IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiffs–Appellants,

vs.

No. 31,421

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

Defendants–Appellees.

Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable John W. Pope, Judge

ANSWER BRIEF OF TOPIARY DEFENDANTS

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ORAL ARGUMENT REQUESTED

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Certificate of Compliance

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 10,973 words. The brief was prepared and the word count determined using Microsoft Office Word 2003 (11.8328.8333) SP3.

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SUMMARY OF PROCEEDINGS

This is the second of two similar lawsuits brought by former New Mexico Educational Retirement Board ("ERB") employee Frank Foy attacking the management of the investment portfolios of the ERB and of the New Mexico State Investment Council ("SIC"). Foy alleges a vast conspiracy involving supposed fraud and political corruption in connection with numerous investment transactions undertaken by the ERB and SIC over a multi-year period. Blaming fraud, rather than the unprecedented dislocation of the world's financial markets in 2007-09, as the reason for the state's investment losses, Foy has sued approximately 100 individuals, financial institutions, accounting firms and law firms that had any involvement with the investments at issue. In total, he seeks to recover more than $1.5 billion – over $1 billion of which he admits represents damages in excess of any actual losses suffered.

Foy brought both lawsuits under the state's *qui tam* statute, the New Mexico Fraud Against Taxpayers Act ("FATA"), NMSA 1978, §§ 44-9-1 through -14 (2007). This Act allows a private citizen to sue in a representative capacity on the state's behalf in certain instances involving alleged procurement of state funds by fraudulent means. FATA provides for treble damages, as well as fines and an award of attorneys' fees, and rewards a successful plaintiff with a bounty of 25-30% of any recovery obtained. NMSA 1978, § 44-9-7(B). Even without FATA,

affected state agencies and/or the Attorney General have long had other means at their disposal to protect their rights and to recover for any claimed wrongdoing. But without FATA, Foy – as a private citizen with no claimed injury of his own – would have no basis on which to bring either of these suits, much less to recover treble damages, fines, and attorneys' fees.

FATA was enacted with an effective date of July 1, 2007. 2007 Laws of New Mexico ch. 40, § 16. As Foy freely admits, however, a significant portion of the alleged conduct which forms the basis for his claims in each of these lawsuits occurred well before that date – "as early as 2003 or 2004." (Br. in Chief at 4.) In light of this chronology, the district court was asked to determine whether the *ex post facto* clauses in the federal and state constitutions permit FATA to be applied retroactively to conduct that already occurred prior to the statute's enactment.

Foy's Two Lawsuits

In 2008, Foy filed his first *qui tam* lawsuit under FATA. *State ex rel. Frank C. Foy and Suzanne B. Foy v. Vanderbilt Capital Advisors, LLC, et al.*, No. D-101-CV-2008-1895 (N.M. First Judicial District July 14, 2008) ("*Vanderbilt*"). That lawsuit names 36 defendants and is pending before Judge Stephen Pfeffer, and concerns certain investments managed by Vanderbilt Capital Advisors, LLC.

Foy filed the present lawsuit in June 2009. This case names many – but not all – of the same defendants from *Vanderbilt*, and includes more than twice that

number of new defendants. This case is pending before Judge John Pope, and concerns a series of unrelated investments made by the ERB and SIC.

The Lower Courts' FATA Retroactivity Rulings

On April 28, 2010, following hundreds of pages of briefing from the parties and the Attorney General,[1] Judge Pfeffer issued a 31 page decision in *Vanderbilt* finding that the retroactive application of FATA, as authorized by Section 44-9 12(A) of the statute, was unconstitutional. (*See* R.P. 3164-65.) Judge Pfeffer noted that FATA includes mandatory treble damages as well as mandatory penalties and attorneys' fees (R.P. 3149); that the treble damages remedy here would create a "sanction [that] would exceed actual damages" by hundreds of millions of dollars, which "would be excessive with respect to any possible alterative non-punitive, or remedial, purpose" (R.P. at 3161); and that "FATA's provision for joint and several liability could exacerbate the disproportional relationship between the sanction and any alternative non-punitive purpose . . .

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[1] Foy's suggestion that Judge Pfeffer challenged the constitutionality of the statute *sua sponte* (Br. in Chief at 5, 16) is incorrect. Defendants first raised the matter in two motions to dismiss filed while *Vanderbilt* was removed to federal court. *See State ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, No. 09-178, Motion by Defendants Citigroup Inc. et al. to Dismiss Plaintiffs' Claims, at 3 n.3 [Doc. 62], (D.N.M. Mar. 2, 2009); *id.* Vanderbilt Defendants' Motion to Dismiss Complaint, at 3 n.2, [Doc. 93] (D.N.M. March 11, 2009). After the case was remanded to state court, Judge Pfeffer requested and received extensive additional briefing on the subject from the parties and from the Attorney General, as *amicus curiae*.

[because] FATA's sanctions for particular defendants who played minimal roles and who may have never had much to gain financially could be exponentially excessive" (R.P. 3161). Based on these findings, Judge Pfeffer determined that FATA "is punitive in purpose or effect," and can be applied only prospectively. (R.P. 3164.)

Consistent with the directive of the statute to sever any unlawful portions but leave the rest of the statute intact, Judge Pfeffer severed the retroactive application but did not upset the prospective application of the statute. (R.P. 3171-72.) Declining Foy's invitation to create different damage regimes for different time periods, with only actual damages recoverable for the retroactive application of FATA but treble damages mandated for its prospective application, the district court said that Foy was asking it "to rewrite the statutory scheme to tease out a constitutionally acceptable cause of action." (R.P. 3172.) Because "this Court cannot assume the role of the Legislature and infer how that body would re-balance the various statutory provisions that depend on the overall structure it enacted," (R.P. 3172), Judge Pfeffer concluded that "[t]he provision that is severable is the retroactivity provision. Therefore, the entire statutory scheme is left in tact [sic] to address conduct that occurred after its enactment" (R.P. 3172).

Foy unsuccessfully sought interlocutory appeal of Judge Pfeffer's *Vanderbilt* ruling. In *Austin*, he raised the issue with Judge Pope, seeking a ruling that FATA

is constitutional. (R.P. 3245-50.) Following extensive briefing by the parties in this case, and with the benefit of Judge Pfeffer's ruling, Judge Pope ruled from the bench on May 13, 2011 that there had been "sufficient briefing on the question" so that the court "can decide it on paper". (Tr. (5/13/11) at 76, 79.) Judge Pope agreed with Judge Pfeffer (*id.* at 79) and adopted the *Vanderbilt* ruling (*id.* at 81). The court entered an implementing order to that effect on July 8, 2011, which explicitly "adopt[ed] and incorporate[d] the reasoning and analysis" contained in Judge Pfeffer's decision. (R.P. 4894, ¶ 5.) This Court then granted leave to pursue this interlocutory appeal. (R.P. 5183-85.)

Pending Dispositive Motions

At the same time as the parties asked Judge Pope to rule upon the retroactive application of the statute in *Austin*, the defendants moved to dismiss this lawsuit, among other reasons, for lack of jurisdiction. Specifically, FATA mandates that "[n]o court shall have jurisdiction over an action brought . . . by a present or former employee of the state [such as Foy] unless the employee, during employment with the state and 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." NMSA 1978, § 44-9-9(A). As an ERB employee from 1992-2008 (R.P. 147-48, ¶ 68), if Foy became aware of alleged fraud against the state, his primary duty as a state official was to report the misconduct in order to

provide the state with the opportunity to investigate and take any action it deemed appropriate. Foy did not exhaust available reporting mechanisms.

