 White Chevy*, 2002-NMSC-014, ¶11, 132 N.M. 187, 46 P.3d 94; *State v. Block*, 2011-NMCA-101, ¶37, __ N.M. __, __ P.3d __ .[6]These factors are neither exhaustive nor dispositive, but they do provide a framework for the examination. *Allison Engine*, 667 F.Supp.2d at 756. Analysis of the seven factors support a finding that the penalties found in FATA are punitive for purposes of an *ex post facto* inquiry.

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[6]Appellants devote less than three pages of their forty-eight page Brief in Chief addressing these factors. [BIC 44-46]

a. Appellants' interpretation of FATA is that it contains a sanction which involves an affirmative restraint.

The first factor is whether the sanction involves an affirmative disability or restraint. While the terms of FATA do not involve an affirmative disability or restraint, Appellants claim that a court has the power under FATA to enjoin Appellees Bland and Contarino from holding public office and bar Appellees Bland and Contarino from "any future award of state contracts." [RP 189] Such sanctions, if available as Appellants claim, would involve an affirmative restraint.

b. Treble damages have historically been regarded as punishment.

The second factor, whether the sanction has historically been regarded as punishment, is easily answered in the affirmative. FATA contains a mandatory treble damages provision. NMSA 1978, §44-9-3(C)(1). Courts have consistently held that treble damages serve as punishment for the prohibited act and as a deterrent to future wrongdoing. For example, in *Hale v. Basin Motor Co.*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990), the New Mexico Supreme Court stated that "[m]ultiplication of damages pursuant to statutory authority is a form of punitive damages." The *Hale* Court refused to allow a plaintiff to recover both punitive damages for fraud and treble damages under the Unfair Practices Act because both remedies were directed at punishing the defendant. *Id.*

The New Mexico Supreme Court has stated, "[i]f it is clear that the sanction greatly exceeds the quantum of harm, then it is punitive." *Nunez*, 2000-NMSC-013 at ¶89. Mandatory treble damages and mandatory fines which could reach thousands of dollars per violation far exceed the amounts necessary to compensate the state for its loss. As the *Allison Engine* court stated "[s]ince the sanctions recoverable under the FCA can far exceed those necessary to compensate the Government for it loss, this factor weighs in [favor] of a finding that the FCA sanctions, particularly the treble damages provision, are punitive in nature and effect." *Allison Engine,* 667 F.Supp.2d at 757-758; *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), (FCA treble damages "are essentially punitive in nature"); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (the treble damages provision of the FCA serves both a punitive and remedial function); *United States ex rel. Sikkenga v. Regence BluecrossBlueshield of Utah*, 472 F.3d 702, 734 (10th Cir. 2006) (availability of treble damages, even though it has 'a compensatory side,' also has a punitive character").

Citing *Weidler v. Big J. Enterprises, Inc.*, 124 N.M. 591, 953 P.2d 1089 (Ct. App. 1997), Appellants argue that mandatory treble damages are not punitive because "much greater multiples have been held to be constitutional." [BIC 36] However, Appellees Bland and Contarino do not argue that the mandatory treble

damage provision of FATA is unconstitutional, but that the *retroactive* application of mandatory treble damages provision is. Thus, *Weidler* is not on point.

Appellants cite *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) for the proposition that "the damages multiplier [found in the FCA] has compensatory traits along with the punitive." However, as the United States District Court for the District of New Mexico warned in *U.S., ex rel. Baker v. Community Health Systems, Inc.*, 170 F.Supp.2d 1084, 1110 (D.N.M. 2010), "*Chandler* would be mischaracterized to stand for the proposition that the FCA is generically a civil remedial statute to which the Ex Post Facto [clause] does not apply." In *Chandler*, the question before the Court was whether a municipal entity could be considered a "person" under the FCA. *Chandler*, 538 U.S. at 124. "There was no discussion on the punitive nature of the FCA in the context of a violation of the Ex Post Facto clause." *Baker*, 170 F.Supp.2d at 1110. Furthermore, the *Chandler* Court acknowledged that the amendments to the FCA, increasing the recoverable damages from double to treble and raising the fines from $2,000.00 to the range of $5,000.00 to $10,000.00 "turn[ed] what had been a 'remedial' provision into an 'essentially punitive' one." *Chandler,* 538 U.S. at 129-130.

c. FATA's damage award only comes into play on a finding of scienter

The third factor for consideration is whether the sanction comes into play only upon a finding of scienter. Section 44-9-3(A) of FATA requires that a

defendant acted "knowingly." Section 44-9-2(C) defines "knowingly" as actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information.

