No. 124754

IN THE SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS *ex rel.* DAVID P. LEIBOWITZ, as Trustee of the Bankruptcy Estate of Marie A. Cahill, Appellee, v. FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA, Appellants.	On Petition for Leave to Appeal from the Illinois Appellate Court, First District, No. 18-0697 On appeal from the Circuit Court of Cook County, Law Division, No. 17 L 4200 Honorable John C. Griffin, Judge Presiding

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

This case is not about whether insurance fraud is a social ill—it is. Nor is it about whether the State of Illinois can punish those who commit insurance fraud—it may. And it is not about whether the *victim* of fraud may assign its claim for pecuniary damages—it can.

The question, instead, is whether the legislature has authorized *disinterested* parties to serve as roving, private prosecutors of alleged insurance fraud. If the General Assembly in fact enacted such a statute, the subsequent question is whether it complies with the Illinois Constitution.

In Cahill's telling, the legislature has enacted a most extraordinary law—one unlike virtually any other. She claims that the legislature has transferred the sovereign's authority to investigate and prosecute actions seeking punitive fines for insurance fraud on private companies to *anyone* who volunteers. That is not, in fact, what the legislature did. If it had, it would be unconstitutional.

The statute authorizes suit only by "interested person[s]." This is a term of legal import: "The word, 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected." *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 376 (1977).

Cahill's vastly broader construction of the statute—that *anyone* can be a plaintiff—disregards the term "interested." She admits that the term "interested person" in the ICFPA should be read as identical to the term "person" used in the Illinois False Claims Act. But that would violate a cardinal rule of statutory construction—each word should be given meaning.

Cahill focuses principally on the legislative history and her broad policy advocacy. But relator's professed zeal for combating insurance fraud cannot trump the statute's plain language.

Not only does the ICFPA's text compel this conclusion, but so too does the Illinois Constitution. Cahill's reliance on *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484 (2005), is flawed for one essential reason. *Scachitti* addressed damages to the public fisc—that is, it involved an assignment of a traditional pecuniary injury, where a State is similarly situated to a private party. This case, however, involves a *sovereign* injury—it is brought to penalize diffuse harm for the general public good. *Scachitti* did not address the transfer of such law enforcement authority to a private relator. Indeed, the Illinois Constitution forbids it.

Cahill's expansive position has no limit. As she sees it, the General Assembly could deputize citizens at large to pursue punitive fines for any range of conduct, from speeding to murder. The Illinois Constitution does not, however, permit such a transfer of sovereign authority.

I. Cahill is not an "interested person" within the meaning of the plain statutory text.

In the ICFPA, the legislature specifically limited the range of permissible relators to "interested person[s]." 740 ILCS 92/15. In construing the text, the Court should give the word "interested" meaning, as it has done repeatedly before.

Cahill essentially concedes that her construction supplies no meaning to "interested," for she admits that the scope of "interested person" is, in her view, identical to the term "person" standing alone. *See*, *e.g.*, Cahill Br. 9-10, 20. While Cahill consistently asserts that the statute is "unambiguous" in her favor, that position is impossible to square with her contention that the Court should simply disregard the legislature's use of "interested."

Unable to escape the force of these straightforward textual arguments, Cahill instead turns principally to policy. These policy arguments cannot overcome the statute's plain text. In all events, our construction reflects sensible legislative policy. Beyond the Attorney General and the State's Attorneys, those *actually injured* by insurance fraud may bring an ICFPA lawsuit. Virtually every private cause of action enacted by the legislature—from civil RICO to the Illinois Consumer Fraud and Deceptive Business Practices Act—provides *injured* parties a right to sue. By including the word "interested," that is what the General Assembly did here.

A. Overwhelming textual evidence confirms that the statutory term "interested person" excludes Cahill.

1. Cahill misconstrues our argument; any injured party, not just insurance companies, may bring ICFPA actions.

Cahill repeatedly asserts (*e.g.*, at 4-5, 6, 12, 18, 20, 24) that we would limit ICFPA plaintiffs to "only insurance companies." That is incorrect.