Furthermore, FATA independently deprives the district court of jurisdiction over the entire action when a *qui tam* plaintiff sues "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." NMSA 1978, § 44-9-9(B). Among the dozens of defendants Foy sued here are state officials, and Foy alleges that the ERB and SIC not only knew of the alleged misconduct but were complicit in it. He even goes so far as to claim that "the ERB and the SIC cannot be trusted to act in the best interests of the State of New Mexico." (R.P. 181, ¶ 165.) Because FATA was not intended as a means for a private citizen to challenge the decision making of an entire state agency, the defendants argued that the case was barred by the jurisdictional limitations of FATA.

At the same time that he adopted the *Vanderbilt* ruling on retroactivity, Judge Pope "tentatively" denied the jurisdictional motions, while saying he would allow the parties a further opportunity to persuade him to change his mind. (Tr. (5/13/11) at 77-81.) This interlocutory appeal suspended the additional briefing that was to occur on that subject. On September 27, 2011, this Court ruled that the parties may also raise the issue of whether this case should also be dismissed for lack of subject matter jurisdiction.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE.

Judge Pope's decision denying the defendants' motions to dismiss for lack of subject matter jurisdiction was erroneous as a matter of law. Because it is a fundamental principle that courts must ensure that they have jurisdiction over the subject matter of the dispute before proceeding to consider other issues, this Court need not wait for Judge Pope to turn his tentative ruling into a final ruling on the subject. *See Wilson v. Denver*, 1998-NMSC-016, ¶ 8, 125 N.M. 308, 961 P.2d 153 (raising *sua sponte* the issue of subject matter jurisdiction and directing dismissal of certain claims for failure to meet statutory limitation on right to file suit); *Davidson v. Enfield*, 35 N.M. 580, 583-84, 3 P.2d 979, 980 (1931) ("[T]he court must pause, consider, and determine its jurisdiction before proceeding further. . . ."). Because any such ruling by Judge Pope would be reviewed by this Court *de novo*, *see, e.g.*, *Ottino v. Ottino*, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37 (filed 2000), the fact that the district court expressed its ruling as tentative will not impede this Court's analysis. If this Court determines that it lacks jurisdiction over this case, then adjudication of the constitutional issues can be avoided. *See, e.g.*, *State v. Santiago*, 2010-NMSC-018, ¶ 10, 148 N.M. 144, 231 P.3d 600.

Under FATA's express language, this Court lacks jurisdiction and must remand this action with instructions to dismiss for two independent reasons: (i)

Foy's failure to exhaust administrative remedies and (ii) Foy's decision to sue State officials.

A. Foy Failed to Exhaust Internal Remedies.

Foy was an ERB employee from 1992-2008 (R.P. 147-48, ¶ 68, 178-79, ¶ 157.) Section 44-9-9(A) of FATA expressly requires a State employee to exhaust internal procedures before bringing a FATA claim:

> *No court shall have jurisdiction* over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act by a present or former employee of the state *unless the employee*, during employment with the state and 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.

NMSA 1978, § 44-9-9(A) (emphasis added). As Judge Pfeffer ruled in *Vanderbilt*, Section 44-9-9(A) imposes a "jurisdictional requirement" that "precludes a court from having jurisdiction over a *qui tam* action brought by a present or former state employee" unless the listed conditions are met. (R.P. 3163.)

Other New Mexico courts similarly have ruled that statutory provisions such as FATA's exhaustion provision are prerequisites for subject matter jurisdiction. "[W]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171

P.3d 300 (internal quotation marks & citation omitted). *See also Neff v. State ex rel. Taxation & Revenue Dep't*, 116 N.M. 240, 243, 861 P.2d 281, 284 (Ct. App. 1993) (quoting New Mexico's Tax Administration Act, which provides (similar to FATA) that "'[n]o court of this state has jurisdiction to entertain any proceeding'" prior to exhausting internal channels within the agency); *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't*, 2006-NMSC-017, ¶ 11, 139 N.M. 589, 136 P.3d 999 (mandatory exhaustion required).

Moreover, FATA is patterned after the federal civil False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"). The United States Supreme Court has held that identical language in the FCA – "no court shall have jurisdiction over an action" – represents "a clear and explicit withdrawal of jurisdiction" under the conditions specified. *See Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 467-68 (2007). The same is true under FATA.

Foy has not even alleged that he exhausted existing internal procedures for reporting false claims. As such, he has not met a key jurisdictional prerequisite and the Court lacks jurisdiction to hear this case. *See, e.g., Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063 (10th Cir. 2002) (no jurisdiction because plaintiff failed to plead facts showing that he exhausted administrative remedies); *Richardson v. Fowler Envelope Co., L.L.C.*, 288 F. Supp. 2d 1215, 1222 (D. Kan. 2003) ("Failure to exhaust is a jurisdictional bar to filing suit.").

Foy's statement that he "did speak up repeatedly" (R.P. 179, ¶ 159) is insufficient to carry his burden of establishing that he exhausted available remedies prior to filing suit. *See Plumbers Specialty Supply Co. v. Enter. Prods. Co.*, 96 N.M. 517, 632 P.2d 752 (Ct. App. 1981); *see also Clark v. Las Cruces Pub. Sch. Dist.*, No. 10-307, 2010 U.S. Dist LEXIS 141387, at *4 n.3 (D.N.M. July 1, 2010) (plaintiff must plead facts demonstrating exhaustion of administrative remedies; court "need not rely on Plaintiffs[']' conclusory assertions"); *Gallagher v. Wilkinson*, No. 03-3193, 2003 WL 22170649, at **1 (6th Cir. Sept. 17, 2003) (affirming dismissal because defendant's "conclusory assertion that he filed a grievance was insufficient").

Foy's alternative and self-serving claim that there was no mechanism to report false claims (R.P. 179, ¶ 159; *see also* R.P. 3164) is plainly incorrect. To the contrary, numerous avenues existed for Foy to report claimed misconduct to state officials. For instance, Foy could have reported the alleged fraud to the Office of the State Auditor. *See Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 696, 448 P.2d 799, 802 (1968) ("[T]he office of state auditor was created and exists for the basic purpose of having a completely independent representative of the people, accountable to no one else, with the power, duty and authority to examine and pass upon the activities of state officers and agencies who, by law, receive and expend public moneys."). He could have reported it to the New

Mexico Attorney General, who is required to prosecute all actions in which the state has an interest and all actions by or against any state officer or employee in his official capacity. NMSA 1978, § 8-5-2 (1975). He also could have gone to the ERB's general counsel, to the Legislative Finance Committee, which has oversight responsibility for the fiscal practices of state agencies, *id.* §§ 2-5-3 (1965) & 2-5-4 (1967), to the General Counsel of the New Mexico Public Education Department, or to any other similar official. Foy concedes that he did not pursue (much less exhaust) any of these avenues before filing suit.

