

STATE EX REL. EDELWEISS  
FUND LLC,

*Plaintiffs-Petitioners,*

v.

JPMORGAN CHASE & CO.,  
JPMORGAN CHASE BANK, N.A.,  
J.P. MORGAN SECURITIES LLC  
(f/k/a JPMorgan Securities, Inc.),  
CITIGROUP, INC., CITIGROUP  
GLOBAL MARKETS INC.,  
CITIBANK, N.A., CITIGROUP  
FINANCIAL PRODUCTS INC.,  
CITIGROUP GLOBAL MARKETS  
HOLDINGS INC., CITIGROUP  
GLOBAL MARKETS LIMITED,  
WELLS FARGO & COMPANY,  
WELLS FARGO BANK, N.A.,  
WELLS FARGO SECURITIES LLC,  
WACHOVIA BANK, N.A., its  
predecessor by merger, BANK OF  
AMERICA CORPORATION, BANK  
OF AMERICA, N.A., BANK OF  
AMERICA SECURITIES LLC,  
MERRILL LYNCH, PIERCE,  
FENNER & SMITH  
INCORPORATED, BANK OF  
AMERICA CAPITAL  
CORPORATION, BOFA MERRILL  
LYNCH ASSET HOLDINGS, INC.,  
BANK OF AMERICA MERRILL  
LYNCH, MORGAN STANLEY,  
MORGAN STANLEY SMITH  
BARNEY LLC, MORGAN STANLEY  
& CO., LLC, MORGAN STANLEY  
CAPITAL GROUP, INC.,

*Defendants-Respondents.*

SUPREME COURT OF NEW JERSEY  
DOCKET NO.: 090285

Civil Action

On Petition for Certification from a  
Final Judgment of the Appellate  
Division, Docket No. A-1340-23

Sat Below:

Hon. Greta Gooden Brown, J.S.C.  
Hon. Morris G. Smith, J.S.C.

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BRIEF OF AMICUS CURIAE MATTHEW J. PLATKIN,  
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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**TABLE OF CONTENTS**

**PAGE**

PRELIMINARY STATEMENT..... 1

PROCEDURAL HISTORY AND STATEMENT OF FACTS..... 4

ARGUMENT

POINT I: THE COURT SHOULD GIVE IMMEDIATE EFFECT  
TO THE ATTORNEY GENERAL’S OPPOSITIONS TO THE  
PUBLIC DISCLOSURE BAR WHEN SUCH OPPOSITIONS ARE  
FILED AFTER PASSAGE OF THE 2023 AMENDMENTS .....15

POINT II: AT A MINIMUM, RELATOR SHOULD BE  
PERMITTED TO PURSUE CLAIMS FOR CONDUCT THAT  
POST-DATES THE 2023 AMENDMENT . .....29

CONCLUSION.....33

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b>Page(s)</b>
<u>DiProspero v. Penn,</u> 183 N.J. 477 (2005) .....	16
<u>Gibbons v. Gibbons,</u> 86 N.J. 515 (1981) .....	19
<u>Graham Cnty. Soil &amp; Water Conservation Dist. v. United States ex rel. Wilson,</u> 559 U.S. 280 (2010).....	7, 11, 17, 26
<u>Hughes Aircraft Co. v. United States ex rel. Schumer,</u> 520 U.S. 939 (1997) .....	24-26
<u>In re Enf't of New Jersey False Claims Act Subpoenas,</u> 229 N.J. 285 (2017) .....	6
<u>In re Plavix Mktg., Sales Practices &amp; Prods. Liab. Litig.,</u> 123 F. Supp. 3d 584 (D.N.J. 2015) .....	29
<u>Johnson v. Roselle EZ Quick LLC,</u> 226 N.J. 370 (2016) .....	16
<u>Landgraf v. USI Film Prods.,</u> 511 U.S. 244 (1994).....	20–21, 25
<u>Lombardo v. Revlon, Inc.,</u> 328 N.J. Super. 484 (App. Div. 2000) .....	19
<u>Maia v. IEW Constr. Group,</u> 257 N.J. 330 (2024) .....	19-21
<u>Murray v. Plainfield Rescue Squad,</u> 210 N.J. 581 (2012) .....	16
<u>Peper v. Princeton Univ. Bd. of Trs.,</u> 77 N.J. 55 (1978) .....	28

<u>Russo Farms, Inc. v. Vineland Bd. of Educ.,</u> 144 N.J. 84 (1996) .....	31
<u>Schindler Elevator Corp. v. United States ex rel. Kirk,</u> 563 U.S. 401 (2011) .....	27
<u>Shepherd v. Hunterdon Developmental Ctr.,</u> 174 N.J. 1 (2002) .....	32
<u>State v. Coviello,</u> 252 N.J. 539 (2023) .....	27
<u>State v. Lane,</u> 251 N.J. 84 (2022) .....	20
<u>TAC Assocs. v. N.J. Dept. of Env't Prot.,</u> 202 N.J. 533 (2010) .....	28
<u>United States ex rel. Eisenstein v. City of New York,</u> 556 U.S. 928 (2009) .....	6, 9
<u>Universal Health Servs., Inc. v. United States,</u> 579 U.S. 176 (2016) .....	4
<u>Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Env't Prot.,</u> 191 N.J. 38 (2007) .....	28
<u>United States ex rel. Bogina v. Medline Indus., Inc.,</u> 809 F.3d 365 (7th Cir. 2016) .....	26
<u>United States ex rel. Kreindler &amp; Kreindler v. United Techs. Corp.,</u> 985 F.2d 1148 (2d Cir. 1993) .....	32
<u>United States ex rel. Shea v. Verizon Commc'ns, Inc.,</u> 160 F. Supp. 3d 16 (D.D.C. 2015) .....	29
<u>United States ex rel. Springfield Terminal Ry. Co. v. Quinn,</u> 14 F.3d 645 (D.C. Cir. 1994) .....	6