As we explained (*see*, *e.g.*, Opening Br. 8, 10, 18, 12-16), our construction—which the Circuit Court adopted—is that an "interested person" is one who has a "personal claim, status, or right which can be affected by a determination of the controversy." A36. While that includes insurance companies, it is not limited to them.

The ICFPA attaches to various criminal statutes. One of the underlying substantive offenses expressly extends to fraud on a "self-insured entity." 720 ILCS 5/17-10.5(a)(1). That sweeps in not only companies, partnerships, and other entities—but it also includes individual people who may self-insure. As just one example, a sole proprietorship may self-insure for worker's compensation claims. *See*, *e.g.*, Illinois Workers' Compensation Commission, *Self-Insurance*, https://perma.cc/CY7L-E5X6. Self-insured entities have brought suit under the California law on which Cahill says the ICFPA was modeled. *See*, *e.g.*, *People ex rel. Monterey Mushrooms, Inc. v. Thompson*, 136 Cal. App. 4th 24 (2006).

Another substantive offense provides that "[a] person commits health care benefits fraud *against a provider* … when he or she knowingly obtains or

attempts to obtain, by deception, health care benefits." 720 ILCS 5/17-10.5(a)(2) (emphasis added). Providers like individual doctors may thus qualify as an "interested person" and sue under the ICFPA.

In addition, the statute may be used by insurance policy holders injured by fraud—such as when an evaluator provides fraudulently low valuations to an insurer for purposes of valuing a claim. *See State of California ex rel. Metz v. CCC Information Services, Inc.*, 149 Cal. App. 4th 402 (2007). Likewise, under the anti-kickback provision, it is unlawful to pay to procure clients "that will be the basis for a claim against an insured person or the person's insurer." 740 ILCS 92/5(a). A violation of this law may injure the "insured person," by causing submission of a fraudulent claim against them. This, too, would give rise to a claim by an individual.

Altogether, individuals and businesses of all forms may qualify as an "interested person" within the meaning of the ICFPA.

2. Cahill fails to provide meaning to the term "interested."

Cahill does not even try to give meaning to the word "interested" in the phrase "interested person." In her view, the statute would have the identical effect if the word "interested" were omitted. She admits as much (at 10): "'Interested' is descriptive, not restrictive." This argument is not tenable. The General Assembly used the phrase "*interested* person" in the operative portion of the ICFPA, defining who may sue; these words must be given meaning.

Cahill must concede that she would render the word "interested" meaningless. As she sees it, the scope of permissible plaintiffs under the ICFPA is identical to that of the Illinois False Claims Act—*anyone* alleging that they possess information about fraud may sue. *See* Cahill Br. 5-7. But the legislature used materially different language between these statutes: The Illinois False Claims Act provides that a "*person* may bring a civil action for a violation of Section 3 for the person and for the State." 740 ILCS 175/4 (emphasis added). As the Circuit Court concluded, "section 15(a) of the ICFPA includes unambiguous, limiting language that is not found in section 4(b)(1) of the FCA." A35.

That is to say, in Cahill's telling, there is *no difference*—none whatsoever—between the legislature's use of "person" in the False Claims Act and its use of "interested person" in the IFCPA. As a result, according to Cahill, the term "interested" does *absolutely nothing*. Rather, as she candidly admits, she asks the Court to disregard the word "interested," asserting that the Court should "chang[e] or modify[] the language" of the statute. Cahill Br. 20.

This is a fundamental problem for Cahill's interpretation: It is a sacrosanct principle of statutory construction that courts cannot disregard a word the legislature has used in a statute. Ultimately, "[e]ach word" of text should have meaning and "should not be rendered superfluous." *People v. Perez*, 2014 IL 115927, ¶ 9. *See* Opening Br. 10-11. The Court restates this settled doctrine time and time and time again. *See*, *e.g.*, *Whitaker v. Wedbush Sec.,*

Inc., 2020 IL 124792, ¶ 32 ("courts must construe statutes so that each word, clause, and sentence is given a reasonable meaning, if possible, and no part is rendered superfluous"); *Lakewood Nursing & Rehab. Ctr. v. Dep't of Pub. Health*, 2019 IL 124019, ¶ 17; *1550 MP Rd. LLC v. Teamsters Local Union No. 700*, 2019 IL 123046, ¶ 31.