Foy speculates that "it would have been futile to follow" any procedures for reporting false claims because "the wrongdoers were thoroughly in control of the ERB" (R.P. 179, ¶ 159). Such conjecture cannot remedy his clear failure to report the alleged fraud. Foy does not allege that "the wrongdoers" had any control over the State Auditor, the Attorney General, or the Legislative Finance Committee. More importantly, FATA contains no futility exception. Under FATA's plain language, there simply is no jurisdiction over a *qui tam* action by a present or former state employee unless and until (i) the employee actually exhausts existing internal procedures for reporting false claims and (ii) the state fails to act on the information provided within a reasonable period of time. Where the legislative mandate for exhaustion is clear and jurisdictional, New Mexico courts will not employ the doctrine of futility. *See U.S. Xpress, Inc.*, 2006-NMSC-017, ¶ 12

(rejecting argument that statute's mandatory exhaustion requirement should be waived on account of the supposed "futility" of pursuing internal procedures).

B. The Court Lacks Jurisdiction Because the Amended Complaint Names State Officials as Defendants.

Section 44-9-9(B) of FATA separately deprives the district court of jurisdiction over the entire action when a *qui tam* plaintiff sues "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." NMSA 1978, § 44-9-9(B). This suit names as defendants two individuals who still held state office when they were sued – Gary Bland, the former State Investment Officer, and Bruce Malott, the former ERB Chairman (R.P. 138-39, ¶¶ 16, 21, 153, ¶ 84) – as well as a third official, David Contarino (Governor Richardson's former chief of staff) who had left office by the time the case was filed but who is sued in part for acts undertaken while he was a state official (R.P. 139, ¶ 22, 148-50, ¶¶ 70-74).

Foy claims that these state officials not only knew about the alleged fraud, but that they "carr[ied] out the fraudulent schemes at the ERB" with the other defendants (R.P. 164, ¶ 123); that "the wrongdoers were thoroughly in control of the ERB" (R.P. 179, ¶ 159); and 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" (R.P. 181, ¶ 165), such that each entire agency is alleged to be tainted. Because the alleged misconduct

was, under Foy's theory, "known" to those agencies, his FATA claim is barred by Section 44-9-9(B) and the entire lawsuit must be dismissed for lack of jurisdiction.

II. THE CONSTITUTIONAL BARS ON *EX POST FACTO* LAWS PROHIBIT RETROACTIVE APPLICATION OF FATA.

Separate from the jurisdictional bar to this suit, Judges Pope and Pfeffer properly held that FATA cannot be applied retroactively to conduct that occurred prior to its enactment. While this Court considers *de novo* the district courts' legal determination as to the constitutionality of applying FATA retroactively, *see, e.g.*, *State v. Morales*, 2005-NMCA-027, ¶ 8, 137 N.M. 73, 107 P.3d 513 (filed 2004), the district courts' rulings on that subject were correct as a matter of law.

Both the United States and New Mexico Constitutions prohibit the enactment of *ex post facto* laws. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any . . . ex post facto law"); N.M. Const. art. II, § 19 ("No ex post facto law . . . shall be enacted by the legislature."). The reason for this prohibition is well-founded in considerations of justice and fairness:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted . . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994) (footnotes omitted); *see Carmell v. Texas*, 529 U.S. 513, 531 & n.21 (2000) (the *ex post facto* clauses ensure that "legislative enactments give fair warning of their effect," reinforce the separation of powers, and provide "fundamental justice"). Consequently, before a court may apply a statute retroactively, it must determine "whether doing so would violate constitutional prohibitions against ex post facto laws." *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264 (filed 1999); *see also Landgraf*, 511 U.S. at 266.

Retroactive application of a statute will violate the *ex post facto* clauses if the law punishes the defendant for the conduct at issue. As the Supreme Court explained, "[a]n ex post facto law is one which renders an act *punishable* in a manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810) (emphasis added). Indeed, "[t]he mark 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, 160 (1960); *see also United States ex rel. Baker v. Community Health Systems, Inc.*, 709 F. Supp. 2d 1084, 1108 (D.N.M. 2010) ("The retroactive application of a law that is intended to punish violates the *ex post facto* clause of the United States Constitution.").

A. The Prohibition Against *Ex Post Facto* Laws Applies to Civil Cases.

Contrary to Foy's repeated refrain (*see* Br. in Chief at 10, 13-14, 21-26), laws need not be denominated "criminal" to be punitive. The prohibition against *ex post facto* laws applies equally to statutes deemed "civil," particularly when, as with FATA, the statute includes provisions for fines and damages that are punitive. As the New Mexico Supreme Court explained in *Nunez*,

> [I]n 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. We settled this matter in *State ex rel. Schwartz v. Kennedy*. In that case we concluded that if the penalty in a civil proceeding "may be fairly characterized only as a deterrent or as retribution, then the revocation is punishment; if the penalty may be fairly characterized as remedial, then it is not punishment ...."

2000-NMSC-013, ¶ 46, (quoting *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 630, 904 P.2d 1044, 1055 (1995)).

Federal courts interpreting the *ex post facto* clause have reached that same conclusion. *See Baker*, 709 F. Supp. 2d at 1108 n.25, 1109 ("the labels 'criminal' and 'civil' are not of paramount importance"; "civil statutes may also violate the Ex Post Facto Clause."). *See also United States ex rel. Sanders v. Allison Engine Co.,* 667 F. Supp. 2d 747, 753 (S.D. Ohio 2009) (same). Indeed, the Supreme Court noted in *Landgraf* that "'punitive' or 'exemplary' damages . . . share key characteristics of criminal sanctions," and applying the new punitive damage

provisions of the Title VII anti-discrimination statute (a civil statute) retroactively "would raise a serious constitutional question" under the *ex post facto* clause. 511 U.S. at 281.

Time and again, courts faced with civil statutes that, like FATA, include treble or punitive damage provisions recognized that those incremental damages, added by statute after the challenged conduct had occurred, raise *ex post facto* concerns. Thus, in *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966 (2d Cir. 1985) (which the Supreme Court cited approvingly in *Landgraf*), the Second Circuit ruled that retroactively applying the treble damages provisions of the Trademark Counterfeiting Act of 1984 (a non-criminal statute) could violate the *ex post facto* clause because "the Ex Post Facto Clause prohibits the enactment of laws that either impose punishment for acts not punishable at the time they were committed or increase punishment over that previously prescribed." *Id.* at 971-72. The court therefore construed the Trademark Counterfeiting Act to have only a prospective effect. *Id.* at 974.

