

# Divided but Not Detached: Why Agency Theory Prevents Arbitration of FCA Qui Tam Actions Without Government Consent

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*Forcing arbitration of a relator's False Claims Act (FCA) qui tam action undermines the statute's core purpose by weakening whistleblower protections and discouraging individuals from coming forward. While courts have generally declined to compel such actions to arbitration absent the government's consent, their reasoning for doing so has been upended by a line of Supreme Court precedent recognizing relators as partial owners of the claim. As a result, courts can no longer rely solely on the common rationale that the government's exclusive ownership bars arbitration of the claim without the government's consent. Indeed, in 2013, a district court became the first to compel a group of relators' claims to arbitration on the basis of the relator's ownership of the claim. This decision garnered support from scholars and courts alike. Yet, these supporters have not fully accounted for the fact that Supreme Court precedent supports both lines of reasoning: The Court has clarified that both the government and the relator are partial owners of the claim. This Note seeks to reconcile this doctrinal tension. Drawing on agency theory, it argues that a relator's partial ownership does not, on its own, provide sufficient grounds to compel arbitration without government consent, and it underscores the significant costs that forced arbitration imposes on both whistleblowers and the public interest that the FCA was designed to protect.*

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## Introduction

“[E]ach party expressly waives any right, including without limitation the right to trial by jury, it might have to seek redress in any federal, state[,] or local court or other forum . . . .”<sup>1</sup> This was the arbitration clause embedded in the student-enrollment agreement to attend the Miami–Jacobs Business College—a nonnegotiable agreement that all students must sign to enroll in the institution.<sup>2</sup> In 2012, a class of students filed suit against the college, alleging that the school presented false and deceptive information to the federal government to obtain excessive federal funding<sup>3</sup>—a violation of the False Claims Act (FCA).<sup>4</sup> However, pursuant to the clause in the enrollment

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1. *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*1 (S.D. Ohio Jan. 31, 2013).

2. Class Action Complaint for Damages, Equitable Relief and Declaratory Judgement with Jury Demand at 23, *Deck*, 2013 WL 394875 (No. 3:12-cv-63).

3. *Id.* at 41–44.

4. *What Is the False Claims Act?*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/protect-the-false-claims-act/> [<https://perma.cc/8VN8-7KN7>].

agreement, the students were barred from pursuing their action in a judicial forum.<sup>5</sup>

*Deck v. Miami Jacobs Business College Co.*<sup>6</sup> illustrates a common fact pattern in FCA qui tam actions, which are increasingly common.<sup>7</sup> The students were able to bring this action because the structure of the FCA incorporates a unique mechanism: the “qui tam action.”<sup>8</sup> This provision allows a private individual, known as a “relator,” to bring a lawsuit on behalf of the government.<sup>9</sup> A relator is commonly referred to as a “whistleblower”—a person who reports fraud or other misconduct to someone in a position to rectify the wrongdoing.<sup>10</sup> Often, these actions are brought by relators who have a pre-existing relationship with the defendant, the terms of which are governed by contractual agreements with a pre-dispute arbitration clause. These clauses typically require all future disputes to be resolved through arbitration.<sup>11</sup>

A key divide in FCA cases is whether whistleblowers can be bound by these arbitration clauses. Though courts have historically tended to deny defendants’ motions to compel arbitration of these claims, courts rarely provided an in-depth analysis for doing so. Their reasonings were brief and vague, including holdings based on the government’s alleged ownership of the claim, or interpreting agreements to exclude FCA claims.<sup>12</sup>

The district court that decided *Deck* in 2013 became the first to hold that the claim could be subject to a relator’s pre-dispute arbitration agreement with the defendant.<sup>13</sup> The *Deck* court’s holding is hardly surprising given the increasing pressure on courts to compel arbitration. The Federal Arbitration Act (FAA) was enacted in response to judicial hostility to arbitration and has been interpreted by courts as creating a policy favoring arbitration.<sup>14</sup>

The *Deck* decision garnered scholarly support. In *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims*

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5. *Deck*, 2013 WL 394875, at \*7–8.

6. No. 3:12-cv-63, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013).

7. Jaime L.M. Jones, Scott D. Stein & Brenna E. Jenny, *DOJ Releases FY2024 FCA Statistics*, SIDLEY (Jan. 17, 2025), <https://fcablog.sidley.com/2025/01/17/doj-releases-fy2024-fca-statistics/> [<https://perma.cc/3DZM-N2PW>].

8. CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2021).

9. *Id.*

10. *What Is a Whistleblower?*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/what-is-a-whistleblower/> [<https://perma.cc/63UP-72UE>].

11. Jonathan Kurta, *FINRA Rule 2268: What Is a Preedispute Arbitration Agreement?*, KURTA L. (Nov. 2, 2022, at 1:46 PM), <https://www.kurtalawfirm.com/blog/finra-rule-2268/> [<https://perma.cc/8JJU-QE47>].

12. *See infra* subpart II(A).

13. *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*6–7 (S.D. Ohio Jan. 31, 2013).

14. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

*Act*, Mathew Andrews agreed with the *Deck* court and offered further support for the holding through Supreme Court precedent.<sup>15</sup> In his opinion, the precedent proves that qui tam relators are owners of the claim through partial assignment.<sup>16</sup> He contends that because the relators are bringing their own claims when the government declines to intervene, these claims do not belong to the government; therefore, relators should be bound by their personal arbitration agreements with the defendant.<sup>17</sup>

However, the *Deck* court's analysis and Andrews's subsequent support of it are flawed. This Note argues that even if the Court is correct to hold that relators are partial assignees of the government's damages claim, it does not follow that the claim can be subject to arbitration pursuant to a relator's pre-dispute agreement. Rather, the portion of the claim that was not assigned to the relator still belongs to the government, and the relator only brings that part of the claim in an agency capacity. Requiring the relator to pursue the claim in arbitration would be binding a nonconsenting party, the government, to a contract it did not sign.

In 2017, the Ninth Circuit revived the debate when it was asked to decide on the interesting question of FCA qui tam actions' arbitrability.<sup>18</sup> The Ninth Circuit declined to do so,<sup>19</sup> but the parties' arguments were proof that the *Deck* court's outlier holding and Supreme Court precedent classifying relators as partial assignees do present an arguable case for defendants seeking to invoke their arbitration clauses against relators.<sup>20</sup> Allowing such precedent to take hold in the courts would be harmful to the government and whistleblowers alike. Forced arbitration provides whistleblowers with fewer protections than they would receive if they pursued their claims in court, and this may in turn deter whistleblowers from attempting to stop the fraud at all.

In Part I, I examine the statutory background of the FCA and the FAA. Part II analyzes case law addressing whether an FCA relator's enforcement action can be subject to their pre-dispute agreements. Part III discusses Supreme Court precedent classifying FCA relators as partial assignees of the government's claim and explains why partial assignment theory does not

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15. See generally Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203 (2015) (arguing based on *Deck*, Supreme Court precedent, and the Dodd–Frank Amendments of 2010 that these courts were correct to compel arbitration).

16. *Id.* at 219–23.

17. *Id.* at 228.

18. United States *ex rel.* Welch v. My Left Foot Child.'s Therapy, LLC, 871 F.3d 791, 794 (9th Cir. 2017).

19. See *id.* (holding that the question of whether an FCA claim can be arbitrated was not properly at issue with Welch's arbitration agreement).

20. See, e.g., Defendants' Motion to Compel Arbitration and Stay Action at 3, *Welch*, 871 F.3d 791 (No. 16-16070) (relying on *Deck* to argue for enforcement of the arbitration clause and force arbitration of the FCA claim at issue).

provide a viable basis for compelling FCA enforcement actions into arbitration. Relying on the Third Restatement of Agency, I further develop the underexplored and contested theory that relators bring FCA enforcement actions as agents of the government. Because the claim partially belongs to the government, I argue that it cannot be sent to arbitration without the government's consent. In Part IV, I explain that this interpretation aligns with Congress's intentions for the FCA qui tam provision.

### I. Statutory Background

I begin by discussing the FCA's origins and purpose, focusing on its qui tam enforcement mechanism, which allows private individuals to bring lawsuits on behalf of the government. I explain how the FCA is designed to incentivize whistleblowers to expose fraud against the government by offering them a share of the recovered damages. Next, I outline the FAA, focusing on its mandate to enforce arbitration agreements and its expansive interpretation by the Supreme Court.

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

The FCA, 31 U.S.C. § 3729, was enacted in 1863 to combat damages the government sustains due to government contractors' widespread use of fraudulent and false claims for payment.<sup>21</sup> Perpetrators found to have presented fraudulent claims for payment to the United States government are liable to the government for civil penalties.<sup>22</sup> While the statute itself has "become increasingly powerful,"<sup>23</sup> one of its most important provisions has remained constant. Pursuant to § 3730, the United States Attorney General isn't the only person who can bring a claim against any person(s) violating § 3729. Section 3730 makes clear that private individuals may also bring claims for violations of the FCA.<sup>24</sup> The action may be brought "for the person and for the United States Government," and "shall be brought in the name of the Government."<sup>25</sup>

Relators may not bring qui tam actions based on allegations or transactions that are the subject of a civil suit to which the government is already a party.<sup>26</sup> And when bringing a claim under the FCA, relators are required to serve the government a "copy of the complaint and . . . all material evidence and information the person possesses."<sup>27</sup> The government

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21. *What Is the False Claims Act?*, *supra* note 4.

22. 31 U.S.C. § 3729(a)(1).

23. *What Is the False Claims Act?*, *supra* note 4.

24. 31 U.S.C. § 3730(b).

25. 31 U.S.C. § 3730(b)(1).

26. 31 U.S.C. § 3730(e)(4)(A)(i).

