IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ZOLTAN BARATI and MOTOROLA, INC., Respondents.	Case No. 1D13-4937

BRIEF FOR AMICUS CURIAE THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF PETITIONER

I. INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, small business owners, business leaders, doctors, and lawyers, all working toward the common goal of restoring predictability and personal responsibility to civil justice in Florida through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute, which is the first independent organization focused solely on civil justice in Florida, works to restore faith in the Florida judicial system and protect Floridians from the social and economic toll that is incurred from rampant litigation.

The Institute has a strong interest in apprising the Court of the significant adverse consequences for Florida's citizens if the power of the State of Florida to

control the disposition of *qui tam* actions brought on its behalf under the Florida False Claims Act, §§ 68.081–68.092, Fla. Stat. ("Florida FCA"), is not upheld. If allowed to stand, the lower court's actions would eviscerate the Attorney General's prosecutorial discretion and allow meritless litigation to be continued by profit-seeking plaintiffs even where the Attorney General determines it is not in the State's best interest. Unless the Court intervenes, the effect of the lower court's actions will be to invite private plaintiffs to pursue these meritless claims involving alleged fraud against the State in the hopes of profiting through a forced settlement. The elimination of the Attorney General's discretion would impose significant burdens on defendants, who would be forced to expend large sums of money defending against or settling meritless claims. Thus, the statutory authority of the Attorney General to voluntarily dismiss *qui tam* actions directly implicates the fairness, predictability, and efficiency of Florida's civil justice system.

II. SUMMARY OF ARGUMENT

The plain language of the Florida FCA establishes the Attorney General's unilateral power to dismiss a *qui tam* action without judicial oversight, even over the objections of the relator. This statutory dictate is further supported by the separation of powers doctrine established by the Florida Constitution, which vests prosecutorial power – and the prosecutorial discretion that comes with that power – in the Attorney General. Indeed federal courts have rejected, on constitutional

grounds, arguments that the similar dismissal provision of the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("federal FCA"), should be interpreted to include stringent judicial oversight. Without Executive Branch control of a *qui tam* suit, the *qui tam* enforcement provisions of the Florida FCA likewise would be rendered unconstitutional. Finally, public policy considerations confirm that the Florida FCA's dismissal provision must be enforced as written – *i.e.*, as giving the Attorney General the unrestricted right to dismiss a *qui tam* action.

III. ARGUMENT

A. The Plain Meaning of the Florida FCA Provides the Attorney General with Unfettered Discretion to Unilaterally Dismiss *Qui Tam* Actions Without Violating the Due Process Clause

The Florida FCA explicitly provides that "[t]he department [of Legal Affairs][1] may voluntarily dismiss the action notwithstanding the objections of the person initiating the action." § 68.084(2)(a), Fla. Stat. (2009). In originally drafting this language, the House of Representatives explained, "The subsection [] provides that the department may unilaterally dismiss the claim." Fla. H. Comm. on Judiciary, "Bill Analysis and Economic Impact Statement," CS/HB 1155, § 4, at 3 (1994), *reprinted in* John T. Boese, Civil False Claims and Qui Tam Actions app. I.5 (4th ed. Supp. 2013). Indeed, the language is unambiguous in giving the

[1] The Department of Legal Affairs, as part of the Attorney General's office, is "responsible for providing all legal services required by any department [of the state], unless otherwise provided by law." § 16.015, Fla. Stat.

Attorney General the power – with no timing restriction,[2] no notice or consent requirements, and no approval of the court[3] – to dismiss an FCA action. Any attempt to read such limitations into the statute violates its plain meaning.

The Florida FCA "is patterned after the Federal False Claims Act." Fla. H. Comm. on Judiciary, "Bill Analysis and Economic Impact Statement," CS/HB 1155, at 1 (1994). But the federal FCA's dismissal provision is narrower than the Florida FCA's: requiring a hearing and thus court approval before the government can dismiss a *qui tam* action.[4] Since the Florida FCA is explicitly modeled on the federal FCA, it was clearly an intentional act of the legislature to leave out the

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[2] This provision was amended in 2013 to "clarify[] that the department may dismiss actions at any point." Comm. Substitute for H.B. No. 935, Ch. 13-104, § 68.084, at 1, Laws of Fla. (Appendix A). This amendment did not alter the meaning of the provision in any way but rather only clarified the absence of any timing restrictions. Thus, there is no question of retroactivity as both the 2009 and 2013 versions of the provision would apply in the same way. *See Finley v. Scott*, 707 So. 2d 1112, 1116–17 (Fla. 1998) (accepting statutory amendment as clarifying legislative intent).

[3] This is in contrast to the Florida FCA's requirement that the court determine, through a hearing, that a proposed settlement "is fair, adequate, and reasonable under all the circumstances." § 68.084(2)(b), Fla. Stat.