United States ex rel. Zizic v. Q2Administrators, LLC,  
728 F.3d 228 (3d Cir. 2013) ..... 27, 30-31

W.S. v. Hildreth,  
252 N.J. 506 (2023) ..... 21

**Statutes**

N.J.S.A. 2A:32C-3 ..... 4  
N.J.S.A. 2A:32C-5 ..... 4-5  
N.J.S.A. 2A:32C-6 ..... 5  
N.J.S.A. 2A:32C-7 ..... 5-6  
N.J.S.A. 2A:32C-9 ..... 10  
N.J.S.A. 2A:32C-11 ..... 32  
N.J.S.A. 2A:32C-17 ..... 17, 33

N.J.S.A. 2A:32C-9 (2008) ..... 7-8

31 U.S.C. 3730 (2007) ..... 8

31 U.S.C. 3730 (2008) ..... 8

31 U.S.C. 3730 ..... 5, 10

**Other Authorities**

Assemb. Budget Comm. Statement to A. 5584 at 1 (June 27, 2023) ..... 10, 19

Brief for the United States as Amicus Curiae Supporting Respondent, Graham  
Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 280  
U.S. 280 (2010) ..... 18

Letter From Christi A. Grimm, Inspector General, Dep’t of Health & Human  
Servs., to N.J. Atty. Gen. (Sept. 7, 2023) ..... 11

L. 2007, c. 265 ..... 4, 7

L. 2023, c. 73 ..... 2, 10, 11, 15, 16, 18, 33

Pub. L. No. 111-21, 123 Stat. 1617 (2009) ..... 30

Pub. L. No. 111-148, 124 Stat. 119 (2010) ..... 9

S. Rep. No. 110-507 (2008) ..... 9

## **PRELIMINARY STATEMENT**

The New Jersey False Claims Act (“NJFCA”), N.J.S.A. 2A:32C-1 to -17, prohibits various forms of fraud against the State. Modeled after the Federal False Claims Act, the statute allows private individuals (called “relators”) to bring civil actions on behalf of the State and then share in any recovery the State obtains. This encourages relators with useful information to come forward, and it provides a crucial supplement to the State’s own enforcement efforts. But this can also incentivize “parasitic” relators to bring lawsuits that reduce the State’s recovery while providing no useful information. To address these competing concerns, the NJFCA generally prevents relators from basing suits on “public disclosures” of information (as distinct from non-public information they obtain), but allows the Attorney General to overcome that so-called “public disclosure bar” and permit certain cases to proceed.

That statutory rule—that relators normally cannot press forward with suits based on public information, but that the Attorney General can take action to allow such cases to proceed—has always been the rule in our State. And in 2023, as part of a broader update to the NJFCA, the Legislature left that substantive regime in place, but changed the procedures by which the Attorney General could allow a suit based upon public information to proceed.

Before 2023, the Attorney General had to formally intervene in the relator’s action, and then the suit could proceed notwithstanding the “public disclosure bar” that otherwise applied to relator suits. In 2023, the Legislature simply created a new procedural device to achieve that goal. Now, rather than intervening, the Attorney General could register the same information—his desire that the lawsuit proceed as non-parasitic—with a filing communicating as much.

This Court should hold that these new, more informal procedures apply to any such filing the Attorney General makes in an NJFCA case after the passage of the statute. The 2023 amendments were to “take effect immediately.” L. 2023, c. 73, § 11. So, in this case, the Attorney General filed a document with the trial court—after the 2023 amendments were enacted—noting his opposition to the application of the public disclosure bar, and thus his view that the relator should be allowed to proceed with the suit as non-parasitic. The trial court correctly treated that filing as effective, as it was consistent with the new law’s procedures. But the Appellate Division reversed, believing this would apply the 2023 statute retroactively.

This Court should correct the Appellate Division’s fundamental mistake. The effect of the trial court’s ruling was exactly what the Legislature instructed: it gave “immediate[]” effect to the statutory revisions. That result was a

prospective application of the statute—and not a retroactive one—because the conduct regulated by the relevant amendment was the Attorney General’s procedural task of filing a litigation document. Both before and after this 2023 amendment, the defendants faced the exact same substantive liability. And both before and after this 2023 amendment, the Attorney General had the power to block defendants from relying on the public disclosure bar—and to ensure that a specific lawsuit could go forward based on the Attorney General’s understanding that the lawsuit was not parasitic. For those reasons, applying a purely procedural amendment like this to future filings in pending matters is applying it prospectively—as this Court has held with regards to other similar changes. The contrary approach would let fraudsters avoid liability and require the State to undertake the process of intervention just to allow some potentially meritorious case to proceed—the very procedural burdens the Legislature lifted.

That is enough for this Court to resolve this case and reverse. But at an absolute minimum, if this Court is otherwise inclined to affirm, the Court should clarify that the Attorney General’s new procedural way of communicating his opposition is effective for any relator claims concerning conduct that occurred after the 2023 amendments. For those claims, it is hard to see how there could even be any arguable retroactivity concerns. The panel below thought otherwise, but the logic of the continuing violation doctrine that it cited would—

if anything—counsel exactly the opposite result here. For this reason, too, the Appellate Division’s decision below was error.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**<sup>1</sup>

The Attorney General relies upon and incorporates by reference the facts and procedural history referenced in the Appellate Division’s opinion, State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., No. A-1340-23, 2024 WL 5231309, (N.J. Super. App. Div. Dec. 27, 2024), adding the following.