This principle surely applies here. In specifying that only an "*interested* person" may sue, the General Assembly limited the range of plaintiffs to a *subset* of "persons." That is the purpose of a modifier like the word "interested." And this word was so important that the legislature included it in the section's *title*. *See* Opening Br. 12.[1] Failure to give effect to this language would be to rewrite the legislation.

Cahill's responses miss the mark.

First, Cahill asserts that "the [C]ourt should not rely on canons of construction *at all* because the Act unambiguously provides that individuals can be relators." Cahill Br. 19 (emphasis added). This argument is doubly erroneous. When construing statutory text, canons of construction *always* apply, as they are the tools used to interpret the text's meaning. And, to the extent that Cahill's argument is that the plain text favors her position, this fails given that, in her construction, the word "interested" does nothing. The statuto-

[1] We do not suggest that the title alone limits the scope of the statute. Cahill makes our point: "[T]he title of section 15 … repeats the text." Cahill Br. 22. This term is so important that it appears in the text *and* title.

ry text cannot "unambiguously" favor Cahill when she asks the Court to disregard one of the words that the legislature used.

Second, Cahill contends that our reading would render the phrase "including an insurer" surplusage. Cahill Br. 20. That is wrong because our construction is not limited to an insurer. *See* pages 3-5, *supra*.

In fact, the phrase "including an insurer" strongly supports *our* reading because, "when a statute provides a list that is not exclusive, … the class of unarticulated things will be interpreted as those that are similar to the named things." *See People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 48 (2002). An insurance company is a notable example of an ICFPA plaintiff because it may be injured.

Cahill responds by saying that the "ICFPA does not include a list." Cahill Br. 21. That ignores the substance: When a statute identifies a broader category (here, "interested person") and then supplies an example ("insurer"), the example informs the meaning of the broader category. "[A] word is known by the company it keeps." *People v. Clark*, 2019 IL 122891, ¶ 95.

Third, Cahill reveals her true argument, contending that it is appropriate to "chang[e] or modify[] the language of a statute if necessary" to comply with certain policy objectives. Cahill Br. 20. Simply disregarding statutory language, however, is an extraordinary step—and it certainly is not necessary here because the text as written leads to a harmonious statutory structure.

Fourth, Cahill contends that there is no "evidence the General Assembly wrote the statute's *qui tam* provision as a contrast to the Illinois False Claims Act *qui tam* provision for a 'person.'" Cahill Br. 23. But *of course* there is evidence of a contrast: The legislature *used different words* across these two statutes, and "[t]he most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *People v. Casas*, 2017 IL 120797, ¶ 18. Cahill ultimately urges the Court to engage in the very worst form of statutory construction—disregarding the legislature's specific choice of language because of an *absence* of legislative history.

In sum, the term "interested" must have *some* meaning. Cahill's entire position, by contrast, rests on the proposition that "interested" does no work in this statute—and the Court should simply disregard it. That argument is fundamentally incorrect.

3. When the legislature used the term "interested person," it selected a term with precise meaning.

When the legislature adopted the ICFPA, the term "interested person" was long understood to require a personal injury. *See* Opening Br. 12-16. And, where "a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning." *People v. Smith*, 236 Ill. 2d 162, 167 (2010).

Here, the evidence is overwhelming that, to qualify as an "interested person," a party must have a direct and personal stake in the outcome of a proceeding. The Court has long held that "[t]he word, 'interested' does not

mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected." *Underground Contractors*, 66 Ill. 2d at 376. And that, of course, is far from all—probate law, corporate law, and public contract law all use "interested" in this same way—a party with a *personal* stake in the outcome of the matter. Opening Br. 12-16. When the legislature used this specific language, it was not operating against a blank slate.

Cahill says (at 24) that the use of "interested" in the declaratory judgment setting is inapplicable because, in that setting, "there is an acute concern about making sure a court ruling will lead to an actual consequence and impact on the parties." But in the ICFPA context, Cahill asserts (*id.*), "there is no dispute that the court is considering an actual dispute for parties with a personal stake: The State and the defendants." Therein lies Cahill's problem—Cahill is not the State, and our fundamental point is that she does not qualify as an "interested person," because she has suffered no injury. To the extent any dispute exists, *Cahill* has no right to litigate it.

