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IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

STATE OF ILLINOIS *ex rel.* EMILY FOX, Relator-Appellant, v. JENNY THORNLEY, Defendant, and THE STATE OF ILLINOIS, Appellee.	)	On Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois No. 2021 L 0053 The Honorable ADAM JIGANTI, Judge Presiding.

BRIEF OF APPELLEE THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

This appeal involves a *qui tam* action under the Illinois False Claims Act in which the circuit court granted the Attorney General's motion to dismiss the case over the objections of the relator, Emily Fox. Fox's *qui tam* complaint alleged that Jenny Thornley, a co-worker at the Illinois State Police Merit Board, fraudulently obtained overtime compensation and other employment benefits, and also fraudulently obtained temporary workers' compensation benefits by falsely claiming that the Board's executive director sexually assaulted her. The Attorney General moved to dismiss the action under Section 4(c)(2)(A) of the False Claims Act, 740 ILCS 175/4(c)(2)(A). In response to Fox's objections, the Attorney General explained, among other things, that Thornley can be ordered to make restitution for any overtime compensation she fraudulently obtained in the pending criminal prosecution against her; that she can be required to make restitution of any fraudulently obtained workers' compensation benefits in her pending workers' compensation case; and that she is a defendant in several debt collection actions, putting in doubt both the amount of any ultimate recovery against her and the benefit of devoting time and resources to a separate suit against her under the False Claim Act. In its order dismissing Fox's *qui tam* action, the circuit court held that she did not sustain her burden to show that the Attorney General's decision to dismiss the action was made in bad faith or fraudulent. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly followed binding precedent under which a relator bears the burden to establish that the Attorney General has improper reasons for dismissing a *qui tam* action under the Illinois False Claims Act, and thus validly let the Attorney General explain his reasons for dismissing this action after the relator offered her objections to dismissal.

2. Whether the circuit court properly granted the Attorney General's motion to voluntarily dismiss this *qui tam* action over the relator's objections.

STATUTE INVOLVED

Section 4(c)(2)(A) of the Illinois False Claims Act states:

> The State may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

740 ILCS 175/4(c)(2)(A).

STATEMENT OF FACTS

Introduction

The Illinois State Police Merit Board, which oversees hiring, promotion, and discipline for the Illinois State Police, has a staff of just a few individuals, including an executive director, a program director, a chief financial officer, legal counsel, and an information systems analyst. (C 171, 335.)[1] In late January 2020, the Board's operations were disrupted when its executive director, Jack Garcia, and its chief financial officer, Jenny Thornley, accused each other of serious misconduct. On January 22, Garcia asked the Office of Executor Inspector General ("OEIG") to investigate whether Thornley had obtained overtime compensation by submitting false time reports. (C 117.) And Thornley accused Garcia of sexually assaulting her the following day, January 23. (C 332, 369.) Several days later, Thornley reported this alleged sexual assault to the contractor that administers workers' compensation benefits for state employees, and she then submitted a "Notification of Injury" form making the same allegation. (C 370, 746, 811–15.)

After consulting the Governor's office, the Board put Garcia and Thornley on paid leave. (C 9, 48, 341.) At the recommendation of the Governor's office, the Board also retained an outside firm, McGuire Woods, to investigate the allegations against Thornley and Garcia. (C 9, 117, 883.)

[1] References use the following prefixes: "C" – common law record; "R" – report of proceedings; "Rel. Br." – Relator's brief.

Thornley initially obtained a court injunction against the investigation, which the Attorney General then succeeded in having dissolved. (C 721, 901.) The firm later issued a report concluding that it found evidence "sufficient to support a finding that Thornley caused payments to herself for overtime she did not work," and that the evidence it reviewed was "insufficient to support a finding that Garcia sexually assaulted Thornley." (C 423.) The Board then terminated Thornley. (C 425.) For some months after she was terminated, Thornley received temporary workers' compensation benefits, which CMS, represented by the Attorney General, later terminated. (C 67, 79, 809; R 9, 10, 18, 20.) In September 2021, Thornley was charged in a seven-count indictment with forgery, theft of state property, and official misconduct. (C 440–47.)

Fox's *qui tam* complaint and disclosures

In April 2021, Fox filed her *qui tam* action under seal and provided a copy to the Attorney General, along with a letter summarizing her proposed claims and 27 related exhibits. (C 8–25, 94–1023.) Fox's complaint alleged that Thornley, who started working for the Board in 2014, (1) obtained more than $67,000 in overtime compensation from the Board by submitting false overtime reports and forging Garcia's signature; (2) obtained "thousands of dollars" in reimbursement for claimed travel expenses on trips she did not take or were for personal purposes, as well as reimbursement for other activities she falsely claimed were work-related; and (3) obtained "tens of

thousands of dollars" in workers' compensation benefits by falsely claiming that she experienced psychological trauma after Garcia sexually assaulted her. (C 8–9, 12–16, 19–20.) Fox's complaint further alleged that Thornley sought and obtained employment with the Board and promotions by misrepresenting her academic qualifications. (C 11–13.) Her complaint also alleged, without elaboration, that Fox was an "original source" for the matters alleged, and that they were not previously "publicly disclosed." (C 20.)

According to the complaint, Fox first suspected that Thornley was making false overtime claims in late November 2019, when Thornley made a comment about seeking overtime pay. (C 17, 873.) In January 2020, Fox shared her suspicions with Garcia, who said he had not approved any overtime for Thornley and asked Fox to help him investigate the issue. (C 873–74.) As a result of this investigation, Garcia submitted a complaint to the OEIG on January 22, 2020. (C 117.) The OEIG ultimately did not publicly announce any recommended disciplinary action against Thornley (e.g., suspension or termination), as authorized by the State Officials and Employees Ethics Act, 5 ILCS 430/20-50, 20-52. (C 21.)

Fox's complaint admitted that, after Thornley said Garcia assaulted her, the Governor's office recommended that the Board put Garcia on paid leave pending an outside investigation into the allegations about him and Thornley, and that the Board followed these recommendations, leading to the McGuire Woods report. (C 48–49, 73, 78–79, 330–423.)

Allegations of "complicity" in Thornley's fraud by Governor's Office

Fox's complaint also alleged that Thornley's fraud against the State was perpetrated "most recently with the apparent complicity of Illinois Governor J.B. Pritzker, his wife, . . . and the Governor's Office, including Ann Spillane, the Governor's General Counsel." (C 8.) The complaint alleged the following:

- The workers' compensation benefits that Thornley temporarily received as a result of her "false statements" about being sexually assaulted by Garcia resulted from "the direct involvement of the Governor's Office, including Spillane, on her behalf," who personally "accepted" Thornley's workers' compensation claim "and processed it." (C 9, 19–20.)
- The State continued to pay temporary workers' compensation benefits to Thornley after the Board terminated her "because individuals at the Governor's Office, or at the behest of that office, effectively reversed Thornley's termination." (C 10–11.)
- Fox reported to the OEIG Thornley's allegedly fraudulent receipt of workers' compensation benefits, but it "refused" to investigate the matter and "in retaliation for [Fox's] complaints . . . initiated an investigation of [Fox], apparently based on more false accusations by Thornley," which "appears again to be a direct consequence of pressure from the Office of the Governor, including Spillane." (C 9–10.)
- Despite Fox's efforts to have the State take action to correct the harm causes by Thornley' misconduct, "no action has been taken to do so," and "[t]his protection of a person who has defrauded the State is apparently based directly upon the intervention of the Governor's Office and Spillane in particular." (C 21.)

Except for Fox's allegation that Spillane was involved in discussions about how to respond to Thornley's workers' compensation claim (described below), the exhibits submitted with Fox's complaint do not contain any evidence to substantiate these allegations against the Governor's office.

As alleged factual support for Fox's accusations that the Governor's office was "complicit" in the State's payment to Thornley of fraudulent workers' compensation benefits, Fox's exhibits included her description of telephone calls she reported having with Kevin Richey, the Supervisor of CMS's Risk Management Division, on whom Thornley's workers' compensation claim was served, and with Assistant Attorney General Richard Glisson, who handled the litigation defense of the claim after it was filed. (C 434, 437, 810, 891.) Fox assumed that Thornley was ineligible to receive workers' compensation benefits after being terminated by the Board, even for an earlier workplace injury. (C 96–97, 434–35, 819; R 20, 25.) Fox also assumed that the Board, not CMS, could decide how to respond to Thornley's workers' compensation claim. (*Id.*) By statute, however, CMS and the its third-party contractor it retained administered all workers' compensation benefits for state employees, and the Attorney General represents the State in connection with all workers' compensation claims filed with the Workers' Compensation Commission. 20 ILCS 405/405-105(10) to 405-105(11); *see also Hoffman v. Madigan*, 2017 IL App (4th) 160392, ¶¶ 6, 15–30, 36–37.

Fox's description of her reported discussions with Richey and Glisson indicated that, after Thornley was terminated by the Board and started receiving temporary workers' compensation benefits, Fox was surprised that the Board had not been notified of Thornley's claim, and that it was being handled by CMS. (C 49, 809, 819.) Fox spoke to Richey, who said he was limited in what he could tell her because Fox was named in Thornley's claim. (C 819–20.) According to Fox, Richey did tell her that "the Governor's Office was involved in all communication and decisions regarding this case," and "Ann Spillane was on phone conference calls and has been updated on this matter throughout the entire process." (C 819.) Fox asked Richey "what steps the Board needs to take in order to file a response to Ms. Thornley's claim, since there was an independent investigation conducted and the 'injury' was proven to be completely falsified." (*Id.*) According to Fox, Richey responded that CMS was handling the matter, while keeping the Governor's office "aware of the situation every step of the way." (C 819–20.) He also explained that a doctor would conduct an independent medical examination of Thornley, and then "it will be determined whether or not TTD [temporary total disability benefits] will be stopped." (C 819.) Fox later told Richey and Glisson that, in her opinion, "Thornley's benefits should be cut off immediately based on the evidence in the McGuire Woods report that no injury occurred." (*Id.*) Glisson explained that he "would be running the issues through his supervisors and the Governor's Office and would have an answer on their planned course of

action going forward . . . ." (*Id.*) Thornley's temporary workers' compensation benefits were later terminated. (R 10.)