#### **A. The New Jersey False Claims Act.**

The Legislature enacted the NJFCA in 2008 to combat fraud against the State. See L. 2007, c. 265; N.J.S.A. 2A:32C-3 (imposing civil penalties and damages on individuals who defraud the state in various ways). The statute was inspired by its longstanding counterpart, the Federal False Claims Act, 31 U.S.C. §§ 3729 to -3733, which traces its origins to the Civil War era and imposes civil liability for assorted species of fraud on the federal government. See Universal Health Servs., Inc. v. United States, 579 U.S. 176, 181-82 (2016). Like its federal counterpart, the NJFCA allows cases to either be brought directly by the government, or to be brought by a private individual—known as a qui tam “relator”—who sues “in the name of the State of New Jersey.” N.J.S.A. 2A:32C-

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<sup>1</sup> These sections are combined for the Court’s convenience.

5(a)-(b); cf. 31 U.S.C. § 3730(a)-(b) (providing that the Attorney General may bring a civil action, or a private person may bring a civil action “for the person and for the United States government”). A relator can share in the State’s recovery if the lawsuit ultimately succeeds. N.J.S.A. 2A:32C-7.

Relevant here, when a private relator sues under the NJFCA, his complaint is initially sealed, and that sealed complaint is served on the Attorney General but not on the defendants. N.J.S.A. 2A:32C-5(c)-(d). During the seal period, the Attorney General can investigate the complaint and decide whether to intervene. See id. § 32C-5(g). If the Attorney General decides to “proceed with the action himself,” the complaint can be unsealed and served on the defendants, and “the action is conducted by the Attorney General” directly. Id. § 32C-5(g)(1).<sup>2</sup> If the Attorney General declines to intervene, however, the complaint can still be unsealed and served on the defendants, and the relator may conduct the action himself. Id. §§ 32C-5(g)(2), 32C-6(f). In this latter scenario, where the case is pursued by a relator alone, the Attorney General can choose to continue to receive the parties’ filings, facilitating the State’s ability to monitor the proceedings. Id. § 32C-6(f). The Attorney General can seek to intervene at a later time, which the court must allow “upon a showing of good cause.” Ibid.

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<sup>2</sup> If the Attorney General intervenes, the relator has a right to remain a party, subject to certain limitations. See N.J.S.A. 2A:32C-6(a).

The Attorney General’s intervention decision has a variety of procedural consequences for the litigation. For one, a decision by the Attorney General to decline intervention limits his ability to issue future administrative subpoenas in the case. See In re Enf’t of New Jersey False Claims Act Subpoenas, 229 N.J. 285 (2017). In addition, in declined cases, the State is generally not considered a “party” for purposes of various court rules that turn on “party” status. Cf. United States ex rel. Eisenstein v. City of New York, 556 U.S. 928, 932-34 (2009) (explaining that under the Federal False Claims Act, the government is not a “party” when it has declined to intervene). Declination can also affect the relator’s share of the recovery, with a relator generally entitled to a larger cut when he pursues the case himself, and a smaller cut when the State has taken over the case. N.J.S.A. 2A:32C-7(a), (d).

Qui Tam statutes like the NJFCA and the Federal False Claims Act balance two interests. On the one hand, they provide tools for deterring and rooting out fraud, as they provide financial incentives to private citizens who can “supplement government enforcement” through fraud-prevention and public-funds recovery efforts. United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994). Resource-constrained government agencies may be unable to investigate comprehensively every suspected fraud case; lack certain kinds of expertise that are needed to identify very sophisticated

frauds; be unaware of certain insider information necessary to identify a fraud; or face internal hurdles that make it difficult for discrete portions of the government to assemble the disparate facts that together reveal a fraudulent scheme. At the same time, however, qui tam statutes can incentivize parasitism. That is, a relator might bring a suit the government easily could have brought entirely on its own—and then demand a share of the proceeds from the government’s recovery. See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 293-94 (2010). Such suits harm the public fisc because they force the State to give up some of what it would otherwise collect in a suit designed to remedy a harm to the government itself.

The NJFCA addresses this problem through a provision known as the “public disclosure bar.” As originally enacted in 2008, the public disclosure bar stated that an action under the NJFCA could not

be based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of the Legislature or by the news media, unless the action is brought by the Attorney General, or unless the person bringing the action is an original source of the information.

L. 2007, c. 265, § 9(c) (codified at N.J.S.A. 2A:32C-9 (2008)) (emphasis added); see ibid. (defining an “original source” to mean “an individual who has direct and independent knowledge of the information on which the allegations are

based and has voluntarily provided the information to the State before filing an action under this act based on the information”). This language closely tracked a similar (but not identical) provision in the Federal False Claims Act, as such provision had existed in 2008. See 31 U.S.C. § 3730(e)(4)(A)-(B) (2008) (stating that “no court shall have jurisdiction” over actions based on a defined public disclosure unless the action was brought by the government or the person was an original source).

Notably, under both the state and federal versions that existed in 2008, the government could always preclude the public disclosure bar from applying by intervening in the case and taking it over. See N.J.S.A. 2A:32C-9 (2008) (bar inapplicable when “the action is brought by the Attorney General”); 31 U.S.C. § 3730(e)(4)(A) (2007) (same, referencing the U.S. Attorney General). This made eminent sense, because the public disclosure bar was designed to protect the government from parasitic lawsuits, and the government itself was best positioned to determine if a qui tam suit was truly parasitic. If the government nonetheless thought the relator’s claims were worth pursuing—and the government elected to attach its flag to relator’s case rather than pursue its own independent action—neither our Legislature nor the U.S. Congress believed that a prior “public disclosure” was a sufficient reason to shut down an otherwise meritorious lawsuit.