27. 31 U.S.C. § 3730(b)(2).

may then elect to intervene and proceed with the action or decline to do so.<sup>28</sup> If the government proceeds, it takes on the “primary responsibility for prosecuting the action[] and shall not be bound by” the relator’s actions.<sup>29</sup> The relator, however, retains the right to continue as a party to the action, subject to the government’s discretion to dismiss the action, settle the action, or restrict the relator’s participation in the action.<sup>30</sup>

Alternatively, if the government declines to intervene, the relator has the right to continue conducting the action on their own.<sup>31</sup> Still, the government retains significant control over the relator’s action. The government may request that it be served with copies of all pleadings filed and deposition transcripts, or it can ask the court to stay discovery if it would interfere with the government’s own investigation or prosecution of a civil matter arising out of the same facts.<sup>32</sup> Additionally, the government retains the right to intervene at a later date.<sup>33</sup>

The FCA incentivizes private individuals to bring claims. When the government does not intervene in the action, the relator can recover between 25% and 30% of the proceeds.<sup>34</sup> If the government intervenes in the action, the relator can recover between 15% and 25% of the proceeds.<sup>35</sup> Even these seemingly small percentages can bring about high rewards for the relators, considering the penalty for liability under the FCA is between \$5,000 and \$10,000 plus three times the amount of damages the government sustained.<sup>36</sup>

To further encourage individuals to prevent fraud, the FCA also provides a cause of action for individuals who are retaliated against for their efforts to stop it.<sup>37</sup> This retaliation provision provides relief to any employee, contractor, or agent who was discharged, demoted, suspended, harassed, or discriminated against for efforts to prevent FCA violations.<sup>38</sup> While the whistleblower may seek relief for retaliation related to the whistleblower’s pursuit of an FCA enforcement action, the statute also provides relief for retaliation even when the whistleblower has not taken or threatened legal action.<sup>39</sup>

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28. *Id.*

29. 31 U.S.C. § 3730(c)(1).

30. 31 U.S.C. § 3730(c)(1)–(2).

31. 31 U.S.C. § 3730(c)(3).

32. 31 U.S.C. § 3730(c)(3)–(4).

33. 31 U.S.C. § 3730(c)(3).

34. 31 U.S.C. § 3730(d)(2).

35. 31 U.S.C. § 3730(d)(1).

36. 31 U.S.C. § 3729(a)(1).

37. 31 U.S.C. § 3730(h).

38. 31 U.S.C. § 3730(h)(1).

39. *See id.* (allowing relief from retaliatory actions made in response to both qui tam actions and “other efforts” to stop FCA violations).

The government also has a strong incentive to encourage relators to bring these claims. In 2024, it was estimated that the federal government loses between \$233 billion and \$521 billion to fraud each year.<sup>40</sup> The government, on its own, does not have the resources necessary to hold all of these perpetrators accountable.<sup>41</sup> The qui tam provision is a way for the government to enlist private citizens to help increase its chances of prosecution and recovery.<sup>42</sup> When the government decides to intervene in the action, it receives between 75% and 85% of the proceeds of the action.<sup>43</sup> Even when the government declines to intervene, it is still entitled to between 70% and 75% of the proceeds.<sup>44</sup> The FCA has proved to be successful in accomplishing its goal of recovery: As of 2019, the FCA had recovered over \$62 billion of that fraud, \$7.3 billion of which went to whistleblowers.<sup>45</sup>

In many cases, the actions are brought by private individuals who learn of their employers' misdeeds.<sup>46</sup> The FCA requires that relators are the "original source" of the information,<sup>47</sup> making employees privy to company secrets prime candidates for bringing these actions. Additionally, employees often have access to information beyond the reach of government inspections.<sup>48</sup>

The issue is that pre-dispute arbitration clauses are often embedded in employment contracts.<sup>49</sup> These clauses can "require individual, final[,] and binding arbitration."<sup>50</sup> Despite critics contending that enforcement of these arbitration clauses can "preclude the vindication of federal and state statutory rights," the Supreme Court recognizes the FAA as establishing a national policy favoring arbitration and grounds for enforcing arbitration contracts "as written."<sup>51</sup>

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40. *Fraud Risk Management: 2018-2022 Data Show Federal Government Loses an Estimated \$233 Billion to \$521 Billion Annually to Fraud, Based on Various Risk Environments*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 16, 2024), <https://www.gao.gov/products/gao-24-105833> [<https://perma.cc/P2WV-877L>].

41. Ben Depoorter & Jef De Mot, *Whistleblowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 137–38 (2006).

42. *Id.* at 139.

43. 31 U.S.C. § 3730(d)(1).

44. 31 U.S.C. § 3730(d)(2).

45. Nathan T. Tschepik, *The Executive Judgment Rule: A New Standard of Dismissal for Qui Tam Suits Under the False Claims Act*, 87 U. CHI. L. REV. 1051, 1053 (2020).

46. See Charles A. Sullivan, *Whose Claim Is It Anyway? Arbitrating Relators' FCA Claims*, 9 J. HEALTH & LIFE SCIS. L. 4, 4 (2015) (describing the way most qui tam actions arise through employer–employee relationships).

47. 31 U.S.C. § 3730(e)(4)(A).

48. Depoorter & De Mot, *supra* note 41, at 138.

49. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 109 (2015).

50. *Id.*

51. *Id.*

*B. The Federal Arbitration Act*

The FAA, 9 U.S.C. § 2, mandates that “an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable” unless law or equity requires.<sup>52</sup> While the FAA’s primary purpose is to ensure that arbitration agreements are enforced according to their terms<sup>53</sup> and combat judicial hostility to arbitration agreements,<sup>54</sup> the Court has interpreted the statute as “manifest[ing] a ‘liberal federal policy favoring arbitration agreements.’”<sup>55</sup>

Enacted in 1925,<sup>56</sup> the FAA has since been significantly expanded by the Court. The FAA and related Supreme Court decisions have been criticized for giving too much power to large corporations and abdicating them of accountability.<sup>57</sup> While the enacting Congress’s intent was merely to address disputes between “equally-able bargaining parties,”<sup>58</sup> the Court has confirmed that the FAA does apply to employer–employee contracts.<sup>59</sup> Moreover, the Court has also made clear that the FAA applies to statutory claims, where the plaintiff’s right to sue is derived from a statute.<sup>60</sup>

The FAA is especially daunting when one considers that the Court enforces arbitration clauses even when they are contained in nonnegotiable contracts. In *Epic Systems Corp. v. Lewis*,<sup>61</sup> the Court enforced an employer’s arbitration agreement over the dissent’s criticisms that the FAA was never supposed to be used in situations where “one party sets the terms of an agreement while the other is left to ‘take it or leave it.’”<sup>62</sup> In 2024, over half of all private-sector, non-union employees were subject to mandatory arbitration clauses,<sup>63</sup> which are largely nonnegotiable.<sup>64</sup>

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52. 9 U.S.C. § 2.

53. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010).

54. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

55. *Id.* at 25 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

56. BRYAN L. ADKINS, CONG. RSCH. SERV., IF12764, *THE FEDERAL ARBITRATION ACT AND CLASS ACTION WAIVERS* (2024).

57. *E.g.*, Brittany L. Pushkin, *A Means to an End: How the Expansion of the Federal Arbitration Act of 1925 by the Supreme Court Created a Loophole for Corporations to Avoid Claims by Consumers and Workers Alike*, U. MIA. BUS. L. REV., Winter 2021, at 142, 147–48.

58. *Id.* at 147.

59. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 503, 525 (2018) (enforcing an arbitration agreement between an employer and employee).

60. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

61. 584 U.S. 497 (2018).

62. *Id.* at 526–27, 544 (Ginsburg, J., dissenting) (internal citation omitted).

63. Dan Ocampo, *FAQ on Mandatory Arbitration in Employment*, NAT’L EMP. L. PROJECT (Oct. 30, 2024), <https://www.nelp.org/insights-research/faq-on-mandatory-arbitration-in-employment/> [https://perma.cc/F3LT-QKSJ].

64. Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. STATE L. REV. 1103, 1133.

Unfortunately, mandatory arbitration may suppress claims altogether.<sup>65</sup> It's estimated that ninety-eight percent of employees with potential claims against their employers don't pursue their claims at all due to mandatory arbitration.<sup>66</sup> And employment contracts aren't the only ones with take-it-or-leave-it arbitration agreements. In *Deck*, for example, the student enrollment agreement containing the arbitration clause was required for attendance and nonnegotiable.<sup>67</sup> In these cases, the employees and students must "forfeit their right to a judicial forum or lose their chance at employment" or education.<sup>68</sup> Because the prime candidate to bring an FCA enforcement action is typically a would-be relator who has a binding agreement with the defendant, the rise of enforceable, mandatory arbitration clauses in FCA enforcement actions could result in less actions being brought.

## II. The Split on Forced Arbitration of FCA Relator Claims

For two decades, courts generally rejected motions to compel arbitration of these claims.<sup>69</sup> But this trend may be ending due to two decisions compelling arbitration of FCA claims, similar cases compelling arbitration of state qui tam actions for analogous reasoning, and an article by Mathew Andrews arguing that Supreme Court precedent demonstrates that FCA claims are arbitrable pursuant to the relator's pre-dispute agreements.

If the government intervenes before the complaint is unsealed, it's unlikely that a court would compel arbitration based on a relator's contract.<sup>70</sup> When the government intervenes in the action before the seal period has elapsed, the party bringing the claim in these cases is undisputably the government, and parties can only be bound by contracts to which they have consented.<sup>71</sup> The question becomes more complicated when the government declines to intervene before a motion to compel arbitration.

So far, court decisions on forced arbitration pursuant to the relator's pre-dispute contract have primarily hinged on the courts' conception of who

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65. ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 10 (2018), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/H65N-4PJT>].

66. Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \$9.2 Billion in 2019 from Workers in Low-Paid Jobs*, NAT'L EMP. L. PROJECT (June 7, 2021), <https://www.nelp.org/insights-research/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019/> [<https://perma.cc/T3DQ-88FM>].

67. Class Action Complaint for Damages, Equitable Relief and Declaratory Judgement with Jury Demand at 23, *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013).

68. Andrews, *supra* note 15, at 204.

69. *See id.* at 213 (explaining that the "judicial principle that qui tam actions cannot be arbitrated . . . originated nearly twenty years ago").

70. Sullivan, *supra* note 46, at 6.

71. *E.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

owns the claim being brought.<sup>72</sup> If the government owns the claim, despite declining to intervene, then the relator is bringing the claim merely on behalf of the government—which was not a party to the arbitration agreement—and, thus, the arbitration agreement cannot be enforced. If, however, Andrews is correct that the relator is bringing their own claim under the FCA, then compelling arbitration may be the proper legal outcome.

*A. Courts Declining to Enforce Pre-Dispute Arbitration Agreements Against FCA Relators*

As discussed above, courts were initially reluctant to subject whistleblowers' FCA claims against their employers to the arbitration clauses in their employment contracts. In *United States v. Cancer Treatment Centers of America*,<sup>73</sup> a district court took a strong approach in declaring that a whistleblower's FCA claim cannot be forced into arbitration pursuant to a pre-dispute agreement with the defendant.<sup>74</sup> The arbitration clause required arbitration of "any dispute[s]" arising between the relator and defendant.<sup>75</sup> But, the court found, a qui tam dispute isn't between the relator and the defendant—it's between the *government* and the defendant.<sup>76</sup> Thus, the court held the FCA claim was not susceptible to the relator's arbitration clause.<sup>77</sup>

To the Illinois district court it was obvious: A relator bringing a qui tam claim merely acts as a representative of the government, and the government, or its agents, is not bound by a contract it did not sign.<sup>78</sup> Despite that court's strong approach to what they seemingly viewed as a question with an obvious answer, courts commonly avoid issuing decisions on whether these qui tam claims can be subject to the relator's pre-dispute arbitration clause by interpreting the clause to exclude these types of actions.<sup>79</sup>

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72. Another interesting question is whether an arbitration agreement can ever extend to FCA enforcement actions. Although the Ninth Circuit ultimately found the arbitration clause at issue did not encompass arbitration claims, its in-depth analysis of the issue suggests the court thought that an arbitration clause *could* do so. See *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 797–800 (9th Cir. 2017) (deciding the issue based on the scope of the specific contract in question as opposed to the general arbitrability of FCA claims). However, an arbitration agreement broad enough to encompass FCA enforcement actions may be unconscionable. Scott Oswald & Andrew Witko, *Arbitration Agreements and FCA: Lessons from 9th Circ.*, LAW360 (Oct. 23, 2017, at 12:16 PM EDT), <https://www.law360.com/articles/976791> [<https://perma.cc/P4R2-XD75>]. This Note does not contemplate ways to draft an arbitration clause that would encompass an FCA claim, or whether such a clause would be enforceable.

73. No. 99 C 8287, 2002 WL 31497338 (N.D. Ill. Nov. 7, 2002).

74. See *id.* at \*1–4 (declining to enforce arbitration of an FCA qui tam claim).

75. *Id.* at \*1.

76. *Id.* at \*2.

77. *Id.*

78. *Id.* at \*2–3.

79. *E.g.*, *Mikes v. Strauss*, 889 F. Supp. 746, 754–55 (S.D.N.Y. 1995).

In *Mikes v. Strauss*,<sup>80</sup> for example, the court doubted that the relator, standing as a private representative of the government, would ever be bound to an arbitration agreement that the government was not a party to.<sup>81</sup> Nevertheless, this was not crucial to the court's decision, as the arbitration clause related solely to the terms of the relator's employment with the defendant.<sup>82</sup> Because the relator would have been able to bring a claim under the FCA whether the relator was an employee of the defendant or not, the court reasoned that the qui tam suit did not relate to their employment and was not covered by the agreement.<sup>83</sup>

Even the Ninth Circuit in *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*<sup>84</sup> declined its chance to be the first federal circuit court to issue a ruling on the topic.<sup>85</sup> Though it found the question of whether FCA relator claims can be forced into arbitration pursuant to relators' pre-dispute arbitration clauses "interesting," the court reasoned that answering it was unnecessary to the holding of the case.<sup>86</sup> Instead, the court was able to dodge the tension between the FCA and pre-dispute arbitration clauses by interpreting the arbitration clause at issue to not encompass the FCA claim.<sup>87</sup>

Notably, the district court that first decided *Welch* held the arbitration clause *did* encompass the FCA claim, but the claim could not be arbitrated because the government was not a party to the arbitration agreement.<sup>88</sup> The district court made a compelling case. The defendants relied on *United States ex rel. Eisenstein v. City of New York*,<sup>89</sup> a Supreme Court case that held the government is a party to an FCA qui tam action only if it intervenes.<sup>90</sup> But in that case, the Court acknowledged that the government remains a real party in interest regardless of its choice to intervene.<sup>91</sup> A real party in interest is "an actor with a substantive right whose interests may be represented in litigation by another."<sup>92</sup> The district court further relied on Ninth Circuit precedent, which held that FCA claims belong to the government, not the

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80. 889 F. Supp. 746 (S.D.N.Y. 1995).

81. *Id.* at 755.

82. *Id.* at 754.

83. *Id.* at 754–55.

84. 871 F.3d 791 (9th Cir. 2017).

85. *See id.* at 794 (interpreting the contract not to encompass the FCA claim).

86. *Id.*

87. *Id.*

88. *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, No. 2:14-cv-01786-MMD-GWF, 2016 WL 3381220, at \*6 (D. Nev. June 13, 2016), *aff'd on other grounds*, 871 F.3d 791 (9th Cir. 2017).

89. *See id.* at \*4 (discussing *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009)).

90. *Eisenstein*, 556 U.S. at 933.

91. *Id.* at 930, 932.

92. *Id.* at 934–35.

relator.<sup>93</sup> Ultimately, the district court declined to extend the arbitration agreement to the claim because it belonged to the government, which never agreed to arbitrate.<sup>94</sup> Despite the district court's reasoning, the Ninth Circuit punted the question.<sup>95</sup>

If these courts aimed to keep whistleblower claims brought under the FCA out of arbitration, contract interpretation was never going to be a long-term solution. These decisions can be circumvented by an employer's savvy drafting of arbitration clauses.<sup>96</sup> Though the employer-defendant in *Welch* failed to convince the Ninth Circuit that it had drafted an arbitration clause broad enough to encompass FCA claims, other employers have managed to successfully persuade courts that FCA claims do fall within the scope of their agreements.

*B. Courts Holding Relator Claims Subject to Pre-Dispute Arbitration Agreements*

*Deck* made waves in 2013 when it became the first federal court decision to rule that a group of student relators' FCA claims were within the scope of their arbitration agreements with their college and that an arbitration agreement of this kind was enforceable.<sup>97</sup> Looking to the FAA as its standard of review, the court reasoned that because the parties had entered into an agreement to arbitrate, they should be held to that agreement unless Congress itself had expressed an intention to preclude a waiver of judicial remedies.<sup>98</sup>

The court seemed unconvinced that the government being a non-party to the arbitration agreement had any bearing on the issue. Although the relators brought the claim "in the name of the Government," the court believed the claim ultimately belonged to the relators themselves.<sup>99</sup> Though the court seemed to base its decision on the language in the statute—actions by private persons are "for the person and for the United States Government"—the court did not further expand on this reasoning.<sup>100</sup>

Oddly enough, the court also focused on the fact that the government did not object to arbitration here; rather, the government asked the court to ensure that any arbitration findings would be non-binding.<sup>101</sup> The court found

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93. *Welch*, 2016 WL 3381220, at \*4.

94. *Id.* at \*4–5.

95. See United States *ex rel.* *Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 794 (9th Cir. 2017) (interpreting the arbitration clause at issue as excluding FCA claims).

96. Sullivan, *supra* note 46, at 4.

97. *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*6–7 (S.D. Ohio Jan. 31, 2013).

98. *Id.* at \*2, \*6.

99. *Id.* at \*7 (quoting 31 U.S.C. § 3730(b)(1)).

100. *Id.* (quoting 31 U.S.C. § 3730(b)(1)).

101. *Id.* at \*6.

that because the government had not objected to arbitration, it had not “withheld its consent.”<sup>102</sup> But if the court was correct to hold that the FCA claim belongs to the relator, and not the government, the government’s consent or lack thereof should be a non-issue. After all, if the claim belongs solely to the relator, who has a binding and enforceable agreement that encompasses the FCA claim, there’s no reason to think that the government, a non-party, needs to consent.

Soon after *Deck*, an Ohio district court decision also compelled FCA co-relators’ claims to arbitration. Finding the relators’ FCA claims clearly and unambiguously fell within their pre-dispute arbitration agreements, the court found no reason to decline to enforce arbitration.<sup>103</sup> Ohio courts weren’t the only ones to follow suit. Shortly after, a California district court also compelled arbitration of a claim brought under a California qui tam statute.<sup>104</sup> Though the district court did not cite *Deck*, it used analogous reasoning.<sup>105</sup> In *Cunningham v. Leslie’s Poolmart, Inc.*,<sup>106</sup> the plaintiff brought an action under California’s Private Attorney General Action (PAGA), a state statute that authorizes an “aggrieved employee” to file an action for violations of the California Labor Code on behalf of themselves and other current or former employees.<sup>107</sup> The district court explained that PAGA is a qui tam action like the FCA because the plaintiff seeks to recover funds on behalf of the government and because the statute does not create new substantive duties for defendants.<sup>108</sup> Still, the court found that because the plaintiff was seeking to “vindicate [their] own right,” they were compelled to arbitrate.<sup>109</sup> Additionally, the California Supreme Court has “acknowledged that plaintiffs may be contractually obligated to arbitrate” qui tam claims.<sup>110</sup>

### III. Whistleblowers Are Agents of the Government

*Deck* and its progeny caught Andrews’s attention, who deemed the opinion “incomplete” but correct.<sup>111</sup> Andrews relied on Supreme Court precedent to conclude that qui tam claims are arbitrable because the relators own the claim as “partial assignees.”<sup>112</sup> Andrews’s analysis is important as

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102. *Id.*

103. United States *ex rel.* Hicks v. Evercare Hosp., No. 1:12-cv-887, 2015 WL 4498744, at \*3 (S.D. Ohio July 23, 2015).

