IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

iA AMERICAN WARRANTY CORP., et al.,

Petitioners,

v. No. S-1-SC-41286

THE HONORABLE BRYAN BIEDSCHEID,

Respondent,

and

STATE OF NEW MEXICO ex rel. RAÚL TORREZ, KEVIN WOODRUFF, SOUTHWEST REINSURE (NM), INC., et al.,

Real Parties in Interest,

and

NEW MEXICO TAXATION & REVENUE DEPARTMENT,

Intervenor-Real Party in Interest.

# CONSOLIDATED SUPPLEMENTAL BRIEF OF THE STATE OF NEW MEXICO AND QUI TAM PLAINTIFF KEVIN WOODRUFF IN OPPOSITION TO THE PETITION FOR WRIT OF SUPERINTENDING CONTROL

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## INTRODUCTION

Pursuant to the Court's Order Requesting Briefing of June 5, 2026, as amended June 8, 2026, the State of New Mexico, by and through Attorney General Raúl Torrez, and Qui Tam Plaintiff Kevin Woodruff jointly submit this consolidated supplemental brief in opposition to the petition for writ of superintending control. The Court has directed the parties to address two issues: (1) whether NMSA 1978, Section 44-9-3(E) (2015) ("Subsection (E)") applies to the claims asserted in the underlying qui tam action; and (2) how Subsection (E) affects the district court's jurisdiction over the qui tam action and the issues and arguments raised in the petition.

The answer to the first question is no. Subsection (E) provides that Section 44-9-3, the liability section of the Fraud Against Taxpayers Act ("FATA"), NMSA 1978, §§ 44-9-1 to -14 (2007, as amended through 2015), "does not apply to claims, records, or statements made pursuant to the provisions of Chapter 7 NMSA 1978." The claims in this action rest on false, misleading, and fraudulent records and statements that Petitioners and other Defendants made to the Office of Superintendent of Insurance ("OSI") and the National Association of Insurance

Commissioners ("NAIC") in regulatory filings governed by the Insurance Code ("Chapter 59A"), in order to conceal and avoid premium tax obligations that arose under NMSA 1978, § 59A-15-4 (2023), itself a provision of the Insurance Code. No claim, record, or statement on which this action rests was made pursuant to any provision of Chapter 7.

The answer to the Court's second question is that Subsection (E) does not affect the district court's jurisdiction, and its impact on the issues and arguments raised in the petition is to provide solid ground on which to deny the instant petition. This is because Subsection (E) provides nothing more than a limitation on the type of false claims, records, or statements that can form the basis of a FATA case. Subsection (E) limits the substantive reach of FATA, but it says nothing about the jurisdiction of any court. There is a section of FATA, however, that does contain jurisdictional limitations: NMSA 1978, § 44-9-9 (2015), which provides three circumstances under which "[n]o court shall have jurisdiction" over purported FATA claims, and a fourth circumstance permitting discretionary dismissal, none of which applies here. Section 44-9-3(E) contains no such language. The only role Subsection (E) has to play in this case is as a merits defense—one that Petitioners have already

raised in motions to dismiss that are fully briefed in the district court—not a limitation on the district court's jurisdiction, and not a basis for the extraordinary remedy of superintending control.

## ARGUMENT

### I. Section 44-9-3(E) Does Not Apply to the Claims Asserted in the Qui Tam Action.

#### A. By its plain language, Subsection (E) excepts only claims, records, or statements "made pursuant to the provisions of Chapter 7 NMSA 1978." It is not a "tax bar."

Section 44-9-3(A)(8) states that a person who "knowingly make[s] or use[s], or cause[s] to be made or used, a false, misleading or fraudulent record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state or a political subdivision" is liable for a violation of FATA. Section 44-9-3(A)(4) imposes liability on a person or persons who "conspire" to do the same. Subsection (E) then provides a single exception to FATA liability for false, misleading, or fraudulent statements made to the State; it states: "[t]his section does not apply to claims, records or statements made pursuant to the provisions of Chapter 7 NMSA 1978." Section 44-9-3(E).

The exception in Subsection (E) is triggered only when the claims, records, or statements that form the basis of a purported FATA case were

made "pursuant to the provisions of Chapter 7 NMSA 1978." *Id.* It does not accept "tax claims," "claims relating to taxation," or statements made under the revenue laws of the state generally. It accepts only claims, records, and statements made or used pursuant to one identified body of law: Chapter 7 of the New Mexico Statutes ("Chapter 7"), which contains the Tax Administration Act, NMSA 1978, §§ 7-1-1 to -84, and the State's tax acts.