Fox's complaint did not allege that the Attorney General was in any way involved in any of Thornley's alleged misdeeds, nor did it assert that the Attorney General assisted or participated in any way in the alleged misconduct by individuals in the Governor's office. (C 8–25.)

Attorney General's decision and motion to dismiss the action

After receiving Fox's *qui tam* complaint and accompanying materials, the Attorney General began an investigation of the matters raised and requested several extensions of time to take action, which the circuit court granted. (C 4, 26–33.) Eight months after receiving Fox's complaint, the Attorney General moved to dismiss the action under Section 4(c)(2)(A) of the Illinois False Claims Act (the "Act," or "IFCA"). (C 37–39.) Because the circuit court dismissed the case before it was unsealed, Thornley was not notified of the action or served as a defendant before the dismissal.

The Attorney General's motion stated:

- "[T]he Illinois False Claims Act gives the State broad discretion to dismiss false claims." (C 38, citing *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 512 (2005.)
- "'"[I]t is the state's prerogative to decide which case to pursue, not the court's."'" (*Id.*, quoting *State ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, ¶ 21 (quoting *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 517 (1st Dist. 2006)).)

- "[A] relator's right to a hearing on the government's dismissal is [not] an inquiry into the merits." (*Id.*, citing *Burlington Coat*, 369 Ill. App. 3d at 517.)
- "A court should grant the State's motion to dismiss a false claims case unless extraordinary circumstances exist such as 'glaring evidence of fraud or bad faith by the state.'" (*Id.*, quoting *Burlington Coat*, 369 Ill. App. 3d at 517.)

The motion then stated that, "[a]fter reviewing the voluminous pre-filing disclosures [and] analyzing ongoing lawsuits related to the facts of the Complaint,"

> [T]he State finds that the Complaint suffers from significant legal and factual defects that do not justify continued expenditure of the State's litigation resources on this matter. Consequently, the State elects to exercise its prosecutorial discretion under 740 ILCS 175/4(c)(2)(A) to dismiss this action.

(C 39.)

Briefing on Attorney General's motion to dismiss

Fox and the Attorney General submitted an agreed order, which the circuit court entered, for briefing on the Attorney General's motion. (C 42.) Fox's response described at length her *qui tam* complaint, which she described as being "replete with facts that demonstrate how Defendant Jenny Thornley violated [the Act]" and including claims that are "substantiated by documentary evidence." (C 43–50.) Fox's response also stated that her complaint "alleges complicity in those schemes to defraud Illinois by Governor

J.B. Pritzker; M.K. Pritzker; the Office of the Governor, including General Counsel Ann Spillane; and the Office of the Executive Inspector General (the 'OEIG')." (C 43.) It criticized the Attorney General's motion for not discussing "the evidence of political cover-up and complicity by Governor Pritzker, his wife, his General Counsel and even the OEIG." (C 45.) Fox's response similarly asserted that "there is evidence that the OEIG, under the Governor's control, has been complicit in covering up Thornley's conduct while simultaneously doing Thornley and the Office of the Governor's bidding." (C 52.) Fox's response did not identify or give citations to any "evidence" in the materials she provided of a "political cover-up and complicity" by the Governor, his office, or the OEIG. (C 43–57.)

With respect to the Attorney General's decision to dismiss the case, Fox's response stated: "there is no apolitical explanation for the State's motion to dismiss this case"; "the State's motion offers no substantive justification whatsoever"; and "[t]he State has no good faith basis from which to argue that there is no case here to pursue." (C 43, 44.) Fox also stated that "it appears that the Attorney General's office is similarly succumbing to political pressure to shut this case down before the truth comes out and the State can be made whole." (C 52.) Again, Fox did not cite any evidence in the documents she submitted to support her allegation that the Attorney General was "succumbing to political pressure to shut this case down before the truth comes out." (*Id.*)

In his reply, the Attorney General asserted, among other things, that (1) the factual basis for Fox's claims was disclosed in public reports and records before Fox brought this action; (2) the State could obtain monetary recoveries against Thornley in the criminal action against her and in her pending workers' compensation proceeding, and the State accordingly "has no interest in pursuing an additional civil proceeding"; (3) it would be "a poor use" of the State's "limited prosecutorial resources" to pursue the complaint's claims under the Act, which involved "alleged timekeeping, travel reimbursement, and worker's compensation fraud by a single former state employee who has already been terminated, and who already faces an ongoing criminal prosecution where restitution can be obtained upon conviction"; and (4) Fox's "unsupported speculation that 'political pressure' motivated the dismissal motion is not evidence at all, let alone 'glaring evidence' of fraud or bad faith by the Attorney General's Office," as required by applicable precedent. (C 61–62, 65–74.) The Attorney General added that Fox's speculation about "some nefarious 'complicity'" and a "wide-ranging cover-up" by the Governor, his wife, his staff, and the OEIG had no "connection to the Attorney General's Office or to the decision to seek dismissal" of Fox's action. (C 61–62, 72.)

Hearing on Section 4(c)(2)(A) motion

At the hearing on the Attorney General's Section 4(c)(2)(A) motion, the Assistant Attorney General, who oversaw the investigation of Fox's claims,

emphasized that the focus of the court's inquiry, under applicable precedent, was not Fox's allegations of "some sort of complicity" between Thornley and the Governor's Office, which "have nothing to do with the State's decision to dismiss," but whether Fox presented "glaring evidence of fraud or bad faith" by the Attorney General in connection with that decision. (R 13.)

Fox argued that she had alleged valid fraud claims against Thornley, and that she was the "original source" for these claims because she "is the one who brought to the State's attention the resume fraud and the overtime fraud by Miss Thornley." (R 17.) Fox also argued that the Attorney General's reasons for dismissing the action included in his reply brief were "waived." (R 16–17.) But she did not seek leave to submit, or assert that she could present, any additional evidence or information to respond to those reasons. (R 14–27.)

Circuit court judgment

After describing relevant precedent, the circuit court's order dismissing the action held that Fox had not "identified the type of 'glaring evidence of fraud or bad faith' required for the Court to override the State's broad prosecutorial discretion over IFCA claims." (C 81, quoting *Burlington Coat*, 369 Ill. App. 3d at 517; *see also* C 86.)

The court described the parties' positions on whether Fox's claims against Thornley were foreclosed by the Act's "public disclosure" and "government action" bars, and whether Fox was an "original

source" for the complaint's claims. (C 83–84.) The court ruled, however, that it need not decide those issues where dismissal was within the Attorney General's discretion for other reasons. (*Id.*)

The circuit court further ruled that "[t]he Attorney General's Office has also identified multiple credible reasons why it seeks dismissal in this case." (C 83.) In particular, the court stated, Fox's claims against Thornley "overlap significantly with the seven-count criminal indictment against Thornley" in which, "if convicted, Thornley could be required to pay restitution to the State for her alleged overtime and travel and expense reimbursement fraud." (C 84.) Even if that did not preclude Fox's similar claims against Thornley, the court held, "it is well within the State's prosecutorial discretion . . . to decide that an IFCA civil action on top of a criminal action against the same defendant for the same underlying conduct is duplicative and an inefficient use of the State's resources." (*Id.*) The court noted, too, that Thornley's worker's compensation claim was "the subject of an ongoing administrative proceeding in which the State is a party." (C 83.) And it emphasized that the Attorney General had identified several debt collection actions against Thornley, stating that "[t]he inability to collect a judgment is also a legitimate factor for the State to weigh in the exercise of its prosecutorial discretion." (C 85.) The court then concluded that, in these circumstances, where "Thornley has been terminated from her job, indicted, and faces debt collection proceedings, it is not an unreasonable exercise of prosecutorial discretion to decide against

protracted IFCA litigation." (*Id.*)

The circuit court also examined Fox's contention that it should follow federal court precedent under the federal False Claims Act that "infer a substantive due process limitation on the government's ability to dismiss claims." (C 85–86.) The court declined to decide whether such a limitation applies under Illinois' Act, however, stating that "[e]ven if the Court applied this substantive due process analysis . . . , the result would not change" because "[t]he bar for establishing a substantive due process violation based on a discretionary executive action is extremely high." (*Id.*) Relevant precedent describing that standard, the circuit court observed, requires that executive action "shock the conscience" and "offend even hardened sensibilities" (C 86, citations omitted), and it held that "[t]he State's decision to seek dismissal in this case does not approach this high standard" (*id.*).

The circuit court did not determine whether Fox's accusations of "complicity" by the Governor's office relating to Thornley's misconduct were validly supported factually or merely speculative, and instead ruled that they were "not sufficient to override the presumption of good faith that the Court must afford to the State's decision to seek dismissal." (C 82, citing *Burlington Coat*, 369 Ill. App. 3d at 516.) The court stated:

> [Fox's] allegations relate exclusively to the Governor's Office and purported intervention regarding Thornley's worker's compensation claim. None of these allegations speak to the

> decision by the Attorney General's Office, as counsel for the State, to seek dismissal of the Relator's IFCA claims.

(*Id.*) With that focus, the court held that, "[a]t most, the Relator has offered mere speculation that the Attorney General's Office is 'succumbing to political pressure' to seek dismissal of this case," but the "Illinois Appellate Court has held . . . that 'glaring evidence,' not mere speculation, is necessary for a court to override the State's decision to seek dismissal of IFCA claims." (*Id.*, quoting *Burlington Coat*, 369 Ill. App. 3d at 517.) The court continued:

> The Relator in this case has not produced evidence that the Governor's Office even knows about the Relator's complaint at this point. As required by the IFCA, the complaint was filed under seal and disclosed to the Court and the Attorney General's Office. . . . The Court cannot infer without evidence that the Attorney General's Office is "succumbing to political pressure" from the Governor's Office to dismiss a case that the Governor's Office may not even be aware of at this point.

(*Id.*, citation omitted.) This appeal followed.