Similarly, in *Resolution Trust Corp. v. S&K Chevrolet*, 868 F. Supp. 1047 (C.D. Ill. 1994), the court ruled that the 1989 amendments to the civil RICO statute should not be applied retroactively because they imposed treble damages and "retroactive application of a treble damages provision raises serious constitutional questions under ... the Ex Post Facto Clause." *Id.* at 1063. *See Rein v. Socialist*

People's Libyan Arab Jamahiriya, 162 F.3d 748, 761-62 (2d Cir. 1998) (imposing punitive damages under a new provision of a civil statute (the Foreign Sovereign Immunities Act) could potentially violate the *ex post facto* clause were it to be applied retroactively). If Foy were correct that "the *ex post facto clause* applies only to criminal statutes" (Br. in Chief at 21), these courts would have had no reason to be concerned about the *ex post facto* implications of the various civil statutes they addressed.[2]

Foy's suggestion that *Hudson v. United States*, 522 U.S. 93 (1997), changed the law and mandated that only "criminal" punishments are subject to the *ex post facto* clause (Br. in Chief at 27-30) simply misreads that decision. Quite the opposite, *Hudson* reaffirmed that a court must weigh the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (discussed below) – just as

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[2] Even though Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), referred to the *ex post facto* clause as covering "criminal" laws (and some subsequent cases have used similar language) (Br. in Chief at 22-25), he found the challenged statute in that case to be constitutional not because it was civil but because it was *not punitive*. 3 U.S. at 392. Rather, the challenged statute altered a probate court ruling deciding which of the litigants – passively, and by operation of a legal instrument not of their making – inherited a piece of real property.

Contrary to Foy's statement (Br. in Chief at 22), the Supreme Court has stated repeatedly that the *ex post facto* clause applies to *any* punitive statute, not just those labeled criminal. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 95-96 (1958) (prohibition against *ex post facto* laws applies to "statutes imposing penalties;" "[i]f the statute imposes a disability for the purposes of punishment-that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal" (citing *Calder v. Bull*)); *see also De Veau*, 363 U.S. at 160; *Fletcher*, 10 U.S. at 139.

Judges Pfeffer and Pope did here – in determining whether a statute "was so punitive in purpose or effect as to transform a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 97 (internal quotation marks & citations omitted). Moreover, subsequent Supreme Court decisions have continued to raise *ex post facto* concerns in the context of civil statutes. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92 (2003); *Seling v. Young*, 531 U.S. 250, 261 (2001).

The fact that FATA is denominated "civil", therefore, does not immunize it from analysis under the *ex post facto* clause.

B. FATA Increases the Liability for Completed Conduct.

FATA changes the consequences to defendants for their actions. That is precisely why there are *ex post facto* implications to its retroactive application. The United States Supreme Court was explicit in *Landgraf* that the relevant inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Foy maintains:

- FATA remedies are in addition to those available at common law. (Br. in Chief at 10 (citing NMSA 1978, § 44-9-14).)
- "FATA ... creates more effective remedies for conduct that was already against the law." (Br. in Chief at 11; *accord id.* at 38.)
- "FATA adds an additional and powerful restitutionary provision" and "imposes a reporting and restitution requirement on the inadvertent beneficiaries of an earlier false claim." (Br. in Chief at 12 (citing NMSA 1978, § 44-9-3(A)(9)).)

Further, as the district courts observed, FATA imposes mandatory treble damages, whereas at common law, punitive damages are discretionary. (R.P. 3170.) It imposes civil penalties of $5,000-$10,000 per violation on top of those treble damages – a provision which has no common law counterpart – and further departs from the common law by mandating an award of attorneys' fees and costs to a successful plaintiff. (R.P. 3170); NMSA 1978, § 44-9-3(C).

These are precisely the types of changes that courts note in finding that retroactive statutory changes create *ex post facto* problems. *See Louis Vuitton*, 765 F.2d at 971-72.

Foy argues that the *ex post facto* clause is not implicated because FATA addresses only conduct that was already unlawful (Br. in Chief at 10.). But the *Landgraf* Court was clear that even though employment discrimination was already prohibited, adding the availability of compensatory damages "would attach an important new legal burden to that conduct" and was tantamount to "creating a new cause of action [whose] impact on parties' rights is especially pronounced." 511 U.S. at 283. The Court went further and held that even if the statute at issue in *Landgraf* were merely viewed as "increasing the amount of damages available under a preestablished cause of action," applying it to conduct arising before the statute's effective date would "undoubtedly impose . . . a new disability in respect of past events." *Id.* (internal quotation marks & citation omitted). *See also Baker*,

709 F. Supp. 2d at 1109 ("Under *Landgraf*, a provision has retroactive effect if it would . . . increase a party's liability for past conduct *or* impose new duties with respect to transactions already completed" (emphasis added) (internal quotation marks & citation omitted); *U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 696 F. Supp. 2d 1190, 1196 (D. Idaho 2010) (amendments to FCA which expanded liability would "raise[] serious ex post facto concerns" if applied retroactively). Because FATA "attaches new legal consequences to events completed before its enactment," the fact that defrauding the state was already prohibited is irrelevant, just as discrimination was already prohibited prior to *Landgraf*.

Exacerbating the constitutional problem, FATA for the first time allows a private citizen, and not just the state, to pursue the claim. This very issue arose in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). There, the Supreme Court examined whether the FCA's 1986 amendments should be applied retroactively to pre-1986 conduct. These amendments expanded the class of claims which a *qui tam* plaintiff could bring, but they did not affect the government's longstanding rights and remedies to pursue its own claims. The Court explained:

> The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.... *In permitting actions by an expanded universe*

> *of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.*

520 U.S. at 949-50 (emphasis added). Therefore, the Court ruled that this "new cause of action" would be applied only prospectively, to post-1986 conduct.

As in *Hughes Aircraft*, FATA "essentially create[d] a new cause of action" when it gave private citizens the right to sue on the state's behalf. (*See* R.P. 3170 ("prior to enactment of the FATA, the possibility of qui tam actions did not exist in state law").) The same issue arose under New Mexico's other FCA analogue, the New Mexico Medicaid False Claims Act, NMSA 1978, § 27-14-1 to -15 (2004), which likewise created a new private right of action to sue with respect to fraud on the state in connection with certain health care payments. Citing *Hughes Aircraft*, the United States District Court held that retroactive application of that *qui tam* statute would also be impermissible:

> In *Hughes*, the basic statute already existed at the time of the lawsuit, and the court was called upon merely to consider the retroactive applicability of an amendment. In the instant case, the NM False Claims Act itself did not exist at the time Relator's action accrued. *Surely there is no better example of a legislative development that permits more plaintiffs to bring suit than was possible before the statutory enactment – literally creating a new cause of action.*

United States ex rel. Bogart v. King Pharmaceuticals, 410 F. Supp. 2d 404, 408 (E.D. Pa. 2006) (emphasis added), *aff'd* 493 F.3d 323 (3d Cir. 2007). Foy's

argument that fraud on the state was never lawful, accordingly, cannot immunize FATA from its *ex post facto* violation.[3]

Two recent decisions from other courts interpreting FATA have come to the exact same conclusion as Judge Pfeffer and Judge Pope. In *United States ex rel. Hendrix v. J-M Manufacturing. Co.*, No. 06-cv-0055 (C.D. Cal. Sept. 2, 2010), the court considered a claim brought under FATA and other state *qui tam* statutes. The court ruled that FATA "would . . . violate the Ex Post Facto clause if applied retroactively," expressly agreeing with *Vanderbilt* and dismissing the claim. *Id.*, slip op., attached as Ex. 1 to Civil Minutes, at 17. Similarly, a federal district court in Texas ruled that FATA may not be retroactively applied to conduct that took place prior to its effective date. *See United States ex rel. King v. Solvay S.A.*, ___ F. Supp. 2d ___, 2011 WL 4834030, at *46 (S.D. Tex. Oct. 12, 2011).[4]

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[3] Foy's illogical argument that "FATA can be viewed as not retroactive at all, since it applies only to cases filed after its effective date" (Br. in Chief at 35) was rebutted by Judge Pfeffer: "[T]his Court finds no indication in any of the applicable case law that an *ex post facto* law can be applied to conduct that antedates the enactment of the law so long as the statute was in place before an action is commenced and, furthermore, the suggestion defies logic. If the assertion were accepted, there would be no *ex post facto* concern for any action commenced after a statute is enacted, even when the sanction is clearly punitive." (R.P. 3166.)