When statutory language is clear and unambiguous, the Court gives effect to that language and refrains from further interpretation. *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618. Courts "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413. Subsection (E) is clear as written: it withdraws from FATA's liability section only claims, records, and statements that Chapter 7 governs or requires.

Chapter 7 is where New Mexico's tax programs are generally codified; however, when FATA was enacted in 2007, and when Section 44-9-3 was amended in 2015, the premium tax on independently procured insurance was not codified in that Chapter. Rather, it was codified,

imposed, reported, and collected under the Insurance Code, specifically Chapter 59A, and administered by the New Mexico Superintendent of Insurance, entirely outside of Chapter 7. *See* NMSA 1978, § 59A-15-14 (1984, amended 2018) (remaining in effect without amendment until January 1, 2020).

The Legislature is presumed to have been aware of existing law when it enacted FATA. *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 73, 129 N.M. 1. Had it intended Subsection (E) to reach every claim touching taxation regardless of where it was codified, it could easily have done so — for example, by excepting statements made pursuant to any revenue law of the state. Instead, it accepted only Chapter 7 and left premium tax obligations that arose under Chapter 59A within the scope of FATA. "The Legislature knows how to include language in a statute if it so desires." *State v. Greenwood*, 2012-NMCA-017, ¶ 38.

**B. The claims in this action rest on records and statements made pursuant to Chapter 59A, not Chapter 7.**

Subsection (E) turns on whether the operative claims, records, or statements were "made pursuant to the provisions of Chapter 7 NMSA 1978." The operative complaint in this case contains many examples of

false claims or statements allegedly made by the Petitioners, and none of them is alleged to have been made pursuant to Chapter 7.

Petitioners' obligation to pay premium tax arose under the Insurance Code. Under Section 59A-15-4, an insured who purchases insurance directly from a non-admitted insurer is obligated to report the premium and pay the premium tax to the State of New Mexico. Prior to 2020, the tax was payable to OSI. After that year, the tax is payable to the Taxation and Revenue Department ("TRD"). *See* 2018 N.M. Laws, Ch. 57; 2019 N.M. Laws, Ch. 47 (both codified in scattered sections of Chapter 7 and Chapter 59A). The Second Amended Complaint alleges that Petitioners never reported or paid the premium tax they owed on the insurance they procured directly from non-admitted insurers. Second Am. Compl. ¶¶ 144-145 (Dec. 15, 2022). The Complaint further alleges that Petitioners made false statements to the State of New Mexico to avoid paying the premium tax they owed. Those statements were found in their annual regulatory filings with OSI and the NAIC pursuant to the Insurance Code's regulatory regime, Chapter 59A.

It was in these filings that the Petitioners falsely characterized the insurance policies they purchased from non-admitted insurers as

"reinsurance." *Id.* ¶¶ 146-147, 159-165. The complaint alleges that these statements were false as a matter of insurance law because (1) "reinsurance" is "the assumption by an insurer of all or part of a risk undertaken originally by another insurer," NMSA 1978, § 59A-14-2(R) (2017); (2) reinsurance is limited to contracts between insurers, NMSA 1978, § 59A-7-11 (2017) (recodified as NMSA 1978, § 59A-12E-1 to -18 (2022)); and (3) the administrator-obligor Petitioners, whose false statements form the basis for this case, were not insurers and were not in the business of insurance, NMSA 1978, § 59A-58-8 (2002). Thus, whether the statements were false turns entirely on provisions found only in Chapter 59A and not Chapter 7.

Filings made to OSI under the Insurance Code, and filings made to the NAIC on which New Mexico's insurance regulators rely, are not "claims, records or statements made pursuant to the provisions of Chapter 7 NMSA 1978." They are made pursuant to Chapter 59A. Based on the plain language of Subsection (E) and the nature of the false claims made by the Petitioners, the Subsection (E) exception has no application in this case.