104. *Cunningham v. Leslie’s Poolmart, Inc.*, No. CV 13–2122 CAS (CWx), 2013 WL 3233211, at \*7, \*12 (C.D. Cal. June 25, 2013).

105. Andrews, *supra* note 15, at 206, 215.

106. No. CV 13–2122 CAS (CWx), 2013 WL 3233211 (C.D. Cal. June 25, 2013).

107. *Id.* at \*5; CAL. LAB. CODE § 2699 (West 2004).

108. *Cunningham*, 2013 WL 3233211, at \*7.

109. *Id.* at \*7, \*12.

110. Andrews, *supra* note 15, at 207.

111. *Id.* at 215.

112. *Id.* at 219–23.

similar reasoning has begun to take hold in defendants' arguments for compelling arbitration.<sup>113</sup> Moreover, Supreme Court precedent holding relators to be partial assignees undermines district court decisions holding that qui tam claims belong solely to the government. After the Ninth Circuit's avid circumvention of the issue and the rise in courts forcing qui tam claims into arbitration, it's entirely probable that circuit courts will soon have to face the issue head-on. Thus, it's important to understand why Andrews's analysis, along with the *Deck* court's, does not provide courts grounds to compel arbitration of these claims.

In this Part, I discuss Supreme Court precedent that establishes that FCA relators bring their claims as partial assignees of the qui tam enforcement claim and how Andrews erroneously interpreted this to mean the claim can be bound by a relator's pre-dispute arbitration clause. After raising doubts that partial assignment theory is the correct way to classify the relator's relationship with the qui tam claim, I argue that partial assignment theory is nonetheless compatible with the relator bringing the action at least primarily as an agent of the government—the majority owner of the claim. Thus, I conclude the FCA claim can never be bound to a relator's pre-dispute arbitration clause without government consent.

#### A. *Relators Are Held Partial Assignees*

The Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>114</sup> rejected the idea that relators' *standing* to bring a claim under the FCA is derived from an agency relationship with the government.<sup>115</sup> This analysis was “precluded . . . by the fact that the statute gives the relator [themselves] an interest in the lawsuit, and not merely the right to retain a fee out of the recovery.”<sup>116</sup> This interest includes the right to bring a claim “for the person and for the . . . Government”; the right to continue as a party to the action even when the government intervenes; the right to a hearing before the government can dismiss the suit; and the right to a judicial determination of “fair[ness], adequa[cy], and reasonable[ness]” prior to the government settling the suit.<sup>117</sup> Instead, the Court found the relator had standing to bring the action as a partial assignee of the government's damages claim.<sup>118</sup>

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113. See, e.g., Appellants' Reply Brief, at 20–22, 27–28, *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017) (No. 16-16070) (relying on *Deck* and Supreme Court precedent to establish that relators are partial assignees who can be compelled to arbitration without government consent).

114. 529 U.S. 765 (2000).

115. *Id.* at 772.

116. *Id.* (emphasis omitted).

117. 31 U.S.C. § 3730(b)(1), (c)(1), (c)(2)(A)–(B).

118. *Stevens*, 529 U.S. at 773–74.

Partial assignment occurs when the owner of a claim—here, the government—fractures its single claim into two and transfers one of those pieces to the assignee—in this case, the relator.<sup>119</sup> An assignment of a right, whether in whole or in part, “is operative as to that part to the same extent and in the same manner as if the part had been a separate right” to begin with.<sup>120</sup> Thus, when the government partially assigns the claim to the relator, it becomes the relator’s own claim, and it is contended that the relator’s claim is arbitrable pursuant to their pre-dispute agreement.<sup>121</sup>

According to Andrews, the Court’s later decision in *Eisenstein* confirms this interpretation.<sup>122</sup> There, the Court held the government is not a “party” to a qui tam suit for procedural purposes when it declines to intervene; it merely retains an interest in the claim as a real party in interest, along with the relator.<sup>123</sup> Notably, however, the Court did acknowledge that the government and the relator have substantive rights and their interests may be represented in litigation by the other.<sup>124</sup> Because the relator is seen by the Court as having a “substantive right,” Andrews reasons that the relator must own part of the qui tam claim.<sup>125</sup>

Despite the Court’s holding in *Stevens*,<sup>126</sup> partial assignment may not fully explain FCA qui tam suits. For starters, the relator’s claim does not operate as though it were a separate right, which would contradict the Second Restatement of Contracts § 326. This section states that an assignment of a right “is operative as to that part to the same extent and in the same manner as if the part had been a separate right.”<sup>127</sup> However, under § 3730, the government retains the right to dismiss the action notwithstanding the objections of the relator;<sup>128</sup> the government may settle the action notwithstanding the objections of the relator;<sup>129</sup> and the government can restrict the relator’s participation in the action.<sup>130</sup> In fact, the relator may not even dismiss their own claim without the approval of the Attorney General.<sup>131</sup> And the government has the sole authority, if it so chooses, to elect to pursue *its* claim through an alternative remedy.<sup>132</sup> In that case, the relator has to

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119. Andrews, *supra* note 15, at 221.

120. RESTATEMENT (SECOND) OF CONTS. § 326 (A.L.I. 1981).

121. Andrews, *supra* note 15, at 221.

122. *Id.* at 222.

123. United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 932–35 (2009).

124. *Id.* at 934–35.

125. Andrews, *supra* note 15, at 223.

126. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000).

127. RESTATEMENT (SECOND) OF CONTS. § 326 (A.L.I. 1981).

128. 31 U.S.C. § 3730(c)(2)(A).

129. 31 U.S.C. § 3730(c)(2)(B).

130. 31 U.S.C. § 3730(c)(2)(C).

131. 31 U.S.C. § 3730(b)(1).

132. 31 U.S.C. § 3730(e)(5).

arbitrate their claim through such an alternative remedy alongside the government.<sup>133</sup> But if partial assignment means the claim should operate as though it were a separate claim to begin with, there is no explanation for the government's control over the relator's portion of the claim. If the relator owns a claim against the defendant, the relator should be able to decide where to pursue their claim and they should be the one deciding to dismiss or settle that claim.<sup>134</sup>

Even if we were to accept that the government does not partially assign the claim to the relator unless it declines to intervene in the action,<sup>135</sup> the government still retains significant control over the relator's suit. The government may request that it be served with all pleadings filed and be supplied all deposition transcripts, and the government retains the right to intervene in the action upon a showing of good cause.<sup>136</sup> These provisions "cast[] more than a little doubt on the notion of a partial assignment."<sup>137</sup>

Some argue that the claim cannot even be *partial*. Whether or not the government decides to intervene, the relator only gets a percentage of the recovery from the proceeds of the action or the settlement, indicating that it is one indivisible claim.<sup>138</sup> Moreover, once a relator files suit, a separate action by the government or anyone else is precluded.<sup>139</sup>

Additionally, after the Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc.*,<sup>140</sup> there could also be an argument that the assignment does not take place until after a final judgment is rendered.<sup>141</sup> In *Polansky*, the Court held that even if the government initially declines to intervene in a case, it may still unilaterally move to dismiss the action.<sup>142</sup> The district court in *United States ex rel. Zafirov v. Florida Medical Associates*<sup>143</sup> looked to the Supreme Court's recent decision and longstanding precedent, leading it to doubt that "a relator's interest in the lawsuit vests before final

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133. *Id.*

134. *See, e.g.*, Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) ("In ordinary non-class litigation, parties are free to settle their disputes on their own terms, and plaintiffs may voluntarily dismiss their claims without a court order.").

135. *See* *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1742 (2023) (Thomas, J., dissenting) ("For [the *Stevens*] holding to make sense, it appears that this assignment must be effective no later than the point in time at which the Government declines to intervene in the seal period . . .").

136. 31 U.S.C. § 3730(e)(3).

137. Sullivan, *supra* note 46, at 7.

138. 31 U.S.C. § 3730(d); *see* Sullivan, *supra* note 46, at 6–7 ("The claim is essentially indivisible . . .").

139. 31 U.S.C. § 3730(e)(4)(A)(i).

140. 143 S. Ct. 1720 (2023).

141. *United States ex rel. Zafirov v. Fla. Med. Assocs.*, 751 F. Supp. 3d 1293, 1323 (M.D. Fla. 2024).

142. *Polansky*, 143 S. Ct. at 1730.

143. 751 F. Supp. 3d 1293 (M.D. Fla. 2024).

judgment.”<sup>144</sup> If the district court’s doubts are correct, the relator merely acts as a representative of the government while the action is ongoing. Then, the *Deck* court’s analysis, holding that the relator owns the claim that can be subject to the relator’s own pre-dispute arbitration agreement, would not hold up.<sup>145</sup> The assignment would not happen until *after* a final judgment is rendered, so the relator would not have their own claim that would bind them to arbitration until it is too late.