In practice, however, these earlier versions of the public disclosure bar still presented procedural difficulties for the state and federal governments alike. Intervening in a pending action meant assuming “the costs and benefits of party status,” including potentially significant discovery obligations. Eisenstein, 556 U.S. at 933-34; see also Br. for the United States as Amicus Curiae Supporting Respondents, United States ex rel. Eisenstein v. City of New York, 556 U.S. 928 (2009), at 10-11 (explaining that intervention can impose “substantial litigation burdens” on government personnel, and so the government may decline to intervene in a case it thinks should go forward because of fears that discovery and related obligations will be “unmanageable”). Concerns about assuming these procedural obligations meant that governments sometimes declined to intervene, and otherwise meritorious qui tam suits were ultimately dismissed under the public disclosure bar. Accord S. Rep. No. 110-507 (2008), at 21-22 (describing how “many meritorious cases brought by qui tam relators” had been dismissed under the then-applicable version of the public disclosure bar, and recognizing that such dismissals went well beyond the genuinely “parasitic claims” that the public disclosure bar had been designed to target).

Both public disclosure bars were amended to address this concern, with the federal statute amended in 2010, and the state statute amended in 2023. See Pub. L. No. 111-148, Title X, § 10104(j)(2), 124 Stat. 119, 901 (2010) (codified

at 31 U.S.C. § 3730(e)(4)); L. 2023, c. 73, § 6 (codified at N.J.S.A. 2A:32C-9(c)). Dismissal under the public disclosure bar is now impermissible if such a dismissal is “opposed by the Government” (as to the federal statute), 31 U.S.C. § 3730(e)(4)(A), or “opposed by the Attorney General” (as to the state statute), N.J.S.A. 2A:32C-9(c). That is, both statutes now allow the government to prevent dismissal under the public disclosure bar via a simple notice, without the necessity of formal intervention.

The 2010 and 2023 federal and state statutes also made other changes to the public disclosure bar. Some of these narrowed the circumstances under which a disclosure counted as “public,” and others broadened the definition of who qualified as an “original source” entirely exempt from the public disclosure bar. See Pub. L. No. 111-148 § 10104(j)(2); L. 2023, c. 73, § 6. The federal change also removed the bar’s “jurisdictional” character under the federal statute—a character that had never applied under the NJFCA. See Pub. L. No. 111-148 § 10104(j)(2).

The State’s 2023 update to the public disclosure bar was part of a broader update to the NJFCA. Prior to 2023, the U.S. Department of Health and Human Services’ Inspector General had determined that the NJFCA was not “at least as effective” as the Federal False Claims Act in facilitating recoveries in Medicaid fraud cases. Assemb. Budget Comm. Statement to A. 5584 at 1 (June 27, 2023).

This finding jeopardized the State’s ability to recover certain funds as a matter of federal law, and so the State responded with the 2023 statute to address these concerns. See id. at 1, 3. The Inspector General then determined that, with these changes, the NJFCA was at least as effective as the federal law in addressing Medicaid fraud. See Letter From Christi A. Grimm, Inspector General, Dep’t of Health & Human Servs., to N.J. Atty. Gen. (Sept. 7, 2023).<sup>3</sup>

The statute with the State’s 2023 changes stated that it would “take effect immediately.” L. 2023, c. 73, § 11. The federal government’s 2010 changes to the public disclosure bar were silent as to their effective date. See Graham County, 559 U.S. at 283 n.1.

**B. Procedural History.**

This NJFCA case was originally filed in Superior Court in 2015 by relator Edelweiss Fund LLC.<sup>4</sup> (Ppa13.) The complaint, originally filed under seal, contended that various defendant banks had defrauded the State in how they set interest rates and charged the State other fees related to the issuance of certain bonds. (Ppa11-13.) The State investigated relator’s complex allegations

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<sup>3</sup> Available at [https://oig.hhs.gov/documents/root/1129/New\\_\\_Jersey\\_False\\_Claims\\_Act\\_09.07.23.pdf](https://oig.hhs.gov/documents/root/1129/New__Jersey_False_Claims_Act_09.07.23.pdf).

<sup>4</sup> “Ppa” refers to Relator-Petitioner Edelweiss Fund LLC’s Annex in support of certification. “Db” refers to Defendants’ brief in the Appellate Division. “Dsb” refers to Defendants’ supplemental brief in this Court.

(including as articulated in two amended complaints) and ultimately notified the trial court in July 2019 that it was declining to intervene. (Ppa14.) Relator proceeded with the action.

After various pretrial proceedings, the relator filed an amended complaint in March 2021 with additional factual allegations. (Ppa19.) The trial court denied the defendants' ensuing motion to dismiss based on the public disclosure bar, concluding it was unclear whether the bar applied. (Ppa19.) The defendants then filed a motion for summary judgment in March 2023, again citing the public disclosure bar. In the interim—i.e., on June 30, 2023—the Legislature enacted its amendments to the public disclosure bar. (Ppa19-20.)

In light of the amendment, the Attorney General filed a document in Superior Court exercising his statutory right to prevent dismissal. (Ppa21.) Following briefing on whether the Attorney General could exercise his statutory power in the case, the court denied defendants' summary judgment motion. (Ppa21-22.) The court explained that the 2023 change was procedural, in that the Attorney General had always had the ability to block public disclosure dismissals—before, by intervening in the case, now, through a filing but without needing to formally become a party. (Ppa45.) The court thus concluded that the statutory change applied in the case. (Ppa40); see also (Ppa45) (stating that “the amendment has procedural retroactive effective”). In the alternative, the court

found that disputed issues of fact existed regarding whether the relator’s complaint was in fact based on a public disclosure—an independent reason to deny the motion for summary judgment in this case. (Ppa54.)

The defendants successfully moved for leave to appeal, and the Appellate Division reversed. (Ppa36). Most relevant here, the court thought the case was controlled by the language in the 2023 statute indicating that its changes were to have immediate effect, which in the court’s view required prospective application. (Ppa28.) The court only very briefly considered relator’s argument that applying the revised statute to the Attorney General’s post-amendment filing was merely a prospective application. (Ppa28.) In the court’s view, allowing the Attorney General to object without actually intervening was a “significant change,” and so allowing that change to apply to pending cases would be giving it “retroactive application.” (Ppa28.) The panel below also asserted that the change was not “curative,” and was instead designed to allow the State to qualify for enhanced Medicaid recoveries under federal law. (Ppa28-29.)

