UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA *ex rel.* BROOK JACKSON, Plaintiff, v. VENTAVIA RESEARCH GROUP, LLC; PFIZER, INC.; ICON, PLC, Defendants.	)	Civil Action No.: 1:21-cv-00008-MJT

NOTICE OF SUPPLEMENTAL AUTHORITY SUPPORTING RELATOR'S OPPOSITION TO THE GOVERNMENT'S MOTION TO INTERVENE AND DISMISS

Relator Brook Jackson ("Relator") respectfully requests that the Court consider the following supplemental authorities supporting her opposition (ECF Nos. 147 and 149) to the submitted motion by the Government to intervene to dismiss.

1. ***United States v. Acad. Mortg. Corp.*, 2018 U.S. Dist. LEXIS 109489, 2018 WL 3208157 (N.D. Cal., June 29, 2018), *appeal dismissed United States v. United States ex rel. Thrower*, 968 F.3d 996 (9th Cir. 2020)**

In *United States v. Acad. Mortg. Corp.*, No. 16-cv-02120-EMC, 2018 U.S. Dist. LEXIS 109489, at *10-11 (N.D. Cal. June 29, 2018), the district court denied the Government's motion to intervene to dismiss for lack of "good cause" to intervene under 31 U.S.C. § 3730(c)(3). The Ninth Circuit dismissed the appeal because Government interests implicated in "a False Claims Act case in which it has not intervened are insufficiently important to justify an immediate appeal." *United States v. United States ex rel. Thrower*, 968 F.3d 996, 1010 (9th Cir. 2020). The decisions are relevant to the submitted motion for several reasons.

At the May 1, 2024, hearing on the Government's Motion (*see* ECF 154), the Court inquired expressly whether counsel had found any "*qui tam* cases where . . . the government didn't have good cause to intervene?" (5/1/24 RT at 36:23-37:21.) The Court stated: "Maybe there is a case. I want to know about that." In an exchange with Pfizer's attorney, the Court made clear it was "talking about any [case], before or after *Polansky*." (*Id*., at 37:5-6.) District Court Judge Edward Chen's decision in *Acad. Mortg.* is such a case.

Like Brook Jackson, the relator in *Acad. Mortg.* requested an evidentiary hearing on the Government's motion. For that, the court required relator to provide "'some evidence' that the Government's decision to dismiss was unreasonable, not a result of a full investigation, or based on arbitrary or improper considerations." *Acad. Mortg. Corp*., 2018 U.S. Dist. LEXIS 109489, at *2 (citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998)). The court invited both parties to submit evidence consistent with the *Sequoia* standards. When the relator submitted evidence and the Government declined, the court denied the Government's motion to intervene to dismiss.

> Because the undisputed evidence shows that the Government did not perform a full investigation of the amended complaint, its motion to dismiss is DENIED. Accordingly, the Relator's request for an evidentiary hearing is DENIED as moot. [*Acad. Mortg. Corp*., 2018 U.S. Dist. LEXIS 109489, at *2-3.]

The very same rationale applies here. Brook Jackson cites expressly to the *Sequoia* decision, as well as to several decisions where the courts applied the standards under Rule 24. *See* ECF 145, at 12, 18; ECF 149, at 2, 3. Relator's evidence demonstrates the Government's motion undermines the purpose and functioning of the False Claims Act; it is impermissibly based on Brook Jackson's viewpoint; it disorders the Separation of Powers; and it is arbitrary, capricious and without a rational basis. As in *Acad. Mortg.*, the Government's utter failure to offer any contrary evidence leaves relator's evidence undisputed.

2. *National Rifle Association of America v. Vullo*, No. 22-842, 602 U. S. 175, 144 S. Ct. 1316, 218 L. Ed. 2d 642 (May 30, 2024)

National Rifle Association v. Vullo, 218 L. Ed. 2d 642, 659 (2004) holds that "the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech." This holding supports Brook Jackson's contention that the DOJ's motion to intervene to dismiss this case is an impermissible selective viewpoint-based official action which abridges her First Amendment Right to Petition. *See* ECF 149, at 19-21; 5/1/24 RT at 66:12-68:2, 93:21-25.

In *Vullo*, the Supreme Court reaffirmed that: "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." 218 L. Ed. 2d at 652. But the Court made a clear distinction between the sharing views of government officials and use of official power to suppress speech based upon the viewpoint expressed in the content of that speech.

> A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. **What she cannot do, however, is use the power of the State to punish or suppress disfavored expression**. [*Id*. (Emphasis supplied).]