### B. *Coexistence of Partial Assignment and Agency*

The idea that an FCA relator’s claim actually belongs solely to the government did gain traction with at least one scholar. Janet Cooper Alexander made a similar argument explaining why courts should not enforce a relator’s mandatory arbitration clause when bringing a PAGA claim against their employer. In PAGA claims, like FCA claims, the relator is “asserting a claim belonging to the state, on behalf of the state.”<sup>146</sup> The government has the right to decline to enter an agreement to arbitrate, and in fact, has not entered one.<sup>147</sup> If a qui tam action is merely asserting the government’s own rights and for the benefit of the government, then private parties should not be able to waive or destroy the government’s right to bring an action in court.<sup>148</sup> Given Supreme Court precedent, however, relators hoping that a court will decline to enforce their pre-dispute arbitration clauses should no longer solely rely on this argument. Rather, relators should find a way to convince courts that even if the claim does not solely belong to the government—as the Supreme Court has established—forcing arbitration pursuant to these agreements is nevertheless problematic.

In discussing other provisions of the FCA, the Sixth Circuit has held that a qui tam relator is the government’s “agent” referred to in § 3730(e)(4)(A)(i) after applying basic agency principles.<sup>149</sup> Similarly, in *United States ex rel. Gilbert v. Virginia College, LLC*,<sup>150</sup> the Alabama district court looked to the Third Restatement of Agency to hold that relators are agents of the government for purposes of the public disclosure bar.<sup>151</sup> Section 3730(e)(4)(A)(i) mandates that a court shall dismiss actions or claims under

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144. *Id.* at 1305 n.1.

145. *See Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*7 (S.D. Ohio Jan. 31, 2013) (holding that the relator owns the claim).

146. Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1234 (2013).

147. *Id.*

148. *Id.* at 1233.

149. *United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 845 (6th Cir. 2020).

150. 305 F. Supp. 3d 1315 (N.D. Ala. 2018).

151. *Id.* at 1324, 1326.

this section if the allegations or transactions are substantially the same as those publicly disclosed “in a Federal criminal, civil, or administrative hearing in which the Government *or its agent* is a party.”<sup>152</sup>

After finding that the allegations in the case were substantially the same as those in a previous *qui tam* suit brought against the defendant, where the government declined to intervene, the court had to decide whether the government or its “agent” had been a party to the previous suit.<sup>153</sup> The court, relying on *Eisenstein*, held that the government was not a “party” to the lawsuit where it did not intervene.<sup>154</sup> But the defendant argued that the government’s *agent* was a party to the suit—the relator.<sup>155</sup> Recognizing that the Court in *Stevens* held that a relator is an assignee of a portion of the government’s damages claim, the district court nevertheless held that a relator is still an agent of the government under the public disclosure bar, whether or not the government intervenes.<sup>156</sup> This seems to fly in the face of the Supreme Court’s holding in *Stevens*, where it reasoned that a relator’s standing cannot be explained by saying they are “simply the statutorily designated agent” because “the statute gives the relator [themselves] an interest in the lawsuit.”<sup>157</sup> The court nevertheless proclaimed that its holding “is consistent with general agency principles.”<sup>158</sup>

However, the district court did not explain how this holding was consistent with the Court’s reasoning in *Stevens*.<sup>159</sup> Possibly, the district court did not feel compelled to address Supreme Court precedent to the contrary because the court was deciding only whether the relator is the “agent” referenced in § 3730(e)(4)(A)(i).<sup>160</sup> Either way, it raises the question of whether a relator can be both an assignee *and* an agent of the government, and if so, what effect that would have on the enforceability of a relator’s pre-dispute arbitration clause.

Even if the Supreme Court is correct to hold that relators have been partially assigned the government’s claim, making it their own, this does not negate the argument that the relator is simultaneously acting as the government’s agent when the government declines to intervene. A theory of agency between the relator and the government is compatible with the

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152. 31 U.S.C. § 3730(e)(4)(A)(i) (emphasis added).

153. *Gilbert*, 305 F. Supp. 3d at 1321.

154. *Id.* at 1323.

155. *Id.*

156. *Id.* at 1323–24.

157. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (emphasis omitted).

158. *Gilbert*, 305 F. Supp. 3d at 1323.

159. *Id.* at 1323–24.

160. *See id.* at 1318 (“For purposes of this opinion, the court focuses only on . . . [whether] the public disclosure bar of § 3730(e)(4)(A) requires dismissal . . .”).

assignor–assignee theory established by the Court. That a person can bring a lawsuit in separate capacities is a commonly recognized legal fiction. Plaintiffs often bring claims against defendants in two separate capacities: individually and as a representative. For example, in class actions, an individual may bring a claim individually and as a representative of a class.<sup>161</sup> Similarly, under the FCA, the relator is bringing the action for themselves and as a representative of the government. The language of the statute, which mirrors the common language of class actions, confirms this dual capacity interpretation: The relator may bring the action “for the person and for the United States Government.”<sup>162</sup>

In fact, the Supreme Court’s decision in *Stevens* did not rule out the possibility that the relator is simultaneously bringing the claim as both an assignee and the government’s agent: “*For the portion of the recovery retained by the relator, . . . some explanation of standing other than agency . . . must be identified.*”<sup>163</sup> While the Court clarified that an agency relationship could not explain the *relator’s* portion of the claim, it did not preclude the theory for explaining the relator’s relationship to the *government’s* portion of the claim. This statement alone illustrates that the Court was not intending to hold that the relator is not also an agent of the government, as Andrews incorrectly interprets it.<sup>164</sup>

### C. Application of Agency Law

The Supreme Court’s holding that the relator is an assignee does not mean the relator is not also acting as an agent on the government’s behalf. To illustrate this, consider Andrews’s explanation of partial assignment: The government breaks its claim in half and assigns one of the pieces to the relator.<sup>165</sup> But that does not explain the relator’s relationship to the *other* half of the claim—the half the government still owns. The part of the claim the relator is representing—the *larger part*—still belongs to the government.<sup>166</sup>

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161. WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2.6 (6th ed. 2022); *see also, e.g.*, Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1921 (2022) (“Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law. Familiar examples include shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons.”).

162. 31 U.S.C. § 3730(b)(1).

163. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772 (2000) (emphasis added).

164. *See* Andrews, *supra* note 15, at 219 (“The Court rejected the widespread assumption, offered by appellate courts and litigants, that relators serve as agents of the federal government . . .”).

165. *Id.* at 221.

166. Sullivan, *supra* note 46, at 6–7.

In that sense, the relator is still bringing the action as an agent of the government, which did not consent to arbitration.

The FCA relator is an agent of the government under general agency principles. An agency relationship is created if and only if the principal manifests assent to the agent “that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>167</sup> The FCA itself is a unilateral contract that the relator accepts by filing the suit.<sup>168</sup> The statute provides the government’s assent to the relator acting as the government’s agent through § 3730(b)(1): “A person may bring a civil action . . . for the United States Government.”<sup>169</sup> When the relator files an action under § 3730, they do so aware that it is, at least in part, an action for the government. The government is a real party in interest, and the relator is bringing the claim on the government’s behalf. Thus, in bringing the action, the relator is assenting to act as the government’s agent.

And the relator is subject to the principal’s control even when the government declines to intervene in the action. This control includes the government’s ability to request that the relator serve it copies of the pleadings and deposition transcripts, to stay discovery, and to intervene at a later date, as well as the government’s right to approve or reject a dismissal.<sup>170</sup>

Whether the parties characterize the relationship as agency or not is not controlling.<sup>171</sup> Many legal relationships do not by themselves create an agency relationship, but these relationships are also agency relationships when the elements of the Third Restatement of Agency § 1.01 are present.<sup>172</sup> The Supreme Court’s characterization of the relator and principal’s relationship, one of assignor and assignee, does not by itself preclude the existence of an agency relationship. Because the elements stated in § 1.01 are present in the government–relator relationship, there is an agency relationship whether the Court acknowledges it or not.

Further, the relator has actual authority to act for the government once they bring the claim. “An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”<sup>173</sup> By filing an action for the government, the relator is taking an action that has legal consequences

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167. RESTATEMENT (THIRD) OF AGENCY § 1.01 (A.L.I. 2006).

168. Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 564 (1990).

169. 31 U.S.C. § 3730(b)(1).

170. 31 U.S.C. § 3730(b)(1), (c)(3)–(4).

171. RESTATEMENT (THIRD) OF AGENCY § 1.02 (A.L.I. 2006).

172. *Id.* cmt. a.

173. RESTATEMENT (THIRD) OF AGENCY § 2.01 (A.L.I. 2006).

for the government. And the relator is reasonable to believe the government “wishes” the relator to act. Not only does the FCA permit the relator to file the action for the government, but the FCA’s qui tam provision was intended to incentivize relators to do so.<sup>174</sup> Because it is the government’s intention that relators with incriminating information come forward through the qui tam provision, the relator is reasonably inferring the government wishes them to do so.

Moreover, in bringing the claim, the government has capacity to act as a principal, and the relator has capacity to act as an agent. A person has capacity to act as a principal in an agency relationship if, at the time the agent acts, the principal would have had capacity to do that act.<sup>175</sup> When the relator acts on behalf of the government, they are only performing an act that the government certainly would have had capacity to perform: bringing an action against one who has wronged it. As the government’s agent, the relator cannot increase or diminish the government’s rights or liabilities unless the relator acts with actual or apparent authority, or the government ratifies the relator’s actions.

When the soon-to-be-relator signed their pre-dispute arbitration agreement with the defendant, they did not do so as the government’s agent because the relator does not act with actual authority until they file suit on the government’s behalf. Nor can the defendant claim the relator acted with apparent authority from the government to sign the arbitration agreement. An agent has apparent authority to affect a principal’s legal relationship with a third party when that third party reasonably believes the agent has authority to act on the principal’s behalf.<sup>176</sup> But, for example, when a future employee and employer are entering an employment contract, the employer has no reason to believe the employee would be acting on behalf of the government.