The court’s opinion did not attempt to carve out any conduct described in the operative complaint that post-dated the 2023 change. In a footnote, the court opined that the issue was inadequately pressed by the relator, and that—in any

event—“the anti-retroactivity rule requires courts to apply the pre-amendment version of the statute to the entire course of conduct.” (Ppa29.)<sup>5</sup>

Relator petitioned this Court for certification, which this Court granted. This amicus brief follows.

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<sup>5</sup> In a separate portion of the opinion, the court applied the pre-amendment version of the public disclosure bar and concluded that defendants were entitled to summary judgment because there had been a public disclosure and the relator was not an original source. (Ppa29-36). The Attorney General takes no position in this brief on that fact-bound holding applying the pre-amendment statute.

## ARGUMENTS

### POINT I

#### **THE COURT SHOULD GIVE IMMEDIATE EFFECT TO THE ATTORNEY GENERAL'S OPPOSITIONS TO THE PUBLIC DISCLOSURE BAR WHEN SUCH OPPOSITIONS ARE FILED AFTER PASSAGE OF THE 2023 AMENDMENTS.**

When it passed the 2023 amendments to the NJFCA, the Legislature unequivocally declared its changes would “take effect immediately.” L. 2023, c. 73, § 11. That is precisely how the Attorney General understands the statute. Before the amendment, if the Attorney General wanted to prevent the public disclosure bar from thwarting the prosecution of a non-parasitic qui tam suit, the only available procedural device was formally intervening as a party. After the amendment, the Attorney General immediately gained access to a new filing option to achieve precisely the same outcome: he could notify the court that he opposed dismissal without first needing to intervene. The Attorney General did exactly that here, and he asks this Court to make that action effective—just as the Legislature directed.

In reaching a contrary result, the Appellate Division misapplied retroactivity principles. It started from the premise that the Legislature’s “take effect immediately” language signaled a desire to avoid retroactive application. From there, it leapt to the conclusion that the amendment would apply

retroactively if it applied to cases filed before the amendment's effective date. But that leap failed to ascertain the correct "event" regulated by the amendment at issue: the filing of the Attorney General's opposition. Before the amendment, such an opposition would not have been effective to obviate the public disclosure bar, unless the Attorney General had also intervened. After the amendment, his filing must be given effect. Nothing about that result, which gives effect to a procedural change, is impermissibly retroactive.

Determining whether the 2023 change applies here presents a question of statutory interpretation. See, e.g., Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386-87 (2016). This Court's role is therefore to "discern and effectuate the intent of the Legislature[,]" starting with the statutory text. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012). If needed, the Court may consult legislative history. DiProspero v. Penn, 183 N.J. 477, 493-94 (2005). Here, the statutory text is straightforward. The 2023 amendment to the NJFCA says its changes "take effect immediately." L. 2023, c. 73, § 11. That is, "immediately" after the 2023 amendments were passed, the new provision allowing the Attorney General to file an opposition without further intervention took "effect." This Court should follow the statute and recognize that the Attorney General's filing was effective.

That plain reading is reinforced by the broader terms of the NJFCA, and its manifest aim of protecting the State from fraud. The Legislature has directed that the NJFCA be construed “liberally . . . to effectuate its remedial and deterrent purposes.” N.J.S.A. 2A:32C-17; see also, e.g., Green v. Monmouth Univ., 237 N.J. 516, 538 (2019) (recognizing that statutory provisions directing that legislation be “liberally construed” carry weight and influence judicial interpretation). If the statute were interpreted as defendants propose, then more individuals who defraud the State will be able to invoke the public disclosure bar to defeat meritorious lawsuits—unless the State undertakes the burdens of intervention from which it was spared. That certainly does not advance the NJFCA’s express remedial purposes. And that is especially so when one considers that the point of the public disclosure bar is to protect the State from “parasitic lawsuits.” Graham County, 559 U.S. at 295. At the very least, in situations where the government itself is telling the Court that the lawsuit is not parasitic, it would best effectuate the NJFCA’s remedial purposes to allow the suit to go forward and be judged on its underlying merits.

Indeed, as the most recent amendments to the state and federal public disclosure bars illustrate, there can be meritorious and non-parasitic lawsuits that would have been barred by the prior version of the public disclosure bar. That is why, for example, the public disclosure bars now clarify that they only

apply to disclosures made in administrative or judicial hearings to which the relevant government was a party—recognizing that the government can be entirely unaware of disclosures buried deep in obscure proceedings in far-flung jurisdictions. See Pub. L. No. 111-148 § 10104(j)(2); L. 2023, c. 73, § 6. Accord Br. for the United States as Amicus Curiae Supporting Respondent, Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. at 22 (explaining that “many state and local reports and investigations never come to the attention of” the relevant authorities, and that even when materials are present in governmental files, that does not mean that “officials are actively investigating or likely to investigate the matters they cover”). It is also why the recent statutory amendments broadened the definition of who is an “original source” entirely exempt from the public disclosure bar. See Pub. L. No. 111-148 § 10104(j)(2); L. 2023, c. 73, § 6. And of course, under both the pre- and post-amendment versions of the public disclosure bars, the relevant governments could pretermitt an otherwise applicable public disclosure bar—whether solely by intervention pre-amendment, or also via a separate standalone filing post-amendment.