Appellants' only argument regarding this factor is that it should not be a factor because it is "overbroad." [BIC 45] Thus, Appellants concede that the FATA sanctions only come into play upon a finding of scienter.

d. Operation of the sanction promotes the traditional aims of punishment-retribution and deterrence

Whether operation of the sanction promotes the traditional aims of punishment-retribution and deterrence is the fourth factor. An award of mandatory treble damages promotes the traditional aims of punishment-retribution and deterrence because awarding damages three times above the actual damages suffered can have no purpose other than punishment-retribution and deterrence. *See Nunez*, 2000-NMSC-013, ¶86 ("The cost of the forfeiture is designed to exceed, if possible, any profitability from the crime). In addition to mandatory treble damages, FATA requires a penalty of $5,000.00 to $10,000.00 per violation, plus attorney's fees and costs, which also serve to punish wrongdoers and deter potential wrongdoers.NMSA 1978, §44-9-3(C).

Appellants concede that operation of the treble-damages sanction promotes the traditional aims of punishment but try to minimize the importance of this by labeling it a "civil punishment." [BIC 45] Labeling punishment "civil" does not

protect it from *ex post facto* violation concerns.*See Nunez,* 2000-NMSC-013, ¶46(label of 'civil' or 'criminal' is not dispositive of the true nature of the proceeding).

Appellants then cite *State v. Druktenis*, 2004-NMCA-013, 135 N.M. 223, 86 P.3d 1050 for the proposition that a statute does not violate the *ex post facto* clause if it is not a penal statute which disadvantages the offender. [BIC 21]In *Druktenis,* this Court joined "[v]irtually all federal circuits and state jurisdictions" in rejecting the argument that retroactive application of a sexual offender statute registration and notification requirement violates constitutional *ex post facto* prohibitions. *Id.* at ¶36. The *Druktenis* Court came to this conclusion only after careful application of the *Kennedy v. Mendoza-Martinez*factors. *Id.* at ¶¶36-37. This Court found "[t]he express purpose of [New Mexico's Sex Offender Registration and Notification Act] SORNA is to assist law enforcement to protect communities by requiring resident sex offenders 'to register with the county sheriff,' 'requiring the establishment of a central registry for sex offenders,' and 'providing public access to information regarding certain registered sex offenders.'" Id. at ¶19. However, application of the *Kennedy v. Mendoza-Martinez* factors in the case leads to the inescapable conclusion that the purpose and effect of FATA's treble damages provision is punishment.

e. The behavior to which the sanction applies is already a crime

The fifth factor is whether the behavior to which the sanction applies is already a crime. The wrongdoing targeted by FATA may arguably be prosecuted as crimes under the New Mexico criminal fraud statute, NMSA 1978, §30-16-6 (2006), and under the criminal provisions of the New Mexico Uniform Securities Act, NMSA 1978, §58-13C-508 (2009). Indeed, the language of FATA makes reference to the fact that the wrongdoing it targets may also be the subject of a criminal proceeding. *See* NMSA 1978, §44-9-9(C) ("no court shall have jurisdiction over an action brought pursuant to Section 5 of [FATA] when the action is based on allegations or transactions that are the subject of a criminal...proceeding"); *see also*NMSA 1978, §44-9-6(G) (referring to possible interference with "the state's investigation or prosecution of a criminal or civil matter arising out of the same facts"); *see also*NMSA 1978 §44-9-12(B) (again referring to a "criminal proceeding" which concerns the same transaction that is the subject of the fraud against taxpayers action).

f. There is no alternative purpose to which the sanction may rationally be connected

The sixth factor is whether there is an alternative purpose to which the sanction may rationally be connected. While recouping losses suffered by the state

are rationally connected to the purpose of remediating the wrong, receiving three times the actual damages suffered by the state, it certainly also has "an alternative purpose"—punishment and deterrence. In addition, the fact that FATA allows for the reduction of the treble damage award to double damages for a wrongdoer who cooperates with the Attorney General illustrates that the treble damages cannot rationally be connected to a purpose other than punishment. NMSA 1978, §44-9-3(D).

Furthermore, FATA's mandatory statutory penalties, which are imposed in addition to the mandatory treble damages, are plainly punitive and not tied in any way to the amount of losses actually incurred by the state. Moreover, as discussed above, a large portion of the treble damages are paid into a general fund and all the penalties are paid into the school fund, neither of which are tied in any manner to advancing any remedial aspects of FATA. *See* pages 9-10 of this Answer Brief.

g. Even if one were to accept the alternative purpose of compensation, the sanction appears excessive in relation to the alternative purpose assigned.