[4] Many federal courts have found that even this hearing is really no more than a public notice of the exercise of prosecutorial discretion to dismiss the case, barring any evidence that the government's decision was arbitrary and capricious. *See, e.g.*, *Berg v. Obama*, No. 08-1933 (RWR), 2009 WL 2996674, at *1 (D.D.C. Sept. 21, 2009) (noting that the government has essentially "an unfettered right to dismiss a *qui tam* action" (quoting *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003))). Thus, Florida's conscious decision to not even include a hearing requirement must be read to implicate even less (*i.e.*, no court oversight of the Attorney General's unilateral power to dismiss a *qui tam* action).

hearing requirement of the similar federal FCA's dismissal provision and any associated need for the Attorney General to explain the basis for that dismissal.

Indeed, the Attorney General has inherent prosecutorial powers under the Florida Constitution, but a *qui tam* relator, who has not suffered personal injury-in-fact by the conduct giving rise to the FCA suit, does not have any powers under the FCA except as specifically granted to the *qui tam* relator by the legislature. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000) (explaining that a *qui tam* relator only has standing "as a partial assignee of the United States" per the language of the FCA).

The fact that the Florida FCA does not provide the relator with a hearing before unilateral dismissal of an action – whereas the federal FCA provides the possibility of a hearing[5] – is not a violation of due process. Due process only protects fundamental rights, which do not include any right to pursue a *qui tam* action. As noted, a relator only has rights to pursue a *qui tam* action as a partial assignee of the government, and the government – as assignor – can put whatever limit on that grant of rights it desires. *See Bd. of Regents of State Colls. v. Roth*,

[5] An in-person hearing is not guaranteed, even under the federal FCA. *See United States ex rel. Pentagen Techs. Int'l Ltd. v. United States*, No. 00 Civ. 6167 (DAB), 2001 WL 770940, at *7 n.2 (S.D.N.Y. July 10, 2001) (granting government's motion to dismiss without conducting a hearing where relators were given an opportunity to be heard on the government's motion through the filing of a formal opposition).

408 U.S. 564, 578 (1972) (finding no property right protected by due process where state statute creating and defining the "property" interest specifically limited that interest and thus concluding that respondent did not have a constitutional right to a statement of the reasons for and a hearing on petitioner's decision to terminate that interest).

Those limits – and all the process a relator is due – are spelled out in the text of the Florida FCA. By its terms, the statute does not give a relator a protected property interest in maintaining a *qui tam* action because there can be no expectation that the relator can continue the action where the action can be settled or dismissed without his consent.[6] *See, e.g.*, *Jones v. Miami-Dade Cnty.*, 816 So. 2d 824, 826 (Fla. 3d DCA 2002) (finding no entitlement to due process protections where the "plain language" of the contracts establishing the alleged property right in employment indicated there was no entitlement to continued employment); *McRae v. Douglas*, 644 So. 2d 1368, 1373 (Fla. 5th DCA 1994) ("As a result of this statutory framework, deputy sheriffs in Florida are not deemed to be employees of the sheriff, but rather, are appointees who serve at the pleasure of the

[6] The text of the Florida FCA is plain, such that a relator is well aware of the fact that the action might be discontinued. Indeed, here, the relator noted this possibility in one of his own early filings. *See* Pet. App., Tab A, p. 7 ("[T]he Florida Attorney General ... despite having previously declined to intervene ... may seek to voluntarily dismiss the action at any time notwithstanding the objections of the person initiating the action.").

sheriff. Because deputy sheriffs are not employees and both their selection and retention come under the absolute control of the sheriff, they have no property interest in their positions for purposes of the Fourteenth Amendment to the United States Constitution."). Because a relator does not have a protected property interest in pursuing a *qui tam* action, the Florida FCA legitimately circumscribes the process a relator is due when the Attorney General dismisses an action – by not giving the relator the right to object to government dismissal through a hearing as under the federal FCA. No further due process analysis is required.

And just as there is no requirement in the text of § 68.084(2)(a) that a hearing must be held prior to dismissal, there is likewise no requirement that the Attorney General intervene first before dismissing an action. Courts interpreting the federal FCA – which has nearly identical intervention language to the Florida FCA[7] – have read it the same way:

> [Section] 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation.

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[7] *Compare* 31 U.S.C. § 3730(b)(2) ("The Government may elect to intervene and proceed with the action ...") *with* § 68.083(3), Fla. Stat. ("The department ... may elect to intervene and proceed with the action, on behalf of the state ...").

Swift v. United States, 318 F.3d 250, 251 (D.C. Cir. 2003), *cert. denied*, 539 U.S. 944 (2003); *see also Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 933 (10th Cir. 2005), *cert. denied*, 546 U.S. 816 (2005) ("[W]e identify nothing in the language of § 3730(c)(2)(A) to suggest the authority of the Government to dismiss a *qui tam* action is dependent upon prior intervention in the case."); *United States ex rel. Piacentile v. Amgen, Inc.*, No. 04 CV 3983, 2013 WL 5460640, at *3 (E.D.N.Y. Sept. 30, 2013).

B. Any Interpretation of the Florida FCA That Interferes with the Attorney General's Discretion to Dismiss *Qui Tam* Actions Raises Serious Concerns That the *Qui Tam* Enforcement Provisions of the Florida FCA Are Unconstitutional

Reading the Florida FCA as requiring anything more from the Attorney General – such as validating its dismissal before the trial court – would implicate serious concerns regarding the constitutionality of *qui tam* enforcement of the Florida FCA.[8] In the federal context, courts that have considered the constitutionality of the *qui tam* enforcement provisions of the federal FCA – including the provision allowing for government dismissal – have determined that they do not violate the separation of powers doctrine only where the Executive is left with sufficient control over the action because "the degree of control by the

[8] *See State v. Lick*, 390 So.2d 52, 53 (Fla. 1980) ("This Court's obligation is to resolve all doubts as to the validity of a statute in favor of its constitutionality." (internal citations omitted)).