This also corresponds with how dictionaries define "interested person": "A person having a property right in or claim against a thing, such as a trust or decedent's estate." *Person*, Black's Law Dictionary (11th ed. 2019). The plain meaning of the legislation must govern.

4. The Court need not disregard the term "interested" to make sense of the balance of the ICFPA.

Cahill's focus on other aspects of the statute are no basis to disregard the word "interested."

First, Cahill argues that under our construction, the term "including an insurer" would be redundant. Cahill Br. 8. But, as we have explained, other companies and individuals may bring a claim. *See* pages 3-5, *supra*.

Second, Cahill points (at 8) to the anti-retaliation provision for employees engaged in "investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Act." 740 ILCS 92/40. But this provision does not say that employees *file* an action—an employee may "initiat[e]" an action by providing information to one who qualifies as an "interested person." Indeed, the language specifically contemplates that the employee may be acting on "behalf of … others in furtherance of an action under this Act." *Id*.

Third, the ICFPA's prohibition on recovery for a "person who planned and initiated the violation" (740 ILCS 92/25(i)) is consistent with our reading. One qualifying as an "interested person," such as one alleging that there has been fraud in connection with submission of an insurance claim (*see* pages 4-5, *supra*), could well partake in the fraud.

Fourth, the enhanced recovery provision addresses circumstances in which the plaintiff has paid out money to the defendant. 740 ILCS 92/25(c). There are several circumstances where an injured private party would not

have paid out money. For example, the underlying substantive statutes prohibit both attempted insurance fraud (720 ILCS 5/17-10.5(a)(1)) and conspiracy to commit insurance fraud (*id*. 5/17-10.5(c)). A party may be harmed by such conduct (including costs to examine and detect a fraudulent claim) and therefore sue, even absent actually paying out funds. Additionally, in the example where an individual is injured because an insurance company pays him or her *less* in proceeds because of a fraudulent valuation (*see* page 5, *supra*), there would be no payment *from* the injured person. Further, the State may bring a claim, regardless of underlying injury.

Fifth, the original source provision merely provides an exception to the public disclosure bar. 740 ILCS 92/30. Because, under Illinois law, a "person" includes a "corporation" and other business entities, an insurance company may have access to this provision. *See* 25 ILCS 170/2(a). In all events, individuals can well be ICFPA plaintiffs.[2]

B. Cahill's non-textual arguments do not rebut the statute's plain text.

Several of Cahill's arguments are non-textual, focusing on history and policy that she believes underlie the ICFPA. At the outset, these contentions have little probative force; when "the language of the statute [is] plain," the Court does not "examine the legislative history or debates." *People v. Clark*,

[2] The Illinois Administrative Procedure Act is not probative here, because it does not delineate the range of persons that may sue in court.

2018 IL 122495, ¶ 33. In all events, Cahill's arguments neither counsel for a different result nor overcome the dispositive textual evidence.

1. Cahill points (at 10-11) to two statements, each by individual legislators, relating to suits by "insurance companies" and "individuals." We agree with Cahill: Individuals *can* sue under the ICFPA. They just must have suffered injury. As we have shown, many different sorts of individuals will qualify. *See* pages 3-5, *supra*.

In all events, "while a court gives some consideration to statements by the sponsor of a bill, such statements are not controlling." *People v. Hickman*, 163 Ill. 2d 250, 262 (1994). Statements by individual legislators, like those here, "do not constitute such a clear expression of obvious legislative intent as to allow [the Court] to ignore the unambiguous statutory language." *Id*. And that is especially so when—as is the case here—"statutes are enacted after judicial opinions are published," because "it must be presumed that the legislature acted with knowledge of the prevailing case law." *Id*.[3]

2. Cahill's assertion that Illinois modeled the California Insurance Frauds Prevention Act does not shed meaningful light on the question here.

