

No. 4-22-0622

**IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT**

PEOPLE OF THE STATE OF)	Appeal from the Circuit Court of the
ILLINOIS ex rel., EMILY FOX)	Seventh Judicial Circuit, Sangamon
)	County, Illinois
Relator/Appellant)	
State of Illinois/Appellee)	
)	Circuit Court No. 21 L 000053
v.)	
)	Hon. Adam Giganti, Judge Presiding
JENNY THORNLEY)	
)	
Defendant)	

REPLY BRIEF OF RELATOR-APPELLANT EMILY FOX

Robert M. Andalman (ARDC No. [REDACTED])
Diana Guler (ARDC No. [REDACTED])
A&G Law, LLC
542 S. Dearborn Street, 10th Floor
Chicago, IL 60605
312-348-7629 (phone)
312-341-0700 (fax)
randalman@aandglaw.com
dguler@aandglaw.com
Counsel for Relator-Appellant, Emily Fox

ORAL ARGUMENT REQUESTED

TABLE OF POINTS AND AUTHORITIES

Argument 1

Ashcraft v. Bd. Of Educ.,
2019 IL 123201 1

Wingert v. Hradisky,
83 Ill. App. 3d 938 (4th Dist. 1980)..... 1

I. The Material Facts are Established by the Record..... 2

A. Fox is an Original Source of the Allegations against Thornley 3

B. Fox’s Allegations Demonstrate Complicity by the Office of the Governor with Thornley..... 5

II. The Attorney General’s Motion Was Akin to a Motion to Dismiss Pursuant to Section 2-619 and Should Be Reviewed Accepting All Well-Pleaded Facts as True..... 6

Morrison v. Wagner,
191 Ill.2d 162 (2000) 6

State ex. rel. Saporta v. Mortg. Elec. Registration Sys.,
2016 IL App (3d) 150336 6

740 ILCS 175/4(b)(1) 7

III. The Attorney General Is Bounded By Substantive Due Process 7

Ashcraft v. Bd. Of Educ.,
83 Ill. App. 3d 938 (4th Dist. 1980)..... 8

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000)..... 7

Wingert v. Hradisky,
2019 IL 123201 8

740 ILCS 175/4(b)(1) 7

A. Federal Authority, Including an Upcoming Decision by the U.S. Supreme Court, is Directly Relevant to the Due Process Issues and Statutory Construction Issues in this Appeal	8
<i>Mekertichian v. Mercedes-Benz U.S.A., L.L.C.</i> , 347 Ill. App. 3d 828 (1st Dist. 2004)	9
<i>People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.</i> , 2015 IL App. (1st) 132999.....	9
<i>Scachitti v. UBS Fin. Servs.</i> , 215 Ill.2d 484 (2005)	10, 11
<i>Sprietsma v. Mercury Marine</i> , 197 Ill.2d 112 (2001)	9
<i>State ex rel. Edmondson v. Bd. of Trs.</i> , 2019 IL App (5th) 18033	9
<i>State ex rel. Hurst v. Fanatics, Inc.</i> , 2021 IL App (1st) 192159.....	9
<i>State ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.</i> , 151 F.3d 1139 (9th Cir. 1998)	10
<i>Swift v. United States</i> , 318 F.3d 250 (D.C. Cir. 2003)	8
<i>Vt. Agency of Nat. Res. v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000).....	10
<i>U.S. ex. rel. Polansky v. Exec. Health</i> , 17 F.4th 376 (3d Cir. 2021)	9, 10
<i>United States ex. rel. CIMZNHCA, LLC v. UCB, Inc.</i> , 970 F.3d 835 (7th Cir. 2020)	10
740 ILCS 175/4(b)(1)	10
B. No Illinois Case Has Approved Dismissal of a Whistleblower Case in Like Circumstances or Applied the Impossible Standard the Attorney General Presses	11

<i>People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.</i> , 2015 IL App (1st) 132999.....	14
<i>Scachitti v. UBS Fin. Servs.</i> , 215 Ill.2d 484 (2005)	12, 13
<i>State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.</i> , 369 Ill. App. 3d 507 (1st Dist. 2006)	13, 14
<i>State ex rel. Krislov v. Bmo Harris Bank, N.A.</i> , 2021 IL App (1st) 192273-U	14, 15
<i>State ex rel. Thulis v. City of Chicago</i> , 2021 IL App (1st) 191675-U	15
IV. The Attorney General Denied Fox the Opportunity to Respond to his Arguments by Failing to Provide Any Rationale in His Boilerplate Motion and Then Relying in Reply on Insubstantial Pretext.....	15
A. Fox Was Prejudiced by the Procedure Below	15
<i>Mancini Law Grp., P.C. v. Schaumburg Police Dep't</i> , 2019 Ill. Cir. LEXIS 190.....	16
<i>People v. Sparks</i> , 315 Ill. App. 3d 786 (4th Dist. 2000).....	16
<i>West-Howard v. Department of Children & Family Services</i> , 2013 IL App (4th) 120782	16
B. The Attorney General’s “Reasons” Were Unsound, Insubstantial and Pretextual.....	17
<i>People ex rel. Lindblom v. Sears Brands, LLC</i> , 2018 IL App (1st) 171468.....	19
740 ILCS 175/4(e)(3).....	19
Conclusion.	20