[4] Although the court in *King* appears to have been unaware of FATA's retroactivity provision, NMSA 1978, § 44-9-12(A), its recognition that FATA "imposes new *penalties*" likely would have led it to the same conclusion even had it been aware of Section 12(A), (*King*, 2011 WL 4834030, at *46 (emphasis added).

C. Applying FATA Retroactively Would Violate the *Ex Post Facto* Clause.

In determining whether a law is "punitive" and subject to the *ex post facto* clause, the threshold question is whether "the intention of the legislature was to impose punishment." *Smith v. Doe*, 538 U.S. at 92. If the legislation is intended to be punitive, "that ends the inquiry" and the law violates the *ex post facto* Clause. *Id.* However, even if the legislature's intent "was to enact a regulatory scheme that is civil and nonpunitive," the *ex post facto* clause is still violated if the "statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). FATA fails both tests.

D. FATA Has a Punitive Intent.

1. The Statute Demonstrates Punitive Intent.

Because "[i]t is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself," the language of the statute is the starting place for determining whether FATA is intended to punish wrongdoers. *See Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236. FATA's plain language demonstrates that it was enacted to punish.

Sections 44-9-3(C)(1) and 44-9-3(C)(2) of FATA provide for treble damages and statutory penalties, and make those remedies both cumulative and mandatory.

These provisions reflect legislative intent that the civil remedy serve as punishment for the prohibited act and as a deterrent to future wrongdoing. *Hale v. Basin Motor Co.*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) (treble damage remedy under the Unfair Practices Act is punitive; "Multiplication of damages pursuant to statutory authority is a form of punitive damages."); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . .").

The federal False Claims Act also has a treble damages provision, and the courts have repeatedly held that this clause alone reflects a punitive intent. *See, e.g.*, *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (treble damages provision of FCA serves punitive as well as remedial function); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (FCA damages "are essentially punitive in nature"); *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (FCA's statutory penalties "clearly ha[ve] a punitive purpose" insofar as treble damages are recoverable in addition to the penalties); *Mortgages, Inc. v. U.S. Dist. Ct.*, 934 F.2d 209, 213 (9th Cir. 1991) ("[T]he 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." (emphasis added)), *holding limited on other grounds by United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995).

As one court recently summed it up, "[c]ourts have consistently recognized that the FCA punishes those who violate it, with particular attention being paid to the FCA's treble damages clause." *Allison Engine Co.*, 667 F. Supp. 2d at 755. *See United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 956 (10th Cir. 2008) ("[T]he FCA[] seeks to sanction and deter wrongful conduct through the imposition of up to treble damages."). Treble damage remedies under other states' *qui tam* statutes have similarly been held to demonstrate the legislature's punitive intent. *See, e.g., Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 237-38 (D. Mass. 2011).

Foy admitted in the trial court that one purpose of FATA's treble damages and civil penalties provisions is "to *punish* and *deter* persons who deceive the state." (R.P. 1278 (emphasis added).)[5] Because FATA's express terms reflect a punitive intent, the statute cannot be applied retroactively.

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[5] Judge Pfeffer recognized that FATA's "use of the term 'prosecute' also suggests a punitive purpose or effect, or legislative intent to punish." (R.P. 3163.) As he explained,

> Although the term "prosecution" may also be used in the context of civil litigation, the more common usage is in the pursuit of criminal actions. While not dispositive in and of itself, the Legislature's choice of terms is yet another indicator of the punitive nature of the scheme and bolsters the already conclusive indicators of that purpose and effect.

2. The Analogous Federal Statute Has a Punitive Intent.

In addition to looking at the statutory language, New Mexico courts look to "the statute's history and background" in determining legislative intent, and, where a statute has a federal analogue, they look to the legislative intent behind the federal statute as well. *See State v. Kirby*, 2003-NMCA-074, ¶¶ 13, 24, 133 N.M. 782, 70 P.3d 772 ("In enacting the [state Securities] Act, our Legislature undoubtedly shared the legislative intent behind the [federal] Securities Exchange Act of 1934 . . . ."). Consequently, in determining FATA's intent, it is appropriate to examine the intent of the FCA, as the district courts did here.

The False Claims Act is the "federal counterpart of New Mexico's FATA," and FATA "parallels [the FCA] in significant respects." (R.P. 3145.) This observation is hardly surprising since FATA, like many state *qui tam* statutes, was adopted in the wake of federal encouragement to adopt state law counterparts to the FCA. *See, e.g.*, Pamela Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1534-35 (2010) (twenty-three states and the District of Columbia have enacted statutes akin to the FCA and "[m]any of the state false claims statutes ... are of very recent vintage" and were enacted after Congress, in the 2005 Balanced Budget Act, "encourag[ed] each state to pass False Claims Acts mirroring the federal FCA").

Other states have repeatedly looked to FCA cases in construing and establishing the intent behind their own *qui tam* statutes. *See, e.g., Illinois ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp.*, 856 N.E.2d 1096, 1102-03 (Ill. App. Ct. 2006) (using FCA to interpret Illinois Whistleblower Reward and Protection Act); *In re Knox County ex rel. Envtl. Termite & Pest Control, Inc.*, No. E2007-02827-CO-AR3CV, 2009 WL 2144478, at *6 (Tenn. Ct. App. July 20, 2009) (same regarding Tennessee False Claims Act), *aff'd*, 350 S.W.3d 511 (Tenn. 2011).

In particular, other courts have used federal cases for guidance on whether state *qui tam* statutes can be applied retroactively, just as Judges Pope and Pfeffer did here. (R.P. 3145.) *See, e.g., Bogart*, 410 F. Supp. 2d at 407 (New Mexico Medicaid False Claims Act "closely tracks the language of the federal False Claims Act . . . . Thus, in order to determine whether the New Mexico statute applies retroactively, this court turns to the same question concerning the FCA."); *Schering-Plough*, 779 F. Supp. 2d at 234 (taking into account "Supreme Court precedent on the question of whether the FCA is punitive" in determining whether Massachusetts False Claims Act may be retroactively applied).

In *Allison Engine Co.*, a federal court undertook an exacting analysis of whether recent amendments to the FCA could be retroactively applied and concluded that because the FCA is a punitive statute, retroactive application was

impermissible. The issue arose because Congress amended the FCA through the Fraud Enforcement and Recovery Act of 2009 ("FERA") to permit defendants to be liable without proof that the alleged false statements were made "to get" a claim "paid or approved by the Government." 667 F. Supp. 2d at 750. FERA included a retroactivity provision, which applied this new standard to "all claims under the False Claims Act that are pending on or after [the effective date of June 7, 2008]." *Id.* at 750-51 (internal quotation marks & citations omitted).