ARGUMENT

I. Summary of Argument

The circuit court properly followed Illinois precedent holding that when the Attorney General moves to dismiss a *qui tam* action under Section 4(c)(2)(A) of the Act, it is not the Attorney General's burden to show a good reason, but instead the relator's burden to establish that the Attorney General has a bad reason — bad faith or fraud — for dismissal. *See QVC*, 2015 IL App (1st) 132999, ¶ 21; *Burlington Coat*, 369 Ill. App. 3d at 517. The circuit court thus correctly rejected Fox's contention that it could not consider the Attorney General's reasons for dismissing the action explained in his reply in support of his Section 4(c)(2)(A) motion, after Fox stated her objections to dismissal.

The circuit court also correctly held that Fox failed to establish that the Attorney General had an improper reason to dismiss the case. Indeed, Fox offered only sheer speculation to support her contention that the Attorney General had a legally impermissible motive. And the court rightly held that, in any event, the Attorney General had sound reasons for dismissing the action — namely, that pursing this action made little sense where recovery of Thornley's overtime and workers' compensation benefits could be obtained in her pending criminal and workers' compensation proceedings, and Thornley was being pursued in several debt collection cases. Those reasons also defeat Fox's contention that dismissing this action violated her right to substantive due process. The circuit court likewise validly concluded that Fox's allegations

that the Governor's office was guilty of "complicity" and a "cover-up" regarding Thornley's alleged fraud against the State were both speculative and immaterial.[2]

II. Standard of Review

The circuit court's judgment is subject to *de novo* review to the extent that it involves the interpretation of a statute, here Section 4(c)(2)(A). *See Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). That includes what substantive standards apply to determine whether the Attorney General may dismiss a *qui tam* action, and who bears the burden of proof. *De novo* review also applies to situations where, as in this case, the circuit court dismisses a *qui tam* action based on the parties' written submissions, without live testimony. *See Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). The circuit court's judgment may be affirmed on any basis supported by the record, even if not the basis on which the circuit court relied. *Ultsch v. Ill. Mun. Ret. Fund*, 226 Ill. 2d 169, 192 (2007).

III. The False Claims Act

The Act (originally named the Whistleblower Reward and Protection

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[2] Supreme Court Rule 341(h)(6) requires the Statement of Facts in a party's brief to be "stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Rule 341(h)(7) further requires assertions of fact in the Argument to be supported by citations to the record. Fox's brief frequently violates these requirements, and the Attorney General does not concede (and often disputes) the accuracy of the factual assertions, inferences, and conclusions in Fox's brief that do not comply with them.

Act) was enacted in 1992 and largely adopted the provisions of its federal counterpart in effect at the time. Public Act 87-662; *Scachitti*, 215 Ill. 2d at 506. The Act makes it unlawful to obtain state funds based on false or fraudulent claims, 740 ILCS 175/3(a)(1), and it authorizes the Attorney General to bring a civil action against any person who violates this prohibition, 740 ILCS 175/3(a), 4(a). This authority supplements the Attorney General's constitutional authority to recover amounts owed to the State. *See Scachitti*, 215 Ill. 2d at 497–501.

The Act also allows a private person, known as the relator, to bring a *qui tam* action "in the name of the State" against anyone who obtains state funds by fraudulent means. 740 ILCS 175/4(b)(1). The relator must serve the Attorney General with "[a] copy of the complaint and written disclosure of substantially all material evidence and information." 740 ILCS 175/4(b)(2). The complaint remains under seal for 60 days, plus any extensions of time granted by the court for the Attorney General to investigate the claim and decide what action to take. 740 ILCS 175/4(b)(2), (3). Within that time, the Attorney General may intervene or decline to do so. 740 ILCS 175/4(b)(2), (b)(4). In either case, the Act gives the relator a right to receive a share of any recovery against the defendant in the action, with the share being higher if the relator conducts the case. 740 ILCS 175/4(d)(1), (2).

A *qui tam* case may not proceed if it is based on transactions "which are the subject of a civil suit or an administrative civil money penalty proceeding

in which the State is already a party," 740 ILCS 175/4(e)(3), or (unless the State consents) if those transactions "were publicly disclosed . . . in a criminal, civil, or administrative hearing in which the State or its agent is a party," 740 ILCS 175/4(e)(4)(A), (A)(i). This public disclosure condition does not bar the case, however, if the relator is an "original source" of the relevant information who voluntarily disclosed it to the State before the public disclosure or has "knowledge that is independent of and materially adds to the publicly disclosed" information and provided it to the State before filing a *qui tam* action. 740 ILCS 175/4(e)(4)(A), 4(e)(4)(B).

If the Attorney General intervenes, he assumes "primary responsibility for prosecuting the action," and the relator has a right to continue as a party, subject to any restrictions on his participation that the court may grant at the Attorney General's request. 740 ILCS 175/4(c)(1), (2). If the Attorney General declines to take over the action, the relator may continue to pursue it. 740 ILCS 175/4(c)(3). In that situation, the Attorney General he may require the relator to serve him with copies of all pleadings and deposition transcripts, and the Attorney General may later intervene on a showing of good cause. *Id.* If the relator conducts the case, he may not dismiss it without the written consent of the court and the Attorney General. 740 ILCS 175/4(b)(1).

At any time, including after the initial statutory deadline for the Attorney General to intervene or decline to intervene, he may either dismiss or settle the action, "notwithstanding the objections" of the relator. 740 ILCS

175/4(c)(2)(A), (B). For such a dismissal, Section 4(c)(2)(A) of the Act states:

> The State may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

740 ILCS 175/4(c)(2)(A). For settlements by the Attorney General over the relator's objections, the Act requires the circuit court to determine, after a hearing, whether "the proposed settlement is fair, adequate, and reasonable under all the circumstances." 740 ILCS 175/4(c)(2)(B).

IV. The Circuit Court Properly Followed Controlling Precedent By Allowing the Attorney General to Explain His Reasons for Dismissing this Action after Fox Asserted Her Objections.

On appeal, Fox argues that the circuit court's order dismissing this action should be reversed due to its supposed procedural error in allowing the Attorney General to elaborate on his reasons for dismissing the case in his reply, after Fox filed her objections to dismissal. (Rel. Br. at 24–29.) But Fox's argument misconceives the nature of a motion to dismiss under Section 4(c)(2)(A), as well as Illinois precedent which imposes on the relator the burden to show that dismissal of a *qui tam* action is improper. Under that precedent, which the circuit court was bound to follow, the court acted properly when the Attorney General moved to dismiss this action by requiring Fox to submit any objections to the Attorney General's motion, and then giving the Attorney General an opportunity to address those objections.

A. The circuit court was required to follow Illinois precedent imposing on the relator in a *qui tam* action the burden to establish that dismissal is improper.

Circuit courts must follow Supreme Court precedent, *People v. Artis*, 232 Ill. 2d 156, 164 (2009), and, absent such precedent, must follow relevant decisions by the appellate court, *In re A.A.*, 181 Ill. 2d 32, 36 (1998); *State Farm Fire & Cas. Co. v. Yapejian*, 152 Ill. 2d 533, 539–40 (1992). And unless there is a conflict among appellate court decisions, every circuit court judge must follow precedent from any appellate district. *Yapejian*, 152 Ill. 2d at 539–40 (1992); *In re Marriage of Baylor*, 324 Ill. App. 3d 213, 218 (4th Dist. 2001).

Here, uniform appellate court precedent holds that it is the relator's burden to show that the Attorney General's decision to dismiss a *qui tam* action is improper, not the Attorney General's burden to justify dismissal. *See*, *e.g.*, *QVC*, 2015 IL App (1st) 132999, ¶ 21; *Burlington Coat*, 369 Ill. App. 3d at 517. Accordingly, the circuit court did not err by holding that Fox had the burden to establish that dismissal of her *qui tam* action under Section 4(c)(2)(A) was improper and, after she filed her objections to dismissal, allowing the Attorney General to provide his reasons to dismiss the case.

B. Illinois precedent, taking account of the Attorney General's constitutional authority to represent the State, correctly holds that the relator has the burden of persuasion to avoid dismissal under Section 4(c)(2)(A).

Illinois precedent is also correct in recognizing the Attorney General's discretion to voluntarily dismiss a *qui tam* action and consequently imposing on the relator the burden to show that such a dismissal is improper. That

precedent conforms to Section 4(c)(2)(A)'s text and the Attorney General's exclusive constitutional authority to represent the State.

The text of Section 4(c)(2)(A), read in the context of the Act as a whole, refutes Fox's argument that it requires the Attorney General to justify dismissing a *qui tam* action. While various provisions of the Act contain substantive standards for judicial scrutiny of proposed actions in *qui tam* actions (e.g., voluntary dismissals by the relator, *see* 740 ILCS 175/4(b)(1), and settlements by the Attorney General when the relator controls the case, 740 ILCS 175/4(c)(2)(B)), Section 4(c)(2)(A) contains no such standards. Thus, by stating that the Attorney General "may" dismiss a *qui tam* action and imposing only procedural conditions on such a dismissal, Section 4(c)(2)(A) makes clear that whether such an action should be dismissed is a matter within the Attorney General's discretion. It follows that the relator must establish any basis to deny the Attorney General's motion to voluntarily dismiss the case.

Illinois precedent rightly interprets Section 4(c)(2)(A) in this manner, according to its terms. In *Scachitti*, the Supreme Court analyzed the Act's text in light of the Attorney General's "exclusive power to represent the State of Illinois in litigation when the state is the real party in interest," 215 Ill. 2d at 516, including in cases seeking recovery for a monetary harm to the State, *id.* at 497–99. The Court held that this authority "is not infringed when the state's interest is represented by other counsel who remain under the control

of the Attorney General and serves only at the Attorney General's pleasure." *Id.* at 514. The Act's *qui tam* provisions preserve this right of control by the Attorney General, thus preserving the Act's constitutionality, the Court ruled, because they "ensure the Attorney General retains authority to control the litigation at every stage of the proceedings." *Id.* at 510–11. And although *Scachitti* did not specifically analyze the language of Section 4(c)(2)(A), it described the many ways in which the Act gives the Attorney General control over a *qui tam* action, adding that, "[m]ost critically, the Attorney General has authority to dismiss or settle the action at any time, despite the objections of the *qui tam* plaintiff." *Id.* at 511–12. The Court concluded:

> Even when the Attorney General declines to intervene, the Attorney General retains *complete control* of the litigation. *See* 740 ILCS 175/4(c)(2)(A), (c)(2)(B) (West 2002). For these reasons, we interpret the plain language of the Act to provide that the Attorney General in all circumstances effectively maintains control over the litigation, consonant with the Attorney General's constitutional role as the chief legal officer of the state.