Executive Branch over a suit brought on behalf of the United States is determinative of the separation of powers issue." *Morrison v. Olson*, 487 U.S. 654, 695 (1988). *See Ridenour*, 397 F.3d at 934 (citing cases finding federal FCA constitutional based on the government's level of control over *qui tam* actions). And one of the most important means by which the Executive exercises control over a *qui tam* litigation is through its prerogative to terminate the action.

The Florida Constitution requires an explicit separation of powers in Article II, § 3:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

See Avatar Dev. Corp. v. State, 723 So. 2d 199, 201 (Fla. 1998) (recognizing that "[a]rticle II, section 3 declares a *strict separation of the three branches of government*" (emphasis in original)). The Attorney General is the chief legal officer of the state, and the Florida Constitution invests the Executive Branch – including the Attorney General – with the duty to "take care that the laws be faithfully executed...." Art. IV, § 1(a), Fla. Const. This language tracks the language in the Take Care Clause of the United States Constitution, which has been found to embody the separation of powers between the Executive and Judicial Branches of the federal government. *See* Art. II, § 3, U.S. Const. (entrusting the

Executive Branch with the duty to "take Care that the Laws be faithfully executed....").

And "there is considerable authority for the proposition that prosecutorial discretion is itself an incident of the constitutional separation of powers, and that as a result the courts are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over ... prosecutions." *State v. Cain*, 381 So.2d 1361, 1368 n.8 (Fla. 1980); *see also Johnson v. State*, 314 So.2d 573, 577 (Fla. 1975) ("[The] origin [of Florida's prosecutorial discretion] is found in the common law of England. Similarly in the Federal system the Federal Courts have consistently held that the discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.").

To require the Attorney General to justify its dismissal of a *qui tam* action or to intervene first in order to dismiss a *qui tam* action – and thus be required to establish good cause before the judiciary[9] – would call into question the constitutional validity of the *qui tam* enforcement provisions of the Florida FCA because "the exercise of ... prosecutorial discretion is not generally subject to

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[9] *See* § 68.084(3), Fla. Stat. ("When a person proceeds with the action, the court, without limiting the rights of the person initiating the action, may nevertheless permit the department to intervene and take over the action on behalf of the state at a later date upon showing of good cause.").

judicial review." *State v. Cotton*, 769 So. 2d 345, 351 (Fla. 2000).[10] As the Tenth Circuit explained with respect to the federal FCA:

> Although the *qui tam* provisions have thus far withstood constitutional challenge, we conclude that to condition the Government's right to move to dismiss an action in which it did not initially intervene upon a requirement of late intervention tied to a showing of good cause would place the FCA on constitutionally unsteady ground. Because we are to interpret statutes in a manner that renders them constitutionally valid, we should avoid an interpretation that unnecessarily binds the Government. Therefore, we conclude that the Government, in a case in which it has declined to intervene in the seal period, is not required to intervene with a showing of good cause under § 3730(c)(3) before moving to dismiss the action under § 3730(c)(2)(A). Nor do we engraft a good cause requirement on a government motion to dismiss.

Ridenour, 397 F.3d at 934–35; *see also Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (analyzing the degree of control the Executive maintained over a *qui tam* action and finding one of the key elements to be the Government's "unilateral power to dismiss an action notwithstanding the objections of the [relator]"); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (concluding that the

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[10] The court in *Cotton* also noted that the sentencing guidelines at issue – enacted by the legislature – were "[c]onsistent with this tenet" because "the prosecutor's decision to rely upon an enumerated exception in deciding not to seek a [particular] sentence is not made expressly subject to judicial review." 769 So. 2d at 351. The same is true with respect to the Florida FCA, which explicitly leaves out any hearing or judicial approval requirement in § 68.084(2)(a).

"Executive Branch retains 'sufficient control' over the relator's conduct" to fulfill its constitutional role in part because it has the ability "to decide that the case should be dismissed"); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754 n.14 (9th Cir. 1993) (concluding that the federal FCA provided "sufficient control" by the Executive over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties" largely because the Government could end the *qui tam* litigation).[11] The Tenth Circuit thus adopted the Ninth Circuit's constitutionally-based and very limited "rational basis" standard for the federal FCA's hearing requirement that "respect[s] the Executive Branch's prosecutorial authority" by requiring "no more" than a showing by the Government that its decision was not "arbitrary" or "irrational." *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1146 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).[12]

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[11] Similar reasoning was applied by an Illinois appellate court with respect to its state FCA. *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 516–17 (Ill. App. Ct. 2006) ("If we interpret section 4(c)(2)(A) of the Act to require judicial review of the Attorney General's decision to dismiss an action ... we give the court veto power over the state's decision to dismiss, essentially usurping the Attorney General's power to direct the legal affairs of the state and putting that power into the hands of the court. ... [I]t is the state's prerogative to decide which case to pursue, not the court's.").