### C. The federal courts' construction of the False Claims Act's "tax bar" confirms the conclusion.

Because FATA "closely tracks" the FCA, this Court "find[s] the cases construing FATA's federal analogue, the False Claims Act, helpful in understanding the context and purpose of FATA." *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2015-NMSC-025, ¶ 16. The FCA's "tax bar," 31 U.S.C. § 3729(d), is the federal counterpart to Subsection (E): each excludes claims, records, or statements made under the jurisdiction's identified tax code — there, the Internal Revenue Code; here, Chapter 7. The federal cases construing the bar therefore ask the same question Subsection (E) poses: whether the claim is one made under the identified tax code.

The leading federal decision is *United States ex rel. Lissack v. Sakura Global Capital Markets, Inc.*, 377 F.3d 145 (2d Cir. 2004). There, the Second Circuit applied the tax bar to a relator's claim because "the very basis for Lissack's case depend[ed] entirely on a purported violation of the Tax Code." *Id.* at 153. The claims at issue were false "precisely because (and only because) they violate[d] the Tax Code" and because the IRS had "authority to recover the precise amounts" the relator sought. *Id.* The court framed the test functionally: the "tax bar" prohibits a claim

that "rises or falls on finding a violation of the Tax Code," *id.* at 154, and its purpose "is to prevent private litigants from interfering with the IRS's efforts to enforce the tax laws," *id.* at 156.

Following the reasoning of *Lissack*, Subsection (E) has no application in this case and does not bar the claims at issue here. The falsity of Petitioners' statements rises or falls on the questions answered by the provisions of Chapter 59A, not on Chapter 7: the dispositive questions are whether contracts purchased by non-insurers from non-admitted carriers can be "reinsurance" under Sections 59A-14-2(R) and 59A-7-11, and whether the Petitioners owed premium tax under Section 59A-15-4. No provision of Chapter 7 need be construed—much less found to have been violated—to establish that the statements were false when made. Furthermore, this action does not interfere in any way with TRD's enforcement of Chapter 7: during the entire time period relevant to this case, the premium-tax collection and enforcement obligations belonged to OSI under Chapter 59A, and TRD had no premium-tax authority to exercise. A qui tam action that polices fraudulent statements in insurance regulatory filings does not intrude on or touch the tax enforcement powers of TRD.

### D. The 2018 and 2019 transfer legislation does not bring the claims within Subsection (E).

Petitioners have argued in the district court that the Legislature's transfer of premium-tax collection from OSI to TRD places these claims within Subsection (E). This argument fails for two reasons.

First, the transfer legislation did not change the character of the Petitioners' false records and statements at issue. The course of conduct alleged begins in 1985 and the original complaint was filed under seal on June 28, 2019. Both occurred before the transfer took effect on January 1, 2020. Every pre-2020 statement was made, and every pre-2020 obligation arose, under the Insurance Code alone. After January 1, 2020, the filings at issue remain Insurance Code filings: OSI and NAIC annual statements are made under Chapter 59A, and an insured's obligation to report independently procured insurance to OSI continues under NMSA 1978, § 59A-15-4, even though collection now proceeds under Chapter 7. The situs of tax collection moved; however, the regulatory filings in which Petitioners made their false statements did not become "statements made pursuant to the provisions of Chapter 7."

Second, as to this pending case, the New Mexico Constitution forecloses giving the transfer legislation the effect Petitioners urge.

Article IV, Section 34 provides that "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. Const. art. IV, § 34. This action was filed on June 28, 2019, and was pending when the transfer legislation took effect on January 1, 2020. Reading statutes enacted in 2018 and 2019 to extinguish the State's and the qui tam Plaintiff's accrued FATA claims in a then-pending case would "affect the right or remedy" of parties to a pending case. This is precisely what Article IV, Section 34, forbids.

Nor does the Attorney General's December 2022 election of a TRD assessment proceeding as an alternate remedy concede otherwise. Section 44-9-6(H) permits the Attorney General to "elect to pursue the state's . . . claim through any alternate remedy available, including an administrative proceeding." NMSA 1978, § 44-9-6(H) (2015). An election of forum for pursuing recovery is a procedural choice; it does not transform the Petitioners' false statements into statements "made pursuant to" Chapter 7, and it does not retroactively alter where Petitioners' obligations arose or to whom their statements were made.

## II. Section 44-9-3(E) Does Not Affect the District Court's Jurisdiction, and it Does Not Support the Relief Sought in the Petition.