ARGUMENT

In our democracy, Due Process is a hallowed check on the power of the executive. This happens every day when courts review executive conduct to ensure it is rational and not arbitrary or capricious. This judicial review is not unconstitutional: just the opposite, it is a cornerstone of our constitutional process. *See, e.g., Wingert v. Hradisky*, 2019 IL 123201, ¶ 29 (“The constitutional guarantee of due process is implicated ‘whenever the State engages in conduct towards its citizens deemed oppressive, arbitrary or unreasonable.’”); *Ashcraft v. Bd. Of Educ.*, 83 Ill. App. 3d 938, 940 (4th Dist. 1980) (“Substantive due process has been erected by the Supreme Court as the essential bulwark against arbitrary government action.”)

It is thus surprising that the Attorney General, Illinois’ highest-ranking legal officer, argues in this case that his conduct is bound by “no substantive limits” when it comes to dismissal of a whistleblower action under the Illinois False Claims Act (“IFCA”) and, further, that no court may review such decisions through the rubric of Due Process. *See* AG Br. at 41 (“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.”); *id.* at 42 (arguing there are “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.”)¹

The Illinois False Claims Act (the “IFCA”) exists to encourage whistleblowers like Emily Fox to say something when they see something. That includes when what they see

¹ Citations to the Record on Appeal bearing the prefix “R.C.” correspond to citations to the Corrected Common Law Record. Citations bearing the prefix “R.R.” correspond to the Report of Proceedings. Citations to the Attorney General’s opening brief as abbreviated as “AG Br.” Citations to Fox’s opening brief are to “Fox Br.”

is corruption facilitated by persons in the highest offices of the State. That is what happened here. Fox alleges corruption that defrauded the State of Illinois of more than a half million dollars. She further describes how the Office of the Governor, and the Governor's General Counsel in particular, directly facilitated that fraud. The Attorney General does not dispute the State was defrauded. But rather than follow the facts where they may lead, or allow Fox to do so, the Attorney General not only declined to pursue the case but he attempted to quash the case altogether, thus protecting from the light of discovery not just the defendant but also the Governor and his staff.

In addition to his argument that he is unbounded by Due Process or any substantive restraint, the Attorney General further argues that the Illinois General Assembly provided whistleblowers like Fox a right to a hearing on the Attorney General's motion that anticipates no role for the court but to host (in the words of the Seventh Circuit, rejecting a similar argument, to "be a potted plant").

The Attorney General suggests an improper legal standard and misrepresents the facts and law in a manner both atypical and beneath his office. The unsupported arguments he propounds to this Court stand as just further evidence of his conflicted position in this case, in which Fox's allegations are inextricably intertwined with Gov. Pritzker and the Governor's General Counsel, Anne Spillane. Fox's complaint should not have been dismissed and the Attorney General's attempt to keep concealed the corrupt facts that she has alleged is properly rejected as an improper and capricious exercise of political power.

I. The Material Facts are Established by the Record

The Attorney General's factual recitation is unchronological and confused. He does not dispute that Thornley committed resume fraud and forgery; overtime fraud, including

additional forgery; expense reimbursement fraud; and workers' compensation fraud. *See* Fox Br. at 5-10 (including record citations). Instead, he tries to obscure that (a) Fox was the original source to the State about Thornley's frauds; and (b) Fox's allegations and the supporting documentation that demonstrates Thornley was materially assisted in her fraud by the Office of the Governor. Neither of these attempts to remake the record survive scrutiny.²

A. Fox is an Original Source of the Allegations against Thornley

The Attorney General begins his factual recitation at the end of January 2020 with what he characterizes as cross-allegations made by Jack Garcia (at the time Fox's supervisor) and Thornley. AG Br. at 3. But that was not the chronology. Thornley only threatened to make a complaint against Garcia *after* Fox had blown the whistle about Thornley's frauds in November 2019. R.C. 17. It was Fox who then investigated Thornley and submitted the information she found to Garcia on or about January 10, 2020. R.C. 18, 20-21. Only weeks later did Thornley – acting through a mutual acquaintance – send Garcia the message that he “did not know who he was messing with” and “the Governor's Office would get involved if Garcia did not back off.” R.C. 18. And only when Garcia did not thereafter “back off” on the matters Fox had raised did Thornley make her allegations of assault against Garcia to the Governor's Office. *Id.* It is a fact that both the subsequent investigation by the McGuire Woods law firm and a separate investigation by the Illinois State Police concluded Thornley's accusations against Garcia were false. *Id.* The Attorney

² The Attorney General's misstatement of the record includes his false assertion that Fox failed to comply with Supreme Court Rule 341(h)(6) & (7) by not supporting her opening brief with citations to the record. AG Br. at 18 n. 2. This is demonstrably untrue. Every sentence in Fox's Statement of Facts is supported by a record cite. *See* Fox Br. at 5-10.