[12] *Cf. Swift*, 318 F.3d at 253 (declining to adopt the *Sequoia* standard and concluding "that the function of a hearing when the relator requests one is simply

Florida, which has an even more explicit separation of powers delineated in its Constitution, does not even require a hearing before dismissal by the Attorney General. Thus, in order to avoid any constitutional question as to the legitimacy of its *qui tam* provisions, the Florida FCA must be interpreted according to the plain meaning of § 68.084(2)(a),[13] avoiding any judicial oversight of the prosecutorial discretion of the Attorney General.

C. Public Policy Concerns Also Favor the Attorney General's Unilateral Discretion to Dismiss *Qui Tam* Actions Under the Florida FCA

There are many public policy reasons that might cause the Attorney General to desire to dismiss a *qui tam* action, whatever the stage of that litigation. These would include, but certainly not be limited to, a desire to conserve the State's resources where it otherwise would be forced to participate in discovery or a lengthy trial. The legislature's decision not to include any explanation or hearing requirement in the Florida FCA prior to unilateral dismissal by the Attorney

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to give the relator a formal opportunity to convince the government not to end the case," with a possible exception for any evidence of fraud on the court).

[13] It is of no moment that § 68.084(2)(a) appears just after § 68.084(1), which provides for situations where "the state[] proceeds with the action." A federal court considering the similar placement of the dismissal provision in the federal FCA reasoned that the placement "is not crucial" because "[t]he controlling point is that to construe the statute [to require intervention prior to dismissal] would raise serious constitutional questions. ... The Court will not assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General." *Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992).

General makes clear that it is neither a court's nor a relator's place to judge or overrule these policy considerations, which are a key component of prosecutorial discretion. *See Sequoia Orange*, 912 F. Supp. at 1340 (establishing a deferential "rational basis" standard for the federal FCA's hearing requirement in order to "preserve the traditional authority of the executive branch to make policy choices about the litigation it pursues."). Indeed, the potential public policy concerns at play are obvious here where there is already record evidence that the contract at issue has been complied with fully.

And "[u]nlike the situations in which we fear that a party may be attempting to profit at the expense of unrepresented individuals, *e.g.*, class actions and shareholder derivative suits, we here have as plaintiff the very government department charged with seeing that the laws are enforced. We therefore ... can safely assume that the interests of all affected have been considered." *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1332 (5th Cir. 1980). In declining to intervene, the Attorney General has already signaled that the *qui tam* case is without sufficient merit or otherwise not worth the State's time and effort. To allow an individual relator – motivated solely by personal financial reward and with no special expertise in, or necessary regard for, these policy implications – to stymie the Attorney General's discretionary decision to dismiss a case makes no sense, violates the plain language of § 68.084(2)(a), and, if allowed, would

undermine the constitutionality of the *qui tam* enforcement provisions of the Florida FCA.

IV. CONCLUSION

For all the foregoing reasons, this Court should grant the State's Emergency Petition for Writ of Prohibition and confirm the Attorney General's unilateral power to dismiss *qui tam* actions.

Respectfully submitted,

William W. Large
Florida Bar No. 981273
Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, FL 32301
Telephone: (850) 222-0170
Facsimile: (850) 222-1098
william@fljustice.org

John T. Boese, *pro hac vice pending*
Kayla Stachniak Kaplan, *pro hac vice pending*
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street NW
Washington, DC 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003
john.boese@friedfrank.com
kayla.kaplan@friedfrank.com

Attorneys for proposed amicus, Florida Justice Reform Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail on November 14, 2013 to the following counsel of record:

Brian F. LaBovick
blabovick@labovick.com

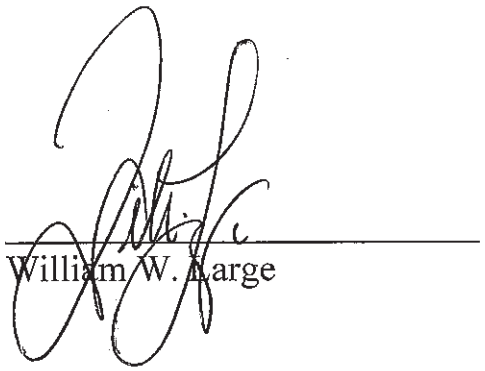
Gary Farmer
gary@pathtojustice.com

Brian A. Newman
Brandice D. Dickson
brian@penningtonlaw.com
brandi@penningtonlaw.com

Russell S. Kent
William E. Foster
russell.Kent@myfloridalegal.com
william.foster@myfloridalegal.com

David Moye
Tracy Moye
david@moyelawfirm.com
tracy@moyelawfirm.com
service@moyelawfirm.com

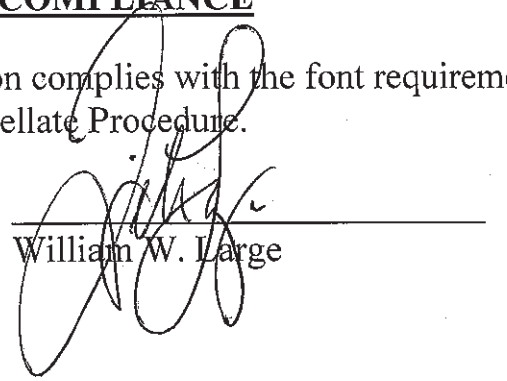
The Honorable Kevin J. Carroll
RybnickyM@leoncountyfl.gov



William W. Large

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.