Id. at 512–13 (emphasis added).

Several lower court decisions have specifically examined Section 4(c)(2)(A)'s text and determined both what *substantive* limits, if any, it imposes on Attorney General dismissals of *qui tam* actions, and what *procedures* courts should follow when the Attorney General moves to dismiss the action. The leading case is *Burlington Coat*, 369 Ill. App. 3d 507 (1st Dist.

2006). After reviewing the Act's terms, as well as the Supreme Court's opinion in *Scachitti*, Illinois precedent on the Attorney General's constitutional authority, and federal court decisions interpreting the Act's federal-law counterpart, *id.* at 512–16, the court in *Burlington Coat* stated that the "core" issue is whether the decision to proceed with a *qui tam* action should be made by the executive branch or by the judicial branch," where "[o]nly the Attorney General is empowered to represent the state in litigation in which it is the real party in interest." *Id.* at 516. *Burlington Coat* then explained that interpreting section 4(c)(2)(A) "to require judicial review of the Attorney General's decision would "give the court veto power over the state's decision to dismiss, essentially usurping the Attorney General's power to direct the legal affairs of the state and putting that power into the hands of the court." *Id.* at 516–17. Elaborating, the court stated:

> The section 4(c)(2)(A) requirement that the relator be given a hearing on the state's decision to voluntarily dismiss a case necessarily gives the court approval of that dismissal decision. *It does not, however, require that the court second guess the state's decision to dismiss by conducting an inquiry into the state's motivations*.

Id. at 517 (emphasis added). Based on this reasoning, *Burlington Coat* held: "the presumption is that the state is acting in good faith and, *barring glaring evidence of fraud or bad faith* by the state, it is the state's prerogative to decide which case to pursue, not the court's." *Id.* (emphasis added).

Disposing of the case before it, *Burlington Coat* concluded: "Neither fraud nor bad faith was alleged here. Accordingly, we affirm the circuit court's dismissal of the action[.]" *Id.* Finally, addressing the relator's contention that the circuit court "erred in denying its request for discovery," the court held that, "[g]iven our determination that evidence of the state's reasons and the spuriousness thereof was not relevant in the hearing, the court did not err in denying relator's request for discovery." *Id.*

Several other Illinois appellate court decisions have expressly following *Burlington Coat*'s holding and interpretation of Section 4(c)(2)(A). *See People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, ¶¶ 13–14, 21, 26; *see also State ex rel. Krislov v. BMO Harris Bank, N.A.*, 2021 IL App (1st) 192273-U, ¶ 23; *State ex rel. Thulis v. City of Chi.*, 2021 IL App (1st) 191675-U, ¶ 20. And the court's opinion in *QVC*, quoting *Burlington Coat*'s holding that it is the State's prerogative, not the court's, to decide which FCA case to pursue, specifically held that the relator "bears the *burden* of presenting 'glaring evidence of fraud or bad faith by the state.'" 2015 IL App (1st) 132999, ¶ 21 (emphasis added); *see also Thulis*, 2021 IL App (1st) 191675-U, ¶ 21 (same). Thus, these cases expressly, and correctly, hold that the Attorney General has extremely broad discretion to dismiss a *qui tam* action and that under Section 4(c)(2)(A) the burden is not on the Attorney General to justify dismissing the relator's *qui tam* action, but on the relator to prove that the Attorney General's decision to dismiss it was made in bad faith

or fraudulent. *QVC*, 2015 IL App (1st) 132999, ¶¶ 21–26; *see BMO Harris Bank*, 2021 IL App (1st) 192273-U, ¶¶ 19–29; *Thulis*, 2021 IL App (1st) 191675-U, ¶¶ 17–25.

Under this precedent, the Attorney General has no obligation to offer reasons for his decision to voluntarily dismiss the action, and a motion to dismiss a *qui tam* action under Section 4(c)(2)(A) need not do so. To the contrary, the relator, who bears the burden of persuasion, must offer objections to dismissal — beyond just conclusory allegations — which warrant a reasonable inference that the Attorney General's motion amounts to bad faith or fraud on the court. *See QVC*, 2015 IL App (1st) 132999, ¶¶ 21–22, 26; *Thulis*, 2021 IL App (1st) 191675-U, ¶¶ 20–25; *see generally Burlington Coat*, 369 Ill. App. 3d at 516–17; *cf. Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 44 (1st Cir. 2022) (describing "substantial threshold showing" relator must make to avoid dismissal of *qui tam* action without further examination of any claim of "improprieties" by the State). Thus, the circuit court properly placed the burden of persuasion on Fox, as the relator, and gave the Attorney General the opportunity to explaining his reasons for dismissing the action after she stated her objections to dismissal.

D. Fox relies on irrelevant authority and has not shown any prejudice from the procedure the circuit court followed.

In opposition to this conclusion, Fox relies on cases applying Supreme Court Rule 341(h)(7), governing appeals. (Rel. Br. at 24). That rule provides that points not argued in an appellant's opening brief "are forfeited and shall

not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. Rule 341(h)(7). But Rule 341(h)(7), by its terms, does not apply to circuit court proceedings generally, or to Section 4(c)(2)(A) motions specifically. And the text of Section 4(c)(2)(A), which does apply, does not impose any requirement that the Attorney General initially offer a justification for the dismissal, nor does it prohibit allowing his response to a relator's objections to include reasons for his decision to dismiss the action.

Regardless, Fox has not demonstrated any prejudice from the circuit court's claimed failure to require the Attorney General to initially state his reasons for dismissing this action. After the Attorney General filed his motion to dismiss, Fox agreed to the briefing schedule entered by the circuit court, under which Fox first stated her objections to dismissal, and the Attorney General then filed his reply. (C 42, 59–75.) And at no time, including at the Section 4(c)(2)(A) hearing after this briefing, did Fox ever assert that she could present, or should be given leave to present, any additional factual basis to dispute the Attorney General's reasons for dismissing the action — much less "glaring evidence" that his decision to do so was fraudulent or made in bad faith. (R 14–28.)

* * *

In sum, the circuit court did not commit reversible error, or any error at all, by letting the Attorney General explain his reasons for voluntarily dismissing this action after Fox stated her objections to dismissal.

V. The Circuit Court Properly Granted the Attorney General's Motion to Voluntarily Dismiss this Case.

There is likewise no merit to Fox's arguments that the circuit court's order dismissing this action was substantively wrong. Fox contends that the circuit court erred in two ways: (1) by allegedly interpreting the Act to give the Attorney General "unfettered discretion" to dismiss a *qui tam* action, rendering the hearing provided by Section 4(c)(2)(A) "an effective nullity" (Rel. Br. at 3, 19–24); and (2) by failing to require the Attorney General to articulate a rationale for dismissal related to a legitimate government purpose, as allegedly required by substantive due process (*id.* at 3, 14–18). Fox is wrong on both counts. And the circuit court's judgment should be affirmed regardless of what standard of scrutiny applies because Fox failed to satisfy any relevant standard to overcome the Attorney General's discretion to voluntarily dismiss a *qui tam* action.

A. Fox failed to sustain her burden to show an improper reason for the Attorney General's decision to voluntarily dismiss this action.

1. Fox failed to satisfy the *Burlington Coat* standard for denying a Section 4(c)(2)(A) motion to dismiss a *qui tam* action.

The circuit court followed applicable Illinois precedent by applying the "glaring evidence" standard announced in *Burlington Coat* and concluding that Fox did not satisfy her burden to meet it. (C 81–82, 84, 86.) But Fox refuses to squarely address that holding. Instead, she mischaracterizes the circuit court's decision, as well as the *Burlington Coat* standard, claiming they

establish an "irrebuttable presumption" in favor of the Attorney General's decision and give him "unfettered discretion" to dismiss a *qui tam* action under Section 4(c)(2)(A). (Rel. Br. at 3, 20.) That straw man argument is both a distraction and wrong.

The circuit court's judgment never said the Attorney General has "unfettered discretion" to dismiss a *qui tam* action. (C 76–87.) Instead, the court applied the *Burlington Coat* standard, which announced substantive limits on the Attorney General's ability to dismiss a case under Section 4(c)(2)(A), and it held that dismissal was warranted because Fox failed to demonstrate that the Attorney General exceeded those limits. (C 80–86.)

Tellingly, Fox makes no attempt to argue that she satisfied the *Burlington Coat* test, apart from making wholly conclusory accusations that the Attorney General's reasons for dismissing the case were "pretextual" and made in "bad faith." (Rel. Br. at 12, 24–30.) Nor could Fox do so, for there is no evidence, much less "glaring evidence," that the Attorney General's decision to voluntarily dismiss this action was made in bad faith or fraudulent. As in *Burlington Coat*, 369 Ill. App. 3d at 517, Fox did not even *allege* that the Attorney General's voluntary dismissal of this action amounted to bad faith or fraud on the court. (C 8–25.) And the objections she filed in response to the Attorney General's motion merely asserted, in conclusory fashion, that the *Governor's office* was "complicit" in Thornley's alleged violations of the Act. (C 43–45, 48, 52–53, 55–56.) But the Attorney General and the Governor are

separately elected constitutional officers. Ill. Const. art. V, §§ 1, 8, 15. Under the Act, it is "the *Attorney General* [who] has authority to dismiss or settle the action at any time, despite the objections of the *qui tam* plaintiff." *Scachitti*, 215 Ill. 2d at 512 (emphasis added). And the Governor does not control the Attorney General's representation of the State in litigation. *See*, *e.g.*, *Hoffman*, 2017 IL App (4th) 160392, ¶¶ 20–23, 36–39; *see generally Envtl. Prot. Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 400–01 (1977). That basic distinction under the Constitution and the Act between the Governor and the Attorney General, which Fox overlooks, is critical. As the circuit court held:

> [T]he Relator's allegations relate exclusively to the *Governor's Office* and purported intervention regarding Thornley's worker's compensation claim. None of these allegations speak to the decision by the *Attorney General's Office*, as counsel for the State, to seek dismissal of the Relator's IFCA claims.