General denigrates the evidentiary basis for McGuire Wood's conclusion that no evidence supported Thornley's claim against Garcia and simply ignores without comment the Illinois State Police's independent investigation reaching the same conclusion. R.C.116.

Nowhere does the Attorney General address that it was Fox who uncovered, investigated, and subsequently reported Thornley's misconduct (both to the Executive Director of the Merit Board, Jack Garcia, and to the OEIG). R.C. 9, 18-21, 586-593, & 390. Neither does he acknowledge (or dispute) that Fox was not just "an" but *the* primary source of the McGuire Woods report, her name appearing more than 150 times in it after she provided 12 hours of interviews toward that investigation. R.R. 18.

Fox was also "an original source" concerning Thornley's fraudulent worker's compensation claim, the fraudulent basis of which Fox disclosed in September 2020 when she first learned about it and reported the matter to the OEIG. R.C. 21. The issue with that claim was not its handling by CMS, as the Attorney General argues (but knows better). *See* AG Br. at 7. The issue (or issues) with the claim are that: (a) it is based on "injuries" allegedly suffered in an assault by Garcia that both McGuire Woods and the Illinois State Police determined did not occur; (b) Thornley falsely states in the claim that she was employed by the Office of the Governor and that J.B. Pritzker was her personal supervisor; and (c) CMS was ordered by the Governor's Office to "reverse" Thornley's termination by the Merit Board so the false claim could be made. R.C. 19-20. These are the facts that Fox disclosed to the OEIG in September 2020, after she first discussed them with CMS and was told that the Governor's General Counsel, Ann Spillane, had (outside the standard intake CMS intake and review process) specifically and personally directed CMS to proceed with paying Thornley. *Id.*

Fox specifically alleges all of these facts in her complaint. It is thus demonstrably false to suggest, as the Attorney General does, that Fox claims to be “an original source” “without elaboration.” AG Br. at 5.

B. Fox’s Allegations Demonstrate Complicity by the Office of the Governor with Thornley

Demonstrating its conflicted roles of prosecutor and defense counsel for the Governor, much of the Attorney General’s attempt to recast the record is directed to minimizing the involvement of the Office of the Governor in Thornley’s fraud. Suggesting that there is something ephemeral about the alleged relationship between Thornley’s schemes and that Office, the Attorney General ignores that from the beginning Thornley warned Garcia that she would leverage her relationship with Governor Pritzker against Garcia if Garcia did not “back off” investigating the information Fox had brought to him. R.C.18. The Attorney General also ignores Thornley’s text message to the Governor’s wife, M.K. Pritzker, after Fox’s initial whistleblowing, thanking Mrs. Pritzker for her friendship and saying “I need J.B. to know what is going on.” R.C.473.

Neither does the Attorney General address that, as noted above, Thornley’s worker’s compensation claim falsely identified Thornley’s employer as the Office of the Governor and falsely identified her direct report as J.B. Pritzker (including the Governor’s personal phone number and email). R.C. 19, 576. The Attorney General offers no innocent explanation for the personal involvement in Thornley’s claim of the Governor’s General Counsel, Ann Spillane, including by ordering CMS to reverse Thornley’s termination and pay the claim. R.C. 20, 582-584. There is no such explanation when Spillane must have known that Thornley had never worked for the Office of the Governor and that her claim of an assault had been investigated and found meritless (twice, including by the State

Police). These are specific, alleged facts backed by documentation Fox provided the government. These facts are not conjectural or speculative; they are alarming and unexplained. The Attorney General's contortions to gloss over these facts is, again, more evidence of his conflicted position. This is, precisely, why the law allows whistleblowers to pursue fraud even when, for whatever reasons, the State will not.

II. The Attorney General's Motion Was Akin to a Motion to Dismiss Pursuant to Section 2-619 and Should Be Reviewed Accepting All Well-Pleaded Facts as True

The Attorney General begins by advocating for a standard of review without precedent or basis. Specifically, he argues that his motion to dismiss below should be treated like any party's voluntary dismissal of its own lawsuit pursuant to 2-1009 of the Code of Civil Procedure. AG Br. at 34. His only "support" for this argument is a medical malpractice case that has nothing to do with the case at bar (including not making any IFCA claims at all). *Id.*, citing *Morrison v. Wagner*, 191 Ill.2d 162, 165 (2000). On the other hand, the Attorney General does not distinguish and ignores the Appellate Court precedent cited by Fox in opening, which holds that the Attorney General's motion to dismiss a whistleblower claim under the IFCA is instead properly treated like a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure. *See* Fox Br. at 13, citing *State ex. rel. Saporta v. Mortg. Elec. Registration Sys.*, 2016 IL App (3d) 150336, ¶ 13.