Even if a court were to accept a purpose other than punishment-retribution and deterrence, the final factor is whether the sanction appears excessive in relation to the alternative purpose assigned. A mandatory award of three times the actual damages suffered, as well as mandatory penalties of $5,000.00 to $10,000 per

violation, is excessive in relation to the purpose of compensating the State for its loss.

Having applied the correct legal analysis as set forth by an abundance of caselaw from both the state and federal supreme courts, appellate courts and district courts, the lower court herein came to the correct conclusion—retroactive application of FATA is unconstitutional.

B. Cases Interpreting the FCA Are Instructive

Appellants urge this Court to ignore all caselaw applying the False Claims Act (FCA), the federal counterpart to FATA, because "FATA incorporates several major textual changes from the FCA" which allegedly transform FATA into a purely civil statute.[7] [BIC 9]

First, Appellants assert that "the FCA was not intended to be retroactive" whereas FATA contains a retroactivity clause. [BIC 10] However, including a retroactivity clause does not make the retroactive application of the statute constitutional. Appellants also maintain that FATA and the FCA are dissimilar because FATA has no statute of limitations and the FCA has a six-year statute of limitations. [BIC 10] Absent from the Appellants' argument is how this difference

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[7] Yet, on pages 31-32 of the Brief in Chief, Appellants cite to an FCA case for authority. [BIC 31-31, *citing United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)]

ties into their claim that FATA imposes only civil penalties while the FCA has been found to impose punishment.

Appellants next argue that because the FCA contains criminal provisions whereas FATA does not, retroactive application of FATA is constitutional. [BIC10]Appellants proclaim, without cited authority, that the reason courts have not allowed retroactive application of the FCA is because this would allow retroactive application of the FCA's criminal punishment provision of "up to five years" in prison. [BIC 21] However, all cases cited by Appellees herein construing the FCA are civil cases, analyzing the civil provisions of the FCA. Not one decision is based on the fact that the FCA provides separate criminal penalties in certain cases when brought by the government. Thus, the distinction is not a valid reason to distinguish the cases interpreting the FCA.

Next Appellants argue, again without citation, that because the New Mexico legislature stated nineteen times in the statutory text that FATA is a civil statute, and presumably the FCA does not have such references in its text (although Appellants do not claim that it does not),[8] FATA can be applied retroactively. [BIC10] This argument flies in the face of established New Mexico caselaw

[8] For the record, Section 3730 of the FCA alone uses the term "civil" eighteen (18) times in relation to the terms "action", "procedure", "matter", "investigation", "suit", "penalty", and "hearing". 31 U.S.C. §3730.

stating that the labels criminal and civil cannot be utilized to defeat the applicable protections of constitutional law. *SeeNunez,* 2000-NMSC=013, ¶46.

Appellants' fourth distinction between the FCA and FATA is that FATA's remedies are in addition to state common law and, unlike the remedies provided for in the FCA, the remedies found in FATA are simply "more effective" remedies for conduct already actionable under laws existing pre-FATA. [BIC 11] However, FATA, like the FCA, creates an entirely new cause of action by granting standing to private citizens to bring suit for false claims made to the state; thus, FATA is not simply codification of existing common law. Consequently, this distinction between the FCA and FATA is also meritless.[9]

Finally, Appellants argue that FATA can be applied retroactively because Section 44-9-3(A)(9) imposes a reporting and restitution requirement on the beneficiaries of a false claim. [BIC12] Once again, Appellants do not provide any legal analysis making the connection between this fact and the constitutionality of applying FATA retroactively. Appellees Bland and Contarino will not try to guess the logic behind the argument.

In an effort to convince this Court to ignore caselaw interpreting the FCA, Appellants cite the recent New Mexico Supreme Court decision *San Juan*

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[9] See pages 28-30 of this Answer Brief for a more thorough rebuttal of Appellants' argument thatthe conduct which FATA targets has always been punishable under existing statutory and common law.

Agricultural Water Users Asso. v. KNME-TV, 2011-NMSC-011, __ N.M. __, 257 P.3d 884. *San Juan Agricultural*is a New Mexico Inspection of Public Records Act (IPRA) case. *Id.* at ¶1. The *San Juan Agricultural* Court declined to follow federal caselaw interpreting the federal Freedom of Information Act as to the narrow issue before it--- standing to bring suit. *Id.*at 38. However, unlike *ex post facto* concerns, standing in a state court is a very different inquiry than standing in a federal court. In state court, standing is only a statutory inquiry. *Id.* at ¶8 (The state statute governs who has standing to sue). Yet, in federal court, standing is both a statutory inquiry as well as a federal constitutional inquiry. *Id.* at ¶ 39 ("Federal courts are constrained by the limited federal jurisdiction delegated to them under Article III of the United States Constitution"). To the contrary, *ex post facto* constitutional concerns are rooted in both the state and federal constitutions. Both the United States and the New Mexico Constitutions prohibit any law which renders an act punishable in a manner it was not punishable when it was committed. *See* U. S. Const. art.I, §10 and NM.Const. art.II, §19.