Legislative history is also in accord. A note to the 2023 amendments indicates that the Legislature’s goal was to make the NJFCA “at least as effective” as the Federal False Claims Act in facilitating qui tam actions about

Medicaid fraud. Assemb. Budget Comm. Statement to A. 5584 at 1 (June 27, 2023). Previously, the U.S. Department of Health and Human Services’ Inspector General had found the state statute less effective than its federal counterpart (which had been significantly amended in 2010, after the NJFCA was first passed). *Id.* at 1, 3. And since that disqualified the State from certain recoveries in Medicaid fraud cases, see *ibid.*, the Legislature understandably wanted to make the NJFCA’s changes take effect as quickly as possible (i.e., to “take effect immediately”). It stands to reason that the Legislature understood that its changes to the public disclosure bar would become effective at the first available opportunity.

That understanding of the 2023 amendment is also fully in accord with this Court’s principles about retroactivity. This Court has a “general rule of statutory construction that favors prospective application of statutes.” Maia v. IEW Constr. Group, 257 N.J. 330, 349 (2024) (quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981)) (emphases removed) (further citation omitted). This rule ensures individuals have advance notice of the substantive liability rules that will attach to their underlying conduct. See Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 489 (App. Div. 2000) (linking the rule to the difficulties that ensue when people are “expected to obey laws that have not yet been enacted” (citation omitted)); see also Maia, 257 N.J. at 347-51.

But it is equally established that “a statute does not operate retroactively merely because it is being applied in a case arising from conduct antedating the statute’s amendment.” Maia, 257 N.J. at 343 (brackets removed) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994)); see also Landgraf, 511 U.S. at 280 (“[T]he instruction that [a statute’s] provisions are to ‘take effect upon enactment’ [is understood] to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct.”). Indeed, “the ‘application of new statutes passed after the events in suit is unquestionably proper in many situations,’” Maia, 257 N.J. at 343 (citing Landgraf, 511 U.S. at 273-75), including in situations where the Legislature has given the statute solely prospective effect, see State v. Lane, 251 N.J. 84, 87-88 (2022) (confirming that an amended provision of N.J.S.A. 2C:44-1(b)(14), “authorize[d] sentencing courts to consider a new mitigating factor in imposing a sentence on or after the date of the amendment” and regardless of the date of filing) (emphasis added).

This Court has further explained that in determining whether a statute’s application would be “retroactive,” it is critical to recognize the difference between procedural rules that regulate the conduct of litigation, and substantive rules that regulate the underlying conduct of the parties. Only the latter normally

present retroactivity concerns, as such applications of statutes “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Maia, 257 N.J. at 343 (quoting Landgraf, 511 U.S. at 280). Procedural rules, by contrast, only regulate secondary conduct (namely, the conduct of litigation) rather than primary conduct (namely, the underlying conduct of the parties giving rise to liability), and so applying changed procedural rules to subsequent litigation conduct—litigation conduct after the amendment—does not normally pose any retroactivity problems. Landgraf, 511 U.S. at 275; see also Maia, 257 N.J. at 347 (procedural rules do not affect the duties and liabilities involved).

The change at issue in this case is a procedural one. It does not regulate or increase liability for the defendants’ primary conduct (the submission of false claims). Nor does it otherwise impose new duties upon defendants with respect to those claims. Instead, it merely changes the kinds of court filings that are effective to register the Attorney General’s opposition to dismissal under the public-disclosure bar. There is thus nothing “retroactive” about giving effect to the Attorney General’s filings here—even if applying this procedural change happens to be outcome determinative in certain scenarios, and even if it could be deemed to eliminate a defense. Accord W.S. v. Hildreth, 252 N.J. 506, 521-22 (2023) (concluding that after a statute eliminated the procedural requirement

that a tort plaintiff file a “notice of claim” before filing suit, and thus eliminated defenses based on a failure to file such a notice, the statute did not operate retroactively when applied to suits arising out of torts committed before the statute’s enactment).

Common sense reinforces this point. At the time a defendant submits false claims to the State, and through the ensuing time before suit is filed, it is hard to see how a defendant could have been relying on the public disclosure bar. Pre-suit there is no relator at all, and it is uncertain whether any future NJFCA lawsuit will be pursued by the State alone, by a relator alone, or by a relator backed by the State as intervenor. To the extent that a fraudster is even thinking about the public disclosure bar, it could only expect to raise that bar as a defense if (i) a relator (and not the State) later brings suit, (ii) the government declines to intervene, (iii) the relator was not an original source of the information, and (iv) the State chooses not to intervene later for good cause post-declination. This chain is far too attenuated for defendants to plausibly claim that they would have altered their underlying conduct based on the precise procedural ways that the government could oppose dismissal on public disclosure grounds. Far from any changes as to the actual substantive liability or quantum of damages to which a defendant might be subject for submitting a false claim to the State, there is no serious argument that a defendant would have changed their fraudulent conduct

based on this 2023 procedural change. And that is unsurprising given that the purpose of the public disclosure bar has always been to protect the State, rather than defendants.

The Appellate Division nonetheless suggested the change was substantive because—in that court’s view—allowing the Attorney General to ensure a suit can proceed without the necessity of intervening was a “significant change.” (Ppa28.) The defendants echo this point, observing that the Attorney General must establish “good cause” to intervene after initially declining to do, and so the 2023 amendments relieved the Attorney General of the need to make that showing to block the public disclosure bar. (Dsb17-20.) But the key question here is not how “significant” the change is. And it certainly is not how significant the change is for the Attorney General, since the defendants are the ones trying to invoke anti-retroactivity principles. The Court’s task is instead to try and identify the underlying conduct regulated by the amendment. Here, that conduct is entirely procedural because it relates solely to the conduct of litigation—not to the sort of substantive conduct that defendants could have changed to eliminate or reduce their own legal liability.

Defendants also wrongly assert that the public disclosure bar “protects defendants” in addition to protecting the State from parasitic lawsuits. (Dsb 20.) It is true enough that defendants may move to dismiss based on the public

disclosure bar. But in doing so, the defendants are still vindicating the State's interest in avoiding parasitic lawsuits, rather than some sort of defendant immunity from suits based on publicly-disclosed facts. That is why, even under the pre-2023 version of the NJFCA, the Attorney General could intervene and obviate the defendants' ability to invoke the public disclosure bar. And it is also why the pre-2023 version of the NJFCA prevented the public disclosure bar from applying when the relator qualified as an original source.