(C 82.) (emphasis added).

The only arguably relevant reference to the Attorney General in Fox's objections to dismissal (not her complaint) was her assertion that "now it appears that the Attorney General's office is similarly succumbing to political pressure to shut this case down before the truth comes out and the State can be made whole." (C 52.) As the Attorney General replied, however, Fox's "(baseless) speculation about . . . . 'political pressure' is not 'glaring evidence' of fraud or bad faith." (C 73, quoting *Burlington Coat*, 369 Ill. App. 3d at 517). The Attorney explained that Fox "offer[ed] nothing to substantiate how this

alleged pressure was applied, by whom, or when," and that "there was no such pressure applied to anyone involved in the decision-making process for the Attorney General's Office." (C 72–73.) Further, the Attorney General explained, Fox's "speculation" did not "rebut or even address the actual reasons for the State's decision to dismiss," including "the parallel criminal and administrative proceedings addressing the same conduct, and an interest in focusing IFCA enforcement resources on high-value recoveries." (C 73.)[3]

The circuit court thus properly found Fox's comment about supposed "political pressure" on the Attorney General "to shut this case down before the truth comes out" to be insufficient to prevent dismissal of the case. (C 72, 82.) Noting *Burlington Coat*'s holding "that 'glaring evidence,' not mere speculation, is necessary for a court to override the State's decision to seek dismissal of IFCA claims," the circuit court emphasized that Fox "has not produced evidence that the Governor's Office even knows about the Relator's complaint at this point." (C 82.) On appeal, Fox does not, and realistically could not, challenge this conclusion. Instead, she just repeats her misplaced assertion

[3] In her brief, Fox asserts that in the circuit court "[t]he Attorney General . . . argued falsely that the State was pursuing compensation from Thornley separately. R. C.68-71." That accusation does not come close to establishing glaring evidence of fraud or bad faith. It is also unfounded. In the referenced pages of the Attorney General's reply in support of his motion to dismiss, he *accurately* stated that Fox's complaint was "duplicative of other ongoing proceedings — including a criminal indictment against Thornley — in which the State can potentially recover restitution based on the same underlying conduct" (C 68), and that "[i]f Thornley is convicted in her criminal case, she could be required to pay restitution to the State" (C 69).

that her complaint alleged serious misconduct by Thornley and the Governor's office. (Rel. Br. at 13, 23, 30.)

Insisting that Section 4(c)(2)(A) requires the Attorney General to supply a good reason for dismissing a *qui tam* action, Fox, citing *State ex rel. Hurst v. Fanatics, Inc.*, 2021 IL App (1st) 192159, ¶ 21, asserts that appellate courts, while giving "lip service to the *Burlington Coat Factory* decision, . . . have also looked for substantive arguments that supported the bases of a government motion to dismiss." (Rel. Br. at 21.) But in *Hurst* the relator appealed only the circuit court's ruling that the State's recovery was not an "alternate remedy" under the Act, not dismissal of the action, so the Attorney General's voluntary dismissal was not an issue the appellate court considered. 2021 IL App (1st) 192159, ¶¶ 17–18, 21. And, as noted above (at 26–27), all Illinois appellate court decisions have adopted the *Burlington Coat* standard. Nonetheless, if a relator opposes dismissal, nothing prevents the Attorney General from providing legitimate reasons for dismissing the case, as he did here.

Fox also contends that, in connection with the Attorney General's Section 4(c)(2)(A) motion, the circuit court was required to accept the truth of the allegations in Fox's complaint. (Rel. Br. at 13–14, 23, 26.) That is both incorrect and irrelevant because Fox's complaint says nothing about the Attorney General's reasons for dismissal. Fox bases this contention on the premise that a motion to dismiss a *qui tam* action under Section 4(c)(2)(A) is like a motion to dismiss under Section 2-619 of the Code of Civil Procedure,

735 ILCS 5/2-619, for which the court takes as true the allegations of the plaintiff's complaint and assumes it states a valid claim. (Rel. Br. at 13–14.) But a dismissal under Section 4(c)(2)(A) is a *voluntary* dismissal by the State, *see Burlington Coat*, 369 Ill. App. 3d at 512, and thus the closest analogy is a motion for voluntary dismissal of an action under Section 2-1009 of the Code of Civil Procedure, 735 ILCS 5/2-1009, for which the court generally does not need to address the accuracy or sufficiency of the complaint's allegations, *see Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). In addition, the Attorney General may move to dismiss a *qui tam* action after investigating the complaint's allegations and concluding that many of them are wrong. *See Scachitti*, 215 Ill. 2d at 505–06, 516. Finally, even if the standards governing involuntary dismissals of pleadings did apply to Section 4(c)(2)(A) motions, the Court would accept as true only "well-pleaded facts," not "conclusory factual allegations unsupported by allegations of specific facts." *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶ 16.

Fox complains that whether the Governor "pressured" the Attorney General to dismiss this case "is unknowable at this stage in the litigation," making it unfair to dismiss this action without further factual development. (Rel. Br. at 23–24.) This contention fails for multiple reasons. As noted, the burden fell on Fox to show bad faith or fraud, not on the Attorney General to show a good reason to dismiss the case. And after the Attorney General gave several sound reasons for dismissing the action, Fox did not, and could not,

credibly argue that they were facially implausible or absurd, supporting even a suspicion that they were a pretext for actual bad faith or fraud.

For the first time on appeal, Fox characterizes the Attorney General's reasons as "pretextual." (Rel. Br. at 12, 24, 25, 27, 29.) But Fox forfeited this accusation by not raising it in the circuit court. *See People v. Cruz*, 2013 IL 113399, ¶ 20. In any event, this conclusory assertion falls far short of the minimum factual basis necessary to establish that a given reason is pretextual — i.e., a "lie" to obscure the true, impermissible reason, *Schnitker v. Springfield Urban League, Inc.*, 2016 IL App (4th) 150991, ¶¶ 42.

Fox also offers another new argument on appeal: that the *current* Attorney General (Kwame Raoul), who moved to dismiss Fox's action, had a "conflict of interest" because Fox alleged misconduct by the Governor's General Counsel, Ann Spillane, who served as Chief of Staff of the *former* Attorney General (Lisa Madigan). (Rel. Br. at 23.) But Fox doubly forfeited this argument by not raising it below, *see Cruz*, 2013 IL 113399, ¶ 20, and by not offering any authority or meaningful argument in her opening brief for the proposition that Ms. Spillane's service for the *former* Attorney General creates a conflict of interest for the *current* Attorney General in a matter that has no relation to her service for the former Attorney General, *see In re M.M.*, 2016 IL 119932, ¶ 30 (party on appeal forfeits issues not "clearly defined with pertinent authority cited and cohesive arguments presented).

In any event, Ms. Spillane's successive roles working for the former Attorney General and the current Governor do not give rise to a conflict of interest that would justify disqualifying the Attorney General from representing the State in this matter. *See Envtl. Prot. Agency*, 69 Ill. 2d at 400–01 (holding that Attorney General is subject to disqualification only when he is interested as a private individual or is an actual party to the litigation); *see also McCall v. Devine*, 334 Ill. App. 3d 192, 198–206 (1st Dist. 2002) (affirming denial of motion to disqualify State's Attorney from investigation of police where movant's allegations showed only a "close professional working relationship" between them); *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 566–67 (3d Dist. 1987) (holding that movant's "speculative and conclusory" allegations of State's Attorney's "political ties" and "political alliance" with mayor accused of misconduct were insufficient to indicate disqualifying conflict of interest); *People ex rel. York v. Downen*, 119 Ill. App. 3d 29, 31–32 (5th Dist. 1983). Moreover, even if a conflict of interest did exist (which it does not), that still would not amount to bad faith, i.e., "dishonesty," *see* Black's Law Dictionary (11th ed. 2019), or fraud in connection with the Attorney General's motion to dismiss this action, as required to defeat the motion. *See QVC*, 2015 IL App (1st) 132999, ¶¶ 21–26.

2. Fox's speculation about "complicity" by the Governor's office in Thornley's alleged False Claims Act violations did not justify denying the Attorney General's motion to dismiss this action.

Even if it were relevant (which it is not), Fox's sensationalist

speculation that the Governor's office was "complicit" in Thornley's alleged fraud against the State is implausible. Notably, Fox has not claimed any complicity by the Governor's office in connection with Thornley's alleged overtime compensation fraud, for which the Governor's office recommended, and the Board commissioned, an independent investigation which found substantial evidence that Thornley committed such fraud. (C 9, 117, 423, 883.)

Fox's assertion of such complicity for Thornley's allegedly fraudulent receipt of temporary workers' compensation benefits also strains credulity. Even if the Court were obliged to accept as true the well-pleaded factual allegations of Fox's complaint, that would not apply to conclusory factual allegations, *see McIntosh*, 2019 IL 123626, ¶ 16, which is all that Fox offers. She contends that the Governor's office improperly approved the payment of temporary workers' compensation benefits to Thornley when the Board's prior termination of her employment prevented her from receiving such benefits, and did so after the McGuire Woods report "proved" that Garcia did not assault Thornley. (Rel. Br. at 9, 12 n.2, 18 n.4, 23, 27; *see* C 434–35, 828, 838). But Thornley's termination did not prevent her from later receiving workers' compensation benefits for any injury that occurred *before* she was terminated. *See Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132, 135–36, 146 (2010). And the McGuire Woods report, while providing much helpful information, did not "prove" its carefully qualified conclusions, or even constitute admissible evidence in Thornley's workers' compensation

proceeding. *See People v. Garrett*, 216 Ill. App. 3d 348, 357 (1st Dist. 1991); *Williamson v. City of Springfield*, 125 Ill. App. 3d 361, 366 (4th Dist. 1984). Thus, CMS's decision to voluntarily pay TTD benefits before the Attorney General was in a position to present strong *admissible* evidence to dispute Thornley's claim avoided the risk that she would immediately demand a hearing and obtain an arbitrator's order requiring such payments, which the State would then have to pay indefinitely, instead of being able to voluntarily terminate them as soon as it had such evidence, which it did. (R 10.) Consequently, Fox's allegation that Richey said the Governor's general counsel participated in discussions about CMS's administration of this claim does not overcome the presumption that public officials act in good faith, *see Scott v. Dep't of Commerce & Cmty. Affairs*, 84 Ill. 2d 42, 55 (1981); *Grissom v. Bd. of Educ., Buckley-Loda Cmty. School Dist. No. 8*, 75 Ill. 2d 314, 320–21 (1979), much less demonstrate "complicity" in defrauding the State.