William W. Large

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INDEX TO APPENDIX FOR AMICUS CURIAE
THE FLORIDA JUSTICE REFORM INSTITUTE

A. Comm. Substitute for H.B. No. 935, Ch. 13-104, Laws of Fla.

APPENDIX A

CHAPTER 2013-104

Committee Substitute for
Committee Substitute for House Bill No. 935

An act relating to the Florida False Claims Act; amending s. 68.081, F.S.; revising a cross-reference; deleting a statement of purpose; amending s. 68.082, F.S.; deleting, revising, and providing definitions; revising conditions under which a person is liable for a specified civil penalty; amending s. 68.083, F.S.; revising terminology; revising language concerning who may intervene or bring a related action after a person files an action under the act; creating s. 68.0831, F.S.; providing for contingent effect; providing a definition; authorizing the Department of Legal Affairs to issue subpoenas for specified purposes before the institution of civil proceedings; providing requirements for the content and service of subpoenas; providing that such subpoenas may not require specified protected documents or testimony; specifying that the department's power to require the appearance of witnesses or production of documents or other tangible evidence located outside the state is unaffected; providing for petitions to modify or set aside subpoenas; providing for orders to comply with subpoenas; providing for the examination of witnesses; providing for review of transcripts of testimony; authorizing the department to stipulate to protective orders of submitted documents and information; providing for natural persons who decline to testify or produce documents after asserting a privilege against self-incrimination to be ordered to testify or produce documents; providing for contempt to comply with such orders; providing for examination of testimony, answers, or materials by the person who produced such materials or answers; providing for construction; prohibiting specified actions by a person knowing or having reason to believe that a subpoena is pending; providing civil penalties; amending s. 68.084, F.S.; clarifying that the department may dismiss actions at any point; revising language concerning the costs to the department for continuing to receive pleadings and transcripts of an action after it has elected to withdraw; providing that the state may elect to pursue available alternative remedies, including administrative proceedings; specifying what constitutes a final finding or conclusion in an alternative proceeding that is binding on all parties to an action under the act; amending s. 68.085, F.S.; providing for successful plaintiffs to receive, in addition to a portion of the amount recovered, awards of expenses and attorney fees and costs; amending s. 68.086, F.S.; deleting references to awards of attorney fees to successful plaintiffs; revising provisions relating to awards of attorney fees to the department; amending s. 68.087, F.S.; revising terminology; revising provisions relating to dismissal of an action if substantially the same allegations or transactions as alleged in the action were publicly disclosed; amending s. 68.089, F.S.; providing for the treatment for statutes of limitations purposes of pleadings filed in interventions by the department; amending s. 68.09, F.S.; providing for estoppel as to certain matters following a final judgment or decree rendered in favor of the state or the

Federal Government in certain criminal proceedings; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 68.081, Florida Statutes, is amended to read:

68.081 Florida False Claims Act; short title~~; purpose.~~—

~~(1)~~ Sections 68.081-68.092 ~~68.081-68.09~~ may be cited as the "Florida False Claims Act."

~~(2) The purpose of the Florida False Claims Act is to deter persons from knowingly causing or assisting in causing state government to pay claims that are false or fraudulent, and to provide remedies for obtaining treble damages and civil penalties for state government when money is obtained from state government by reason of a false or fraudulent claim.~~

Section 2. Section 68.082, Florida Statutes, is amended to read:

68.082 False claims against the state; definitions; liability.—

(1) As used in this section, the term:

~~(a) "Agency" means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government.~~

(a)~~(b)~~ "Claim" means ~~includes~~ any ~~written or electronically submitted~~ request or demand, whether under a contract or otherwise, for money or~~,~~ property, regardless of whether the state has title to the money or property, that: ~~or services, which~~

1. Is presented ~~made~~ to any employee, officer, or agent of the state; ~~an agency,~~ or

2. Is made to a ~~any~~ contractor, grantee, or other recipient if the state ~~agency~~ provides or has provided any portion of the money or property requested or demanded, or if the state ~~agency~~ will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

(b)~~(c)~~ "Department" means the Department of Legal Affairs, except as specifically provided in ss. 68.083 and 68.084.

(c) "Knowing" or "knowingly" means, with respect to information, that a person:

1. Has actual knowledge of the information;

2. Acts in deliberate ignorance of the truth or falsity of the information; or

3. Acts in reckless disregard of the truth or falsity of the information.

No proof of specific intent to defraud is required. Innocent mistake shall be a defense to an action under this act.

(d) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(e) "Obligation" means an established duty, fixed or otherwise, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

(f)~~(d)~~ "State ~~government~~" means the government of the state or any department, division, bureau, commission, regional planning agency, board, district, authority, agency, or other instrumentality of the state.