Not only is the Attorney General's argument inconsistent with the only Appellate Court precedent on point, it is also inconsistent with the plain language of the IFCA. The law does not provide that the whistleblower's case belongs to the State the way a malpractice plaintiff's case belongs to her. Rather, the IFCA provides that when a person who is a whistleblower like Fox files an IFCA claim, she does so "for the person and the

State,” *i.e.*, the claim is her’s, too. 740 ILCS 175/4(b)(1) (emphasis added). The Attorney General makes his unsupported argument for one reason: to evade the requirement that the Court (like the Circuit Court) must upon a 2-619 motion accept the well-pleaded facts of the complaint as true. He knows he cannot prevail under that standard.

III. The Attorney General Is Bounded By Substantive Due Process

The Attorney General does not even mention the Due Process argument at the core of Fox’s appeal until page 55 of his brief. He then falsely characterizes the law, telling this Court that Fox has no interest in her *qui tam* lawsuit but omitting that the U.S. Supreme Court has held directly contrary. *Compare* AG Br. at 55-58 with *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (“the statute gives the relator himself an interest in the lawsuit” based on its provision that *quit tam* actions are brought “for the person [*i.e.*, the Relator] and for the United States Government”); 740 ILCS 175/4(b)(1) (including identical language as the federal FCA that *qui tam* actions are filed “for the person and the State”).

As noted at the outset, the U.S. Constitution confines executive action to what is rational, and for centuries our constitutional system has empowered courts to decide whether actions by either the executive or legislative branches satisfies that standard. This is not unconstitutional. It does not violate the separation of powers. It is how government functions every day.

The Attorney General is all over the field in this regard. Below, he argued that there is “no basis in law” for the proposition that his decisions are confined by substantive due process. R.C. 62. On appeal, he purports to walk that back, stating that the “Attorney General recognizes, of course, that executive action is subject to constitutional limits.” AG

Br. at 48. But elsewhere in his brief he flops again, arguing there are “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.” AG Br. at 42.

The Illinois Supreme Court and this Court have each clearly stated that the substantive Due Process guaranteed by the U.S. Constitution, which prohibits arbitrary and unreasonable government conduct, applies to all executive conduct. *Wingert*, 2019 IL 123201, ¶ 29; *Ashcraft*, 83 Ill. App. 3d at 940; *see supra* at 1. In this Court’s words, Due Process is “the essential bulwark against arbitrary government action.” *Ashcraft*, 83 Ill. App. 3d at 940. This includes when the Attorney General moves to dismiss a *qui tam* IFCA claim.

A. Federal Authority, Including an Upcoming Decision by the U.S. Supreme Court, is Directly Relevant to the Due Process Issues and Statutory Construction Issues in this Appeal

In a brief filled with odd arguments, one of the oddest the Attorney General makes is that the Court should disregard federal decisions that stand for the common-sense proposition that both Due Process and the language of the False Claims Act itself require a government motion to dismiss a whistleblower suit to be rational. *See* AG Br. at 49. The argument is odd because below (and even elsewhere on appeal), the Attorney General advocated for the courts to follow a federal standard, specifically the rule proffered by the D.C. Circuit providing the government has an “unfettered right” to dismiss a false claim case. *See* R.C. 38, citing *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003); AG Br. at 50 (same). So the Attorney General recognizes the relevance of federal case-law on this point (as do the Illinois cases he cites). He just asks the Court to adopt the standard put forward by an outlier case inconsistent with the other federal Circuits.

Fox explained how isolated the *Swift* standard is among federal courts but the Attorney General ignores that discussion in his response. *See* Fox Br. at 16. Likewise, in arguing federal case law should be disregarded in construing the IFCA (at least when it is inconsistent with his position), *see* AG Br. at 49, the Attorney General disregards that the IFCA “is modeled after the federal False Claims Act” – indeed is nearly word-for-word identical – such that it is appropriate and even routine that “Illinois courts turn to federal case law for guidance in interpreting the Act.” *State ex rel. Hurst v. Fanatics, Inc.*, 2021 IL App (1st) 192159, ¶ 18; *see also, e.g., State ex rel. Edmondson v. Bd. of Trs.*, 2019 IL App (5th) 180333, ¶ 31 (“Because the Illinois False Claims Act was modeled after the federal False Claims Act, we may look to federal courts for guidance in interpreting its similar provisions.”); *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App. (1st)132999, ¶30 (“Illinois courts have relied on federal courts’ interpretation of the federal False Claims Act (31 U.S.C. § 3730) for guidance in construing the Illinois False Claims Act.”) The Attorney General knows this, citing exclusively to the outlier decision in *Swift* and to other federal case-law when he believes they support his construction of Section 4(c)(2)(A) of the IFCA. *See* AG Br. at 47-49.