Because *Allison Engine* was already pending when FERA was enacted, the defendants argued that retroactive application of the FCA amendments would expose them to liability for actions that did not violate the FCA at the time those actions were committed. They thus moved to bar retroactive application as unconstitutional. *Id.* The court determined both that Congress intended to impose punishment when it enacted the FCA and its amendments and that "even if Congress had not clearly intended for the FCA to punish those who violate it, the FERA amendments to the FCA would still be unconstitutional pursuant to the Ex Post Facto Clause" because "FCA sanctions are punitive in purpose and effect." *Id.* at 756, 758. *See United States v. Bornstein*, 423 U.S. 303, 309 n.5 (1976) (FCA was adopted "for the purpose of punishing and preventing . . . frauds.").

Similarly, in *Baker*, the federal district court in New Mexico faced the same issue, adopted the reasoning of the *Allison Engine* court and reached the same

conclusions. As the *Baker* court explained, a "careful reading of the legislative history indicates that Congress intended for the FCA to be punitive" and "courts, from the Supreme Court to circuit and district courts, have confirmed Congressional intent to impose punishment through the FCA." 709 F. Supp. 2d at 1110, 1111 (footnote omitted).

The punitive intent that prevents the FCA from being applied retroactively suggests a similar intent – and mandates a similar outcome – for its New Mexico counterpart.

3. Foy's Attempt to Distinguish the Federal FCA Is Unavailing.

Foy seeks to distinguish FATA from its federal counterpart in an effort to justify why the result here should be different. (*See* Br. in Chief at 9-12, 17-21.) However, none of the purported differences Foy highlights materially alter the *ex post facto* clause analysis. "[T]he glaring omission in Plaintiffs' argument and pleading is any explanation of how those improvements make the FATA non-punitive. . . . Plaintiffs have also acknowledged that the FATA's penalties are essentially the same as those that the federal courts have determined are punitive." (R.P. 3164.)

Foy's argument that FATA contains "an express retroactivity clause" while the FCA purportedly has none (Br. in Chief at 10) is both untrue and irrelevant. It is untrue because FERA's amendments to the FCA were enacted on May 20, 2009

and "include[] a retroactivity clause which provides that [certain] amendments . . . 'shall take effect as if enacted on June 7, 2008.'" *Allison Engine*, 667 F. Supp. 2d at 750-51 (quoting 31 U.S.C. § 3729 et seq.). It is irrelevant because the Constitution prohibits federal or state legislatures from enacting even "express" *ex post facto* laws. *See, e.g.*, *Schering-Plough*, 779 F. Supp. 2d at 233 (" [T]his Court cannot retroactively apply the MFCA if such application would collide with the Ex Post Facto Clause applicable to the states."); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 160 n.4 (3d Cir. 1998) ("Of course, a court may not follow an express command to apply a statute to pending cases if to do so would violate a constitutional proscription, such as those found in the Ex Post Facto . . . Clauses.").

Similarly, Foy does not explain why the presence or absence of (i) a statute of limitation (Br. in Chief at 10), (ii) a provision governing inadvertent beneficiaries of false claims (*id.* at 12), or (iii) a severability clause (*id.*) would matter to the analysis of whether FATA may be retroactively applied. Nor does FATA's classification as a "civil" statute distinguish it from the FCA in that regard, *see supra* Section II.A. Finally, the existence of preexisting torts that would have allowed the state to sue for its own damages (Br. in Chief at 38) does not obviate the need to undertake the *ex post facto* analysis, as noted above.

Indeed, the Massachusetts False Claims Act contains nearly every feature that Foy points to in his effort to distinguish FATA from the FCA. *Schering-*

Plough, 779 F. Supp. 2d at 233; Mass. Gen. Laws ch. 12, §§ 5-5(O). Despite these provisions, the United States District Court for the District of Massachusetts ruled that the *ex post facto* clause barred retroactive application of that statute because "the MFCA sanctions are 'so punitive either in purpose or effect' as to transform the MFCA into a criminal penalty for ex post facto purposes." *Id.* at 238 (quoting *Hendricks*, 521 U.S. at 361). The rulings by Judges Pfeffer and Pope are consistent with this precedent.

E. The Effect of FATA Is Punitive.

Even without legislative intent that FATA punish wrongdoing, a statute still may not be retroactively applied if the statutory scheme is "'"'so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'"'" *Allison Engine*, 667 F. Supp. 2d at 756 (quoting *Smith v. Doe*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361)); *see also United States v. Hawley*, No. --- F. Supp. 2d ----, 2011 WL 3295419, at *11-12 (N.D. Iowa Aug. 1, 2011) ("[T]he FCA's statutory scheme is so punitive either in purpose or effect as to negate Congressional intent to deem it civil.").

In evaluating whether a statutory scheme is "punitive either in purpose or effect," courts apply the seven factor test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 11, 132 N.M. 187, 46 P.3d 94 (applying factors to

determine if civil forfeiture was punitive in effect); *Kirby*, 2003-NMCA-074 (applying factors to determine if civil penalties under state Securities Act were punitive). Those factors are:

> (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; *Baker*, 709 F. Supp. 2d at 1111-12 (same); *see also* (R.P. 3148 ("All parties seem to agree that the purpose or effects of the FATA are analyzed using factors set forth in *Kennedy v. Mendoza-Martinez*").)[6]

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[6] Foy argues that the *Mendoza-Martinez* factors are "not a very accurate tool" and "not a good template for deciding retroactivity questions." (Br. in Chief at 43, 44.) However, his sole explanation is that in *State v. Druktenis*, 2004-NMCA-032, ¶ 29, 135 N.M. 223, 86 P.3d 1050, the court noted that the factors are "neither exhaustive nor dispositive." (Internal quotation marks & citation omitted.) Foy fails to reveal, however, that the *Druktenis* court went on to note that the New Mexico Supreme Court referred to the *Mendoza-Martinez* factors as "the test" to be applied, and that the Court of Appeals has consistently used that analysis. *Id.* ¶ 30 (internal quotation marks & citation omitted). Indeed, the court in *Druktenis* applied the very test which Foy would have the Court believe it instead discredited.

Foy's alternative argument that *Mendoza-Martinez* does not apply because it was a due process case rather than a retroactivity case (Br. in Chief at 43) ignores the fact that the test has been applied in several contexts, including for double jeopardy analysis, *see Hudson*, 522 U.S. at 99-102, and for *ex post facto* analysis, *see Smith v. Doe*, 538 U.S. at 97.

Although no one factor is controlling and the factors may even "point in differing directions," *Hudson*, 522 U.S. at 101, as Judges Pfeffer and Pope properly found, applying these criteria to FATA's retroactivity provision leads to a conclusion that the statute's effects are punitive (R.P. 3149-62).

1. Whether the Sanction Involves an Affirmative Disability or Restraint.

FATA does not expressly involve an "affirmative disability or restraint," most commonly understood as imprisonment. However, Foy claims that FATA authorizes removal of individuals from public office, injunctions against holding public office, and debarment from doing any further business with state agencies. (R.P. 189.) If true, then FATA would certainly involve a disability or restraint.