Similarly, Fox's unsubstantiated speculation that the Governor's office somehow controlled the OEIG, an independent agency, leading it to do nothing with respect to Garcia's complaint about Thornley's alleged overtime fraud and to retaliate against Fox (Rel. Br. at 5, 10; C 10, 22, 43, 45), adds nothing to her appeal. OEIG investigations are normally confidential. 5 ILCS 430/20-95(d). And given the OEIG's limited disciplinary powers, no significance attaches to the absence of a public OEIG report on Thornley's alleged overtime fraud after she was fired and indicted for the same conduct.

B. The circuit court's judgment should be affirmed even if Section 4(c)(2)(A) imposes a different statutory standard for dismissals of *qui tam* actions.

Fox devotes much of her opening brief to arguing that the Court should depart from existing Illinois precedent and adopt a stricter standard for judicial examination of voluntarily dismissal motions under Section 4(c)(2)(A), and that under that standard the circuit court's judgment must be reversed. Neither part of this argument has merit. If anything, Section 4(c)(2)(A) should be read, consistent with its terms, not to impose any limitations *itself* on the Attorney General's discretion to dismiss a *qui tam* action, but only to allow a relator to oppose dismissal based on a source of substantive law *outside* Section 4(c)(2)(A), such as an alleged constitutional violation by the Attorney General in seeking dismissal. And even if Section 4(c)(2)(A) did itself impose a stricter standard, the circuit court's judgment dismissing this action was manifestly correct.

1. Section 4(c)(2)(A) does not itself impose a stricter standard than *Burlington Coat* for Attorney General dismissals of *qui tam* actions.

Fox urges this Court to reject the *Burlington Coat* standard and instead apply a stricter standard that a few federal courts have adopted, but others have rejected, in interpreting the federal False Claims Act. (Rel. Br. at 20–23.) The Court should decline that invitation.

a. By its plain terms, Section 4(c)(2)(A) does not itself impose any substantive limits on the Attorney General's dismissal of a *qui tam* action.

The text of Section 4(c)(2)(A) refutes Fox's argument that it should be read to impose *its own* substantive limits on the Attorney General's power to dismiss a *qui tam* action. That text includes no such limit, in contrast to other provisions of the Act that do adopt substantive criteria for courts to apply.

"When construing a statute, the cardinal rule, to which all other rules and canons are subordinate, is to ascertain and give effect to the true intent of the legislature." *Nelson v. Kendall Cnty.*, 2014 IL 116303, ¶ 23. Determining that intent begins with the language of the statute, given its plain and ordinary meaning. *In re Marriage of Mathis*, 2012 IL 113496, ¶ 20. "In determining the plain meaning, [a court] must consider the statute in its entirety, the subject it addresses, and the apparent intent of the legislature in enacting it." *Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL116023, ¶ 16; *see Solon v. Midwest Med. Records Ass'n.*, 236 Ill. 2d 433, 440 (2010). A court may not "depart from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the expressed intent." *Solon*, 236 Ill. 2d at 441. Likewise, statutory interpretation does not give a court license to "inject provisions not found in a statute, however desirable or beneficial they may be." *Droste v. Kerner*, 34 Ill. 2d 495, 504 (1966); *see People v. Lewis*, 223 Ill. 2d 393, 402-03 (2006). Instead, the court "must construe and apply statutory provisions as they are written and cannot rewrite them to

make them consistent with the judiciary's view of orderliness and public policy." *Prazen v. Shoop*, 2013 IL 115035, ¶ 35. Further, "[w]hen the legislature includes particular language in one section of a statute but omits it in another section of the same statute, courts presume that the legislature acted intentionally and purposely in the inclusion or exclusion, and that the legislature intended different meanings and results." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 2012 IL 112566, ¶ 24.

Application of these principles leads to the conclusion that Section 4(c)(2)(A) does not itself subject the Attorney General's right to voluntarily dismiss a *qui tam* action to any judicially applied substantive limits. Critically, although several provisions of Section 4 of the Act, which governs *qui tam* suits, specify substantive criteria for the court to apply, Section 4(c)(2)(A) does not. For example, Section 4(b)(3) provides that upon the Attorney General's request, the court may extend the period when *qui tam* action remains under seal, pending the Attorney General's investigation of the claim, "for good cause shown." 740 ILCS 175/4(b)(3). Similarly, if the Attorney General intervenes and takes primary responsibility for prosecuting the action, Section 4(c)(2)(C) authorizes the court to limit the relator's participation in the case if the relator's unrestricted participation "would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 740 ILCS 175/4(c)(2)(C). The court also may limit discovery by the relator if it "would interfere with the State's investigation or

prosecution of a criminal or civil matter arising out of the same facts." 740 ILCS 175/4(c)(4). And under Section 4(c)(2)(B), the Attorney General may settle the action, notwithstanding the relator's objections, "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 740 ILCS 175/4(c)(2)(B).

Section 4(c)(2)(A), by contrast, imposes no substantive limits on the Attorney General's discretion or substantive criteria for the court to apply when he decides to voluntarily dismiss a *qui tam* action. Instead, it prescribes solely procedural requirements: that the Attorney General give the relator "notice" of its motion, and that the court give the relator "an opportunity for a hearing on the motion." 740 ILCS 175/4(c)(2)(A). Thus, Fox's proposed reading of Section 4(c)(2)(A) must be rejected because it improperly seeks to inject into Section 4(c)(2)(A) terms it does not include, *see Solon*, 236 Ill. 2d at 441, and to do so even though the General Assembly has made clear that, when it wants to impose substantive limits on various types of relief under the Act, it knows how to do so and does so expressly, *see Chicago Teachers Union*, 2012 IL 112566, ¶ 24. Fox's supposed policy reasons for limiting the Attorney General's discretion are therefore misplaced and, absent any textual basis, improperly invite the courts to exercise legislative prerogatives. *See Prazen*, 2013 IL 115035, ¶ 35.

On the other hand, reading Section 4(c)(2)(A) not to impose substantive limits on the Attorney General's ability to voluntarily dismiss a *qui tam* action

does not render the provision's procedural requirements superfluous or meaningless. To the contrary, those procedures give a relator the ability to try to convince the Attorney General not to dismiss the case, *see Burlington Coat*, 369 Ill. App. 3d at 516 (discussing *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003), as well as an opportunity to establish that dismissing the case would violate the relator's constitutional rights, *see Borzilleri*, 24 F.4th at 42–43 ("we think it beyond debate that the government could not dismiss a *qui tam* action if its decision to seek dismissal is based on an unjustifiable standard such as race . . . in violation of equal protection principles") (citations and internal quotation marks omitted).[4]

b. Reading substantive limits into Section 4(c)(2)(A) would cause serious doubts about the statute's constitutionality.

Fox's contention that Section 4(c)(2)(A) should be read to impose substantive limits on the Attorney General's power to voluntarily dismiss a *qui tam* action should rejected for the additional reason that it would create serious doubts about the provision's constitutionality. "A court has a duty to construe a statute in a manner that upholds its validity and constitutionality if it can reasonably be done." *Hayashi*, 2014 IL 116023, ¶ 22; *see People v.*

[4] Fox does not allege that the Attorney General's decision to dismiss this case violated her right to equal protection, e.g., because of her race or gender. Thus, the Court need not decide precisely how equal protection principles limit the Attorney General's decision not to pursue a *qui tam* case, and what procedures apply to claimed violations of those principles. *See Heckler v. Chaney*, 470 U.S. 821, 838 (1985); *see also United States v. Armstrong*, 517 U.S. 456, 463–70 (1996).

Boeckmann, 238 Ill. 2d 1, 6-7, 16 (2010). Accordingly, "[a] statute should be interpreted . . . to avoid, if possible, a construction that would raise doubts as to its validity." *Wade v. City of N. Chicago Police Pension Bd.*, 226 Ill. 2d 485, 510 (2007); *see Boeckmann*, 238 Ill. 2d at 6-7, 16. Contrary to this principle, Fox's reading of Section 4(c)(2)(A) would potentially (1) infringe the Attorney General's constitutional authority to control representation of the State when it is the real party in interest, and (2) violate separation-of-powers limits on the courts' ability to review discretionary actions by executive-branch officers.

i. Fox's proposed reading of Section 4(c)(2)(A) would cause doubts as to whether it infringes the Attorney General's constitutional authority to represent the State.

As noted above, in *Scachitti* the Supreme Court described its long line of decisions holding that the Attorney General's constitutional common law authority makes him the State's exclusive representative in litigation when the State is the real party in interest. 215 Ill. 2d at 497–500, 504, 513–15. In particular, the Court reaffirmed its prior holding in *Lyons v. Ryan*, 201 Ill. 2d 529, 535–42 (2002), that a statute which purported to give private citizens the right to sue for a recovery on behalf of the State when the Attorney General declined to do so "unconstitutionally usurps the power of the Attorney General," who "has the exclusive authority to represent the state" when it is "the only real party in interest." *Scachitti*, 215 Ill. 2d at 504. *Scachitti* further held that the Act's *qui tam* provisions, unlike that statute, do not infringe the Attorney General's constitutional authority because they preserve the

Attorney General's "complete control" over a *qui tam* action at all stages of the proceeding, including the "authority to dismiss . . . the action at any time, despite the objections of the *qui tam* plaintiff." *Id.* at 512–13 (citing Section 4(c)(2)(A)).