The deference shown federal courts is greater yet when it is the U.S. Supreme Court that has decided the issue. *See Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 835 (1st Dist. 2004) (U.S. Supreme Court decision is binding on Illinois courts), citing *Sprietsma v. Mercury Marine*, 197 Ill.2d 112, 119-20 (2001). Here, both parties have pointed out that the U.S. Supreme Court has this very term taken up the limits on a government decision to dismiss a whistleblower case under the False Claims Act case, with the decision expected by the end of June of this year. *See* Fox Br. at 17, discussing *U.S. ex.*

rel. Polansky v. Exec. Health, 17 F.4th 376 (3d Cir. 2021); AG Br. at 51. In the case the Supreme Court has taken up, the Third Circuit gave the government the sort of breadth of decision concerning dismissal that the Attorney General seeks in this case. The U.S. Supreme Court declined to let that stand and oral argument in the case indicates that the Supreme Court will not adopt the *Swift* “unfettered discretion” standard for which the Attorney General advocates. See <https://www.c-span.org/video/?524451-1/united-states-rel-polansky-v-executive-health-services-oral-argument>.

Neither is this only an issue of statutory interpretation. The issue at bar directly implicates the federal constitutional law of substantive Due Process for which federal decisional law is entitled deference. See, e.g., *United States ex. rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 851-52 (7th Cir. 2020) (rejecting the “unfettered discretion” standard adopted by *Swift* (and urged by the Attorney General here) because it is inconsistent with Supreme Court Due Process jurisprudence); *State ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145-46 (9th Cir. 1998) (holding that the same Due Process requirements that limits all government action apply to the decision to dismiss a *qui tam* False Claims case). The Attorney General ignores the constitutional rationale of these cases as he does the constitutional issues this case raises.

The Constitution’s guaranty of Due Process cannot be so readily disregarded and is in fact enforced by both federal and Illinois courts. As noted above, the IFCA provides a cause of action not just for the state but “for the person [*i.e.*, the relator] and the state.” 740 ILCS 175/4(b)(1). Thus, “the statute gives the relator himself an interest in the lawsuit.” *Vt. Agency of Nat. Res.*, 529 U.S. at 772; *Scachitti v. UBS Fin. Servs.*, 215 Ill.2d

484, 506 (2005) (following this holding of *Vt. Agency of Nat. Res.*). That interest cannot be deprived arbitrarily, capriciously, and without some rational basis.

B. No Illinois Case Has Approved Dismissal of a Whistleblower Case in Like Circumstances or Applied the Impossible Standard the Attorney General Presses

The combination of the Attorney General’s boilerplate and unsupported motion and the evidence of involvement by the Office of the Governor, including Gov. Pritzker’s wife and the Governor’s General Counsel, in facilitating the underlying fraud, demonstrate that the Attorney General’s attempt to quash this case and prevent its prosecution should not have been allowed.

Fox did not rely on mere conjecture in these regards but provided the Circuit Court documentary evidence that Thornley threatened to involve Gov. Pritzker if Garcia pursued Fox’s whistleblowing claims. R.C. 18. She further provided evidence that when Garcia did not quash Fox’s claims, Thornley wrote a text to M.K. Pritzker saying “J.B.” needed to know what was happening and thanking the Governor’s wife for her friendship. R.C. 473. After that, Ann Spillane, the Governor’s General Counsel, became personally involved in pushing forward Thornley’s fraudulent worker’s compensation claim notwithstanding that there was no innocent reason (and the Attorney General suggests none) why the Governor’s General Counsel would become personally involved in CMS’s administration of a worker’s compensation claim by a low-level employee of an independent state agency (the Merit Board), which employee had been fired for cause. R.C. 582-84. Spillane did so notwithstanding that she of course knew the claim was false on its face, as Thornley never worked for the Office of the Governor or directly reported to J.B. Pritzker, as the claim asserts. *See* R.C. 576. The claim should have been directed to be denied immediately based

on these false statements but instead Spillane ordered CMS to reverse Thornley's prior termination for cause and to direct that Thornley be paid what amounted to tens of thousands of dollars. This demonstrates the power of the Office of the Governor over other State offices.

The Attorney General quarrels with whether Spillane had to reverse Thornley's termination. AG Br. at 37-38. This misses the point, however, which is not that Spillane was required to reverse the termination but that – in a raw display of political power – Spillane used the authority of the Governor's Office to meddle with CMS and that she did so regardless of the plain facts. She did so because all of the levers of State power have been corrupted and conflicted in Thornley's case, warped by the influence of the Governor's personal involvement and not in the best interests of the People of Illinois.