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997), does not counsel a different result. As an initial matter, that case applied federal principles of statutory interpretation to a federal statute, and it does not control how this Court interprets the NJFCA. Indeed, because the NJFCA has a broad provision requiring courts to give the statute a remedial construction—and the Federal False Claims Act lacks a similar provision (and federal courts lack a similar body of jurisprudence)—it would be inappropriate for this Court to reflexively apply cases like Hughes to the NJFCA.

Hughes is also plainly inapposite. Hughes involved the 1986 amendment to the Federal False Claims Act that first created the public disclosure bar; the statute's prior version had made pre-suit "government knowledge" a complete defense, even if there had been no public disclosure of the relevant information. Id. at 945-46. The Court in Hughes declined to apply this statutory change

“retroactively” in a case where both the false claims, and the prior disclosure to the government of the relevant information, had occurred pre-amendment. Id. at 946. That is understandable, because the 1986 amendment arguably impacted a substantive defense based on underlying pre-suit conduct—it eliminated the defendant’s ability to preclude qui tam liability by making pre-suit disclosures to the government (or at least pointing to pre-suit disclosures they had made). See id. at 947-50. Here, unlike in Hughes, the change at issue is solely about the conduct of the litigation itself because the change concerns the mechanism the Attorney General uses to conclusively communicate his view that his involvement is not necessary to ensure the protection the public-disclosure bar is designed to provide. And Hughes itself confirms that this distinction matters, since Hughes expressly acknowledged Landgraf’s distinction between changes that just “regulate the secondary conduct of litigation” and changes that regulate “the underlying primary conduct of the parties.” Id. at 951; see also id. at 946-48 (recognizing that retroactivity analysis requires a Court to identify a specific retroactivity event). Furthermore, this case is even more unlike Hughes because Hughes involved a categorical elimination of a defense, whereas here any effect that the change has on a defense would depend on the Attorney General’s case-by-case determination about whether to register his opposition; Hughes thought it relevant that the statutory change there was the equivalent of “create[ing] a

new cause of action, not just an increased likelihood that an existing cause of action will be pursued.” Id. at 950.

The U.S. Supreme Court’s decision in Graham County likewise does not counsel adopting defendants’ position. Graham County asked whether disclosures made in state and local reports counted as public disclosures under the pre-2010 version of the Federal False Claims Act. 559 U.S. at 283. In a short footnote, the Court noted that Congress had amended the public disclosure bar just a few days before its opinion issued, and the Court briefly observed that the federal amendment “makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners’ claimed defense to a qui tam suit.” Id. at 283 n.1 (citing Hughes 520 U.S. at 948). Nothing about this terse comment addressed the discrete change at issue here, which concerns the procedures by which the Attorney General articulates his opposition to courts applying the public disclosure bar. At most, the comment in Graham County addresses the portions of the 2010 statutory change that eliminated defendants’ ability to escape qui tam liability via state and local disclosures that happen pre-suit. See also United States ex rel. Bogina v. Medline Indus., Inc., 809 F.3d 365, 368-69 (7th Cir. 2016) (explaining that Graham County’s retroactivity discussion only concerned “a substantive change” to the public disclosure bar, and then concluding that the 2010 statute’s

changes to the definition of “original source” did apply to cases arising out of pre-2010 fraud). Regardless, Graham County applied federal principles of statutory interpretation to a federal statute with materially different text, and so for the reasons already discussed, it does not and should not control.<sup>6</sup>

To the extent any lingering doubt remains—and there should be none—deference principles further counsel in favor of the Attorney General’s interpretation. The Attorney General is the person charged with enforcing the NJFCA, and thus pursuant to the Legislature’s direction, the Attorney General plays a crucial role in administering the statute and has significant expertise in its operations. This Court should thus afford substantial deference to the Attorney General’s interpretation of the NJFCA. See State v. Coviello, 252 N.J. 539, 557 (2023) (“[A]lthough we are not bound by it, we commonly pay significant attention to the legal position of the Attorney General, the ‘sole legal adviser’ to state government concerning the interpretation of ‘all statutes’ that

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<sup>6</sup> These points also refute defendants’ reliance, see Dsb 13-14, on federal appellate decisions about the Federal False Claims Act’s public disclosure bar—some of which only address retroactivity in offhanded dicta, and none of which actually concerns the particular procedural change here. See, e.g., United States ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 n.3, 233-43 (3d Cir. 2013) (applying pre-2010 version of the public disclosure bar in a case about whether disclosures during bankruptcy litigation triggered the bar). See also Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 404 & n.1 (2011) (applying pre-2010 version of the public disclosure bar in a case about whether FOIA responses constitute a public disclosure).

affect state agencies”); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 70 (1978) (“Where an agency has based its statutory interpretation on an opinion by the Attorney General, we have held that a court should attach weight to the Attorney General's opinion.”); cf. TAC Assocs. v. N.J. Dept. of Env’t Prot., 202 N.J. 533, 541 (2010) (“[I]nterpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.”); Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Env’t Prot., 191 N.J. 38, 48 (2007) (“Generally, courts afford deference to an agency’s interpretation of a statute that it is charged with enforcing.”).

Taken together, these principles resolve this case. The 2023 amendments take immediate effect for the Attorney General’s prospective filings—that is, for any filings overcoming the public disclosure bar filed after its enactment date. That result is consistent, too, with the history, purposes, and interpretive rules for the NJFCA. And this result is in no way retroactive, as it affects litigation procedures prospectively, rather than primary conduct retroactively, and works no unfairness on fraudsters after the fact. No precedent, of this State or even in federal court, counsels a different result. This Court should reverse.