Admittedly, *Scachitti* did not specifically analyze the meaning and significance of the final phrase of Section 4(c)(2)(A), which provides that the relator must be "notified" and given "an opportunity for a hearing on the motion" to dismiss the action. 740 ILCS 175/4(c)(2)(A); *see Burlington Coat*, 369 Ill. App. 3d at 513. But any construction of Section 4(c)(2)(A) that limits the Attorney General's exclusive authority over litigation on behalf of the State when it is the real party in interest would raise serious doubts about its constitutionality and should be avoided. *See Wade*, 226 Ill. 2d at 510; *see also Scachitti*, 215 Ill. 2d at 512–16.

Burlington Coat specifically recognized this concern. After stating that, "[a]t its core, the issue here is whether the decision to proceed with a *qui tam* action should be made by the executive branch or by the judicial branch," the court emphasized the Supreme Court's teaching that "[o]nly the Attorney General is empowered to represent the state in litigation in which it is the real party in interest," and that the legislature "cannot reduce the Attorney General's common law authority to direct the legal affairs of the state." 369 Ill. App. 3d at 516 (citing *Lyons*, 201 Ill. 2d at 541). *Burlington Coat* then held:

> If we interpret section 4(c)(2)(A) of the Act to require judicial review of the Attorney General's decision to dismiss an action,

> whether through application of the *Sequoia Orange* test or any other "checks and balances" approach, we give the court veto power over the state's decision to dismiss, essentially usurping the Attorney General's power to direct the legal affairs of the state and putting that power into the hands of the court.

Id. at 516–17 (referring to *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir.1998)). *Scachitti* supported this analysis, *Burlington Coat* observed, by holding that "the *qui tam* provisions do not usurp the Attorney General's constitutional power because, through the significant restrictions placed on *qui tam* plaintiffs by the Act, the Attorney General retains authority to control litigation at every stage," including "the decision whether to dismiss a *qui tam* action." *Id.* at 512–13.

ii. Fox's interpretation of Section 4(c)(2)(A) would raise serious questions as to whether it violates separation-of-powers principles.

Fox's proposed interpretation of Section 4(c)(2)(A) would also raise a serious question as to whether it violates separation-of-powers principles. Although courts adjudicate a wide variety of disputes, including disputes involving public officials, they do not have plenary authority to review all exercises of executive authority. *See People ex rel. Woll v. Graber*, 394 Ill. 362, 370–71 (1946) ("an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law gives to him as a part of his official functions"). Thus, as a general matter courts do not review an exercise of discretionary

executive authority except to determine whether it violates a constitutional or statutory provision that a party challenging the decision has a right to enforce. *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 170–75, 178–79 (2d Dist. 2007); *see State by Raoul v. Hitachi, Ltd.*, 2021 IL App (1st) 191815, ¶ 33; *Millineum Maint. Mgmt., Inc. v. County of Lake*, 384 Ill. App. 3d 638, 649 (2008); *cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Federal courts do not exercise general legal oversight of the Legislative and Executive Branches[.]"). And the quintessential example of such discretionary executive authority is a decision by the Attorney General or a State's Attorney *not* to bring an action, which is no different from the Attorney General's decision to dismiss a *qui tam* action initiated by a private party without the Attorney General's prior approval. *See People ex rel. Barrett v. Finnegan*, 378 Ill. 387, 393 (1941) (Attorney General "has arbitrary discretion to institute proceedings in any case of purely public interest"); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Heckler*, 470 U.S. at 831–32; *cf. People ex rel. Hoyne v. Newcomer*, 284 Ill. 315, 320 (1918) (describing Attorney General's historic prerogative to voluntarily dismiss a criminal prosecution, "to which there was no limitation").

Fox's interpretation of Section 4(c)(2)(A) directly implicates this separation of executive and judicial functions by requiring courts to decide whether the Attorney General has given a reason for voluntarily dismissing a

qui tam action that is "rational, based on public interest and not arbitrary." (Rel. Br. at 2; *see also id.* at 15.) That position is unconvincing. *See U.S. ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1235 (D.C. Cir. 2012) (recognizing holding in *Swift*, 318 F.3d at 252, that "[d]ecisions to dismiss" an action under federal False Claims Act are "analogous to decisions not to prosecute, which are committed to the Executive Branch's absolute discretion"); *Barati v. State*, 198 So. 3d 69, 82 (Fla. App. 2016) (noting that "to interpret the Federal [False Claims Act] in a manner to impede the Executive Branch's control over the litigation" would put the statute on unsteady constitutional ground").

The Attorney General recognizes, of course, that executive action is subject to *constitutional* limits. (*See* above at 43, and below at 56–58.) But separation-of-powers principles governing the scope of judicial oversight over executive action warrant the conclusion that, especially given the absence of any textual support in Section 4(c)(2)(A), it must be read not *itself* to impose any judicially applicable substantive limits on the Attorney General's dismissal of a *qui tam* action.

c. Federal court decisions interpreting federal law do not support departing from Illinois precedent interpreting the Illinois False Claims Act.

Ignoring Illinois precedent interpreting Section 4(c)(2)(A) of the Act, including *Burlington Coat* and *QVC*, Fox relies heavily on a few federal court cases interpreting the parallel provision of the federal False Claims Act, 31 U.S.C. § 3730(c)(2) ("Section 3730(c)(2)"). (Rel. Br. at 15–18.) Those cases

have produced a smorgasbord of different standards governing motions to dismiss a *qui tam* action under Section 3730(c)(2). *See Borzilleri*, 24 F.4th at 37 (surveying cases); *Burlington Coat*, 369 Ill. App. 3d at 515–16 (same). Fox urges this Court to embrace the strictest of these, announced by the Ninth Circuit in *Sequoia Orange*, under which the government must articulate a valid government purpose and establish a rational relationship between dismissing the case and achieving that purpose, 151 F.3d at 1145. (Rel. Br. at 15–17.) Applying that standard, Fox contends, requires doing nothing more than what the Constitution requires. (*Id.* at 14–17.) She is wrong.

"A federal court's construction of a federal statute is not binding on Illinois courts in construing a similar state statute." *People v. Gutman*, 2011 IL 110338, ¶ 17. And while federal case law interpreting the federal False Claims Act *before* the Illinois Act was adopted might be relevant to determining the General Assembly's intent, *People ex rel. Levenstein v. Salafsky*, 338 Ill. App. 3d 936, 942 (2d Dist. 2003), all of the federal court decisions that Fox relies on were decided *after* the General Assembly enacted the Act in 1992. In addition, those federal court decisions do not take into account background principles of Illinois law regarding the Attorney General's constitutional prerogatives, which the General Assembly was presumed to know. *See Ill. Landowners Alliance, NFP v. Ill. Commerce Comm'n*, 2017 IL 121302, ¶ 44; *In re Marriage of Rogers*, 85 Ill. 2d 217, 221 (1981). In any event, the most persuasive federal precedent interpreting Section 3730(c)(2)

supports the Attorney General's position in this case.

The voluntary dismissal standard announced by the Ninth Circuit in *Sequoia Orange*, which Fox urges this Court to follow, is unsound and has been rejected by other federal courts. In that case, where the defendant had been served, the court held that when the government moves to voluntarily dismiss a *qui tam* action, it must "offer[] reasons for dismissal that are rationally related to a legitimate government interest." 151 F.3d at 1147; *id.* at 1145. As the D.C. Circuit held in *Swift*, however, that approach lacked a basis in the statutory text, relied on legislative history for a statutory amendment that was never enacted, and implicated separation-of-powers principles by intruding on the government's executive authority. 318 F.3d at 252–53; *see Burlington Coat*, 369 Ill. App. 3d at 515–16. The court in *Swift* commented that an exception might exist for "fraud on the court," but it did not decide that point because "no evidence of that sort was presented." 318 F.3d at 253. In *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 935–36 (10th Cir. 2005), the Tenth Circuit adopted the *Sequoia Orange* test where dismissal is sought after the defendant has been served. *See Burlington Coat*, 369 Ill. App. 3d at 516; *cf. United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 852–53 (10th Cir. 2012) (noting open question whether different standards govern government's dismissal of False Claims Act before and after defendant is served). But contrary to Fox's characterization (Rel. Br. 16-17), none of the remaining federal cases adopted the *Sequoia Orange* rational relationship

standard.

In *United States ex rel. CIMZNHCA, LLC v. UCB*, 970 F.3d 835, 840, 851-53 (7th Cir. 2020), the Seventh Circuit specifically rejected the *Sequoia Orange* standard, concluding that the proper test under the federal statute "lies much nearer to [*Swift*'s unfettered discretion standard] than *Sequoia Orange*." Under the Seventh Circuit's analysis, Section 3730(c)(2) does not impose serious restraints a motion to dismiss before the defendant has been served, in which case the government's motion is subject only to constitutional constraints, including the substantive due process requirement that dismissal not "shock[] the conscience." *Id.* at 851–52. The Third Circuit likewise rejected *Sequoia Orange*'s rational relationship test and, citing *CIMZNHCA*, held that when the government moves to voluntarily dismiss a *qui tam* action before the defendant files an answer, the motion is "subject only to the bedrock constitutional bar on arbitrary Government action," for which "[o]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *United States ex rel. Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376, 389–90 & n.17 392 (3d Cir. 2021), *cert granted*, 142 S. Ct. 2834 (2022); *see also Borzilleri*, 24 F.4th at 40–45 (rejecting *Sequoia Orange* standard because it "puts the burden on the government to justify its motion to dismiss" despite "no basis in the statutory language for requiring the government to make a prima facie showing that its motion is rational, reasonable, or otherwise proper," and holding that to defeat dismissal the relator must "demonstrate

that the government is transgressing constitutional limits or perpetrating a fraud on the court," such as by violating equal protection or substantive due process); *cf. United States ex rel. Health Choice All., LLC v. Eli Lilly & Co.*, 4 F.4th 255, 267 (5th Cir. 2021) (affirming dismissal after "[a]ssuming, without deciding, that *Sequoia Orange*'s more burdensome test applies").