There is no Illinois case where an analogous record has been made upon a Section 4(c)(2)(A) motion to dismiss a whistleblower suit. Repeatedly, the Attorney General cites *Scachitti*, 215 Ill. 2d 484, *supra*. But that case took up the broader question of whether the IFCA was constitutional and did not involve a Section 4(c)(2)(A) motion to dismiss at all. *Id.* The *Scachitti* court observed that the Attorney General could intervene and had the power to move to dismiss a whistleblower suit; however, the Court had no occasion to and did not consider what standard applied to such motions. *See id.* (discussing powers of the Attorney General generally vis-à-vis whistleblower cases).³

It is further notable that in affirming the constitutionality of the IFCA, the Supreme Court in *Scachitti* agreed that it would not adequately explain the relator's standing to

³ Notably, the Illinois Supreme Court in *Scachitti* specifically looked to federal cases to construe the IFCA. It did not limit itself to federal cases pre-dating the passage of the Act, as the Attorney General (again, knowing better) erroneously contends this Court must do. *See* AG Br. at 49; *compare Scachitti*, 215 Ill. 2d at 506-508 (citing cases).

describe her as simply a statutory agent bringing a case in the name of the government. *Id.* at 507. Rather, the Court read the IFCA as a partial assignment of the underlying claim to the relator. *Id.* at 508. In the words of the Court: “under the Act, a *qui tam* plaintiff is a ‘real party in interest,’ together with the state.” *Id.* at 509. This recognition of the relator’s interest in this case belies the Attorney General’s claim that he retains unfettered discretion to dismiss her claim, with or without reason, in the same way a medical malpractice plaintiff may dismiss her own case.

The Attorney General presses *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507 (1st Dist. 2006), as the “leading case” concerning Section 4(c)(A)(2) dismissal. AG Br. at 24-26. But *Burlington Coat* did not address the circumstance at bar because, as noted in opening, the First District emphasized there that “[n]either fraud nor bad faith” by the government had been alleged. *Id.* at 517. The Attorney General ignores both this limitation of the decision and also the First District’s reluctance to adopt the standard pressed by the Attorney General here, *i.e.*, that ““the court’s role in a section 4(c)(2)(A) hearing is solely to ‘rubberstamp’ the state’s decision to dismiss a *qui tam* action over the relator’s objections.” *Id.*⁴

The fact is that no panel of any District of the Appellate Court has faced a case like this one, in which a whistleblower’s allegations implicate high-ranking State officials

⁴ *Burlington Coat* relies heavily in its construction of the IFCA on federal case-law, and in particular on the since-discredited *Swift* decision from the D.C. Circuit. *See* 369 Ill. App. 3d at 516-17. This is inconsistent with the position the Attorney General asks this Court to take, which is that federal cases should not inform interpretation of the IFCA unless the case precedes the IFCA’s passage. *See* AG Br. at 49. The Attorney General would make an exception of *Swift* while maintaining that the subsequent rejection of its standard by other Circuits and (soon) the Supreme Court should be disregarded. *See supra* at 10; Fox Br. at 15-17.

who have an undeniable interest in the case's dismissal and the Attorney General has moved to quash the case without providing an articulated basis why the substantive claim lacked merit such that dismissal was rational and neither arbitrary nor capricious.

Thus, in *Burlington Coat*, while the Relator alleged the defendant should have, but did not, collect Illinois Use Tax on internet sales, the Attorney General moved to dismiss on the rationale that, in the State's opinion, there was "not a sufficient nexus with Illinois under the commerce clause for Burlington Direct, an out-of-state company, to collect use tax on sales to customers in Illinois." 369 Ill. App. 3d at 510. The Attorney General in that case thus did provide a rationale consistent with a legitimate government purpose, *i.e.*, the power of the State to set its own tax policy. Again, there was no allegation in that case of any bad faith or conflicts of interest.

In the other primary case the Attorney General relies, *QVC*, the relator similarly did not allege bad faith or fraud but instead alleged that discovery might unearth such evidence. *QVC, Inc.*, 2015 IL App (1st) 132999, ¶ 22. There, as in *Burlington Coat*, the Attorney General provided a substantive rationale for dismissal, arguing the State had a right to set its own tax collecting processes and had done so by approving QVC's tax collecting practices that were being challenged by the relator. *Id.* at ¶ 25.

Similarly, in *State ex rel. Krislov v. BMO Harris Bank, N.A.*, an unpublished case cited by the Attorney General, the false claim was "false" only based on a particular construction of the Unclaimed Property Act. 2021 IL App (1st) 192273-U, ¶ 7. The Attorney General moved to dismiss after concluding the relator's construction of the Unclaimed Property Act was wrong and inconsistent with the interpretation of the State Treasurer. *Id.* at ¶¶ 27-28. There was no allegation there of any conflict or bad faith by the

State: only an assertion that the State was misreading the law. *Id.* ¶ 26. Likewise, in *State ex rel. Thulis v. City of Chi.*, another unpublished decision, the court held that simply stating that the State acted in bad faith by choosing not to pursue the relator’s *qui tam* action was insufficient to establish bad faith or fraud sufficient to overcome dismissal. 2021 IL App (1st) 191675-U, ¶ 23.

None of these cases address a Section 4(c)(A)(2) motion to dismiss in the context of allegations that demonstrate government complicity in fraud, as here. Fox’s allegations in this regard are specific and alarming. They are not speculative nor are they conjectural. Fox raised below more than enough to remove any presumption of regularity that would otherwise have attached to the Attorney General’s motion.