C. Appellants' Assorted Arguments Urging this Court to Reverse the District Court are Unpersuasive and Legally Unsound

Finding no help in the applicable caselaw, Appellants utilize snippets of inapplicable caselaw to create a mish-mash argument that the District Court's opinion should be reversed. None of these arguments have merit.

1. *FATA increases penalties for the targeted actions and creates standing for private citizens.*

Appellants argue that FATA's retroactively punitive components are constitutional because the conduct which FATA targets has always been punishable under existing statutory and common law. Appellants suggest that "FATA simply provides more effective remedies for the pre-existing common law torts... and makes no changes in the substantive civil law." [BIC 11] Not only is Appellants' argument factually incorrect, it is legally unsound.

To begin with, the treble damages provision found in FATA is mandatory, while common law punitive damages are discretionary. *Compare* NMSA 1978, §44-9-3(C), *and , e.g.*UJI-13-1827 NMRA (a jury may award punitive damages). In *Louis Vuitton S.A. v. Spencer Handbags Corp.,* 765 F.2d 966, 970-72 (2nd Cir. 1985), the Court of Appeals for the Second Circuit recognized that retroactive application of an amendment to a statute converting treble damages from discretionary to mandatory would implicate constitutional *ex post facto* concerns.

An argument similar to Appellants' was made in *Resolution Trust Corp. v. S&K Chevrolet,* 868 F.Supp. 1047, 1062 (C.D. Ill 1994), where the plaintiff asked the court to retroactively apply a RICO mandatory treble damages provision arguing "the punitive damages applicable to actions for common law fraud are far more onerous than the treble damages." The court refused to do so stating an

award of treble damages under RICO is mandatory whereas the award of punitive damages for common law fraud is discretionary. *Id.* at 1062.

The United States Supreme Court has also rejected an argument similar to Appellants' assertion that retroactive application of FATA is constitutional because fraud has always been prohibited. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the United States Supreme Court held that, even though employment discrimination was already prohibited, adding the availability of compensatory damages "would attach an important new legal burden to that conduct," "creating a new cause of action," and would cause a serious constitutional issue if applied retroactively. *Id.* at 282-84. A "statute increasing the amount of damages available under a pre-established cause of action" would, "if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a 'new disability' in respect to past events." *Id.* at 283. The Supreme Court refused to apply the new compensatory damages provision retroactively. *Id.* at 286.

Not only does FATA increase the amount of damages available and mandates the award of said damages, FATA also creates a new cause of action in that it grants standing to private citizens to pursue claims on behalf of the state. *See* NMSA 1978, §44-9-5.In *Hughes Aircraft v. U.S. ex rel. Schumer,* 520 U.S. 939 (1997), the United States Supreme Court explained, the FCA's grant of standing to private citizens to bring suit *qui tam* "essentially creates a new cause of

action" in favor of a private plaintiff "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft,* 520 U.S. at 949-950. The Court found that providing private citizens this standing retroactively created *ex post facto* problems. *Id.* at 950.

In the case at hand, the mandatory award of treble damages, and the grant of standing to a private citizen, create a new cause of action and penalties not previously available that are sufficiently different from those applicable under statute and common law before the passage of FATA. Thus, retroactive application of FATA would violate the *ex post facto* clause of the federal and state constitutions. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *See BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574 (1996).

Appellants assert that if FATA is found to impose punishment and therefore cannot be applied retroactively, all punitive damage awards are unconstitutional because punitive damages are awarded in cases in which defendants are not afforded the constitutional protections of a criminal trial. [BIC 42]. Predictably, Appellants offer no legal analysis to support this novel statement. The District Court's ruling below, that FATA's sanctions cannot be applied retroactively due to the *ex post facto* clause, is narrowly tailored and well-supported by a careful

examination of the relevant law to the facts of this case. It cannot and will not have the effect of making all punitive damage awards "unconstitutional."