(2) Any person who:

(a) Knowingly presents or causes to be presented ~~to an officer or employee of an agency~~ a false or fraudulent claim for payment or approval;

(b) Knowingly makes, uses, or causes to be made or used a false record or statement material to ~~get~~ a false or fraudulent claim ~~paid or approved by an agency~~;

(c) Conspires to commit a violation of this subsection ~~submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid~~;

(d) Has possession, custody, or control of property or money used or to be used by the state ~~an agency~~ and~~, intending to deceive the agency or~~ knowingly ~~conceal the property,~~ delivers or causes to be delivered less ~~property~~ than all of that money or property ~~the amount for which the person receives a certificate or receipt~~;

(e) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state ~~an agency~~ and, intending to defraud ~~deceive~~ the state ~~agency~~, makes or delivers the receipt without knowing that the information on the receipt is true;

(f) Knowingly buys or receives, as a pledge of an obligation or a debt, public property from an officer or employee of the state ~~an agency~~ who may not sell or pledge the property ~~lawfully~~; or

(g) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases ~~to conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the state ~~an agency,~~

is liable to the state for a civil penalty of not less than $5,500 and not more than $11,000 and for treble the amount of damages the state ~~agency~~ sustains because of the act ~~or omission~~ of that person.

(3) The court may reduce the treble damages authorized under subsection (2) if the court finds one or more of the following specific extenuating circumstances:

(a) The person committing the violation furnished the department ~~officials of the agency responsible for investigating false claims violations~~ with all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

(b) The person fully cooperated with any official investigation of the violation; or

(c) At the time the person furnished the department ~~agency~~ with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this section with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation;

in which case the court shall award no less than 2 times the amount of damages sustained by the state ~~agency~~ because of the act of the person. The court shall set forth in a written order its findings and basis for reducing the treble damages award.

Section 3. Subsection (7) of section 68.083, Florida Statutes, is amended to read:

68.083 Civil actions for false claims.—

(7) When a person files an action under this section, no person other than the department ~~on behalf of the state~~ may intervene or bring a related ~~an~~ action ~~under this act~~ based on the facts underlying the pending action.

Section 4. Effective upon the same date that HB 1297 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law, section 68.0831, Florida Statutes, is created to read:

68.0831 Subpoena.—

(1) As used in this section, the term "department" means the Department of Legal Affairs.

(2) Whenever the department has reason to believe that any person may be in possession, custody, or control of any documentary material or may have any information, which documentary material or information is relevant to a civil investigation authorized by s. 68.083, the department

may, before the institution of a civil proceeding thereon, issue in writing and cause to be served upon the person a subpoena requiring the person to:

(a) Produce such documentary material for inspection and copying or reproduction;

(b) Answer, under oath and in writing, written interrogatories;

(c) Give sworn oral testimony concerning the documentary material or information; or

(d) Furnish any combination of such material, answers, or testimony.

(3) The subpoena shall:

(a) Be served upon the person in the manner required for service of process in this state or by certified mail showing receipt by the addressee or by the authorized agent of the addressee.

(b) State the nature of the conduct that constitutes the violation of this act and that is alleged to have occurred or to be imminent.

(c) Describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such materials to be reasonably identified.

(d) Prescribe a date and time at which the person must appear to testify, under oath or affirmation, or by which the person must answer written interrogatories or produce the documentary material for inspection or copying; however, such date shall not be earlier than 30 days after the date of service of the subpoena.

(e) Specify a place for the taking of testimony or for the submission of answers to interrogatories and identify the person who is to take custody of any documentary material. Inspection and copying of documentary material shall be carried out at the place where the documentary material is located or at such other place as may be thereafter agreed to by the person and such designated custodian. Upon written agreement between the person and the designated custodian, copies may be substituted for original documents.

(4) Such subpoena may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under:

(a) The standards applicable to subpoenas or subpoenas duces tecum issued by a court of this state in aid of a grand jury investigation; or

(b) The standards applicable to a discovery request under the Florida Rules of Civil Procedure, to the extent that the application of such standards

to any such subpoena is appropriate and consistent with the provisions and purposes of this act.

(5) This section does not limit the power of the department to require the appearance of witnesses or production of documents or other tangible evidence located outside the state.

(6) Within 30 days after the service of a subpoena upon any person or at any time before the return date specified therein, whichever period is longer, the person served may file, and serve on the department, a petition for an order of the court modifying or setting aside the subpoena. Any such petition shall be filed in the circuit court of the Second Judicial Circuit in and for Leon County. The time allowed for compliance in whole or in part with the subpoena as deemed proper and ordered by the court shall not run while the petition is pending before the court. The petition shall specify each ground upon which the petitioner relies in seeking relief and may be based upon the failure of the subpoena to comply with this section or upon any constitutional or other legal right or privilege of such person.

(7) In case of the failure of any person to comply in whole or in part with a subpoena and when such person has not filed a petition under subsection (6), the circuit court of the Second Judicial Circuit in and for Leon County, upon application of the department, may issue an order requiring compliance. The failure to obey the order of the court shall be punishable as a contempt of court.