First, *nothing* in the California enactment history—or in any other legal authority at the time of the adoption of the ICFPA—suggested that "interested person" takes on the expansive meaning that Cahill contends. Cahill

[3] That some plaintiffs have brought ICFPA claims as tag-alongs to False Claims Act allegations is irrelevant. Cahill Br. at 11-12. None of these cases contains any analysis of the ICFPA's qui tam provision.

(at 13) simply recycles her asserted textual arguments (*see* pages 10-12, *supra*). Next, Cahill notes (at 13) the *lack* of evidence: "nothing in the legislative history suggests that California intended to limit *qui tam* actions to insurance companies." But the *absence* of evidence supporting our position (which, again, is not limited to insurance companies) is not evidence in *favor* of Cahill's. Nor is it a basis to overcome the plain statutory text.[4]

Second, even if such evidence existed (it doesn't), there is no indication that it was ever supplied to the Illinois legislature, so that it informed the intent of *Illinois*'s enactment of the statute. Legislative materials regarding California law could only conceivably be relevant if they were considered by Illinois—and there is no evidence that they were.

Cahill cites an intermediate California case, *People ex rel. Alzayat v. Hebb*, 18 Cal. App. 5th 801, 831 (2017), for the proposition that the California law's qui tam provision "does not mandate that the relator has suffered his or her own injury." Cahill Br. 13-14. But *Alzayat* does not address the meaning of the term "interested person," no doubt because the issues were not raised

[4] If anything, California, like Illinois, has other statutes that use "interested person" in the way we advocate, and the California legislature would have known as much when enacting its statute. Indeed, the California legislature "had before it long established legislative precedents which make it clear that an 'interested person' in the sense in which those words are used in [statutes] is a person having a *direct, and not a merely consequential*, interest in the litigation." *Torres v. City of Yorba Linda*, 13 Cal. App. 4th 1035, 1042 (Cal. App. 1993) (emphasis added; citation omitted).

by the parties.[5] Rather, the case addressed whether the action was barred by the workers' compensation exclusivity rule, given that the relator in the case *had* suffered an injury. *Alzayat*, 18 Cal. App. 5th at 807-08. This belies Cahill's assertion that only her definition of "interested person" includes individuals. And because *Alzayat* was issued 16 years after Illinois's adoption of the ICFPA, it certainly does not bear on legislative intent.[6]

3. Cahill otherwise invokes broad policy—asserting that the purpose of the ICFPA "is to protect the public from insurance fraud." Cahill Br. at 14. *See also, e.g.,* Cahill Br. at 15 ("The General Assembly has concluded that fraud—including insurance fraud—harms the public at large, not just the defrauded party."). The *amici* make the same point.

But this policy contention is no license to disregard the word "interested" in the statute. And effectuating this policy does not require empowering third party, uninjured relators to engage in enforcement actions. Cahill describes (at 15) the Illinois Consumer Fraud and Deceptive Business Practices Act; notably, that statute permits private actions only by those who have suffered "actual damages." 815 ILCS 505/10(a).

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[5] *See* 2016 WL 6161357 (Appellant's Opening Brief), 2016 WL 7214454 (Respondents' Brief and Cross-Appellants' Opening Brief), 2016 WL 7377695 (Appellant's Reply Brief), and 2016 WL 7734639 (Cross-Appellants' Reply Brief).

[6] *Kim v. Reins International California, Inc.*, Case No. S246911, 2020 WL 1174294 (Cal. Mar. 12, 2020), and the California Labor Code Private Attorneys General Act of 2004 (Cahill Br. 14) are irrelevant as they address unrelated legal structures.

Beyond those defrauded, the Attorney General and the State's Attorneys may pursue ICFPA actions—as well as all other criminal remedies that exist to punish insurance fraud. Our construction of the ICFPA serves the statute's purpose of punishing and deterring insurance fraud.

C. The constitutional avoidance principle also compels interpreting "interested person" consistent with its established meaning.