Regardless, these federal cases, and especially *Sequoia Orange*, provide no basis to interpret Section 4(c)(2)(A) of the Illinois False Claims Act to put any limits on the Attorney General's ability to voluntarily dismiss a *qui tam* action. They were decided after the General Assembly enacted the Act. *See Levenstein*, 338 Ill. App. 3d at 942. And they do not reflect Illinois' long-established constitutional principles governing the Illinois Attorney General's authority to represent the State, which necessarily inform Section 4(c)(2)(A)'s proper interpretation. *See Scachitti*, 215 Ill. 2d at 504. Indeed, *Burlington Coat*, after describing these constitutional principles, held:

> If we interpret section 4(c)(2)(A) of the Act to require judicial review of the Attorney General's decision to dismiss an action, whether through application of the *Sequoia Orange* test or any other "checks and balances" approach, we give the court veto power over the state's decision to dismiss, essentially usurping the Attorney General's power to direct the legal affairs of the state and putting that power into the hands of the court.

369 Ill. App. 3d at 516–17; *see also QVC*, 2015 IL App (1st) 132999, ¶ 14.

2. Under any relevant statutory standard, the circuit court's judgment should be affirmed.

Even if this Court declined to follow existing Illinois precedent and held that Section 4(c)(2)(A) imposes a different substantive standard for the Attorney General's voluntary dismissal of a *qui tam* action, the circuit court's judgment should be affirmed because the Attorney General's motion to voluntarily dismiss this action readily satisfies any such standard. Several of the federal cases interpreting Section 3730(c)(2) hold that the government's voluntary dismissal of an action is limited by constitutional strictures, which are addressed below. *Sequoia Orange* goes further, holding that Section 3730(c)(2) requires the government to identify a "valid government purpose" and "a rational relation between dismissal and accomplishment of the purpose," 151 F.3d at 1145 (cleaned up); a valid public purpose is not limited to a possible lack of merit in the relator's claims, *id.* at 1143–44; and if the government satisfies this initial requirement, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal," *id.* at 1145 (cleaned up).

Here, as the circuit court rightly held, the Attorney General identified several legitimate government purposes that are rationally advanced by dismissing this action, even if Fox's claims had merit. (C 83–85.) Those reasons include the limited prospect of obtaining a meaningful additional recovery in this case where Thornley's overtime compensation and workers' compensation benefits are already recoverable in other proceedings, and she is

facing several debt collection actions. Indeed, recovery of any workers' compensation benefits that Thornley fraudulently received can be obtained *only* in her pending workers' compensation proceeding, not in a separate circuit court action. *See Country Ins. & Fin. Servs. v. Roberts*, 2011 IL App (1st) 103402, ¶¶ 1–6, 11–14; *Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 244–45 (5th Dist. 2008). Fox's assertion that "no recoupment of past [workers' compensation] benefits can be recovered absent a conviction of the claimant for fraud" (Rel. Br. at 28) misinterprets the provisions of the Workers' Compensation Act that *mandate* penalties if there is such a conviction, but do not make such a conviction a *condition* for recovering fraudulently obtained benefits. *See* 820 ILCS 305/25.5(f), (g).

In addition, the workers' compensation case was pending before Fox initiated this *qui tam* action. (C 8, 809.) And because Garcia promptly denied Thornley's accusation that he assaulted her (C 901), Fox cannot credibly claim that she was an "original source" for the information indicating that this accusation, on which Thornley's workers' compensation claim depended, was fraudulent. Moreover, there is a strong likelihood that a civil claim against Thornley for fraudulently obtaining overtime compensation would be stayed in light of the criminal case against her relating to the same events. (*See* C 69–70, citing *People ex rel. Hartigan v. Kafka & Sons Bldg. & Supply Co.*, 252 Ill. App. 3d 115, 120–21 (1st Dist. 1993).)

Fox's complaint also seeks recovery for "resumé fraud" by Thornley based on her misdescription of her educational qualifications before being hired and later promoted by the Board. (C 11–13.) But the damages that could be awarded (not necessarily recovered) for such fraud do not include *all* of Thornley's compensation. *See United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976) (explaining measure of damages under federal False Claims Act for fraud about qualities of goods government kept and used). The valid reasons for dismissing this case also include the interest in devoting the Attorney General's limited resources to cases that affect more Illinois residents and offer greater potential financial rewards. *See Heckler*, 470 U.S. at 831.

* * *

In short, even if Section 4(c)(2)(A) did impose a stricter standard than the one adopted by all relevant Illinois precedent, the circuit court's judgment should be affirmed because Fox has not come close to demonstrating that the Attorney General's decision to dismiss this action is arbitrary or illegal.

C. Fox failed to demonstrate that dismissal of her *qui tam* action violated her constitutional rights.

There is likewise no merit to Fox's contention that the circuit court's judgment should be reversed on the ground that dismissing this *qui tam* action violated her constitutional rights. She invokes substantive due process, claiming that it prohibits all government action that is arbitrary and capricious. (Rel. Br. at 14–18.) This claim lacks legal and factual merit.

First, Fox proposes the wrong standard. For executive actions, substantive due process does not prohibit all actions that could be characterized as arbitrary and capricious. (Rel. Br. at 11, 15.) Instead, it adopts a much stricter standard under which "only the most egregious official conduct," "which shocks the conscience," can support a substantive due process claim. *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 & n.8 (1998); *see CIMZNHCA*, 970 F.3d at 852 ("shocks the conscience" standard governs government dismissal of federal *qui tam* suit); *Borzilleri*, 24 F.4th at 43 (same).

Second, that standard is relevant only to deprivations of life, liberty, or property. *Karabetsos v. Vill. of Lombard*, 386 Ill. App. 3d 1020, 1021 (2d Dist. 2008); *see also Capp v. County of San Diego*, 940 F.3d 1046, 1060 (9th Cir. 2019); *Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010). Here, the only possible interest protected by due process is a property right. But a relator's conditional interest in pursuing a *qui tam* action is not a property interest protected by due process. *United States ex rel. Mateski v. Mateski*, 634 F. App'x 192, 195 (9th Cir. 2015); *Barati v. Fla. Att'y Gen.*, No. 18-13998, 2021 WL 2911729, at *3 (11th Cir. July 12, 2021) (applying Florida False Claims Act), *cert. denied sub nom. Barati v. Moody*, 142 S. Ct. 868 (2022); *Dankanich v. Pratt*, No. CV 19-735, 2020 WL 7227249, at *4 (E.D. Pa. Dec. 8, 2020), *aff'd*, No. 21-1008, 2021 WL 5832281 (3d Cir. Dec. 9, 2021). Consequently, a relator's contingent interest in a *qui tam* recovery cannot be the type of

fundamental property right necessary to receive substantive due process protection. *See Roberts v. Winder*, 16 F.4th 1367, 1375–76 (10th Cir. 2021) (holding that regular property rights are not protected by substantive due process); *Dondero v. Lower Milford Twp.*, 5 F.4th 355, 362 n.1 (3d Cir. 2021) (same).

A relator's statutory right to initiate a *qui tam* action is a conditional assignment of the State's potential recovery. *Scachitti*, 215 Ill. 2d at 508. But because Section 4(c)(2)(A) itself imposes no firm criteria limiting the Attorney General's discretion to dismiss a *qui tam* action, a relator's interest in pursuing the action is not an entitlement under state law that rises to the level of a constitutionally protected property right. *See Nyhammer v. Basta*, 2022 IL 128354, ¶¶ 65–66; *I-57 & Curtis, LLC v. Urbana & Champaign Sanitary Dist.*, 2020 IL App (4th) 190850, ¶¶ 86–89; *see also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) ("If the decisionmaker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest.") (citation and internal quotation marks omitted); *Miyler v. Vill. of E. Galesburg*, 512 F.3d 896, 898 (7th Cir. 2008); *Bituminous Materials, Inc. v. Rice County, Minn.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (holding that no property interest protected by substantive due process exists unless state law limits government "discretion to restrict or revoke" it). And the *procedures* prescribed by Section 4(c)(2)(A)

for dismissing a *qui tam* action (notice and the opportunity for a hearing) do not, by themselves, confer such a substantive right. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 764 (2005) (mandated procedures alone do not give rise to property interests protected by due process); *id.* at 771–72 (Souter, J., concurring); *see also Olim*, 461 U.S. at 250 (same, in context of liberty interests); *Miyler*, 512 F.3d at 898.

Third, even if the dismissal of Fox's *qui tam* action did deprive her of a property interest, she has not presented any factual basis to conclude that the Attorney General's decision to dismiss the action "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento*, 523 U.S. 833, 847 n.8; *see CIMZNHCA*, 970 F.3d at 852; *Karabetsos*, 386 Ill. App. 3d at 1021. At best, Fox's challenge to the dismissal of this action represents a disagreement with the Attorney General's assessment of that dismissal is prudent and in the State's best interest because substantial monetary relief against Thornley can be awarded in the pending criminal and workers' compensation actions, and any ultimate monetary recovery against her is questionable. That assessment cannot plausible be characterized as "conscience shocking." *County of Sacramento*, 523 U.S. at 834.

* * *

In sum, the circuit court correctly held that Fox, as the relator, had the burden to demonstrate that the Attorney General's voluntary dismissal of this

action was improper; that she did not meet that burden, much less present glaring evidence of bad faith or fraud by the Attorney General; that in any event the Attorney General had valid reasons to dismiss the case; and that these reasons did not violate Fox's claimed right to substantive due process.

CONCLUSION

For the foregoing reasons, the circuit court's judgment should be affirmed.

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and the matters to be appended to the brief under Rule 342(a), is 14,803 words.

/s/ *Richard S. Huszagh*

Certificate of Filing and Service

On March 14, 2023, I electronically filed this Brief of Appellee the State of Illinois with the Clerk of the Court for the Illinois Appellate Court, Fourth Judicial District, by using the Odyssey eFile IL system.

Counsel for the other participant in this action, listed below, are registered service contacts on the Odyssey eFileIL system and will be served via that system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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