IV. The Attorney General Denied Fox the Opportunity to Respond to his Arguments by Failing to Provide Any Rationale in His Boilerplate Motion and Then Relying in Reply on Insubstantial Pretext

The Attorney General argues it was appropriate for him to provide no basis for his motion to dismiss and to provide a rationale only in reply, when Fox had no written opportunity to respond. He cites no precedent for such a procedure and there is none. Neither is the Attorney General able to explain how there was any substance to the facially meritless grounds that he did posit in his reply.

A. Fox Was Prejudiced by the Procedure Below

Fox was prejudiced by the Circuit Court allowing the Attorney General not to provide any reason for his motion until his reply brief. *Compare* AG Br. at 27-28 (arguing without support that this procedure did not prejudice Fox). The Attorney General does not argue his motion to dismiss provided any rationale for dismissal because it did not. The motion simply concluded that “the action is legally deficient” without any analysis or

discussion of why the case should not proceed, as the Attorney General had provided in *Burlington Coat* and the other cases he cites now and that are discussed above. *See* R.C. 38. In fact, the Attorney General argued in his motion below that he was not required to provide a reason and that the Court had no role at the subsequent hearing, which the Attorney General argued was “simply a formal opportunity for the Relator to convince the government not to end the case” *Id.* (emphasis added).

On appeal, the Attorney General argues that because the ultimate burden was on Fox to resist his motion that it was appropriate for him not to articulate any basis for the motion until his reply brief and after Fox objected to dismissal. *See* AG Br. at 17, 21-22. He cites no precedent for such a procedure, which conflates the issue of burden of proof with the obligation of a movant to articulate the arguments to which a non-movant must respond. Regardless of who bears the burden of proof on an issue, a party is of course prejudiced by the gamesmanship of another party holding issues until reply. This issue may not have percolated to the Appellate Court – because it is so obvious – but Circuit Courts have noted it. *See Mancini Law Grp., P.C. v. Schaumburg Police Dep't*, 2019 Ill. Cir. LEXIS 190, *28 (although burden of proof was on the defendant police department, it was plaintiff’s burden in its dispositive motion to raise “what it views to be any relevant argument” as to why the defendant could not prove its case). Neither does the issue of a party’s burden of proof dispose of the rule that issues raised for the first time on reply are deemed waived and should not be considered. *See West-Howard v. Department of Children & Family Services*, 2013 IL App (4th) 120782, ¶ 28 (points first raised in reply waived); *People v. Sparks*, 315 Ill. App. 3d 786, 790 (4th Dist. 2000) (same).

Supreme Court Rule 341(h)(7), which codifies this rule, may be a rule of appellate procedure but the unfairness to which the rule is directed applies equally in any court. The Attorney General cites no reason it would not. The consequences to Illinois litigants if this rule did not apply would be devastating. Plaintiffs generally bear the burdens of proof in their cases but it is categorically not the case that defendants may proceed by boilerplate, unreasoned dispositive motions that only provide articulated bases after a plaintiff objects to her case being dismissed. The suggestion is absurd and has absolutely no support.

B. The Attorney General’s “Reasons” Were Unsound, Insubstantial and Pretextual

Neither does the Attorney General’s response suggest that his “reasons” given in reply below were anything but insubstantial pretext. The response does not squarely address this section of Fox’s brief. *Compare* Fox Br. at 24-30. Instead, the Attorney General either attempts new arguments not raised below, *see* AG Br. at 53-55, or else he argues that Fox “did not, and could not, credibly argue that they [the Attorney General’s pretextual bases offered on reply] were facially implausible or absurd,” *id.* at 34-35. The Attorney General does seem to concede that providing implausible and absurd rationales below, as he did, *would* support a conclusion that that his arguments “were a pretext for actual bad faith or fraud.” *See* AG Br. at 35.

The Attorney General’s premise that Fox did not argue that his arguments below were implausible and absurd is false. Her argument against his pretextual arguments run from page 15 to 26 of the transcript below. R.R. 15-26. After first noting the prejudice to her by the State’s tactic, which “effectively deprived Ms. Fox of the opportunity to respond in writing to the arguments that were made in its reply brief and today [at the hearing],” Fox pointed out that “[t]he fact is that much of what the State has said is inconsistent with

the facts as the State know them to be true.” *Id.* at 15-16. She then detailed precisely how and why the Attorney General’s pretexts were implausible and absurd. *Id.* at 17-26. Here, it is worth referring back to the actual record of his arguments on reply in the Circuit Court and to Fox’s response to those arguments.

First, the Attorney General claimed that Fox’s complaint was barred by the public disclosure bar because “Relator’s allegation were publicly disclosed in the McGuire Wood report and Thornley’s worker’s compensation case,” as well as in disclosures to the OEIG. R.C. 65. In this regard, the Attorney General simply ignored that Fox was an original source to the OEIG and, later, the McGuire Woods investigation. Fox directed the Circuit Court to the undisputed fact that it was Fox who first brought Thornley’s fraud to the State’s attention in November 2019, that Fox put together the initial OEIG report her boss Garcia submitted to the OEIG, and that “as far as the McGuire Wood report, Ms. Fox spent over 12 hours being interviewed by McGuire Woods,” “provided hundreds of pages of documents to McGuire Woods,” and her name shows up some 150 times as a source in the McGuire Woods report. R.R. 16-18. So, yes, it was absurd to invoke the public disclosure bar that, by its terms, does not apply to “an original source.” *Id.* at 16-17.