Our reading of the statute is not only true to the text and perfectly sensible, but it also renders the ICFPA consistent with the Illinois Constitution. As we next explain, if Cahill's reading of the statutory text were adopted—and the word "interested" were to serve no limiting function in the statute—then uninjured parties would be provided the law enforcement powers that the Illinois Constitution reserves to the sovereign. The Court's obligation to "construe legislative enactments so as to affirm their constitutionality if reasonably possible" (*People v. Webb*, 2019 IL 122951, ¶ 7) is effectuated by providing the phrase "interested person" its plain, established meaning.

II. If Cahill is authorized to prosecute an ICFPA action, the statute violates the Illinois Constitution's reservation of law enforcement authority to the sovereign.

Cahill's construction of the ICFPA would render the statute unconstitutional as applied. Our argument has two components: first, relator's standing rests on a transfer of the cause of action from the State to the relator (Opening Br. 22-24), and second, Illinois cannot validly transfer to Cahill *this* cause of action, both because it is not a property right (*id*. at 25-27) and be-

cause it would affect an assignment of criminal law enforcement authority in violation of the Illinois Constitution (*id*. at 27-35).

Cahill does not seriously quarrel with the first point—nor could she. *Scachitti*, like *Vermont Agency* before it, grounded a relator's standing in the statute having "'effect[ed] a partial assignment of the Government's damages claim." *Scachitti*, 215 Ill. 2d at 508 (quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)). But, as all agree, Cahill is not litigating a *damages* claim—she is attempting to litigate an injury to the sovereign. The dispositive question here, then, is whether the State Constitution permits assignment of *sovereign*—rather than *proprietary*—injury.

A. A substantial volume of Cahill's arguments are not contested and thus non-responsive.

Before turning to this question, several pages of Cahill's brief are non-responsive to our argument.

Cahill asserts (at 29) that the government has standing to prosecute "injury to its sovereignty arising from [the] violation of its laws." We agree. The question presented here is whether an injury to the sovereign—that is, an injury to the diffuse public good—is *assignable* to a relator. *Scachitti* and *Vermont Agency* dealt with the assignment of proprietary injury, not sovereign injury.

Cahill says (at 29-30) that the legislature "has the power to protect the public from insurance fraud" through the police power. True again. But the question here is whether this sovereign power is *assignable*.

Cahill argues (at 31) that, in the false claims context, relators have standing because there has been an assignment from the State. But that *is* the question posed here—whether the *sovereign's* authority to punish is assignable at all.

B. The ICFPA may not constitutionally transfer to Cahill discretionary, punitive law enforcement authority.

We showed in the opening brief that the ICFPA may not constitutionally provide Cahill the authority to enforce punitive statutes that protect the public good. That is the unique role of the sovereign, and it may not be transferred to private relators. Cahill's rejoinders each fail.

1. *Scachitti* does not address the assignment of a claim for sovereign injury.

Cahill's enormous reliance on *Scachitti* is misplaced. That decision is most certainly not "premised on the bare fact of injury to the State, whether to its sovereignty or treasury." Cahill Br. 33. For support, Cahill rests on *Scachitti*'s broad description of the history of *qui tam* actions; generally, "a '*qui tam* action' is an action brought under a statute authorizing an informant to bring a civil action to recover a penalty." *Scachitti*, 215 Ill. 2d at 494. But this part of the opinion was not deciding whether a specific *qui tam* law comports with the Illinois Constitution.

In making this argument, Cahill takes a quote badly out of context. The part of *Scachitti* on which Cahill (at 33) relies states:

> In examining standing under the Federal False Claims Act, the Supreme Court noted that the complaint clearly asserted an injury to the United States—an injury to its sovereignty based on the violation of its laws, and a proprietary injury from the alleged fraud. *Vermont Agency*, 529 U.S. at 771. It was not clear, however, if the complaint asserted an injury to the complaining party (the relator), a prerequisite for standing under article III of the United States Constitution.

Scachitti, 215 Ill. 2d at 507. Cahill misquotes this passage to suggest that an "injury to [the State's] sovereignty based on the violation of its laws" can support a *relator's* standing. Cahill Br. 33. But the discussion merely points out that whether this is true is an open question, identifying that an injury to the state does *not* automatically become "an injury to the complaining party."