2. *The District Court's Opinion does not conflict with the 1914 opinion* **Colbert v. Journal Publishing.**

Appellants, apparently unable to find more recent caselaw to support their position, devote a page and a half of the Brief in Chief to block quote dicta found in a 1914 New Mexico Supreme Court case, *Colbert v. Journal Publishing Co.,* 19 N.M. 156, 142 P. 146 (1914). [BIC 25-27] Appellants argue that the District Court's ruling below "violates" *Colbert* because *Colbert* "held" that an award of punitive damages in a civil case does not constitute punishment for a crime. [BIC 25-27]

The District Court's ruling below does not contradict the holding in *Colbert*. In *Colbert*, the 1914 New Mexico Supreme Court answered a question which today seems black letter law—whether a plaintiff in a tort case could recover punitive damages from the defendant when the tort also constituted a crime. "In *Colbert v. Journal Publishing Company, supra*, the question of the right to recover punitive damages was said to be one of <u>first impression</u> and the right was challenged." *Gray v. Esslinger*, 46 N.M. 421, 428, 130 P.2d 24 (1942) (emphasis added). The court was not faced with an *ex post facto* issue, and the *Colbert* opinion simply has no bearing on the issues before this Court, nearly one-hundred years later.

3. ***The District Court's Opinion does not conflict with the United States Supreme Court opinion* Hudson v. United States.**

Again utilizing block quotes in place of analysis, Appellants quote *Hudson v. United States*, 522 U.S. 93 (1997) with elliptical cites spanning nearly two pages.[10] [BIC 28-29] In *Hudson*, the United States Supreme Court corrected the errors it found in its earlier opinion *United States v. Halper*, 490 U.S. 435 (1989). The *Hudson* Court overruled *Halper* to the extent that *Halper* held a sanction must be found *solely* remedial to survive a double jeopardy challenge. *Hudson*, 522 U.S. at 101 ("In so doing, the [*Halper*] Court elevated a single *Kennedy* factor- whether the sanction appeared excessive in relation to its non-punitive purposes- to dispositive status. But as we emphasized in *Kennedy* itself, no one factor should be considered controlling as they 'may often point in differing directions.'")

Contrary to Appellants' assertion, the *Hudson* Court did not criticize *Halper* for looking at whether the sanction was punitive, but instead criticized the *Halper* court because this was the *only* inquiry. *Hudson*, 522 U.S. at 102. The *Hudson* Court explained that the proper inquiry was the one performed by the Court in

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[10]Notably, the first sentence of the block quote is incorrect. Appellants quote the *Hudson* Court as stating "[w]e have long recognized that the Double Jeopardy Clause does not prohibit the imposition of <u>any</u> additional sanction that could, 'in common parlance,' be described as punishment." [BIC 28] (emphasis added). However, the actual quote is "[w]e have long recognized that the Double Jeopardy Clause does not prohibit the imposition of <u>all</u> additional sanctions that could, 'in common parlance,' be described as punishment." *Hudson*, 522 U.S. at 98-99 (emphasis added).

Kennedy v. Mendoza-Martinez. See Hudson, 522 U.S. at 99. While Appellants prominently feature *Hudson* in their Brief in Chief as supporting their argument that the statutory scheme of FATA is not punitive in purpose or effect, Appellants all but completely ignore the analysis the *Hudson* Court stated was a "useful guidepost."*Id.* Appellants devote less than three pages of their forty-eight page brief addressing the *Kennedy v. Mendoza-Martinez* factors. The opinion relied upon by the Honorable John W. Pope, written by the Honorable Stephen Pfeffer, considered all the factors set forth in *Kennedy v. Mendoza-Martinez* and is therefore in accordance with the ruling in *Hudson*. [RP 4894, 3148-3161]

Appellants suggest that Judge Pfeffer was "semantically confused" when he wrote his opinion. [BIC 30-31] Appellants criticize Judge Pfeffer for using the terms "penal" and "punitive" and state that the Judge should have differentiated between civil punishment and criminal punishment. However, criminal penalties can be found in a civil penalty provision. *Hudson*, 522 U.S. at 99. "Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory schemes was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 99 *citing Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) (internal citation omitted). The "correct question" is whether a particular statutorily defined penalty is civil or criminal regardless of whether the

statute is labeled civil or criminal. *See Hudson*, 522 U.S. at 99. If the "correct question" were whether the statute imposes punishment for a crime or a tort, as suggested (without authority) by Appellant [BIC30], the abundance of caselaw applying the *Kennedy v. Mendoza-Martinez* factors would be obsolete.