Indeed, in one of the cases cited by the Court in *Mendoza-Martinez*, 372 U.S. at 168 n.22, with regard to this factor, application of the statute at issue had sought "permanently to bar [the defendants] from government service" and "to bar their being hired by any other governmental agency." *See United States v. Lovett*, 328 U.S. 303, 313-14 (1946). The Court struck down that statute because it was "precisely within the category of congressional actions which the Constitution barred by providing that 'No Bill of Attainder or ex post facto Law shall be passed.'" *Id.* at 315 (quoting U.S. Const. art. 1, § 9). The Court explained that "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type," because, among other reasons, it

"stigmatized [the defendants'] reputation and seriously impaired their chance to earn a living." *Id.* at 314, 316.

2. Whether the Sanction Historically Has Historically Been Regarded as Punishment.

Treble damages provisions historically have been regarded as a form of punitive damages, *see Hale,* 110 N.M. at 320, 795 P.2d at 1012, just as the FCA treble damages provision, 31 U.S.C. § 3729(a)(1), is routinely characterized as punitive. *See Allison Engine*, 667 F. Supp. 2d at 754-57; *supra* Section II.D(1). "The U.S. Supreme Court's view that the FCA's treble damages provisions are punitive in nature tilt strongly in favor of concluding that the treble damages provision of New Mexico's counterpart 'has been regarded in our history and traditions as a punishment.'" (R.P. 3153.)

3. Whether the Sanction Comes Into Play Only on a Finding of Scienter.

FATA mandates that some level of scienter is required in order to establish liability. Every one of FATA's enumerated prohibited acts requires that the defendant act "knowingly", NMSA 1978, § 44-9-3(A), which is defined to require at least "reckless disregard" or "deliberate ignorance" of the truth or falsity of one's statements, *id.*, § 44-9-2(C). As Judge Pfeffer noted, "'[k]nowingly' constitutes a scienter element." (R.P. 3153 (citing *Allison Engine*, 667 F. Supp. 2d at 757; Black's Law Dictionary 1345 (6th ed. 1990)).)

Foy urges the Court simply to ignore this factor mandated by the United States and New Mexico Supreme Courts because he thinks it is "overbroad." (Br. in Chief at 45.) He cites no authority allowing him to re-write the *Mendoza-Martinez* factors, and he offers no argument challenging the district courts' determination that this factor "weighs in favor of concluding that the sanction is punitive." (R.P. 3153.)

4. Whether Operation of the Sanction Will Promote the Traditional Aims of Punishment – Retribution and Deterrence.

Foy is seeking over $1 billion in damages over and above any loss he claims the state may have suffered from its investments.[7] In *Nunez*, the New Mexico Supreme Court held that the civil forfeiture penalty of the Controlled Substances Act was punitive in part because "[t]he cost of the forfeiture is designed to exceed, if possible, any profitability from the crime," and therefore the penalty was not merely remedial, but also punitive. *Nunez*, 2000-NMSC-013, ¶¶ 64, 86.

Similarly, under FATA, the proposed billion dollar penalty greatly exceeds the actual damages caused by the misconduct. Moreover, FATA provides for additional penalties of $5,000 to $10,000 per violation on top of that treble damage penalty, plus an award of attorneys fees and costs. As Judge Pfeffer explained, "if

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[7] He states that the actual investment losses were "around half a billion dollars" (Br. in Chief at 4), but since he seeks treble damages and penalties, the excess amount claimed is necessarily at least one billion dollars more.

the FATA were not punitive in purpose or effects, simple damages, the costs of bringing the action, and reasonable attorney fees would cover any remedial purpose or effect."). (R.P. 3154.) *See also Mackby*, 261 F.3d at 830-31 ("[T]he FCA's treble damages provision, at least in combination with the Act's statutory penalty provision" constitutes "a payment to the government, at least in part, as punishment.").

Foy's extended reliance on cases like *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943), (Br. in Chief at 31-32), misses the mark because they deal with an earlier statute providing for lesser remedies. *Compare Vermont Agency*, 529 U.S. 784-85 ("[T]he current version of the FCA imposes damages that are essentially punitive in nature . . . . 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." (citations omitted)) *with Marcus*, 317 U.S. at 551-52 (goal of prior version of the FCA was merely to provide "restitution to the government of money taken from it by fraud" and, as such, "the device of *double damages* plus a specific sum *was chosen to make sure that the government would be made completely whole*" (emphasis added)). FATA, like the modern

FCA, provides for treble damages and other costs, fees, and penalties well in excess of any amount that could conceivably be necessary to make the state whole.

In some respects, FATA is even more punitive than the FCA. Under FATA, unlike the FCA, *see, e.g., Chandler*, 538 U.S. at 130-31, the costs of the investigation and attorneys' fees are not subsumed in the treble damage award, but are statutorily imposed in addition to the treble damages and supplemental penalties. NMSA 1978, § 44-9-3(C)(3), (4). *See also Schering-Plough*, 779 F. Supp. 2d at 236-37 (Massachusetts False Claims Act was "significantly more penal than the FCA" because, among other things, it provided for "costs and attorney's fees on top of the FCA penalties and trebling of damages"). In addition, as Judges Pope and Pfeffer observed, treble damages under FATA are mandatory (R.P. 3170), whereas punitive damages at common law are discretionary. The imposition of mandatory treble damages after the challenged conduct has already occurred represents an increased penalty for completed conduct that raises *ex post facto* concerns all by itself. *Resolution Trust*, 868 F. Supp. at 1062-63 (amendment to RICO statute adding mandatory treble damages "would increase . . . liability . . . for past conduct" and "raises serious constitutional questions under . . . the *Ex Post Facto* Clause. . . .").

Moreover, pursuant to Section 44-9-7(E)(1) of FATA, while "proceeds in the amount of the false claim paid and attorney fees and costs [are] returned to the

fund or funds from which the money, property or services came," all additional recoveries – *i.e.*, the treble damage component, after the *qui tam* plaintiff is paid his bounty, plus the statutory penalties – must be deposited into either a fund for the use of the Attorney General in enforcing FATA or the New Mexico General Fund, NMSA 1978, § 44-9-7(E)(3). *See also, e.g.*, *State ex rel. Nat'l Educ. Ass'n of N.M., Inc. v. Austin Capital Mgmt. Ltd.*, 671 F. Supp. 2d 1248, 1252 n.1 (D.N.M. 2009) ("Even after the defrauded agencies and the *qui tam* plaintiff are paid their shares of the recovery, it is possible that funds could remain to be divided between the general fund, the attorney general's office, and the school fund, because the FATA allows recovery of three times the actual losses suffered by the state.") The fact that the excess damages go to a general purpose fund and not to the agency that suffered the loss confirms that the excess damages do not serve a compensatory purpose; rather as Judge Pfeffer explained, such excess payments "are treated as criminal penalties would be treated." (R.P. 3155.)

This factor weighs in favor of a finding that FATA is punitive.

5. Whether the Behavior Covered to Which the Sanction Applies Is Already a Crime.

Foy's accusations of fraud against the state, if true, arguably could be prosecuted under statutes such as those covering criminal fraud, NMSA 1978, § 30-16-6 (2006), or under the criminal provisions of the New Mexico Uniform Securities Act, NMSA 1978, § 58-13C-508 (2009). Indeed, FATA clearly

contemplates that it covers behavior which is already a crime because it contains express provisions on how to deal with a FATA case procedurally in the face of parallel or threatened criminal proceedings, *see* NMSA 1978, §§ 44-9-6(G), 44-9-12(B), as well as a prohibition against filing a FATA case based on conduct that has already been publicly disclosed through a criminal prosecution, *id.* §44-9-9(C). Therefore, as the district courts held, this factor "weighs in favor of finding a sanction to be punitive." (R.P. 3157.)