## POINT II

**AT A MINIMUM, RELATOR SHOULD BE PERMITTED TO PURSUE CLAIMS FOR CONDUCT THAT POST-DATES THE 2023 AMENDMENT.**

If the Court were to disagree with the above analysis, it should at a minimum let relator pursue claims based on conduct arising after the 2023 amendment—and thus still reverse the Appellate Division’s decision in part. Those claims cannot possibly be subject to retroactivity concerns, because even if defendants’ underlying fraud were the conduct regulated by the 2023 amendment at issue (and it was not), once the statutory amendment was enacted, defendants had all the notice they needed to refrain from submitting additional false claims. Accord In re Plavix Mktg., Sales Practices & Prods. Liab. Litig., 123 F. Supp. 3d 584, 595-99 (D.N.J. 2015) (concluding that because the alleged fraudulent conduct was both before and after the 2010 amendment to the federal statute, the court had to consider the post-amendment definitions of “public disclosure” and “original source” in assessing the claims that post-dated that amendment); United States ex rel. Shea v. Verizon Commc’ns, Inc., 160 F. Supp. 3d 16, 23-24 (D.D.C. 2015) (similar).

The Appellate Division’s contrary reasoning was erroneous. The panel briefly asserted in a footnote that it was “persuaded by the rationale articulated in federal cases holding that the anti-retroactivity rule requires courts to apply

the pre-amendment version of the statute to the entire continuous course of conduct.” (Dpa29 n.11). But its sole citation was a footnote in United States ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 n.3 (3d Cir. 2013), coupled with a parenthetical claiming that Zizic applied “only the pre-amendment public disclosure bar to an action alleging conduct both pre- and post-dating the 2010 federal amendment.” Zizic can in no way bear the weight the Appellate Division placed on it. That decision never even mentioned the “continuous course of conduct” doctrine or any similar principle; the decision instead just stated that because the 2010 changes to the federal statute were not retroactive (per Graham County), “we will discuss [the earlier] version of the public disclosure bar.” Ibid. And Zizic’s terse discussion did not give a reason (persuasive or otherwise) for why there would be any retroactivity concerns associated with applying a statutory amendment to post-amendment fraud.

Furthermore, it is not even clear that Zizic actually involved fraud post-dating the 2010 amendment. A passage in Zizic states that the complaint was filed in December 2009 (i.e., before the 2010 federal amendment), alleging fraud “from about January 2007 to the present,” and does not clarify if “the present” meant December 2009 or some later date. See id. at 234. (The Appellate Division may have been confused by the fact that there was a separate amendment to the Federal False Claims Act in May 2009. See Fraud

Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (2009). The Third Circuit’s opinion in Zizic discusses how the relator alleged fraud from both before and after that distinct 2009 statutory change. See Zizic, 728 F.3d at 234 n.4.) This is far too thin a reed on which to rest a retroactivity test that otherwise lacks support in logic or doctrine.

More broadly, the Appellate Division’s reliance on the “continuous-conduct” doctrine also gets matters entirely backwards. That doctrine is used in tort cases about the statute of limitations, and teaches that when certain torts are “continuous,” the plaintiff can treat the defendant as committing “a new tort, including a new breach of duty, each day, triggering a new statute of limitations.” Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 99 (1996). That is, the continuous-conduct doctrine supports separating out each tortious event, even if the conduct first started before the limitations period. See ibid. Applying that logic here would if anything support treating post-amendment continuous conduct differently from pre-amendment continuous conduct—the opposite conclusion from what the Appellate Division reached.

While there are some contexts where the continuing violation doctrine works differently, those contexts do not help the Appellate Division’s analysis. This Court has noted, for example, that certain kinds of continuous wrongful actions are not completed until “the date of the last act in the pattern,” so the

statute of limitations for suing over that course of conduct as a single violation will not begin to run until “the date on which the last act occurred.” Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 20-24 (2002). If that logic applied here, it would mean that the defendants’ entire course of conduct would need to be treated as occurring after the statutory amendment, and hence no retroactivity concerns would be triggered by any conduct in this case at all.

The continuous conduct argument is particularly strained in the context of false claims. When a fraudulent scheme involves multiple claims for payment, case law under the Federal False Claims Act does not treat the entire scheme as a single act for statute of limitations purposes. The Federal False Claims Act instead treats each submitted claim for payment separately, even if all the claims arose from the same false statement or other deception occurring years earlier. See, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1157 (2d Cir. 1993). So even to the extent the statute of limitations case law matters at all for retroactivity, that case law counsels against the Appellate Division’s refusal to differentiate amongst the various claims at issue here.

Beyond its lack of support in the very doctrine it cited, let alone in the law governing the submission of false claims in particular, the Appellate Division’s approach would lead to odd results. Most False Claims Act cases involve

multiple claims for payment that can be considered part of an ongoing fraudulent scheme spanning many years. Cf. N.J.S.A. 2A:32C-11 (setting a six- to ten-year limitations period for civil actions under the NJFCA). The Appellate Division’s reasoning implies that if even one claim pre-dates the 2023 amendment, the Attorney General’s opposition power will be ineffective as to the entire complaint unless the Attorney General intervenes via the more arduous pre-2023 procedural rules. Particularly for a statute that the Legislature intended to “take effect immediately,” L. 2023, c. 73, § 11, and that the Legislature said must be “liberally construed to effectuate its remedial and deterrent purposes,” N.J.S.A. 2A:32C-17, that result is particularly unlikely to have been intended by the Legislature.

Finally, not only was the Appellate Division wrong to cite the continuous-conduct doctrine for its unsupportable approach, but it was also wrong to claim that it had a basis in “in federal cases.”

### **CONCLUSION**

This Court should reverse the Appellate Division’s judgment and conclude that the Attorney General’s trial court filing was effective to prevent dismissal under the public disclosure bar.

Respectfully submitted,

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