That is why the Court proceeded with its analysis and reasoned that "'the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor'" provided an adequate basis for relator standing under the FCA because that law "could 'reasonably be regarded as effecting a partial assignment of the government's *damages claim*.'" *Scachitti*, 215 Ill. 2d at 508 (quoting *Vermont Agency*, 529 U.S. at 773) (emphasis added). "Therefore, the relator's complaint alleging an injury in fact to the United States sufficed to confer standing on the relator." *Id*. (citing *Vermont Agency*, 529 U.S. at 774). The Court then "adopt[ed] the reasoning of *Vermont Agency*" and held that "a *qui tam* plaintiff is a partial assignee of the state's claim un-

der the *qui tam* provisions" of the law, thereby "giv[ing] a *qui tam* plaintiff a personal stake in the outcome." *Id*.

This analysis makes it clear that even though the *government* in a False Claims Act case has suffered both "an injury to its sovereignty based on the violation of its laws, and a proprietary injury from the alleged fraud," the *relator's* "personal stake in the outcome" (and thus standing) is premised on a partial assignment of the government's damages claim—its "proprietary injury from the alleged fraud." This does not, as Cahill claims, require a "financial loss to the State." Cahill Br. at 33. Rather, it requires an injury related to the government's *property*, which could include a threatened or potential loss. *See Proprietary*, Black's Law Dictionary (11th ed. 2019) (defining "proprietary" as "Of, relating to, or holding as property").

Scachitti says nothing about whether a relator would have standing under a qui tam provision that lacked a "proprietary injury." That is, *Scachitti* most certainly did not hold, as Cahill asserts, that the State may assign a claim for *sovereign* injury. That is what makes this case fundamentally different.

2. The State may not transfer its sovereign law enforcement authority to a private party.

Cahill is candid that this lawsuit does not seek to remedy any specific financial harm; instead, she is purportedly suing to punish diffuse, second-level harm to "the public at large." Cahill Br. at 15. *See, e.g.,* Cahill Br. at 15-

16 (providing policy arguments regarding the social cost of insurance fraud).[7] This is straightforwardly a punitive lawsuit. It is no different than if a State assigned out the right to enforce its laws against speeding, theft, or murder by means of penalty to any private relator who wishes to volunteer.

The Illinois Constitution, however, does not permit this result. As we showed, this Court has long construed Article V, Section 15 to preclude the transfer of authority to prosecute matters where "the People of the State are the real party in interest." *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 500 (1976). Likewise, the State's Attorney has the authority to "represent[] the people in matters affected with a public interest." *County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc.*, 215 Ill. 2d 466, 478 (2005).

Tellingly, Cahill does not cite—or respond to—either of *Briceland* or *Rifkin*. *See* Opening Br. 28-29. Each of the rebuttals she attempts fails.

First, Cahill denies that this is a punitive action—repeatedly calling it civil. *See*, *e.g.*, Cahill Br. 41-44. But that is wrong, as Cahill elsewhere acknowledges that the purpose of her action is "protecting the integrity of the insurance market for the public at large by stopping fraud" (*id*. at 3) and "to protect the public from insurance fraud" (*id*. at 14). This is not an action to remedy pecuniary interests of the State (where the State may act similar to non-sovereigns), but instead represents the State acting in its unique sovereign capacity, where it seeks to stem harms befalling the public at large.

[7] That the State investigates and prosecutes fraud in general does not render a "pecuniary" interest to the state.

The examples that Cahill presents prove our point. She explains that there is a cause of action for both the tort of conversion and the crime of theft—and other examples. Cahill Br. 43. An *injured* party may bring the tort claim. The State may bring the criminal claim. What may not occur is a transfer of the *State*'s claim to uninjured volunteers.