#### *D. Private Attorney General Action Qui Tam Claims*

The Supreme Court recently held that a different qui tam claim, brought under PAGA, could be sent to arbitration pursuant to a relator’s pre-dispute agreement.<sup>177</sup> However, the qui tam relator did not argue that the claim shouldn’t be sent to arbitration without the government’s consent, and even if they had, the argument probably would have failed. The Supreme Court raised doubts that qui tam relators in PAGA actions are agents of the government, but the reasons that led the Court to believe that PAGA relators are not agents of the government actually confirm that FCA relators are.

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174. See, e.g., *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (“[T]he entire purpose of the FCA’s qui tam provisions is to employ the help of individuals to uncover fraud against the government.”).

175. RESTATEMENT (THIRD) OF AGENCY § 3.04(1) (A.L.I. 2006).

176. RESTATEMENT (THIRD) OF AGENCY § 3.03 (A.L.I. 2006).

177. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1914, 1924–25 (2022).

The FCA qui tam provision is unlike a PAGA qui tam action. Though PAGA was enacted to obtain civil penalties that could formerly be obtained only by the state in an enforcement action, the statute authorizes an aggrieved employee to bring an action against a former employer “on behalf of [themselves] and other current or former employees.”<sup>178</sup> Thus, a plaintiff bringing a PAGA claim is a representative in two separate capacities: a representative of the state and a representative of the other affected employees.<sup>179</sup> In *Viking River Cruises, Inc. v. Moriana*,<sup>180</sup> the Court recognized that, because the plaintiff is a representative of the state, there is no truly “individual” PAGA claim, but there is an “individual . . . claim” separate from the claims of other employees.<sup>181</sup>

The Court ruled that the FAA preempts the California court’s rule that precluded the division of the individual claim from the non-individual claim.<sup>182</sup> The Court acknowledged that whether a PAGA plaintiff is truly an “agent” of the government is disputed, but they did not address the issue, nor did the plaintiff oppose arbitration on this basis.<sup>183</sup> Though the Court held that a PAGA employee’s claim can be separated from other employees’ claims, the Court was not asked to separate the representative’s claim from the state’s.<sup>184</sup>

A footnote in the decision, however, does shed light on how the Court may come out on the question of agency in FCA qui tam actions. The Court acknowledged that there is a dispute as to whether the PAGA plaintiff is bringing the action as an agent or complete assignee.<sup>185</sup> The Court said that agency requires control, “[b]ut apart from the exhaustion process, the statute does not feature any explicit control mechanisms, such as provisions authorizing the State to intervene or requiring its approval of settlements.”<sup>186</sup>

First, it’s notable that the Court was not considering an argument for partial assignment for PAGA claims even though they have previously held that relators in a similarly structured qui tam action, the FCA, are partial assignees.<sup>187</sup> This may suggest that the Court, in declaring FCA relators to be partial assignees of the claim, was especially cognizant of the fact that the other part of the claim still belongs to the government. Second, the Court’s

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178. CAL. LAB. CODE § 2699(a) (West 2004).

179. *Viking*, 142 S. Ct. at 1916.

180. 142 S. Ct. 1906 (2022).

181. *Id.* at 1916.

182. *Id.* at 1924.

183. *Id.* at 1914 n.2.

184. *See id.* at 1917, 1924–25 (deciding only whether PAGA actions can be divided into individual and non-individual claims).

185. *Id.* at 1914 n.2.

186. *Id.*

187. *See* *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (holding that FCA relators are partial assignees).

examples of control that may be sufficient to constitute an agency relationship are both powers that the government maintains in FCA actions: The government may intervene, and the relator must obtain government approval before settling the action.<sup>188</sup> Moreover, one of the factors that does weigh in favor of an agency relationship in PAGA claims is that the state is the real party in interest, which is a status “based on ownership and control over the cause of action.”<sup>189</sup> In every FCA action, the government remains a real party in interest.<sup>190</sup>

*E. Necessity of Governmental Consent*

When an agent brings a representative action on behalf of a principal, it “involve[s] the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant.”<sup>191</sup> Thus, regarding the portion of the claim the relator is bringing on behalf of the government, we should look only to the rights of the government. A party cannot be bound by a contract it did not consent to.<sup>192</sup> Because the government was not a party to the arbitration agreement, it cannot be bound by it. Therefore, when the relator acts in an agency capacity for the government, the relator, in this capacity, also will not be bound by an agreement the government did not sign. Not even the FAA and its policy favoring arbitration can “require parties to arbitrate when they have not agreed to do so.”<sup>193</sup>

Typically, in cases where a party brings an action in a dual capacity with two claims and only one is bound by arbitration, the court will compel arbitration of the claim that is bound but decline to send the other claim.<sup>194</sup> In FCA cases, the relator’s pre-dispute agreement would only be able to bind part of the claim to arbitration. The larger part of the claim, which belongs to the government, is not bound by the relator’s arbitration clause. Under normal circumstances, it would logically follow that the relator would be sent

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188. *United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1250 (10th Cir. 2017) (noting that 31 U.S.C. § 3703(b)(1) “allows the government to resist [unfavorable settlements] and protect its ability to prosecute matters in the future” (quoting *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997) (alteration in original))).

189. *Viking*, 142 S. Ct. at 1914 n.2.

190. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009).

191. *Viking*, 142 S. Ct. at 1912.

192. *E.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

193. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

194. *E.g.*, *Roth v. Evangelical Lutheran Good Samaritan Soc’y*, 886 N.W.2d 601, 603 (Iowa 2016).

to arbitration for their portion of the claim but be able to represent the government's interests in court.<sup>195</sup>

The issue with this conclusion is that the claim is indivisible. The structure and language of § 3730 makes clear that the claim is indivisible whether or not the government decides to intervene. First of all, the relator cannot bring a separate action for their portion of the claim.<sup>196</sup> Once a relator has filed the action, the government has two options: It can decline to intervene and allow the relator to continue with the action, or it can intervene, and the relator will be bound by the government's actions.<sup>197</sup> Moreover, if the government decides to pursue its claim through an alternative remedy, such as arbitration, the relator is also bound by the government's decision. If the claim had really been split in half and given to the relator, the relator would not be bound by the government's actions when pursuing their own claim.

Additionally, the language of § 3730 further supports the idea that the claim is indivisible. Section 3730(d)(1) states that if the government proceeds with the action, the relator can receive a portion of the action or settlement of *the claim*;<sup>198</sup> § 3730(d)(2) states that if the government does not proceed with the action, the relator settling *the claim* shall receive an amount the court finds reasonable.<sup>199</sup> Whether the government has intervened or not, Congress recognized there was only one claim at issue. Therefore, the claim cannot be compelled to arbitration without necessarily also forcing the nonconsenting government into arbitration.

If one party can make the unilateral decision to bind the claim to arbitration, it should be the government because it is the majority owner of the claim. As discussed above, there are many reasons to doubt that the relator has any ownership over the claim as a result of partial assignment.<sup>200</sup> But even if we accept that this is the case, the vast majority of the claim still belongs to the government.<sup>201</sup> The relator's small percentage of ownership over the claim, even when the government does not intervene, is evident in § 3730(d)(2), which limits the relator's proceeds of the action to no more

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195. See *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (“If some claims are non-arbitrable, . . . then we will sever those claims subject to arbitration from those adjudicable only in court.”).

196. See 31 U.S.C. § 3730(b)(1)–(2), (c) (explaining the relator's rights and the role of the government).

197. *Id.*

198. 31 U.S.C. § 3730(d)(1).

199. 31 U.S.C. § 3730(d)(2).

200. See *supra* notes 126–45 and accompanying text.

201. See Sullivan, *supra* note 46, at 7 (“If the relator ‘owns’ a piece, the United States owns the larger stick in the bundle.”).

than 30%.<sup>202</sup> Therefore, if either owner is to make binding decisions on behalf of the other, it should be the government.

But when the government does not consent, arbitration should not be compelled. The nonconsenting government cannot be bound to the relator's pre-dispute agreement. The Supreme Court has confirmed that the FAA's policy favoring arbitration does not extend to bind non-consenting parties.<sup>203</sup> In *EEOC v. Waffle House, Inc.*,<sup>204</sup> the defendant-company required all employees to sign arbitration agreements as a condition of employment.<sup>205</sup> An employee who signed this agreement filed a discrimination charge with the U.S. Equal Employment Opportunity Commission (EEOC), which subsequently filed an enforcement action against the defendant.<sup>206</sup> The defendant moved to compel arbitration pursuant to the agreement.<sup>207</sup>

The Fourth Circuit recognized the EEOC had not been a party to the arbitration agreement but reasoned that allowing the action to proceed would undermine the FAA's strong pro-arbitration policy.<sup>208</sup> The Supreme Court rejected the Fourth Circuit's reasoning, explaining that arbitration under the FAA is a matter of consent, and a contract cannot bind a party that has not consented to be bound.<sup>209</sup> Because the EEOC—a non-party to the agreement—brought the claim, it was not required to arbitrate.<sup>210</sup>

The same reasoning should apply to FCA qui tam suits. Whether the parties are subject to mandatory arbitration is a question of whether they consented.<sup>211</sup> As argued above, the qui tam claim—at least, a majority of it—belongs to the government, and the relator brings the action as an agent of the government.<sup>212</sup>

In virtually all cases, the government is not a party to the relator's pre-dispute agreements with the defendant, nor did the relator bind the government by signing their employment contract.<sup>213</sup> An agent can only bind a principal when acting within the scope of their authority, and a relator has neither apparent nor actual authority to bind the government when they sign their employment contract.<sup>214</sup> Thus, the government is not a party to the agreement. As the Court confirmed in *Waffle House*, parties are not bound

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202. 31 U.S.C. § 3730(d)(2).

203. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

204. 534 U.S. 279 (2002).

205. *Id.* at 282–83.

206. *Id.* at 283.

207. *Id.* at 284.

208. *Id.* at 284–85.

209. *Id.* at 285, 294.