(8) The examination of all witnesses under this section shall be conducted by the department before an officer authorized to administer oaths in this state. The testimony shall be taken stenographically or by a sound-recording device. Any person compelled to appear under a subpoena for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for any such objection. If such person refuses to answer any question, the person conducting the examination may petition the circuit court as provided by subsection (11).

(9) When the testimony is fully transcribed, the person conducting the deposition shall afford the witness, and counsel, if any, a reasonable opportunity to examine the transcript, and the transcript shall be read to or by the witness, unless such examination and reading is waived by the witness. Any changes in form or substance that the witness desires to make shall be entered and identified upon the transcript by the officer or the department, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness unless the witness waives the signing in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after his or her being afforded a reasonable opportunity to examine it, the person

conducting the examination shall sign it and state on the record the fact of the waiver, illness, absence, or refusal to sign, together with the reason, if any, given therefor. Any person required to testify or to submit documentary evidence is entitled, on payment of reasonable costs, to procure a copy of any document produced by such person and of his or her own testimony as stenographically reported or, in the case of a deposition, as reduced to writing by or under the direction of the person taking the deposition.

(10) The department shall have the authority to stipulate to protective orders with respect to documents and information submitted in response to a subpoena under this section.

(11) The department may request that any natural person who refuses to comply with this section on the ground that the testimony or documents may incriminate him or her be ordered by the circuit court to provide the testimony or the documents. Except in a prosecution for perjury, a natural person who complies with a court order to provide testimony or documents after asserting a privilege against self-incrimination to which he or she is entitled by law may not be subject to a criminal proceeding with respect to the transaction to which he or she is required to testify or produce documents. Any natural person who fails to comply with such a court order to testify or produce documents may be adjudged in contempt and imprisoned until the time the person purges himself or herself of the contempt.

(12) While in the possession of the custodian, documentary material, answers to interrogatories, and transcripts of oral testimony shall be available, under such reasonable terms and conditions as the department shall prescribe, for examination by the person who produced such materials or answers or that person's duly authorized representative.

(13) This section does not impair the authority of the department to:

(a) Institute a civil proceeding under s. 68.083;

(b) Invoke the power of a court to compel the production of evidence before a grand jury; or

(c) Maintain the confidential and exempt status of the complaint and any other information as provided in s. 68.083(8).

(14)(a) A person who knows or has reason to believe that a subpoena pursuant to this section is pending shall not:

1. Alter, destroy, conceal, or remove any record, document, or thing with the purpose of impairing its verity or availability in such proceeding or investigation; or

2. Make, present, or use any record, document, or thing knowing it to be false.

(b) Any natural person who violates this subsection is subject to a civil penalty of not more than $100,000, reasonable attorney fees, and costs. Any other person who violates this subsection is subject to a civil penalty of not more than $1 million, reasonable attorney fees, and costs.

Section 5. Subsections (2) through (5) of section 68.084, Florida Statutes, are amended to read:

68.084 Rights of the parties in civil actions.—

(2)(a) The department may at any point voluntarily dismiss the action notwithstanding the objections of the person initiating the action.

(b) Subject to s. 17.04, nothing in this act shall be construed to limit the authority of the department or the qui tam plaintiff to compromise a claim brought in a complaint filed under this act if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

(c) Upon a showing by the department that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the department's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to:

1. Limiting the number of witnesses the person may call;

2. Limiting the length of the testimony of the person's witnesses;

3. Limiting the person's cross-examination of witnesses; or

4. Otherwise limiting the participation by the person in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the department elects not to proceed with the action, the person who initiated the action has the right to conduct the action. If the Attorney General, as head of the department, or the Chief Financial Officer, as head of the Department of Financial Services, so requests, it shall be served~~, at the requesting department's expense,~~ with copies of all pleadings and motions filed in the action along with ~~and~~ copies of all deposition transcripts at the requesting department's expense. When a person proceeds with the action, the court, without limiting the rights of the person initiating the action, may nevertheless permit the department to intervene and take over the action on behalf of the state at a later date upon showing of good cause.

(4) Regardless of whether ~~or not~~ the department proceeds with the action, upon a showing by the department that certain actions of discovery by the person initiating the action would interfere with an investigation by the state ~~government~~ or the prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera by the department that the criminal or civil investigation or proceeding has been pursued with reasonable diligence and any proposed discovery in the civil action will interfere with an ongoing criminal or civil investigation or proceeding.

(5) Notwithstanding paragraph (2)(b), the state may elect to pursue its claim through any available alternate remedy, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as the person would have had if the action had continued under this section ~~The application of one civil remedy under this act does not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, not mutually exclusive~~. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of ~~As used in~~ this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is ~~the term "final" means~~ not subject to judicial review.

Section 6. Section 68.085, Florida Statutes, is amended to read:

68.085 Awards to plaintiffs bringing action.—

(1)(a) If the department proceeds with ~~and prevails in~~ an action brought by a person under this act, subject to the requirements of paragraph (b), the person shall receive ~~except as provided in subsection (2), the court shall order the distribution to the person of~~ at least 15 percent but not more than 25 percent of the proceeds of the ~~recovered under any judgment obtained by the department in an~~ action ~~under s. 68.082~~ or ~~of the proceeds of any~~ settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

(b)~~(2)~~ If the ~~department proceeds with an action which the~~ court finds the action to be based primarily on disclosures of specific information, other than information ~~that~~ provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing; a legislative, administrative, inspector general, or auditor general report, hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds ~~recovered under a judgment or received in settlement of a claim under this act~~, taking into account the significance of the

information and the role of the person bringing the action in advancing the case to litigation.