Even by the factors Cahill proposes (at 41 & n.3), the ICFPA as used here tilts decidedly punitive: the statute requires a finding of scienter (*see*, *e.g.*, 720 ILCS 5/17-10.5(a)(1) (requires "knowing[]" conduct)), it is designed, as Cahill acknowledges, for deterrence (Cahill Br. 17, 18, 26), and the underlying offenses are crimes (*see* Opening Br. 3-4).[8]

Second, relying on *Scachitti*, Cahill argues (at 44-50) that the minimal controls afforded the State over an ICFPA action render it permissible. This analysis falters, as we have explained, because *Scachitti* did not have before it the sort of punitive action advanced here. *Scachitti*'s assessment of appropriate controls for a transfer of the State's *pecuniary* claim does not address whether those controls are sufficient for the State to assign its *sovereign* power to punish violations of the criminal laws, for the benefit of the public at large. When the State assigns a *pecuniary* claim, it acts like any private party. But the sovereign law enforcement authority involves a far more sensitive

[8] *People ex rel. Allstate Insurance Co. v. Muhyeldin*, 112 Cal. App. 4th 604, 609 (2003), did not address this argument, and it was brought by an insurance company—a party with its own injury.

exercise of the State's power, with the crucial check of prosecutorial discretion. *See* Opening Br. 28-35.

Third, Cahill asserts (at 35) that, in the false claim context, relators sometimes recover statutory sums that are specified "where damages are hard to quantify." But that is just compensatory damages by another name. Legislatures may establish a statutory damages amount—a type of liquidated damages—to approximate the actual compensatory claim that is otherwise hard to value. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."). Ultimately, the enforcement remains of the proprietary right held by the wronged party; it is not a generalized claim for the social good.

Fourth, Cahill's scattered authority is all irrelevant to the core question posed here—whether the Illinois Constitution precludes transferring enforcement of a *sovereign* injury to private relators.

Cahill's heavy reliance (at 34) on the Federal Circuit's decision in *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321 (Fed. Cir. 2010), is misplaced for a simple reason—the prohibition on transferring a sovereign claim for damages to a relator is found in the *Illinois* Constitution. *Stauffer*, address-

ing a (now-repealed) federal statute, said nothing at all about Illinois constitutional law.[9]

Likewise unhelpful are the various "informer" statutes in Illinois during the 19th century. Cahill Br. at 36-37. None of these laws are current, and several appear to have been superseded by the state's current regulatory scheme. *E.g.* 235 ILCS 5/7-1 *et seq.* (liquor licensing); 225 ILCS 735/5 (timber sales); 430 ILCS 10/5 (inspection of gasoline). Crucially, all predate the current Illinois Constitution. It may well be that in a prior era, States relied on private citizens for law enforcement. Today, however, the Illinois Constitution vests that authority solely with the sovereign. This reflects the value of centralizing prosecutorial discretion on professional prosecutors "litigating *as the State*," and not bounty-driven volunteers who wish to "litigate *for the benefit of the State*." Cahill Br. 28.

3. The State's law enforcement authority is not an assignable chose in action.

Beyond the limits placed by the Illinois Constitution, the putative assignment fails because there is nothing that is assignable. *See* Opening Br. 25-27. Cahill is wrong to suggest (at 38-39) that there is no public policy rationale to oppose an assignment here. The public policy is clear: Law enforcement is entrusted to State prosecutors, not to volunteers acting for per-

[9] To be sure, *Stauffer* is flawed on its own terms, as it has no basis to support the assertion both sovereign and proprietary injuries to "collectively … be sufficient to confer standing on the government and therefore on the relator." 619 F.3d at 1326. Ultimately, though, this is a question if Illinois constitutional law, rendering *Stauffer*'s analysis irrelevant.

sonal profit. *See* Opening Br. 29-35. This public policy is stated directly in the Illinois Constitution.

CONCLUSION

The Court should reverse the decision of the Appellate Court, reinstating the Circuit Court's order dismissing this action.

Dated: May 6, 2020

Respectfully submitted,

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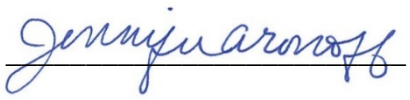
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 6,000 words.



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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on May 6, 2020, the above Reply Brief of Defendants-Appellants and the attached Appendix were filed and served electronically on the Clerk of the Illinois Supreme Court, and that true and correct copies of the same were served by electronic mail on the following:

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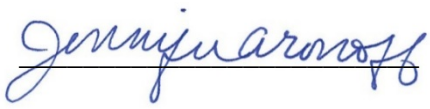
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.



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