210. *Id.* at 294.

211. *Id.*

212. *See supra* subpart III(B)–(C).

213. *See supra* subpart III(C).

214. *Id.*

by contracts they did not agree to.<sup>215</sup> For this reason alone, the *qui tam* action cannot be sent to arbitration without government consent.

The government may ratify the relator's pre-dispute agreement, in which case, arbitration should be compelled. When the relator signed their agreement with the defendant, they were not acting as the government's agent—they had no apparent or actual authority to affect the government's legal interests.<sup>216</sup> However, the government may later acquiesce, effectively consenting to arbitration pursuant to its agent's prior acts.

A person may ratify a non-agent's act, giving it effect as if it had been performed by an agent with actual authority.<sup>217</sup> Ratification occurs when the person manifests assent to the act or engages in conduct that would justify a reasonable person in believing they have consented to it.<sup>218</sup> In this sense, the government may explicitly consent to the choices the relator made before they were acting as the government's agent, thereby ratifying the agreement. If the court finds the government ratified the relator's signing of the arbitration agreement, it may compel arbitration of the claim. While the relator might wish to avoid this scenario, the FAA strongly favors enforcing consensual arbitration.<sup>219</sup>

A defendant may argue that the government always ratifies the relator's arbitration clause by declining to intervene in the action and functionally consenting to be bound by any pre-dispute agreement between the relator and defendant. But this argument is undermined by Supreme Court precedent and the fact that automatic consent to arbitration is against the government's interests.

To begin, recent Supreme Court precedent indicates that the government's silence is not a sufficient basis for finding ratification because the Court does not typically infer consent from silence in the arbitration context.<sup>220</sup> The Third Restatement of Agency clarifies that the sole requirement for ratification is the principal's consent,<sup>221</sup> but the Court typically demands more than silence to infer consent under the FAA. For example, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>222</sup> the

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215. *Waffle House*, 534 U.S. at 294.

216. *See supra* subpart III(C).

217. RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (A.L.I. 2006).

218. *Id.* at § 4.01(2).

219. *See* 9 U.S.C. § 2 (providing that arbitration clauses “shall be valid, irrevocable, and enforceable” unless law or equity provides a reason to revoke the contract).

220. Similarly, silence as acceptance in contract law in general is also limited. *See* RESTATEMENT (SECOND) OF CONTS. § 69 (A.L.I. 1981) (permitting silence as acceptance in only three limited circumstances).

221. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b (A.L.I. 2006) (“The act of ratification consists of an externally observable manifestation of assent to be bound by the prior act of another person.”).

222. 559 U.S. 662 (2010).

Court declined to infer the plaintiffs consented to class arbitration when the agreement was silent on it, finding the “FAA requires more” than mere silence.<sup>223</sup>

Additionally, in *Lamps Plus, Inc. v. Varela*,<sup>224</sup> the Court similarly held that courts may not infer consent to class-wide arbitration from an ambiguous agreement.<sup>225</sup> The Court would not infer consent when it would require the parties to lose the benefit of individual arbitration, purporting that this conclusion “aligns with [its] refusal to infer consent when it comes to other fundamental arbitration questions.”<sup>226</sup> This reinforced the Court’s strict approach to inferred consent under the FAA, particularly where compelling arbitration would run counter to a party’s interests.

Here, forced arbitration of FCA relators’ actions would undermine the government’s interests because it deters whistleblowers from bringing enforcement actions in the first place.<sup>227</sup> But encouraging private citizens to bring these claims so the Attorney General doesn’t have to is in the government’s best interest. The government lacks the resources to combat fraud on its own.<sup>228</sup> That was the whole point of enacting the qui tam provision.<sup>229</sup> Conflating the government’s decision not to intervene with the decision to be bound by a relator’s pre-dispute agreement would reduce the efficacy of the provision and place a large burden on the government.

Further, *any* arbitration of these claims is contrary to the government’s interests. In all cases, the government retains at least 70% of the proceeds.<sup>230</sup> But arbitration often favors corporate defendants.<sup>231</sup> Even if a relator prevails in arbitration, they are only estimated to recover roughly 20% of what they would in court.<sup>232</sup> Thus, arbitration is a lose–lose for the relator and the government, and the Court would likely consider this reality when deciding if the government consented to mandatory arbitration.

#### IV. Arbitrability of False Claims Act Qui Tam Claims

The policy favoring arbitration has largely shut down parties’ abilities to convince courts that arbitration of FCA claims should be denied because

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223. *Id.* at 681–87.

224. 139 S. Ct. 1407 (2019).

225. *Id.* at 1416.

226. *Id.*

227. *See supra* note 65 and accompanying text.

228. Depoorter & De Mot, *supra* note 41, at 137–38.

229. *Id.*

230. 31 U.S.C. § 3730(d)(1)–(2).

231. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 23 (2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/H4F7-8TLZ>].

232. *Id.* at 20 tbl. 1.

forcing these claims to arbitration would be incompatible with the goals of the FCA. When deciding whether to compel arbitration under the FAA, a court considers (1) whether the parties agreed to arbitrate; (2) the scope of the arbitration agreement; (3) if federal statutory claims are asserted, whether Congress intended those claims to be arbitrable; and (4) if some but not all of the claims are subject to arbitration, whether the court should stay the remainder of proceedings pending arbitration.<sup>233</sup> Any doubts as to whether the arbitration clause should be enforced are resolved in favor of arbitration.<sup>234</sup> Notably, this four-part test does not provide an independent basis for the court to consider other concerns that could weigh against compelling arbitration.

In Part II, I argued that the structure of the FCA qui tam action prohibits mandatory arbitration without the government's consent because a party bringing the action did not agree to arbitrate. Thus, the claim should not be sent to arbitration regardless of what Congress intended. However, if a court insists Congress's intent is relevant to the arbitrability of FCA actions when the government has not consented, there is evidence Congress intended to require government consent. This Part shows that the FCA's legislative history and the Dodd-Frank Act confirm that Congress did not intend for FCA qui tam claims to be forced into arbitration without the government's consent.

#### A. *Legislative Intent of the False Claims Act*

The legislative history and policy behind the FCA qui tam action suggest Congress actually does not want to force these whistleblowers to arbitrate their qui tam claims—and for good reason. The FCA's purpose and forced arbitration are incompatible. Congress's explicit goal in maintaining the FCA's qui tam provision was to incentivize private individuals to help combat widespread fraud against the government.<sup>235</sup> It has acknowledged that the cooperation of individuals who are close observers or otherwise involved in the fraud is especially beneficial to the government's fraud detection.<sup>236</sup> But employees frequently decline to report fraud they have direct knowledge of, attributing their failure to come forward to the belief that no corrective action would be taken and a fear of reprisal.<sup>237</sup>

In 1986, Congress increased the incentives for private individuals to bring suit to encourage relators to come forward despite personal and

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233. *E.g.*, *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000).

234. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

235. *See* S. REP. NO. 99-345, at 2 (1986) (“The proposed legislation seeks . . . to encourage any individual knowing of Government fraud to bring that information forward.”).

236. *Id.* at 4.

237. *Id.* at 4–5.

financial fears.<sup>238</sup> Specifically, Congress stated that relators are more likely to come forward when they “are able to more directly participate in seeing that the fraud is remedied.”<sup>239</sup> When whistleblowers lose the ability to adjudicate their FCA claims in court, the qui tam provision may not achieve its intended goal of incentivizing qui tam suits and, in turn, decreasing fraud.

Additionally, one of the most effective methods to deter companies from misconduct, or motivate them to take corrective action, is the risk of bad publicity. Bad publicity can destroy a company’s reputation, and whistleblowers who could air out a company’s dirty laundry in court make this threat more likely. Companies outed for fraud or corruption are likely to see their day in court, and they are also subjected to the court of public opinion. The best way to ensure an employee doesn’t blow the whistle and draw this negative attention is to refrain from engaging in activities that would subject them to liability.<sup>240</sup> And to mitigate the consequences of actions that have already been brought, companies are incentivized to quickly take corrective measures, including accepting and admitting guilt.

Incentives for companies to accept and admit guilt are greatly reduced when the dispute is arbitrated. Pre-dispute agreements often include provisions that bar employees from openly discussing the case, which, along with a lack of public court proceedings, further insulates the company from scrutiny.<sup>241</sup> Companies can utilize these clauses to suppress evidence of their wrongdoings.<sup>242</sup>

Relatedly, forced arbitration also reduces incentives for people to blow the whistle at all. Potential plaintiffs may perceive disadvantages inherent in arbitration, such as employer bias, discovery limitations, and venue restrictions.<sup>243</sup> Additionally, nondisclosure agreements are common in pre-dispute agreements and eliminate another protection whistleblowers otherwise enjoy: the protection of the media.<sup>244</sup> Not only can the media prevent social rejection of the whistleblower by providing an independent investigation into the allegations and enhancing the whistleblower’s public

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238. *Id.* at 27–28.

239. *Id.* at 25.

240. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 667 (1999) (“The threat of possible government intervention may encourage the organization to act ethically.”).

241. Nizan Geslevich Packin & Benjamin P. Edwards, *Regulating Culture: Improving Corporate Governance with Anti-Arbitration Provisions for Whistleblowers*, 58 WM. & MARY L. REV. ONLINE 41, 56–57 (2016).

242. *Id.* at 56.

243. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes–Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1075–76 (2004).

244. Bast, *supra* note 240, at 667.

credibility,<sup>245</sup> but it can also enhance protections against potential retaliation by increasing the likelihood the company will be exposed for retaliation.<sup>246</sup>

Lastly, arbitration harms future parties because it does not yield precedent.<sup>247</sup> Without precedent, parties must argue their cases from scratch. This is timely, expensive, and often avoidable by court precedent. In FCA cases, the problem is exacerbated. These individual plaintiffs often face well-resourced companies that can easily afford to litigate from scratch.<sup>248</sup> The subsequent risk of increased attorneys' fees in arbitration may deter relators from bringing actions at all.