4. *The District Court's Opinion is not at "odds with" the United States Supreme Court opinion* **United States ex rel. v. Hess.**

In an about face, the Appellants ask this Court to rely upon a federal case applying the FCA. Prior to page 31 of the Brief in Chief, Appellants urged this Court to not apply any caselaw interpreting the FCA due to the differences between the FCA and FATA. But at page 31, Appellants ask this Court to find that the ruling of the court below is at "odds with" *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). *Marcus* is a 1943 FCA case, interpreting a version of the FCA which did not contain a treble damages clause. *See Marcus*, 317 U.S. at 540 (whoever commits the prohibited acts shall pay double damages and a fine of two thousand dollars). Indeed, the *Marcus* court pointed out that double damages served a compensatory purpose because the "government's half of the double damages is the amount of actual damages proved" and suggested that treble damages such as those in the antitrust law would have been punitive. *Id.* at 550. In any event, in 2000, the United States Supreme Court clarified its earlier rulings:

> Although this Court suggested that damages under an earlier version of the FCA were remedial rather than punitive, that version of the statute imposed only double damages and a civil penalty of $2,000 per

> claim; the current version, by contrast, generally imposes treble damages and a civil penalty of up to $10,000 per claim.

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 785 (2000) (internal citations omitted). The Court noted that the very nature of treble damages in the modern version of the FCA reveals a punitive purpose. *Id.*at 786.

5. *The District Court's Opinion does not conflict with this Court's opinion* **State v. Kirby**

Appellants cite *State v. Kirby*, 2003-NMCA-074, ¶¶ 13, 24, 133 N.M. 782, 70 P.3d 722 for the proposition that a statute can create a crime within its statutory scheme but survive a double jeopardy challenge if the statute's purpose, as a whole, is remedial. [BIC 34] The Appellants then reason if such a statute can survive a double jeopardy challenge, than surely FATA survives an *ex post facto* challenge "since FATA creates no crime." *Id.* Appellants make this declaration without any factual or legal analysis of the *Kirby* decision. The logic behind Appellants argument is non-existent.

The issue in *Kirby* was "whether administrative imposition of the civil penalty contained in the New Mexico Securities Act bars, under New Mexico Double Jeopardy jurisprudence, a criminal prosecution under that Act for the same conduct on which the civil penalty was imposed." *Kirby*, 2003-NMCA-074 at ¶1. The *Kirby* court carefully applied the *Kennedy v. Mendoza-Martinez* factors and

only then concluded that the penalty provision of the Securities Act did not constitute criminal punishment. *Id.* at ¶38. It is distinguishable from the case at hand as follows: the Securities Act allows fines but not mandatory treble damages and the penalty does <u>not</u> come into play "only on a finding of scienter." *Id.* at ¶¶31-32.

6. Appellants' complaint attempts to apply FATA retroactively.

Appellants next make the absurd argument that they are not trying to apply FATA retroactively because the case was filed after FATA's effective date. [BIC 35] If there were no retroactivity problem as long as a lawsuit is not filed until after the statute's effective date, the entirety of *ex post facto* law is null and void. Not surprisingly, the cases cited by the Appellants come nowhere near supporting the fallacious argument, and none address retroactive application of a statute imposing what could be considered a penalty, civil or criminal.

In *Cutter Flying Serv., Inc. v. Straughan Chevrolet*, 80 N.M. 646,459 P.2d 350 (1969) the purpose of the challenged law, allowing an award of attorney's fees, was to discourage frivolous litigation.*Id.* at 649. The filing of a frivolous case was the conduct of concern to the legislature, so the attorney's fee award provision could be applied to any case not yet filed. In *City of Albuquerque v. State ex rel. Village of Los Ranchos*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991) the court refused to apply the New Mexico Prehistoric and Historic Sites Preservation Act

(PHSPA) retroactively. *Id.* at 617 ("Viewing the provisions of PHSPA in their entirety, we conclude that the legislature did not intend that the act be given retroactive application to the project in question"). The decisions in *State v. Mears*, 79 N.M. 715, 716, 449 P.2d 85, 86 (Ct. App. 1968) and *Lucero v Board of Regents of Northern N.M.*, 91 N.M. 770, 772, 581 P.2d 458, 460 (1978) both gave something to a citizen via retroactive application of a law as opposed to taking something away (credit for time served in *Mears* and tenure rights in *Lucero*).

7. *FATA is not simply an extension of the statute of limitations for torts committed against the state.*

Appellants assert that FATA simply extends the statute of limitation for torts committed against the state and therefore FATA does not implicate *ex post facto* concerns. [BIC36] FATA has no statute of limitations, and, as explained in depth above, it impermissibly reaches back twenty years increasing penalties for wrong doing long after the commission of said wrongdoing. It also newly creates standing for a private individual to bring suit. It is not simply an extension of the statute of limitations on existing law.