(c) Any payment to a person under paragraph (a) or paragraph (b) shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2)~~(3)~~ If the department does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that ~~which~~ the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds ~~recovered under a judgment rendered in an action under this act or in settlement of a claim under this act~~. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3)~~(4)~~ Following any distributions under subsection (1) or, subsection (2), ~~or subsection (3),~~ the state entity ~~agency~~ injured by the submission of a false or fraudulent claim shall be awarded an amount not to exceed its compensatory damages. If the action was based on a claim of funds from the state Medicaid program, 10 percent of any remaining proceeds shall be deposited into the Operating Trust Fund to fund rewards for persons who report and provide information relating to Medicaid fraud pursuant to s. 409.9203. Any remaining proceeds, including civil penalties awarded under s. 68.082, shall be deposited in the General Revenue Fund.

~~(5) Any payment under this section to the person bringing the action shall be paid only out of the proceeds recovered from the defendant.~~

(4)~~(6)~~ Regardless of whether ~~or not~~ the department proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of s. 68.082 upon which the action was brought, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that ~~which~~ the person would otherwise receive under this section, taking into account the role of the person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of s. 68.082, the person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the department to continue the action.

Section 7. Section 68.086, Florida Statutes, is amended to read:

68.086 Expenses; attorney ~~attorney's~~ fees and costs.—

(1) If the department initiates an action under this act or assumes control of an action brought by a person under this act, the department shall be awarded its reasonable attorney ~~attorney's~~ fees, expenses, and costs.

~~(2) If the court awards the person bringing the action proceeds under this act, the person shall also be awarded an amount for reasonable attorney's fees and costs. Payment for reasonable attorney's fees and costs shall be made from the recovered proceeds before the distribution of any award.~~

(2)~~(3)~~ If the department does not proceed with an action under this act and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney ~~attorney's~~ fees and expenses ~~costs~~ if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(3)~~(4)~~ No liability shall be incurred by the state ~~government, the affected agency,~~ or the department for any expenses, attorney ~~attorney's~~ fees, or other costs incurred by any person in bringing or defending an action under this act.

Section 8. Subsections (2), (3), and (6) of section 68.087, Florida Statutes, are amended to read:

68.087 Exemptions to civil actions.—

(2) In no event may a person bring an action under s. 68.083(2) based upon allegations or transactions that are the subject of a civil action or an administrative proceeding in which the state ~~agency~~ is already a party.

(3) The ~~No~~ court shall dismiss ~~have jurisdiction over~~ an action brought under this act unless opposed by the department, if substantially the same ~~based upon the public disclosure of~~ allegations or transactions as alleged in the action were publicly disclosed:

(a) In a criminal, civil, or administrative hearing in which the state is a party;

(b) In a legislative, administrative, inspector general, or other state ~~Auditor General, Chief Financial Officer, or Department of Financial Services~~ report, hearing, audit, or investigation; or

(c) From the news media,

unless the action is brought by the department~~,~~ or ~~unless~~ the person bringing the action is an original source of the information. For purposes of this subsection, the term "original source" means an individual who, before a public disclosure under subsection (3), has voluntarily disclosed to the department the information on which allegations or transactions in a claim are based, or who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions ~~has direct and~~

~~independent knowledge of the information on which the allegations are based~~ and has voluntarily provided the information to the department before filing an action under this section ~~act based on the information~~.

(6) No court shall have jurisdiction over an action brought under this act against ~~a local government. For the purposes of this subsection, the term "local government" means~~ any county or municipality.

Section 9. Section 68.089, Florida Statutes, is amended to read:

68.089 Limitation of actions; effect of interventions by department.—A civil action under this act may not be brought:

(1) More than 6 years after the date on which the violation of s. 68.082 is committed; or

(2) More than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the department ~~state official charged with responsibility to act in the circumstances~~, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(3) If the department elects to intervene and proceed with an action brought under s. 68.083(2), the department may file its own complaint or amend the complaint of a person who has brought an action under s. 68.083(2) to clarify or add detail to the claims in which the department is intervening and to add any additional claims with respect to which the department contends it is entitled to relief. For statute of limitations purposes, any such pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person. This subsection applies to any actions under s. 68.083(2) pending on or filed after July 1, 2013.

Section 10. Section 68.09, Florida Statutes, is amended to read:

68.09 Burden of proof.—

(1) In any action brought under this act, the department ~~State of Florida~~ or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(2) Notwithstanding any other provision of law, a final judgment or decree rendered in favor of the state or the Federal Government in any criminal proceeding concerning the conduct of the defendant that forms the basis for a civil cause of action under this act, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant in any action by the department pursuant to this act as to all matters as to which such judgment or decree would be an estoppel as if the department had been a party in the criminal proceeding.

Section 11. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2013.

Approved by the Governor June 3, 2013.

Filed in Office Secretary of State June 3, 2013.