As argued by Brook Jackson, the Right to Petition "is cut from the same cloth as the other guarantees of [the First] Amendment." ECF 145, at 19 (quoting *McDonald v. Smith*, 472 U.S. 479, 482 (1985)). Government actions that "significant[ly] impair[]" this right must, like all substantial constitutional burdens, survive "exacting scrutiny." ECF 145, at 20 (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976)). Claims brought under the First Amendment's free speech and petition clause are analyzed in the same way. ECF 145, at 21 (citing *Gibson v. Kilpatrick*, 838 F.3d 476, 481 (5th Cir. 2016)). Thus, the holding in *Vullo* controls in this case.

The DOJ's motion to intervene to dismiss Brook Jackson's action is not like motions brought sparingly in other False Claims Act cases, when the Government has a reasonable, viewpoint-neutral argument for why the burdens of continued litigation outweigh its benefits. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1734 (2023). Relator's evidence and the Government's own contentions show the basis for the official action is Brook Jackson's expressed viewpoint that Pfizer obtained Emergency Use Authorization for a vaccine with negative efficacy and serious risks of bodily harm through its clinical trial fraud.[1] Under the First Amendment, the DOJ is free to file a statement of interest supporting Pfizer's motion to dismiss, raising whatever contentions it believed would persuade the Court on the merits of Brook Jackson's case. What it cannot do consistent with the First Amendment and the Supreme Court's decision in *Vullo* is take official action – move to intervene and dismiss pursuant to subparts (c)(3) and (c)(2)(A) – for the purposes of terminating Brook Jackson's right to petition based upon viewpoints expressed in the case.

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[1]This is the same viewpoint – so-called "vaccine misinformation" – that was part of the speech which the district court, Fifth Circuit and dissenting Supreme Court justices believed was selectively and unconstitutionally suppressed in *Murthy v. Missouri*, No. 23-411, 2024 U.S. LEXIS 2842 (June 26, 2024). *See id.*, at *47-62 (Justice Alito, dissenting) (discussing *Vullo*, and describing the disapproved views on the efficacy and risks of the vaccine that the platforms had suppressed). The majority opinion in *Murthy* came to no different conclusion. Instead, the Court held that plaintiffs lacked standing to challenge the Government's actions because there was no "concrete link between their injuries" and the Government's communications with private, social-media platforms. Had the Government itself taken official action to suppress that speech activity based upon its content, as the DOJ does here to terminate Brook Jackson's *qui tam* action, there is no doubt the Government's action would have abridged rights protected by the First Amendment. And here, there is no doubt that relator has statutory and constitutional standing to challenge the Government's motion.

3. *Federal Drug Administration v. Alliance for Hippocratic Med.*, Nos. 23-235 and 23-236, 219 L.Ed.2d 121, 2024 U.S. LEXIS 2604 (U.S. June 13, 2024)

In *Federal Drug Administration v. Alliance for Hippocratic Medicine*, 219 L.Ed.2d 121 (U.S. June 13, 2024), the Supreme Court held that doctors lack standing to challenge the FDA's loosening of general public safety requirements, even if it meant that no one would have standing to sue to address the grievance with how the FDA performed its duty. The holding supports Brook Jackson's contention and negates the DOJ's contention regarding other avenues for citizens to petition for redress of their grievances against the FDA.

At the May 1, 2024, hearing, Mr. Gillingham, the attorney for the DOJ, represented to the Court that there were other avenues for persons to seek redress of grievances against the FDA. Referring to Brook Jackson, the attorney said:

> if she's concerned about the decision on the EUAs, the proper procedure to challenge final agency action is through the Administrative Procedures Act. . . . If there's concerns about what the FDA is doing, there are citizen petition rights. [5/1/24 RT, at 72:4-11.]

In response, Mr. Barnes recalled that when he had filed suit against the FDA, the government's position was: "Oh, no, actually, you can't. No standing to sue and to challenge the FDA's ruling." (*Id*., at 93:19-20.)

The decision in *Hippocratic Med.* confirms relator's counsel's representation, as it undermines the credibility of the DOJ's assertion. The Supreme Court in *Alliance for Hippocratic Medicine* rejected the contention that the lack of standing should be a reason to find standing. But here, in the False Claims Act context, there is no doubt that Congress partially assigned to relator the right to bring a *qui tam* action to vindicate the interests of the United States, and Brook Jackson has standing to bring this action and oppose the DOJ's motion.

Date: June 27, 2024

Respectfully submitted,

/s/ Jeremy L. Friedman

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2024 a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5. All counsel of record consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A).

/s/ Jeremy L. Friedman