### A. Subsection (E) limits liability under Section 44-9-3; it does not limit the jurisdiction of the courts.

New Mexico's district courts are courts of general jurisdiction, vested with "original jurisdiction in all matters and causes not accepted in this constitution." N.M. Const. art. VI, § 13. A statutory provision functions as a jurisdictional limitation only when the Legislature so specifies. *See id.* (district courts have "such jurisdiction of special cases and proceedings as provided by law"). FATA, a "special case" created by the Legislature, does have provisions that limit a court's jurisdiction, but Section 44-9-3(E) is not one of them. Section 44-9-9 provides three sets of circumstances in which "[n]o court shall have jurisdiction over an action brought pursuant to Section 44-9-5 NMSA 1978." They are (1) actions by public employees who have not exhausted internal reporting procedures prior to filing a FATA claim; (2) actions against elected or appointed officials based on information already known to a state agency or the attorney general; and (3) actions duplicating pending proceedings to which the State is a party, absent the attorney general's written certification. Section 44-9-9(A)-(C). A fourth provision, Section 44-9-9(D),

permits a court, on the attorney general's motion, to dismiss in its discretion an action based on allegations publicly disclosed in the news media or in a publicly disseminated governmental report. This is a dismissal provision, not a jurisdictional bar. None of the four applies here.

Subsection (E) stands in distinct contrast to FATA's jurisdictional limitations. Subsection (E) addresses what section of the liability provisions in Section 44-9-3, and it does not mention courts, actions, or jurisdiction. Where the same act uses express jurisdiction-limiting language in one section and omits it in another, the omission is meaningful: the Legislature spoke in jurisdictional terms where it meant to, and it did not do so in Subsection (E). "[W]hen the Legislature includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional." *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, ¶ 36 (internal quotation marks and citation omitted).

In *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the United States Supreme Court adopted a "readily administrable bright line" that guides courts in determining whether a legislature has intended to create a

jurisdictional limitation. *Id.* at 516. The Court explained: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue," but "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character." *Id.* at 515-16. Under that approach, a limitation on a statute's substantive coverage—which is all Subsection (E) is—goes to the elements of the claim, not to the court's power to adjudicate it.

The practical consequence answers the Court's second question directly. If Subsection (E) applied to some or all the claims here, the result would be a ruling that those claims fail as a matter of law through an ordinary merits decision entered by the district court and subject to appellate review in the ordinary course. Subsection (E) does not diminish or eliminate the district court's jurisdiction over this case; if anything, the district court's jurisdiction includes the power to decide whether Subsection (E) bars any claim.

### B. Subsection (E) has no bearing on the issues and arguments raised in the petition.

The petition does not turn on Subsection (E). It asks whether the Attorney General's election of an alternate remedy under Section 44-9-6(H) irrevocably foreclosed this litigation, and whether the Attorney General could withdraw the partial delegation of authority he had extended to TRD under Section 44-9-4(B). Those questions concern FATA's procedural architecture and the Attorney General's constitutional and statutory authority over state-interest litigation. Subsection (E) speaks to none of that. It defines the conduct that the liability section of FATA reaches; it says nothing about remedy elections, delegations, or the relationship between the Attorney General and TRD.

If Subsection (E) bears on this proceeding at all, it is in one respect: it confirms that the petition should be denied. At most, Subsection (E) is a pending merits defense awaiting a decision in the district court. Granting extraordinary relief on the strength of a defense the district court has not yet ruled on—in a case where that ruling, whichever way it goes, will be reviewable on appeal—would invert the ordinary course of litigation that superintending control exists to protect, not displace.

## CONCLUSION

Section 44-9-3(E) does not apply to the claims asserted in this qui tam action: the records and statements on which the action rests were made pursuant to Chapter 59A, not Chapter 7. Subsection (E) does not affect the district court's jurisdiction: it is a non-jurisdictional limitation on the scope of FATA's liability section, presently at issue in fully briefed motions to dismiss below, with no bearing on the alternate remedy and delegation questions the petition presents. The Court should answer the first question in the negative, hold that Subsection (E) neither divests the district court of jurisdiction nor supports the petition, and deny the petition for writ of superintending control.

Dated: June 16, 2026

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2026, a true and correct copy of the foregoing was served on all counsel of record via the Court's Odyssey File and Serve system.

*/s/Kori Nau*

## STATEMENT OF COMPLIANCE

Undersigned counsel certifies that the body of this brief is fewer than thirty-five (35) pages and this brief complies with Rule 12-318(F) NMRA.