Furthermore, even if FATA simply extended the statute of limitations for torts committed against the state, "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's

liability." *Hughes Aircraft*, 520 U.S. at 950, *quotingChenault v. U.S. Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994) (internal quotation marks omitted). Not surprisingly, the case cited by Appellants in furtherance of their argument that an extension of the statute of limitation does not implicate *ex post facto* concerns did not involve an *ex post facto* issue. *See Grygorwicz v. Trujillo*, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550.

II. THE DISTRICT COURT BELOW CORRECTLY SEVERED THE RETROACTIVITY CLAUSE

The District Court below found that Section 44-9-12(A) of FATA, which permits its retroactive application, is unconstitutional because it violated the *ex post facto* and due process clauses of the federal and state constitutions. [RP 4894, 3165]. Appellants argue that the District Court should not have severed FATA's retroactivity clause but instead should have rewritten Section 44-9-12(A) and Section 44-9-3 to cure the constitutional problem. [BIC46]. Appellants ask that the judiciary rewrite FATA to disallow the treble damages provision for conduct occurring before the effective date of FATA and allow the remedy of double damages in its place. [BIC 47]

However, it is the legislature's responsibility to answer "the question of how to ultimately fix the constitutional problem." *State v. Frawley*, 2007-NMSC-057, ¶30, 143 N.M. 7, 172 P.3d 144."It is a fundamental principle that we cannot rewrite or add language to a statute in order to make it constitutional." *Id. citing*

United States v. Nat'l Treasury Employees Union,513 U.S. 454, 479 &ftn.26 (1995) (recognizing that courts have an "obligation to avoid judicial legislation" and therefore" refusing to rewrite the statute" at issue in the case).

An unconstitutional provision of a statute is severable only where:

> "the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid."

Baca v. New Mexico Dep't of Public Safety, 2002-NMSC-017, ¶8, 132 N.M. 282, 47 P.3d 441, *quoting Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 70 N.M. 226, 230-31, 372 P.2d 808, 811 (1962); *see also Clovis Nat. Bank v. Callaway,* 69 N.M. 119, 129, 364 P.2d 748, 755 (1961); *Giant Indus. Arizona, Inc. v. Taxation & Revenue Dep't,* 110 N.M. 442, 446, 796 P.2d 1138, 1142 (Ct. App. 1990). Under this standard, the only way to separate the offending portions of FATA is to sever the entire retroactivity clause.

First, the *ex post facto* problem is not solely the result of the treble damages provision but also encompasses the fact that FATA creates a new cause of action in a new plaintiff, thus altering the defendants' exposure for past conduct. *See* pages 29-30 of this Answer Brief for a thorough analysis of this issue. Like the treble damages provision, this "new cause of action" can constitutionally only be applied

prospectively. The Appellants' proposed severability of the treble damages provision does not solve all the *ex post facto* violations.

Second, the Appellants' proposed surgery on FATA, limiting the "treble damages" language to prospective application of the statute and allowing only "double damages" for retroactive application of the statute, changes the force and effect of FATA. The treble damages provision is inseparably entwined with the rest of the statute, and severing it would substantially alter the legislature's intent. For example, Section 44-9-3(D) provides incentive to wrongdoers who cooperate with the Attorney General by reducing the mandatory treble damages to mandatory double damages. The legislature's intent to "award" wrongdoers who cooperate with the Attorney General would be thwarted by excising the treble damages provision.

Furthermore, Section 44-9-7 dictates how the proceeds of a settlement or award shall be disbursed with the *qui tam* plaintiff first receiving his bounty, the state agency that lost money then being reimbursed for its losses, any statutory penalties being paid to the school fund, and all remaining proceeds split one half to a fund for the use of the Attorney General in enforcing FATA and one half to the New Mexico General Fund. Certainly this statutorily determined distribution of proceeds was predicated on the mandatory treble damages provision of FATA. Changing the treble damages provision would require a rewrite to properly reflect

how the legislature intended to distribute the proceeds so as to ensure that the agency is fully compensated for its loss.

The only way to satisfy the test set forth in *Baca* is to eliminate the retroactivity provision completely, leaving the prospective application of FATA intact thereby avoiding irrational conflicts in the way the various sections of the statute work together.

Finally, as the District Court below pointed out

> [S]ignificantly, the statutory scheme would prove unworkable if applied retroactively. Section 44-9-9.A precludes a court from having jurisdiction over a *qui tam* action brought by a present or former state employee "unless the employee, during employment with the state in good faith, exhausted existing internal procedures for reporting false claims and the state failed to act on the information provided within a reasonable period of time. If the FATA were applied to conduct that preceded its enactment, the jurisdictional requirement would be impossible to evaluate because the requirement for reporting such claims would not have existed at the time of the conduct and agencies would not have been on notice that they are to have internal procedures in place for reporting false claims.