In conclusion, Congress's explicit goal in enacting the qui tam provision and its subsequent amendments was to incentivize whistleblowers to come forward. However, the threat of forced arbitration can deter whistleblowers from bringing suit. Therefore, it stands to reason that Congress does not want these claims to be susceptible to forced arbitration.

#### B. *Distinguishing Precedent*

Over two decades ago, a whistleblower bringing a retaliation claim was successful in convincing a federal district court that forced arbitration of FCA claims conflicts with the statute's underlying purpose and that this conflict necessarily means Congress intended to preclude the claims from arbitration.<sup>249</sup> This decision has been unanimously rejected by other courts.<sup>250</sup> The *Deck* court erroneously extended the reasoning of courts holding that Congress intended to subject whistleblower retaliation claims to arbitration when it applied the same reasoning to qui tam actions.

*Nguyen v. City of Cleveland*<sup>251</sup> is an outlier in the line of FCA cases discussing whether Congress intended FCA whistleblower claims to be arbitrable. *Nguyen* involved a retaliation claim under the FCA where the plaintiff had signed a pre-dispute arbitration clause with their employer that encompassed "all claims arising out of [the] employment relationship."<sup>252</sup> When the defendant moved to compel arbitration, the court was faced with a question of first impression: Did Congress intend "the whistleblower

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245. *Id.*

246. Packin & Edwards, *supra* note 241, at 55.

247. *Id.* at 53.

248. See *Who Is Responsible for False Claims Act Attorneys' Fees?*, BRACKER & MARCUS LLC, <https://www.fcacounsel.com/faq/false-claims-act-attorneys-fees-responsibility/> [<https://perma.cc/6BFK-52HD>] (suggesting private individuals cannot afford to litigate against powerful corporate defendants).

249. *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000).

250. *United States ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850, 862–63 (S.D. Tex. 2008).

251. 121 F. Supp. 2d 643 (N.D. Ohio 2000).

252. *Id.* at 644–45 (internal citation omitted).

provision of the FCA” to be precluded from arbitration?<sup>253</sup> The court concluded, “given the policies of the FCA, an employee who brings a claim against his employers as [a] relator on behalf of the federal government should not be forced by unequal bargaining power to accept a forum demanded as a condition of employment.”<sup>254</sup> Yet the court did not specify which FCA policies it was referring to. Ultimately, the court denied the defendant’s motion to compel arbitration.<sup>255</sup>

However, the Southern District of Ohio has since been the only court to find an inherent conflict between the FCA and arbitration.<sup>256</sup> Courts since have used the FAA and its Supreme Court progeny to hold that the FCA is not outside the reach of the FAA.<sup>257</sup> For example, the court in *United States ex rel. Cassaday v. KBR, Inc.*<sup>258</sup> similarly rejected the reasoning in *Nguyen* and compelled arbitration of the plaintiff’s retaliation claim.<sup>259</sup> The plaintiff argued that arbitration inherently conflicts with the FCA because it diminishes public attention, which may make other whistleblowers aware of the option to blow the whistle, and it causes employees to be less likely to report instances of fraud.<sup>260</sup> However, the court found that the plaintiff failed to distinguish the FCA from other federal statutes with similar public policy goals, and the Supreme Court has “repeatedly recognized that arbitration can appropriately resolve federal statutory claims.”<sup>261</sup> *Deck* extended *Cassaday*’s reasoning to FCA enforcement actions as well.<sup>262</sup>

The *Deck* court was misguided in extending *Cassaday*’s reasoning to the qui tam context. In retaliation cases, the whistleblower brings the action for themselves. The statute makes that clear by authorizing the whistleblower “all relief necessary to make [themselves] whole” if they are retaliated against for attempting to stop fraud.<sup>263</sup> This provision is in stark contrast to the qui tam provision, which is aimed at making the *government* whole—not

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253. *Id.*

254. *Id.* at 647.

255. *Id.*

256. *United States ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850, 862–63 (S.D. Tex. 2008).

257. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 381 (4th Cir. 2008) (noting other courts “have not found *Nguyen* persuasive”); *see also Orcutt v. Kettering Radiologists, Inc.*, 199 F. Supp. 2d 746, 753–56 (S.D. Ohio 2002) (rejecting *Nguyen*).

258. 590 F. Supp. 2d 850 (S.D. Tex. 2008).

259. *Id.* at 862–63.

260. *Id.* at 861.

261. *Id.* at 862.

262. *See Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*6 (S.D. Ohio Jan. 31, 2013) (rejecting the plaintiff’s argument that arbitration conflicts with the goals of the FCA).

263. 31 U.S.C. § 3730(h)(1).

the relator.<sup>264</sup> In fact, a whistleblower can recover for retaliatory harm even if they have not filed a qui tam action or reported the fraud to the government.<sup>265</sup> Thus, the only parties in a retaliation action are the whistleblower and the defendant.

If Congress did not intend to exclude retaliation claims from arbitration—despite the strong policy reasons to do so—then there is no reason to think the parties’ pre-dispute arbitration agreements should not be enforced. In qui tam actions, on the other hand, whether Congress intended to preclude the claim from the reach of the FAA becomes irrelevant because one of the parties bringing the claim is not a party to the arbitration agreement. As discussed above, when a party has not agreed to arbitrate, not even the FAA can mandate arbitration.<sup>266</sup>

### C. *The Dodd–Frank Act*

Even if Congress’s intent mattered, the Dodd–Frank Act confirms it did not intend for qui tam provisions to be arbitrable without government consent. According to Andrews’s view, the Dodd–Frank Act did not help FCA whistleblowers escape their pre-dispute arbitration clauses.<sup>267</sup> Congress enacted the Dodd–Frank Act of 2010 to prohibit employers from invoking the arbitration clauses in their employment contracts against whistleblowing employees.<sup>268</sup> Notably, however, relators under the FCA were not included in this explicit protection against forced arbitration.<sup>269</sup> Andrews views this “loophole” as grounds for courts to send FCA qui tam actions to arbitration without government consent.<sup>270</sup>

First, that the FCA is not expressly protected from arbitration does not necessarily indicate Congress’s intent for courts to enforce pre-dispute arbitration clauses when a relator brings a qui tam action. Rather, it is also possible Congress had its fears assuaged by the courts’ consistent holdings that relator claims under the FCA were not bound by the relator’s arbitration agreement with the defendant. As discussed above, *Deck* was the first court to hold that an FCA qui tam claim was subject to a relator’s pre-dispute

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264. See 31 U.S.C. § 3730(d)(1)–(2) (mandating that the government is entitled to at least 70% of the proceeds of the action in all cases).

265. See 31 U.S.C. § 3730(h)(1) (noting that a whistleblower is entitled to relief for harm incurred in furtherance of an action).

266. See *supra* note 203 and accompanying text.

267. See Andrews, *supra* note 15, at 205 (describing the Dodd–Frank Act as creating a loophole in whistleblower laws).

268. *Id.* at 204.

269. *Id.* at 205.

270. See *id.* (“Congress failed to add anti-arbitration provisions to the . . . [FCA].”).

agreement.<sup>271</sup> The Dodd–Frank Act was enacted in 2010,<sup>272</sup> but *Deck* was not decided until 2013.<sup>273</sup> Given that virtually all district courts that considered the issue before 2010 had decided qui tam claims were not subject to a relator’s personal pre-dispute arbitration agreement, it’s possible that even if Congress intended to preclude these claims from arbitration, it reasonably believed no amendment to the statute was necessary.

If there is anything to be inferred from the Dodd–Frank Act’s silence on the issue, it should be that Congress intended FCA qui tam actions to be precluded from these arbitration agreements. When Congress is silent on an issue that courts have decided, it is typically presumed that Congress’s silence is an indication that it is aware of the interpretation and approves of it.<sup>274</sup> Thus, if Congress intended to subject these claims to a relator’s arbitration clause, one would expect the vast amount of court holdings rejecting this interpretation would have prompted Congress to amend the statute in 2010.

What Congress *did* say in the Dodd–Frank Act further confirms this reading. Congress amended the FCA but not the qui tam provision despite many courts holding that a relator’s pre-dispute arbitration clause does not bind the qui tam claim.<sup>275</sup> “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”<sup>276</sup> If Congress did not intend for qui tam relators to escape their pre-dispute arbitration clauses, it had the opportunity to say so. It chose not to.

### Conclusion

Ultimately, whistleblowers should not be forced into arbitration. It strips whistleblowers of protections against retaliation, insulates fraudsters from liability, and deters potential whistleblowers from coming forward. Forcing arbitration in the FCA context in particular would frustrate Congress’s goal in enacting the qui tam provision—incentivizing private citizens to expose fraud. Ensuring whistleblowers can bring the claims in a judicial forum encourages them to bring the claim at all.

Fortunately, the qui tam action structure and agency doctrine mean whistleblowers aren’t trapped by their pre-dispute agreements. Most district courts holding that whistleblowers cannot be forced into arbitration pursuant to personal, pre-dispute agreements came to the right conclusions, but

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271. *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at \*6–7 (S.D. Ohio Jan. 31, 2013).

272. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

273. *Deck*, 2013 WL 394875.

274. Note, *Congressional Silence and the Supreme Court*, 26 IND. L.J. 388, 389 (1951).

275. 124 Stat. 2079 (2010).

276. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

Supreme Court precedent establishing that relators are partial owners of the claim left a gap in these courts' reasonings. This Note aimed to bridge that gap, arguing that even if relators partially own the claim, they act primarily as agents of the government. As the Supreme Court confirms, not even the FAA can bind a non-consenting party to a contract. Therefore, the qui tam action must proceed in a judicial forum unless the government agrees otherwise.