Foy's historical observation that the FCA, as originally enacted in 1863, contained criminal provisions (Br. in Chief at 7, 10) in no way alters this conclusion; nor does it distinguish FATA from the FCA. It has been over 100 years since the FCA contained any criminal provisions and, today, the respective federal criminal and civil statutes regarding false claims impose different requirements. *See United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 444 & n.12 (6th Cir. 2005) (explaining that "[t]hough they were both part of the original False Claims Act passed in 1863, the civil and criminal provisions were severed in 1874 and codified in different portions of the United States Code"). Retroactively applying the FCA violates the Constitution not because that statute historically contained criminal provisions, but because its current "civil" provisions are punitive in both purpose and effect. The same is true of FATA.

6. *Whether an Alternative Purpose to Which it May Rationally Be Connected Is Assigned to the Sanction.*

A portion of the damages available under FATA are designed to compensate the state for damages suffered as a result of the alleged fraud. However, the treble damages prescribed by FATA are far in excess of what purely compensatory damages would require. Further, FATA's statutory penalties (which are imposed over and above the treble damages) are plainly punitive and are not tied in any way to the amount of damages actually incurred by the state. *See, e.g.*, *Nunez*, 2000-NMSC-013, ¶ 87 ("A statute that attempted to, for example, recompense the government for its investigation and prosecution costs, would devise a fine that reasonably approximated the dollar amount of the government's efforts, based upon average expenditures."). Indeed, the penalties and treble damages are awarded *separately* from *both* the *qui tam* plaintiff's costs and attorneys' fees *and* the attorney general or state agency's own costs and attorneys' fees, both of which are taxed against the defendant. NMSA 1978, §§ 44-9-7(D), (E). The damages and penalties serve no alternative purpose such as compensating either the state or the *qui tam* plaintiff for the costs of litigation.

7. *Whether the Sanction Appears Excessive in Relation to the Alternative Purposes Assigned.*

Because FATA damages significantly exceed the actual harm suffered by the state (including any costs associated with bringing the action), there is no

reasonable explanation for the extra "damages" recoverable other than a desire to punish. "If it is clear that the sanction greatly exceeds the quantum of harm, then it is punitive." *Nunez*, 2000-NMSC-013, ¶ 89.

In *Allison Engine*, the court concluded that "[s]ince the sanctions recoverable under the FCA can far exceed those necessary to compensate the Government for its loss, this factor weighs in [favor] of a finding that the FCA sanctions, particularly the treble damages provision, are punitive in nature and effect." 667 F. Supp. 2d at 757-58. The same holds true under FATA. As Judge Pfeffer noted, the possibility of hundreds of millions of dollars in sanctions over and above the amount of actual damages "would be excessive with respect to any possible alterative non-punitive, or remedial, purpose." (R.P. 3161.)

That conclusion is fully consistent with recent decisions from the United States Supreme Court, which has cautioned that cases involving exceedingly large claims of actual damages need far less of a punitive damage remedy to incentivize plaintiffs to bring suit or to serve any other traditional remedial aim. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 2631-32 (2008) (concern that treble damages are needed to provoke private enforcement "has no traction [in a] case of staggering damage [that would] inevitably provok[e] . . . and any number of private parties to sue"); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425-26 (2003) ("When compensatory damages are substantial," far

smaller punitive damages, "perhaps only" in an equivalent amount can be justified as "reasonable and proportionate" "punishment.").

Furthermore, as the district courts found, "FATA's provision for joint and several liability could exacerbate the disproportional relationship between the sanction and any alternative non-punitive purpose. That is, FATA's sanctions for particular defendants who played minimal roles and who may have never had much to gain financially could be exponentially excessive under joint and several liability provisions." (R.P. 3161.)

The district courts' finding that this factor cuts in favor of finding FATA to be punitive is amply supported, as is their conclusion that the balance of all seven *Mendoza-Martinez* factors weighs heavily in favor of finding that FATA is a punitive statute.

III. FATA's RETROACTIVITY PROVISION MUST BE SEVERED.

FATA contains a severability clause, 2007 Laws of New Mexico ch. 40 § 15, which states that "[i]f any part or application of this act is held invalid, the remainder of the act and its application to other persons or situations shall not be affected." FATA's retroactivity provision is invalid because retroactively applying FATA violates the *ex post facto* clause. Judges Pope and Pfeffer thus properly held that the retroactivity provision should be severed and the remainder of

FATA's statutory scheme "left in tact [sic] to address conduct that occurred after its enactment." (R.P. 3172.)

In the district court, Foy urged that even if retroactive application of increased damages is unlawful, he should be allowed to pursue ordinary compensatory damages for the pre-enactment period and treble damages and other enhanced remedies for the post-enactment period. (R.P. 3171-72.) On appeal, he now urges that he should be allowed to pursue double damages for the earlier period. (Br. in Chief at 47.) This Court, like Judge Pfeffer, should "reject[] Plaintiffs' invitation to rewrite the statutory scheme" (R.P. 3172) by creating a hodge-podge of different damage regimes for different periods of time. As Judge Pfeffer explained,

> Plaintiffs have essentially asked this Court to rewrite the statutory scheme to tease out a constitutionally acceptable cause of action. . . . [T]his Court cannot assume the role of the Legislature and infer how that body would re-balance the various statutory provisions that depend on the overall structure it enacted. This Court cannot rewrite the statutory scheme to make the retroactivity clause constitutional or to fashion penalties that would be non-punitive.

(R.P. 3172 (citing *State v. Frawley*, 2007-NMSC-057, ¶¶ 30, 31, 143 N.M. 7, 172 P.3d 144). Indeed, this Court's decision in *Frawley* makes clear that appellate courts "cannot rewrite or add language to a statute in order to make it constitutional," *Frawley*, 2010-NMCA-021, ¶ 30, as Foy urges the Court to do.

In any event, the *ex post facto* clause bars retroactive application of FATA not merely because FATA imposes treble damages, but because FATA is intended to impose punishment and has a punitive effect, and creates a new cause of action in a new plaintiff who could not previously have brought any claim in any amount. There is no quick fix for those deficiencies. The appropriate way to salvage FATA, as the Legislature requested, is to sever its retroactivity clause as the district courts did.

CONCLUSION

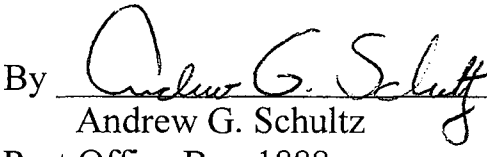
For all of the foregoing reasons, this Court should affirm the district court's decision and all claims involving conduct that predated the enactment of FATA should be dismissed.

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe oral argument will assist the Court in disposing of this appeal and therefore request it.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By 

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I hereby certify that on the 23rd day of January, 2012, a copy of the foregoing pleading was served upon all counsel of record by electronic mail.

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