[RP 4894, 3163]. Thus, the severing of the retroactivity clause is necessary for jurisdictional reasons as well as constitutional ones.

III. THE COURT LACKED JURISDICTION OVER THE STATE DEFENDANTS

As alternative grounds for upholding the dismissal of this action as against Appellees Bland and Contarino, they ask that this Court find the District Court lacked jurisdiction over them. A jurisdictional challenge can be raised at any time,

regardless of whether the trial court has addressed it. *Garcia v. Rodey, Dickason, Sloan, et al.,* 106 N.M. 757, 760, 750 P.2d 118 (1988).

Liability of public employees acting within their scope of duty is governed by the New Mexico Tort Claims Act, NMSA 1978, §§41-4-1, et seq. (TCA). The TCA defines the scope of liability for government entities and their employees by (1) retaining immunity for torts not specifically waived by the TCA, *see* Section 41-4-2(A); and (2) waiving immunity and recognizing liability, subject to certain protections, for employees acting within their scope of duty. *See* NMSA 1978, §41-4-4.

"[P]ublic employee" means an officer, employee or servant of a governmental entity, including "persons acting on behalf of in service of a governmental entity in any official capacity, whether with or without compensation." NMSA 1978, §41-4-3(F)(3). Although Appellants' complaint does not expressly state whether Appellees Blandand Contarino were public or private actors, an examination of the Complaint clarifies that they fall within the definition of "public employee" under the TCA. At all times relevant to the claims stated in the complaint, Appellee Bland was the State Investment Officer and a trustee of the state Education Retirement Board. [RP 138-139] At all times relevant to the claims stated in the complaint, Appellee Contarino was an employee of the State of New Mexico and served as Chief of Staff to or agent of the Governor. [RP 139]

The TCA grants all government entities and their employees general immunity from actions in tort, and waives that immunity only in certain specified circumstances. *See* NMSA 1978, §41-4-4. The areas for which immunity is waived under the TCA are quite specific. *See, e.g.,*NMSA 1978, §41-4-6 (waiver of immunity for negligence in the operation or maintenance of buildings, public parks, machines, or equipment), §41-4-7 (operation of airports), §41-4-8 (public utilities exception), §41-4-9 (medical facilities), §41-4-10 (health care providers), §41-4-11 (highways and streets), §41-4-12 (police officers). Sections §41-4-4 through §41-4-12 provide a complete list of exceptions to an otherwise blanket sovereign immunity. *Luboyeski v. Hill,* 117 N.M. 380, 383, 872 P.2d 353,356 (1994).

Appellants' FATA claims are barred. Section 44-9-3(C) sets forth the penalties recoverable against "[a] person who violates" the Act. Section 44-9-2(D)'s definition of "person" does not include the state or any of its political subdivisions. In fact, not only is "state" separately defined in Section 44-9-2(E), but both FATA and the complaint in this case contemplate that the State of New Mexico is the wronged party, and that any damages recovered will be on behalf of the state, not that the state will be liable for damages. Because FATA does not waive immunity for state employees who violate the Act, Appellants' FATA claims

against Appellees Blandand Contarino, who fall under the definition of a state employee, are barred.[11]

While the TCA does not foreclose the possibility that a separate statutory act may waive immunity for acts not enumerated in Sections 41-4-4 through 41-4-12, any waiver contained in another statutory scheme must be explicit. For example, in *Luboyeski,* the New Mexico Supreme Court held that the New Mexico Human Rights Act specifically waived immunity by providing for an award of damages against "'the state and [any] of its political subdivisions' that violate" the provisions of the Human Rights Act. *Id.* at 384 (internal citation omitted).However, there is no similar language in FATA. Therefore, Appellants' FATA claims are barred by the TCA.

CONCLUSION

This Court should affirm the decision of the district court below.

Respectfully submitted by:

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[11] Recently, the Honorable Raymond Z. Ortiz ruled that there is no waiver of sovereign immunity as to FATA claims. *Joseph Ray v. State of New Mexico Corrections*, First Judicial District Court, No. D-101-CV-2009-03864, Order Granting Partial Motion to Dismiss, filed October 15, 2010 [RP 4241-4244]

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CERTIFICATE OF SERVICE

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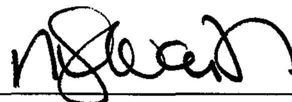

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