As for the worker’s compensation claim, Fox argued below (as here) that it is further absurd to suggest that Thornley disclosed her own fraud by making the fraudulent claim. *See* Fox Br. at 26-29. While the Attorney General argues to this Court that recovery of Thornley’s fraudulent worker’s compensation payments could only be in those administrative proceedings, below he admitted that the State had made no such claim for recovery. *See* R.R. 30-31 (conceding, “[W]e understand what Mr. Andalman is saying about the fact that there’s no current counterclaim [in the worker’s compensation case] ...

it's not there yet, so we have no knowledge, we cannot discern anything from the status of that worker's compensation claim") See *Lindblom*, 2018 IL App (1st) 171468 at ¶ 32 ("Nothing in the statute's [IFCA's] express language demonstrates that the legislature intended to bar a *qui tam* action based on the possibility that the State *may* be a party in a civil suit or administrative civil money penalty proceeding in the future.")

Neither did the Attorney General dispute below that the Assistant Attorney General involved in the worker's compensation case had admitted that he "had a conflict of interest and couldn't proceed with claims against Ms. Thornley." R.R. 23. The Attorney General has never explained whether or how that conflict was resolved.

The Attorney General also invoked the criminal case against Thornley as to a small fraction of her fraud, as if that proceeding implicated the government action bar. R.C. 68-69. It does not, as by statute the government action bar is only implicated by "a civil suit or an administrative civil money penalty proceeding" 740 ILCS 175/4(e)(3). Moreover, Fox pointed out below that this argument glosses over the fact that it was Fox who submitted the claims to the prosecutors, which were first declined based on the State's Attorney's stated conflict in proceeding against Thornley. R.R. 23. In this way, the State's recognized conflicts have continually interfered with any attempt to get to the bottom of Thornley's frauds. Moreover, Fox noted below, as here, that the theft, forgery and misconduct indictment the Appellate Prosecutor has brought in Sangamon County covers just \$10,000 of the half million-dollar fraud in this case. R.R. 24-25.

Ultimately, even cursory review of the insubstantial pretexts the Attorney General waited until reply to make below demonstrates that they are just that: pretexts for the Attorney General's attempt to quash this case and any inquiry into the frauds Fox alleges.

CONCLUSION

As noted at the outset of this brief, whistleblower cases are allowed by the IFCA in cases where the State has not or will not pursue frauds against itself. As the Attorney General stated below: “The IFCA is meant as a safety net. It’s sort of the wheels of justice. If the State entities aren’t working, you would, you know, the IFCA is the net to catch any fraud that the government isn’t aware of.” R.R. 8. In this case, Fox brought Thornley’s fraud to the State and she pressed her boss, the OEIG, McGuire Woods, local prosecutors and anyone who would listen to do something about it. Each time, Thornley’s political connections trumped the disclosed facts. So Fox filed this lawsuit. And then the Attorney General tried to trump it in an arbitrary and capricious manner and without any rational relationship to any legitimate government purpose other than to avoid embarrassment to the Governor and his Office. This result should not stand. It is contrary to Due Process, contrary to the IFCA itself, and it is wrong. Dismissal of Fox’s complaint below is properly reversed so that the facts alleged may be properly pursued, the truth determined, and the State made whole.

Respectfully submitted,

Emily Fox, Relator-Appellant

By: /s/ Robert M. Andalman
One of her counsel

Robert M. Andalman (ARDC No. [REDACTED])
Diana Guler (ARDC No. [REDACTED])
A&G Law, LLC
542 S. Dearborn Street, 10th Floor
Chicago, IL 60605
312-348-7629 (phone)
312-341-0700 (fax)
randalman@aandglaw.com
dguler@aandglaw.com
Counsel for Relator-Appellant, Emily Fox

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the 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 those matters to be appended to the brief under Rule 342(a), is 20 pages.

By: /s/ Robert M. Andalman
Counsel for Relator-Appellant, Emily Fox

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Robert Andalman, an attorney, certify that on May 2, 2023, I electronically filed the foregoing ***REPLY BRIEF OF RELATOR-APPELLANT EMILY FOX*** with the Clerk of the Court for the Illinois Appellate Court, Fourth Judicial District, by using the Odyssey eFileIL system.

I further certify that on May 2, 2023, the foregoing ***REPLY BRIEF OF RELATOR-APPELLANT EMILY FOX*** was served by email and via the Odyssey eFileIL system on the below named participants:

RICHARD S. HUSZAGH
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2587
CivilAppeals@ilag.gov
Secondary e-service:
richard.huszagh@ilag.gov

/s/ Robert M. Andalman